E-CA NO : CA-2023-005922

BEFORE THE HONOURABLE HIGH COURT OF KERALA AT ERNAKULAM

1 Of Year 2023

In

WP(C) No.14484/2021

VISHNUNARAYANAN C.V : Petitioner

Vs

TRAVANCORE DEVASWOM BOARD, : Respondent

Sd/-
E-VERIFIED
GEORGE J.NALAPPAT
K/000945/2020

FSO VERIFIED-12

BEFORE THE HONOURABLE HIGH COURT OF KERALA AT ERNAKULAM

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VISHNUNARAYANAN C.V : Petitioner

V/S

TRAVANCORE DEVASWOM BOARD, : Respondent

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BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

(*Special Original Jurisdiction)*

W.P.(C) NO. 14484 OF 2021

Vishnunarayanan …Petitioner

Versus

Travancore Devaswom Board & Ors. …Respondents

WRITTEN SUBMISSIONS OF J. SAI DEEPAK, ADVOCATE

FILED ON BEHALF OF ADDITIONAL RESPONDENT NO.10 AS DIRECTED BY THIS HON'BLE COURT ON 17.12.2022

DRAWN BY

J. SAI DEEPAK, ADVOCATE

M/s KMNP LAW

KURIAKOSE VARGHESE (D/2090/2003)

V. SHYAMOHAN (K/824/2006)

SRADHAXNA MUDRIKA (K/815/2020)

GEORGE J. NALAPPAT (K/945/2020)

1st Floor, Swapnil Enclave, Marine Drive Kochi- 682031

Counsels for Additional Respondent No.10

1

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

(*Special Original Jurisdiction)*

W.P.(C) NO. 14484 OF 2021

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Versus

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WRITTEN SUBMISSIONS OF J. SAI DEEPAK, ADVOCATE

FILED ON BEHALF OF PEOPLE FOR DHARMA, ADDITIONAL RESPONDENT NO. 10 AS DIRECTED BY THIS HON'BLE COURT ON 17.12.2022

1. The instant Written Submissions are being filed on behalf of Additional Respondent No. 10 (hereinafter referred to as "The Respondent") whose impleadment was allowed by this Hon'ble Court *vide* Order dated December 17, 2022. The Respondent has, *inter alia,* represented the interests of the devotees of the Deity Sree Sabarimala Ayyappa (hereinafter referred to as "The Deity") as well as the rights of the Deity before the Hon'ble Supreme Court of India. Consequently, it has the necessary *locus* to assist this Hon'ble Court in the instant proceedings wherein the Writ Petitioner has assailed the Notification dated May 27, 2021 issued by the Respondent No. 1 for the post of Melsanthi (hereinafter referred to as "the Impugned Notification").

2. The Respondent's sole interest is in preserving the religious traditions of the Sree Sabarimala Ayyappa Temple (hereinafter referred to as "The Temple") which are sought to be eviscerated by the Petitioner by treating the appointment of Melsanthi as merely a "secular" activity over which the Respondent No. 1 has complete control. This flawed premise, which forms the bedrock of the Petition as evidenced from Paragraphs 2, 4, 10(A) and 10 (B) of the Petition, is based on the equally flawed position that the Temple is fully controlled by the State Government of Kerala since it is administered by the Respondent No. 1. This fallacy forms the substratum of the Petition and informs the Grounds invoked by the Petitioner to challenge the Impugned Notification. Consequently, in the ensuing portions of the instant Written Submissions, the Respondent No. 1 shall humbly demonstrate the flawed foundations

of the Petition which affect its maintainability as well as the constitutional tenability of the prayers sought therein. Critically, the Respondent No. 1 shall demonstrate to this Hon'ble Court that the prayers sought by the Petitioner, if granted, shall directly result in the unconstitutional abridgement of the rights of the Deity, His Temple, the custodians of its sacred traditions, and His devotees.

A. THE WRIT PETITION IS NOT "VERTICALLY" MAINTANABLE

3. The Petitioner's challenge to the Impugned Notification is fundamentally not maintainable since the Petitioners understanding of the relationship between the Temple, the Respondent No.1 and the State Government of Kerala is flawed. The Petition is based on the assumption that since the Temple is administered by the Respondent No.1 which, in turn, is fully controlled by the State Government of Kerala, the Temple too is part of "State" within the meaning of Article 12 of the Constitution. While it may be true that the Respondent No.1 is an extension of the State Government of Kerala, the administration of the Temple by the Respondent No.1 under the Travancore Cochin Hindu Religious Institution Act, 1950 (herein after referred to as the "TCHRI Act") is pursuant to Article 25(2)(a) of the Constitution. In other words, the Act has been promulgated by the Kerala State legislature in exercise of the qualified powers vested in it by Article 25(2)(a) of the Constitution, namely to make any law to regulate or restrict any economic financial, political or other secular activity which may be associated with religious activities.

4. Viewed in this light, the Respondent No.1, which is a creature of the Act, is a mere regulatory body that has been tasked with the administration of Temples under its jurisdiction. This, by no stretch of imagination, renders the Temple or any other Temple administered by the Respondent No.1 an extension of the State within the meaning of Article 12. Critically, it cannot be contended that a secular administrative body that performs the qualified role of superintendence over a religious body subsumes the religious body entirely within its ambit in all respects.

5. Without prejudice to the said position, it is further submitted that thanks to the language of Article 25(2)(a), any HRCE legislation such as the Act in question can merely regulate or restrict only a secular activity associated with a religious practice.

Simply put this power does not extend to the religious practices/traditions/rights/rituals or any other related aspect of the religious body such as the Temple in question. This is evident from the language of Section 15A of the Act which makes it abundantly clear that the Board is statutorily bound to preserve the religious traditions of all the Temples it administers under the Act.

6. Consequently, in so far as the secular aspects of the administration are concerned, the Respondent No.1 performs the role of a regulatory body with a very limited purview and in so far as religious aspects of administration are concerned, the Respondent No.1 is bound by the religious traditions of the Temple and has no option but to abide by and enforce them. It cannot sit in judgement over such religious traditions unless such traditions require legislative revisitation under Article 25(2)(b) to further the causes therein. Even when exercising powers under Article 25(2)(b), the legislature itself cannot alter the identity of a religious institution in the name of reform and social welfare or egalitarianism unless it is able to establish after considering the context and the metaphysics involved that a particular practice in question fundamentally offends all conceivable notions of reasonableness, fairness and dignity. It is critically clarified that in assessing religious traditions/practices the limits of secular rationality must be recognized since faith and secular rationality seldom see eye to eye.

7. Applying the position set out above, it is humbly submitted that the appointment of any religious figure such as the Melsanthi in relation to the Temple cannot be remotely considered a secular activity since it involves the application of a continuing living tradition in relation to the position of the Shebait/Servitor which is governed by both scripture and unwritten traditions/customs of the Temple that have been observed for millennia. Since the appointment of the Melsanthi in so far as the prescription of requisite qualifications is concerned is not a secular activity, and the qualifications prescribed in the Impugned Notification issued by the Respondent No.1 are an integral part of the religious practices of the Temple, the Impugned Notification is consistent with Section 15A of the Act. Therefore, the Writ Petition is not maintainable since neither is the Temple State within the meaning of Article 12 nor are the qualifications for the post based on secular considerations. The Petition fails to strike a distinction between the secular aspects of appointment such as emoluments on the one hand, and

religious aspects of appointment on the other such as prescription of qualifications in accordance with the religious practices of the Temple. At best, the former may be treated as a secular activity, whereas the latter is not secular by any yardstick.

8. It is to be noted that the entire Writ Petition is based on vertical assertion of alleged fundamental rights i.e. the rights of the Petitioner qua the Respondent No.1 which is the State. As enumerated above, there is no basis for vertical assertion of fundamental rights in the instant case since the Respondent No.1 is preserving the religious practices of a non-State religious body such as the Temple. Pertinently, the Petition is bereft of any horizontal assertion of alleged fundamental rights. Consequently, the Petitioner has failed to establish any legal basis for assertion of his so-called rights qua the Temple as non-state religious body. Despite the absence of any pleading to that effect in the Petition, the Respondent herein shall demonstrate that no such horizontal assertion is constitutionally tenable in the facts and context of the Impugned Notification.

[*Ajay Hasia Etc* vs *Khalid Mujib Sehravardi,* 1981 AIR 487; *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology,* (2002) 5 SCC 111; *Kaushal Kishor* vs. *State of Uttar Pradesh and Ors.* Writ Petition (Criminal) No. 113 of 2016 and Special Leave Petition (Arising out of (Diary) No. 34629 of 2017) Decided On: 03.01.2023]

B. THE WRIT PETITION IS NOT "HORIZONTALLY" MAINTANABLE

9. In so far as the horizontal maintainability of the Petition is concerned, as stated earlier, the petition is bereft of any such pleading. In any case, the question that needs to be addressed is whether the Petitioner has any right, fundamental or otherwise, which is capable of being asserted to the detriment and peril of the religious practices of the Temple which flow from the Deity's will and which are not amenable to an assessment on the anvils of secular rationality. Simply stated, assuming the Petitioner has faith in the tradition of the Temple and its religious practices, the very challenge of the Petition through the Impugned Notification calls into the question the Petitioner's belief in the Temple's religious practices. This, in turn, undermines the Petitioner's very *locus* to maintain the present Petition. This is because a non-believer has no stake or say in relation to the religious practices of the Temple and a believer is expected to abide by the practices of the Temple. Critically, in so far as the religious aspects of the

Temple are concerned, the Chief Tantri of the Temple is the final authority whose word on the traditions of the Temple binds everyone including the Respondent No.1 and the Petitioner. [*Bonacum* v. *Harrington,* 65 Neb. 831; *MD. & VA. Churches* V. *Sharpsburg CH.,* 396 U.S. 367 (1970); *United States* v. *Ballard,* 322 U.S. 78 (1944); *Sutton* v. *Rasheed,* 323 F.3d 236, 240, 242 (3d Cir. 2003)]

10. Further, in the process of reducing the issue of appointment of Malayali Brahmins to the post of Melsanthi as a caste related consideration, the Petitioner has exposed his utter ignorance of the traditions of the Temple and their origins. It is well known that most Temples have their own history better known as "Sthala Puranas" which inform the rituals of the Temple and the qualifications needed to perform the said rituals. In the facts of the instant case, the Temple subscribes to *Dakshinachara Tantra* tradition which has its own set of prescriptions. Just as there are Temples wherein the priestly position is the exclusive preserve of specific non-brahmin groups, there are Temples whose tradition prescribe the assignment of the role of the Tantri/Melsanthi/Priest to specific brahmin groups. In fact, it is evident from the Impugned Notification that the qualification criteria prescribed therein are informed by the specific traditions of the Temple which envisage appointment of not any and all brahmins but only Malayali Brahmins of a particular age and training. In view of this, to make the claim that the Impugned Notification furthers any form of caste supremacy to the exclusion of other groups is to foist a non-dharmic view on a dharmic institution. In short, selection based on shastraic considerations do not amount to discrimination.
[*Adi Saiva Sivacharyargal Nala Sangam* v. *Govt. of Tamil Nadu* AIR 2016 SC 209; *Seshammal and Ors. etc*. v. *State of Tamil Nadu* AIR 1972 SC 1586; *Venkataramana Devaru and Ors*. vs. *The State of Mysore and Ors.* AIR 1958 SC 255]

11. By seeking to alter the criteria prescribed for the post of Melsanthi, the Petitioner seeks to alter the very identity of the Temple which affects the nature of consecration of the Temple, the preservation of the consecrated energy by performing the prescribed rituals, and the faith of millions of devotees in the said rituals which keep alive the consecrated energy ("*Chaitanyam*"). In other words, if the prayer of the Petitioner were to be granted it would defeat the rights of the Deity, the Temple, the guardians of the institution and the believers in the institution. Therefore, in the interest of preserving and protecting each of these fundamental rights under Articles

25 and 26, the Petition must necessarily fail. It is humbly submitted that secular judicial assessment of such issues through the prism of secular constitutional morality and rationality is incapable of appreciating or accomodating the metaphysics of faith, particularly in the realm of consecrated energy. It is for this reason that constitutional morality dictates that Courts must be alive to the limits of application of secular rationality in relation to religious institutions, in particular their religious aspects. [*Ratilal Panachand Gandhi* v. *State of Bombay* AIR 1954 SC 388; *Most. Rev. P.M.A. Metropolitan and Ors*. vs. *Moran Mar Marthoma and Ors.* AIR 1995 SC 2001.]

12. Applying the above position, it is humbly submitted that the dynamics of and considerations involved in the Application of Article 14 to a secular institution are very different from its application to a religious institution and its religious practices. It is for this reason that despite furthering the goals of egalitarianism from the perspective of entry of all classes of Hindus into Hindu religious institutions, the framers of the Constitution chose not to interfere with those aspects of religious institutions which do not lend themselves to application of secular rationality. It is also for this very reason that Constitutional Courts of this country have consistently held that in matters of appointment to religious positions even the law must make way to the *shastras*/scripture that apply to religious institutions. [*Riju Prasad Sarma and Ors*. vs. *State of Assam and Ors.* (2015) 9SCC 46*]*

13. In the context of Temples, even the Supreme Court has acknowledged that what distinguishes a Temple from a Mosque is that the former involves the foundational ritual of *Prana Prathistha*/Consecration which makes it a place of worship in stark contrast to a Mosque which is a place of prayer/congregation. Given that the act of consecration and its centrality to a Temple under Hindu Law has been judicially recognized, all those rules, rituals, practices and traditions which shape and inform the act of consecration and the continued preservation of the consecrated energy must remain free from secular interference under the garb of social justice or reform. Should the State or its judicial arm fail to observe these limitations, it may result in a situation where the cause of reform would have been advanced at the expense of the spiritual quality of a religious institution. Secular rationality/constitutional morality does not understand the close nexus between rituals and energy (performance of *Karma* and preservation of *Dharma*), and therefore must desist from applying itself to

those realms which are beyond secular considerations. [*Vidya Varuthi Thirtha Swamigal* vs. *Balusami Ayyar and Ors* AIR 1922 PC 123; *Seshammal and Ors. etc.* v. *State of Tamil Nadu AIR* 1972 SC 1586; *Ram Jankijee Deities v. State of Bihar* 1999 AIR SCW 1878; *Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar, Sri Shirur Mutt* AIR 1954 SC 282; *N. Adithayan* vs. *The Travancore Devaswom Board and Ors.* AIR 2002 SC 3538]

14. Given that the faith of the believers is inextricably connected to the observance of such rituals which result in preservation in the spiritual quality of the Hindu religious institutions, the Petitioner cannot claim to have greater or better rights than the rest of the stakeholders to the Temple including and starting with the Primary Cause, namely, the Deity Himself. It is for these reasons that the Petitioner lacks a fundamental right which is capable of being horizontality asserted in the instant context and if such right exists, it is necessarily subservient to the rights of the stake holders to the Temple. This would be consistent with the combined interpretation of Articles 14, 25(1) and 26.

C. DENOMINATIONAL RIGHTS OF AYYAPPA DEVOTEES

15. As submitted above, the Petitioner has to necessarily navigate the rights of the devotees in order for him to succeed. It is humbly submitted that the devotees of the Deity constitute a religious denomination within the meaning of Article 26 whose rights must prevail over the rights of the Petitioner. Since, the Shirur Math judgement of the Hon'ble Supreme Court is under reconsideration as part of the Reference proceedings in the Sabarimala Temple entry case by the Supreme Court, it is humbly submitted that pending adjudication of the questions raised in the said Reference, *status quo* must be preserved in favor of the devotees of the Temple and its religious traditions including the qualifications of the post of Melsanthi. [SC order dated 10 February 2020 in *Kantaru Rajeevaru* vs. *Indian Young Lawyers Association and Ors. (2020)3 SCC 52*]

D. "RELIGIOUS DENOMINATION" AS APPLIED TO HINDU RELIGIOUS INSTITUTIONS

16. Without prejudice to the above position, a religious denomination derives its identity from the object of its faith and not *vice versa*. Further, in the absence of a definition of religious denomination, a definition spelt out by the judiciary cannot be rigidly applied on the same lines as a statutory definition. A perusal of the history of the Shirur Mutt case starting from the judgement of the Madras High Court in 1951 makes it abundantly clear that the spirit of the Shirur Mutt judgement of 1954 of this Hon'ble Court has been misunderstood in subsequent judgements by applying a rigid test to the recognition of denominational status. Following is the definition of religious denomination from the Webster Dictionary used by the Madras High Court in the 1951 Shirur Mutt Judgement:

    "of action of naming from or after something; giving a name to, calling by a name; a characteristic or qualifying name given to a thing or class of things; that by which anything is called; an appellation, designation or title; a collection of individuals classed together under the same name; ***now almost always specifically a religious sect or body having a common faith and organisation and designated by a distinctive name****."*

    The definition in the Oxford dictionary at the relevant time was as follows:

    1. the action of naming from or after something; giving a name to, calling by a name;

    2. a characteristic or qualifying name given to a thing or class of things; that by which anything is called; an appellation, designation, title;

    3. Arith. A class of one kind of unit in any system of numbers, measures, weight, money, etc., distinguished by a specific name;

    4. A class, sort, or kind (of things or persons) distinguished or distinguishable by a specific name;

    5. A collection of individuals classed together under a same name; now almost always specifically a religious sect or body having a common faith and organisation and designated by a distinctive name

17. The definitions of denomination from various dictionaries reveal that the underscored portion of the fifth definition in the Oxford Dictionary is a reflection of the later development of Christian denominations, and was merely one of the definitions of a denomination. The underscored portion from the Oxford dictionary was ultimately relied upon by this Hon'ble Court in Paragraph 15 of its judgement in Shirur Mutt.

However, the verdict was delivered in the context of the following question which was posed by the Court to itself:

"What is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression…"?

18. In light of this history and in light of one of the definitions from Oxford Dictionary quoted by this Hon'ble Court, it is evident that the Court did not reject the applicability of the rest of the definitions, which includes "A class, sort, or kind (of things or persons) distinguished or distinguishable by a specific name". Going by the dictionary definition of a religious denomination, Dharmic Kshetras enjoy denominational status under Article 26 even if they do not have Christian organizational trappings. This would not be against the dictum of Shirur Mutt, but would in fact be consistent with it. In this regard, reliance is also placed on the fact that the term Sampradaya, as used in the Hindi version of Article 26, more accurately describes Indic sects as opposed to "denomination" which is distinctly Christian and therefore cannot be used to understand Hindu sects or denominations or sections thereof. [*Commissioner, Hindu Religious Endowments* vs. *Lakshmindra Thirtha Swamiar, Sri Shirur Mutt* AIR 1954 SC 282; *Sardar Sayedna Taher Saifuddin Saheb* vs. *State of Bombay* AIR 1962 SC 853]

19. Applying the above, it is humbly submitted that Ayyappa Devotees must be treated as a religious denomination within the Hindu fold given its distinctive features and practices. Consequently, the Temple enjoys the protection of Article 26, which limits the Petitioner's ability to assert Article 14 is such an unrestrained fashion.

E. APPLICATION OF THE ESSENTIAL RELEGIOUS PRACTICES ("ERP") TEST

20. It is humbly submitted that the qualifications for the post of Melsanthi stands accepted and endorsed by this Hon'ble *Court* vide judgement dated 14.08.2002, which has been affirmed by the Hon'ble Supreme Court in *Kantaru Neelakantaru Thanthri vs. Travancore Devaswom Board* Civil Appeal No. 2570 of 2003 in judgment dated 06.09.2011, out of which two consequences emanate- first, that such qualifications are consistent with and are integral/essential to religious practices of the Temple, and

second, it must be presumed that the Hon'ble Supreme Court was alive to the selection of Malayali Brahmins for the position of Melsanthi and still did not deem it fit to treat the said qualification as being in violation of Article 14 of the Constitution. It is humbly submitted that it is improper on the part of the Petitioner to invite this Hon'ble Court to sit in judgement over the Hon'ble Apex Court's approval to the qualification for the post of Melsanthi. This leaves this Hon'ble Court with one of the three courses of action- (1) to dismiss the Petition in view of the Supreme Court's prescription/endorsement of qualification; (2) to refer the matter to the Supreme Court for adjudication and (3) adjourn the instant Petition *sine die* and await the outcome in the Reference proceedings wherein crucial and common questions of constitutional import in relation to religious institutions, including the applicability/ validity of the ERP test, are pending adjudication.

21. Should the Court still deem it fit to continue hearing the matter, it must at the very least seek the assistance of the Chief Tantri of the Temple as well as the Pandalam Royal family which is the foster family of the Deity Himself. Without prejudice to the above, it is humbly submitted that the application of ERP test by a secular constitutional court creates the conundrum of application of secular rationality to religious institutions by seeking to distill the essential and non-essential aspects of religious practice which a secular court is institutionally untrained to undertake. [*Commissioner, Hindu Religious Endowments* vs. *Lakshmindra Thirtha Swamiar, Sri Shirur Mutt* AIR 1954 SC 282; *Ratilal Panachand* (1954); *Seshammal and Ors. etc*. v. *State of Tamil Nadu* AIR 1972 SC 1586; *Adi Saiva Sivacharyargal Nala Sangam (*2016); *Most. Rev. P.M.A. Metropolitan and Ors.* vs. *Moran Mar Marthoma and Ors.* AIR 1995 SC 2001]

22. It is precisely for this reason that on matters of religious practice the word of the religious authority of the intuition is deemed to be authoritative. In the instant case, the Chief Tantri of the Sabarimala Temple must be invited to assist this Hon'ble Court on the essentiality of the qualifications of the Melsanthi to the preservation of the consecrated energy of the Temple. In the absence of such expert assistance on an issue in which this Court has no institutional training, the continuation of the instant proceedings would be at the expense of fairness and to the detriment of the rights of the Deity, the Temple and the devotees. At the end of the day, the Temple is the abode

of the Deity and within the Temple the Deity's writ is final which are given effect to by the Servitors and are expected to be observed by all those who wish to enter the Temple. The Deity does enjoy rights under the Constitution as a juristic person. After all, if a corporate body is entitled to enjoyment of fundamental rights as a juristic person for the benefit of its stakeholders, the Deity has a better case for enjoyment of such rights since the existence of the Deity is real for believers in stark contrast to the creation of a legal fiction such as a company. In this regard too, since the judgement dated September 28, 2018 delivered in *Indian Young Lawyers Association and Ors.* v. *State of Kerala W.P. (C) No.373 of 2006* is under Review and the Reference proceedings which arise therefrom are pending, this Hon'ble Court must preserve the rights of the Deity by preserving the *status quo* in relation to the qualifications of the Melsanthi. [*Vidya Varuthi Thirtha Swamigal* vs. *Balusami Ayyar and Ors* AIR 1922 PC 123; *Pramatha Nath Mullick* vs. *Pradyumna Kumar Mullick and Ors.*AIR 1925 PC 139; *Yogendra Nath Naskar* vs. *Commissioner of Income-Tax, Calcutta* 1969 AIR 1089; *Ram Jankijee Deities* vs. *State of Bihar* 1999 AIR SCW 1878.]

Dated this, the 21st day of February, 2023

Drawn by:

J. Sai Deepak, Advocate

V. Shyamohan

Counsel for Additional Respondent No.10

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

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CASE LAW COMPILATION
ON BEHALF OF ADDITIONAL RESPONDENT NO.10

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5.	*MD. & VA. Churches vs. Sharpsburg ch*., 396 U.S. 367 (1970)	Nil	177-179

6.	*United States vs. Ballard* 322 U.S. 78 (1944)	Nil	180-197
7.	*Sutton vs. Rasheed,* 323 F.3D 236, 240, 242 (3D CIR. 2003)	Nil	198-239
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24.	*Yogendra Nath Naskar v. Commissioner of Income-Tax, Calcutta* 1969 AIR 1089	Para 7	529-535

Dated this, the 21st day of February, 2023

V.Shyamohan

Counsel for Additional Respondent No.10

MANU/SC/0498/1980

Equivalent Citation: AIR1981SC487, (1981)1SCC722, [1981]2SCR79

IN THE SUPREME COURT OF INDIA

Writ Petition Nos. 1118, 1119, 1143, 1144, 1145, 1230, 1244-45, 1262, 1263, 1268, 1304, 1331, 1373-74, 1389, 1420-23, 1431, 1437-39, 1440, 1441-43, 1461, 1494-97, 1566-67, 1574-75 and 1586 of 1979

Decided On: 13.11.1980

Appellants: **Ajay Hasia and Ors.**
Vs.
Respondent: **Khalid Mujib Sehravardi and Ors.**

Hon'ble Judges/Coram:
Y.V. Chandrachud, C.J., P.N. Bhagwati, S. Murtaza Fazal Ali, V.R. Krishna Iyer and A.D. Koshal, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Anil Dev Singh, Lalit Kumar Gupta, Subhash Sharma, Chandra Prakash Pandey and S.K. Sabharwal, Advs

For Respondents/Defendant: S.N. Kacker and Altaf Ahmed, Advs.

JUDGMENT

P.N. Bhagwati, J.

1. These writ petitions under Article 32 of the Constitution challenge the validity of the admissions made to the Regional Engineering College, Srinagar for the academic year 1979-80.

2. The Regional Engineering College, Srinagar (hereinafter referred to as the College) is one of the fifteen Engineering Colleges in the country sponsored by the Government of India. The College is established and its administration and management are carried on by a Society registered under the Jammu and Kashmir Registration of Societies Act, 1898. The Memorandum of Association of the Society in Clause 3 sets out the objects for which the Society is incorporated and they include amongst other things establishment of the college with a view to providing instruction and research in such branches of engineering and technology as the college may think fit and for the advancement of learning and knowledge in such branches. Vide Sub-clause (i). The Society is empowered by Clause 3 Sub-clause (ii) of the Memorandum of Association to make rules for the conduct of the affairs of the Society and to add to, amend, vary or rescind them from time to time with the approval of the Government of Jammu and Kashmir State (hereinafter referred to as the State Government) and the Central Government. Clause 3 Sub-clause (iii) of the Memorandum of Association confers power on the Society to acquire and hold property in the name of the State Government. Sub-clause (v) of Clause 3 of the Memorandum of Association contemplates that monies for running the college would be provided by the State and Central Governments and Sub-clause (vi) requires the Society to deposit all monies credited to its fund in such banks or to invest them in such manner as the Society may, with the approval of the State Government decide. The accounts of the Society as certified by a duly appointed auditor are mandatorily required by Sub-clause (ix) of Clause 3 of the Memorandum of

Association to be forwarded annually to the State and Central Governments. Clause 6 of the Memorandum of Association empowers the State Government to appoint one or more persons to review the working and progress of the Society, or the college and to hold inquiries into the affairs thereof and to make a report and on receipt of any such report, the State Government has power, with the approval of the Central Government, to take such action and issue such directions as it may consider necessary in respect of any of the matters dealt with in the report and the Society or the College, as the case may be, is bound to comply with such directions. There is a provision made in Clause 7 of the Memorandum of Association that in case the Society or the college is not functioning properly, the State Government will have the power to take over the administration and assets of the college with the prior approval of the Central Government. The founding members of the Society are enumerated in Clause 9 of the Memorandum of Association and they are the Chairman to be appointed by the State Government with the approval of the Central Government, two representatives of the State Government, one representative of the Central Government, two representatives of the All India Council for Technical Education to be nominated by the northern Regional Committee, one representative of the University of Jammu and Kashmir, one non-official representative of each of the Punjab, Rajasthan, U.P. and Jammu and Kashmir States to be appointed by the respective Governments in consultation with the Central Government and the Principal who shall also be the ex-officio Secretary.

3. The Rules of the Society are also important as they throw light on the nature of the Society. Rule 3 Clause (i) reiterates the composition of the Society as set out in Clause 9 of the Memorandum of Association and Clause (ii) of that Rule provides that the State and the Central Governments may by mutual consultation at any time appoint any other person or persons to be member or members of the Society. Rule 6 vests the general superintendence, direction and control of the affairs and its income and property in the governing body of the Society which is called the Board of Governors. Rule 7 lays down the Constitution of the Board of Governors by providing that it shall consist of the Chief Minister of the State Government as Chairman and the following as members : Three nominees of the State Government, three nominees of the Central Government, one representative of the All India Council for Technical Education, Vice-Chancellor of the University of Jammu and Kashmir, two industrialists/technologists in the region to be nominated by the State Government, one nominee of the Indian Institute of Technology in the region, one nominee of the University Grants Commission two representatives of the Faculty of the College and the Principal of the college as ex-officio member-Secretary. The State Government is empowered by Rule 10 to remove any member of the Society other than a member representing the State or Central Government from the membership of the Society with the approval of the Central Government. Clause (iv) of Rule 15 confers power on the Board to make bye-laws for admission of students to various courses and Clause (xiv) of that Rule empowers the Board to delegate to a committee or to the Chairman such of its powers for the conduct of its business as it may deem fit, subject to the condition that the action taken by the committee of the Chairman shall be reported for confirmation at the next meeting of the Board. Clause (xv) of Rule; 15 provides that the Board shall have power to consider and pass resolution on the annual report, the annual accounts and other financial estimates of the college, but the annual report and the annual accounts together with the resolution passed thereon are required to be submitted to the State and the Central Governments. The Society is empowered by Rule 24, Clause (i) to alter, extend or abridge any purpose or purposes for which it is established, subject to the prior approval of the State and the Central Governments and Clause (ii) of Rule 24 provides that the Rules may be altered by a Resolution passed by a majority of 2/3rd of the members present at the meeting of the Society, but such alteration shall be with the approval of the State

and the Central Governments.

4. Pursuant to Clause (iv) of Rule 15 of the Rules, the Board of Governors laid down the procedure for admission of students to various courses in the college by a Resolution dated 4th June, 1974. We are not directly concerned with the admission procedure laid down by this Resolution save and except that under this Resolution admissions to the candidates belonging to the State of Jammu and Kashmir were to be given on the basis of comparative merit to be determined by holding a written entrance test and a viva voce examination and the marks allocated for the written test in the subjects of English, Physics, Chemistry and Mathematics were 100, while for viva voce examination, the marks allocated were 50 divided as follows : (i) General Knowledge and Awareness-15; (ii) Broad understanding of Specific Phenomenon-15; (iii) Extra-curricular activities-10 and (iv) General Personality Trait-10, making up in the aggregate-50. The admissions to the college were governed by the procedure laid down in this Resolution until the academic year 1979-80, when the procedure was slightly changed and it was decided that out of 250 seats, which were available for admission, 50% of the seats shall be reserved for candidates belonging to the Jammu & Kashmir State and the remaining 50% for candidates belonging to other States, including 15 seats reserved for certain categories of students. So far as the seats reserved for candidates belonging to States other than Jammu & Kashmir were concerned, certain reservations were made for candidates belonging to Scheduled Castes and Scheduled Tribes and sons and wards of defence personnel killed or disabled during hostilities and it was provided that "inter se merit will be determined on the basis of marks secured in the subjects of English, Physics, Chemistry and Mathematics only". The provision made with regard to seats reserved for candidates belonging to Jammu & Kashmir State was that "apart from 2 seats reserved for the sons and daughters of the permanent college employees, reservations shall be made in accordance with the Orders of Jammu and Kashmir Government for admission to technical institutions and the seats shall be filled up on the basis of comparative merit as determined under the following scheme, both for seats to be filled on open merit and for reserved seats in each category separately; (1) marks for written test-100 and (2) marks for viva voce examination-50, marking up in the aggregate-150. It was not mentioned expressly that the marks for the written test shall be in the subjects of Physics, English, Chemistry and Mathematics nor were the factors to be taken into account in the viva voce examination and the allocation of marks for such factors indicated specifically in the admission procedure laid down for the academic year 1979-80, but we were told and this was not disputed on behalf of the petitioners in any of the writ petitions, that the subjects in which the written test was held were English, Physics, Chemistry and Mathematics and the marks at the viva voce examination were allocated under the same four heads and in the same manner as in, the case of admissions under the procedure laid down in the Resolution dated 4th June, 1974.

5. In or about April 1979, the college issued a notice inviting applications for admission to the first semester of the B.E. course in various branches of engineering and the notice set out the above admission procedure to be followed in granting admissions for the academic year 1979-80. The petitioners in the writ petitions before us applied for admission to the first semester of the B.E. course in one or the other branch of engineering and they appeared in the written test which was held on 16th and 17th June, 1979. The petitioners were thereafter required to appear before a Committee consisting of three persons for viva voce test and they were interviewed by the Committee. The case of the petitioners was that the interview of each of them did not last for more than 2 or 3 minutes per candidate on an average and the only questions which were asked to them were formal questions relating to their parentage and

residence and hardly any question was asked which would be relevant to any of the tour factors for which marks were allocated at the viva voce examination. When the admissions were announced, the petitioners found that though they had obtained very good marks in the qualifying examination, they had not been able to secure admission to the college because the marks awarded to them at the viva voce examination were very low and candidates who had much less marks at the qualifying examination, had succeeded in obtaining very high marks at the viva voce examination and thereby managed to secure admission in preference to the petitioners. The petitioners filed before us a chart showing by way of comparison the marks obtained by the petitioners on the one hand and some of the successful candidates on the other at the qualifying examination, in the written test and at the viva voce examination. This chart shows beyond doubt that the successful candidates whose marks are given in the chart had obtained fairly low marks at the qualifying examination as also in the written test, but they had been able to score over the petitioners only on account of very high marks obtained by them at the viva voce examination. The petitioners feeling aggrieved by this mode of selection filed the present writ petitions challenging the validity of the admissions made to the college on various grounds. Some of these grounds stand concluded by the recent decision of this Court in Miss Nishi Maghu v. State of Jammu & Kashmir and Ors. MANU/SC/0077/1980 : [1980]3SCR1253 and they were therefore not pressed before us. Of the other grounds, only one was canvassed before us and we shall examine it in some detail.

6. But before we proceed to consider the merits of this ground of challenge, we must dispose of a preliminary objection raised on behalf of the respondents against the maintainability of the writ petition. The respondents contended that the college is run by society which is not a corporation created by a statute but is a society registered under the Jammu & Kashmir Societies Registration Act, 1898 and it is therefore not an 'authority' within the meaning of Article 12 of the Constitution and no writ petition can be maintained against it, nor can any complaint be made that it has acted arbitrarily in the matter of granting admissions and violated the equality clause of the Constitution. Now it is obvious that the only ground on which the validity of the admissions to the college can be assailed is that the society adopted an arbitrary procedure for selecting candidates for admission to the college and this resulted in denial of equality to the petitioners in the matter of admission violative of Article 14 of the Constitution. It would appear that prima facie protection against infraction of Article 14 is available only against the State and complaint of arbitrariness and denial of equality can therefore be sustained against the society only if the society can be shown to be State for the purpose of Article 14. Now 'State' is defined in Article 12 to include inter alia the Government of India and the Government of each of the States and all local or other authorities within the territory of India or under the control of the Government of India and the question therefore is whether the Society can be said to be 'State' within the meaning of this definition. Obviously the Society cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression "other authorities" if it is to fall within the definition of 'State'. That immediately leads us to a consideration of the question as to what are the "other authorities" contemplated in the definition of 'State' in Article 13.

7. While considering this question it is necessary to bear in mind that an authority falling within the expression "other authorities" is, by reason of its inclusion within the definition of 'State' in Article 12, subject to the same constitutional limitations as the Government and is equally bound by the basic obligation to obey the constitutional mandate of the Fundamental Rights enshrined in Part III of the Constitution. We must

therefore give such an interpretation to the expression "other authorities" as will not stultify the operation and reach of the fundamental rights by enabling the Government to its obligation in relation to the Fundamental Rights by setting up an authority to act as its instrumentality or agency for carrying out its functions. Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form. Now it is obvious that the Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the frame work of civil service was not sufficient to handle the new tasks which were often specialised and highly technical in character and which called for flexibility of approach and quick decision making. The inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the corporation came into being as the third arm of the Government and over the years it has been increasingly utilised by the Government for setting up and running public enterprises and carrying out other public functions. Today with increasing assumption by the Government of commercial ventures and economic projects, the corporation has become an effective legal contrivance in the hands of the Government for carrying out its activities, for it is found that this legal facility of corporate instrument provides considerable flexibility and elasticity and facilitates proper and efficient management with professional skills and on business principles and it is blissfully free from "departmental rigidity, slow motion procedure and hierarchy of officers". The Government in many of its commercial ventures and public enterprises is resorting to more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases "the true owner is the State, the real operator is the State and the effective controllerate is the State and accountability for its actions to the community and to Parliament is of the State." It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government. Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law as the Government itself, though in the eye of the law it would be a distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a fortiori that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations. If such a corporation were to be free from the basic obligation to obey the Fundamental Rights, it would lead to considerable erosion of the efficiency of the Fundamental Rights, for in that event the Government would be enabled to over-ride the Fundamental Rights by adopting the stratagem of carrying out its functions

through the instrumentality or agency of a corporation, while retaining control over it. The Fundamental Rights would then be reduced to little more than an idle dream or a promise of unreality. It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the Fundamental Rights. The constitutional philosophy of a democratic socialist republic requires the Government to undertake a multitude of socio-economic operations and the Government, having regard to the practical advantages of functioning through the legal device of a corporation, embarks on myriad commercial and economic activities by resorting to the instrumentality or agency of a corporation, but this contrivance of carrying on such activities through a corporation cannot exonerate the Government from implicit obedience to the Fundamental Rights. To use the corporate methodology is not to liberate the Government from its basic obligation to respect the Fundamental Rights and not to over-ride them. The mantle of a corporation may be adopted in order to free the Government from the inevitable constraints of red-tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the government to assign to a plurality of corporations almost every State business such as Post and Telegraph, TV and Radio, Rail Road and Telephones-in short every economic activity-and thereby cheat the people of India out of the Fundamental Rights guaranteed to them. That would be a mockery of the Constitution and nothing short of treachery and breach of faith with the people of India, because, though apparently the corporation will be carrying out these functions, it will in truth and reality be the Government which will be controlling the corporation and carrying out these functions through the instrumentality or agency of the corporation. We cannot by a process of judicial construction allow the Fundamental Rights to be rendered futile and meaningless and thereby wipe out Chapter III from the Constitution. That would be contrary to the constitutional faith of the post-Menka Gandhi era. It is the Fundamental Rights which along with the Directive Principles constitute the life force of the Constitution and they must be quickened into effective action by meaningful and purposive interpretation. If a corporation is found to be a mere agency or surrogate of the Government, "in fact owned by the Government, in truth controlled by the government and in effect an incarnation of the government," the court must not allow the enforcement of Fundamental Rights to be frustrated by taking the view that it is not the government and therefore not subject to the constitutional limitations. We are clearly of the view that where a corporation is an instrumentality or agency of the government, it must be held to be an 'authority' within the meaning of Article 12 and hence subject to the same basic obligation to obey the Fundamental Rights as the government.

8. We may point out that this very question as to when a corporation can be regarded as an 'authority' within the meaning of Article 12 arose for consideration before this Court in R.D. Shetty v. The International Airport Authority of India and Ors.[1979] 1 S.C.R.1042 There, in a unanimous judgment of three Judges delivered by one of us (Bhagwati, J) this Court pointed out :

> So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government

> of India Resolution on Industrial Policy dated 6th April, 1948 where it was stated inter alia that "management of State enterprises will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this." It was in pursuance of the policy envisaged in this and subsequent resolutions on Industrial policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel but the instrumentality or agency of the corporation was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through instrumentality or agency of corporations should equally be subject to the same limitations.

The Court then addressed itself to the question as to how to determine whether a corporation is acting as an instrumentality or agency of the Government and dealing with that question, observed :

> A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act 1956 or the Societies Registration Act 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition there should be a certain amount of direct control exercised by Government and, if so what should be the nature of such control? Should the functions which the Corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions immaterial ? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government though this consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government ? It is not possible to formulate an inclusive or exhaustive test

> which would adequately answer this question. There is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not.

The Court then proceeded to indicate the different tests, apart from ownership of the entire share capital :

> **...**if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to' use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of Government.... It may therefore be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.... But a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action-Vide Sukhdev v. Bhagatram MANU/SC/0667/1975 : (1975)ILLJ399SC . So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporation's ties to the State.
>
> There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where public functions are being performed. Vide Arthur S. Miller : "The Constitutional Law of the Security State" (10 Stanford Law Review 620 at 664).
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> It may be noted that besides the so-called traditional functions, the modern state operates as multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J., in Sukhdev v. Bhagatram (supra) where the learned Judge said that "institutions engaged in matters of high public interest of performing public functions are by virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions.

The court however proceeded to point out with reference to the last functional test :

> ...the decisions show that even this test of public or governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation, which is otherwise a private entity, would be an instrumentality or agency of

> Government by reason of carrying on such activity. In fact, it is difficult to distinguish between governmental functions and non-governmental functions. Perhaps the distinction between governmental and non-governmental functions is not valid any more in a social welfare State where the laissez faire is an outmoded concept and Herbert Spencer's social statics has no place. The contrast is rather between governmental activities which are private and private activities which are governmental. [Mathew, J. Sukhdev v. Bhagatram (supra) at p. 652]. But the public nature of the function, if impregnated with governmental character or "tied or entwined with Government" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference.

These observations of the court in the International Airport Authority's case (supra) have our full approval.

9 . The tests for determining as to when a corporation can be said to be a instrumentality or agency of Government may now be called out from the judgment in the International Airport Authority's case. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority's case as follows :

> (1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.
>
> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
>
> (3) It may also be a relevant factor...whether the corporation enjoys monopoly status which is the State conferred or State protected.
>
> (4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.
>
> (5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.
>
> (6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12.

10. We find that the same view has been taken by Chinnappa Reddy, J. in a subsequent decision of this court in the U.P. Warehousing Corporation v. Vijay Narain MANU/SC/0432/1980 : (1980)ILLJ222SC and the observations made by the learnec Judge in that case strongly reinforced the view we are taking particularly in the matrix of our constitutional system.

11. We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government Company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12.

12. It is also necessary to add that merely because a juristic entity may be an "authority" and therefore "State" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in Part XIV. The definition of "State" in Article 12 which includes an "authority" within the territory of India or under the control of the Government of India is limited in its application only to Part III and by virtue of Article 36, to Part IV : it does not extend to the other provisions of the Constitution and hence a juristic entity which may be "State" for the purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. That is why the decisions of this Court in S.L. Aggarwal v. Hindustan Steel Ltd.[1970] 3 S.C.R. 365 and other cases involving the applicability of Article 311 have no relevance to the issue before us.

13. The learned counsel appearing on behalf of the respondents Nos. 6 to 8, however, relied strongly on the decision in Sabhajit Tewary v. Union of India and Ors. MANU/SC/0059/1975 : (1975)ILLJ374SC and contended that this decision laid down ir no uncertain terms that a society registered under the Societies Registration Act, 1860 can never be regarded as an "authority" within the meaning of Article 12. This being a decision given by a Bench of five Judges of this Court is undoubtedly binding upon us but we do not think it lays down any such proposition as is contended on behalf of the respondents. The question which arose in this case was as to whether the Council of Scientific and Industrial Research which was juridically a society registered under the Societies Registration Act, 1860 was an "authority" within the meaning of Article 12. The test which the Court applied for determining this question was the same as the one laid down in the International Airport Authority's case and approved by us, namely, whether the Council was an instrumentality or agency of the Government. The Court implicitly assented to the proposition that if the Council were an agency of the Government, it would undoubtedly be an "authority". But, having regard to the various features enumerated in the judgment, the Court held that the Council was not an agency of the Government and hence could not be regarded as an "authority". The Court did not rest its conclusion on the ground that the Council was a society registered under the Societies Registration Act, 1860, but proceeded to consider various other features of the

Council for arriving at the conclusion that it was not an agency of the Government and therefore not an "authority". This would have been totally unnecessary if the view of the Court were that a society registered under the Societies Registration Act can never be an "authority" within the meaning of Article 12.

1 4 . The decision in Sukhdev Singh v. Bhagat Ram MANU/SC/0667/1975 : (1975)ILLJ399SC was also strongly relied upon by the learned counsel for respondents Nos. 6 to 8 but we fail to see how this decision can assist the respondents in repelling the reasoning in the International Airport Authority's case or contending that a company or society formed under a statute can never come within the meaning of the expression "authority" in Article 12. That was a case relating to three juristic bodies, namely, the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation and the question was whether they were "State" under Article 12. Each of these three juristic bodies was a corporation created by a statute and the Court by majority held that they were "authorities" and therefore "State" within the meaning of Article 12. The Court in this case was not concerned with the question whether a company or society formed under a statute can be an "authority" or not and this decision does not therefore contain anything which might even remotely suggest that such a company or society can never be an "authority". On the contrary, the thrust of the logic in the decision, far from being restrictive, applies to all juristic persons alike, irrespective whether they are created by a statute or formed under a statute.

15. It is in the light of this discussion that we must now proceed to examine whether the Society in the present case is an "authority" falling within the definition of "State" in Article 12. Is it an instrumentality or agency of the Government? The answer must obviously be in the affirmative if we have regard to the Memorandum of Association and the Rules of the Society. The composition of the Society is dominated by the representatives appointed by the Central Government and the Governments of Jammu & Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the college are provided entirely by the Central Government and the Government of Jammu & Kashmir and even if any other monies are to be received by the Society, it can be done only with the approval of the State and the Central Governments. The Rules to be made by the Society are also required to have the prior approval of the State and the Central Governments and the accounts of the Society have also to be submitted to both the Governments for their scrutiny and satisfaction. The Society is also to comply with all such directions as may be issued by the State Government with the approval of the Central Government in respect of any matters dealt with in the report of the Reviewing Committee. The control of the State and the Central Governments is indeed so deep and pervasive that no immovable property of the Society can be disposed of in any manner without the approval of both the Governments. The State and the Central Governments have even the power to appoint any other person or persons to be members of the Society and any member of the Society other than a member representing the State or the Central Government can be removed from the membership of the Society by the State Government with the approval of the Central Government. The Board of Governors, which is in charge of general superintendence, direction and control of the affairs of Society and of its income and property is also largely controlled by nominees of the State and the Central Governments. It will thus be seen that the State Government and by reason of the provision for approval, the Central Government also, have full control of the working of the Society and it would not be incorrect to say that the Society is merely a projection of the State and the Central Governments and to use the words of Ray, C.J. in Sukhdev Singh's case (supra), the voice is that of the State and the Central Governments and the hands are also of the State and the Central Governments. We

must, therefore, hold that the Society is an instrumentality or agency of the State and the Central Governments and it is an 'authority' within the meaning of Article 12.

16. If the Society is an "authority" and therefore "State" within the meaning of Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by; the impugned legislative or executive action. It was for the first time in E.P. Royappa v. State of Tamil Nadu MANU/SC/0380/1973 : (1974)ILLJ172SC that this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said :

> The basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be " cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

17. This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa's case and it was reaffirmed and elaborated by this Court in Maneka Gandhi v. Union of India MANU/SC/0133/1978 : [1978]2SCR621 where this Court again speaking through one of us (Bhagwati, J.) observed :

> Now the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article

14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

This was again reiterated by this Court in International Airport Authority's case (supra) at page 1042 of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not para-phrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.

18. We may now turn to the merits of the controversy between the parties. Though several contentions were urged in the writ petitions, challenging the validity of the admissions made to the college, they were not all pressed before us and the principal contention that was advanced was that the society acted arbitrarily in the matter of granting of admissions, first by ignoring the marks obtained by the candidates at the qualifying examination; secondly by relying on viva voce examination as a test for determining comparative merit of the candidates; thirdly by allocating as many as 50 marks for the viva voce examination as against 100 marks allocated for the written test and lastly, by holding superficial interviews lasting only 2 or 3 minutes on an average and asking questions which had no relevance to assessment of the suitability of the candidates with reference to the four factors required to be considered at the viva voce examination. Now so far as the challenge on the first count is concerned, we do not think it is at all well-founded. It is difficult to appreciate how a procedure for admission which does not take into account the marks obtained at the qualifying examination, but prefers to test the comparative merit of the candidates by insisting on an entrance examination can ever be said to be arbitrary. It has been pointed out in the counter affidavit filed by H.L. Chowdhury on behalf of the college that there are two universities on two different dates and the examination by the Board of Secondary Education for Jammu is also held on a different date than the examination by the Board of Secondary Education for Kashmir and the results of these examinations are not always declared before the admissions to the college can be decided. The College being the only institution for education in engineering courses in the State of Jammu & Kashmir has to cater to the needs of both the regions and it has, therefore, found it necessary and expedient to regulate admissions by holding an entrance test, so that the admission process may not be held up on account of late declaration of results of the qualifying examination in either of the two regions. The entrance test also facilitates the assessment of the comparative talent of the candidates by application of a uniform standard and is always preferable to evaluation of comparative merit on the basis of marks obtained at the qualifying examination, when the qualifying examination is held by two or more different authorities, because lack of uniformity is bound to creep into the assessment of candidates by different authorities with different modes of examination. We would not, therefore, regard the procedure adopted by the society as

arbitrary merely because it refused to take into account the marks obtained by the candidates at the qualifying examination, but chose to regulate the admissions by relying on the entrance test.

19. The second ground of challenge questioned the validity of viva voce examination as a permissible test for selection of candidates for admission to a college. The contention of the petitioners under this ground of challenge was that viva voce examination does not afford a proper criterion for assessment of the suitability of the candidates for admission and it is a highly subjective and impressionistic test where the result is likely to be influenced by many uncertain and imponderable factors such as predilections and prejudices of the interviewers, his attitudes and approaches, his pre-conceived notions and idiosyncrasies and it is also capable of abuse because it leaves scope for discrimination, manipulation and nepotism which can remain undetected under the cover of an interview and moreover it is not possible to assess the capacity and calibre of a candidate in the course of an interview lasting only for a few minutes and, therefore, selections made oil the basis of oral interview must be regarded as arbitrary and hence Violative of Article 14. Now this criticism cannot be said to be wholly unfounded and it reflects a point of view which has certainly some validity. We may quote the following passage from the book on "Public Administration in Theory and Practice" by M.P. Sharma which voices a far and balanced criticism of the oral interview method :

> "The oral test of the interview has been much criticised on the ground of its subjectivity and uncertainty. Different interviews have their own notions of good personality. For some, it consists more in attractive physical appearance and dress rather than anything else, and with them the breezy and shiny type of candidate scores highly while the rough uncut diamonds may go unappreciated. The atmosphere of the interview is artificial and prevents some candidates from appearing at their best. Its duration is short, the few questions of the hit-or-miss type, which are put, may fail to reveal the real worth of the candidate. It has been said that God takes a whole life time to judge a man's worth while interviewers have to do it in a quarter of an hour. Even at it's best, the common sort of interview reveals but the superficial aspects of the candidate's personality like appearance, speaking power, and general address. Deeper traits of leadership, tact, forcefulness, etc. go largely undetected. The interview is often in the nature of desultory conversation. Marking differs greatly from examiner to examiner. An analysis of the interview results show that the marks awarded to candidates who competed more than once for the same service vary surprisingly. All this shows that there is a great element of chance in the interview test. This becomes a serious matter when the marks assigned to oral test constitute a high proportion of the total marks in the competition.

O1 Glenn Stahl points out in his book on "Public Personnel Administration" that there are three disadvantages from which the oral test method suffers, namely, "(1) the difficulty of developing valid and reliable oral tests; (2) the difficulty of securing a reviewable record on an oral test; and (3) public suspicion of the oral test as a channel for the exertion of political influence" and we may add, other corrupt, nepotistic or extraneous considerations. The learned author then proceeds to add in a highly perceptive and critical passage :

> The oral examination has failed in the past in direct proportion to the extent of its misuse. It is a delicate instrument and, in inexpert hands, a dangerous one. The first condition of its successful use is the full recognition of its limitations.

> One of the most prolific sources of error in the oral has been the failure on the part of examiners to understand the nature of evidence and to discriminate between that which was relevant, material and reliable and that which was not. It also must be remembered that the best oral interview provides opportunity for analysis of only a very small part of a person's total behavior. Generalizations from a single interview regarding an individual's total personality pattern have been proved repeatedly to be wrong.

But, despite all this criticism, the oral interview method continues to be very much in vogue as a supplementary test for assessing the suitability of candidates wherever test of personal traits is considered essential. Its relevance as a test for determining suitability based on personal characteristics has been recognised in a number of decisions of this Court which are binding upon us. In the first case on the point which came before this Court, namely, R. Chitra Lekha and Ors. v. State of Mysore and Ors. MANU/SC/0030/1964 : [1964]6SCR368 this Court pointed out :

> "In the field of education there are divergent views as regards the mode of testing the capacity and calibre of students in the matter of admissions to colleges. Orthodox educationists stand by the marks obtained by a student in the annual examination. The modern trend of opinion insists upon other additional tests, such as interview, performance in extra-curricular activities, personality test, psychiatric tests etc. Obviously we are not in a position to judge which method is preferable or which test is the correct one.... The scheme of selection, however, perfect it may be on paper, may be abused in practice. That it is capable of abuse is not a ground for quashing it. So long as the order lays down relevant objective criteria and entrusts the business of selection to qualified persons, this Court cannot obviously have any say in the matter.

and on this view refused to hold the oral interview test as irrelevant or arbitrary. It was also pointed out by this Court in A. Peeriakaruppan v. State of Tamil Nadu and Ors. MANU/SC/0055/1970 : [1971]2SCR430 . :

> In most cases, the first impression need not necessarily be the past impression, but under the existing conditions, we are unable to accede to the contentions of the petitioners that the system of interview as in vogue in this country is so defective as to make it useless.

20. It is therefore not possible to accept the contentions of the petitioners that the oral interview test is so defective that selecting candidates for admission on the basis of oral interview in addition to written test must be regarded as arbitrary. The oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, but in the absence of any better test for measuring personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse. We would, however, like to point out that in the matter of admission to college or even in the matter of public employment, the oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover, great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity, calibre and qualification.

21. So far as the third ground of challenge is concerned, we do not think it can be dismissed as unsubstantial. The argument of the petitioners under this head of challenge was that even if oral interview may be regarded in principle as a valid test for selection of candidates for admission to a college, it was in the present case arbitrary and unreasonable since the marks allocated for the oral interview were very much on the higher side as compared with the marks allocated for the written test. The marks allocated for the oral interview were 50 as against 100 allocated for the written test, so that the marks allocated for the oral interview came to 33 1/3% of the total number of marks taken into account for the purpose of making the selection. This, contended the petitioners, was beyond all reasonable proportion and rendered the selection of the candidates arbitrary and violative of the equality clause of the Constitution. Now there can be no doubt that, having regard to the drawbacks and deficiencies in the oral interview test and the conditions prevailing in the country, particularly when there is deterioration in moral values and corruption and nepotism are very much on the increase, allocation of a high percentage of marks for the oral interview as compared to the marks allocated for the written test, cannot be accepted by the Court as free from the vice of arbitrariness. It may be pointed out that even in Peeriakaruppan's case (supra), where 75 marks out of a total of 275 marks were allocated for the oral interview, this Court observed that the marks allocated for interview were on the highside. This Court also observed in Miss Nishi Maghu's case (supra): "Reserving 50 marks for interview out of a total of 150...does seem excessive, especially when the time spent was not more than 4 minutes on each candidate". There can be no doubt that allocating 33 1/3 of the total marks for oral interview is plainly arbitrary and unreasonable. It is significant to note that even for selection of candidates for the Indian Administrative Service, the Indian Foreign Service and the Indian Police Service, where the personality of the candidate and his personal characteristics and traits are extremely relevant for the purpose of selection, the marks allocated for oral interview are 250 as against 1800 marks for the written examination, constituting only 12.2% of the total marks taken into consideration for the purpose of making the selection. We must, therefore, regard the allocation of as high a percentage as 33 1/3 of the total marks for the oral interview as infecting the admission procedure with the vice of arbitrariness and selection of candidates made on the basis of such admission procedure cannot be sustained. But we do not think we would be justified in the exercise of our discretion in setting aside the selections made for the academic year 1979-80 after the lapse of a period of about 18 months, since to do so would be to cause immense hardship to those students in whose case the validity of the selection cannot otherwise be questioned and who have nearly completed three semesters and, moreover, even if the petitioners are ultimately found to be deserving of selection on the application of the proper test, it would not be possible to restore them to the position as if they were admitted for the academic year 1979-80, which has run out long since. It is true there is an allegation of mala fides against the Committee which interviewed the candidates and we may concede that if this allegation were established, we might have been inclined to interfere with the selections even after the lapse of a period of 18 months, because the writ petitions were filed as early as October-November, 1979 and merely because the Court could not take-up the hearing of the writ petitions for such a long time should be no ground for denying relief to the petitioners, if they are otherwise so entitled. But we do not think that on the material placed before us we can sustain the allegation of mala fides against the Committee. It is true, and this is a rather disturbing feature of the present cases, that a large number of successful candidates succeeded in obtaining admission to the college by virtue of very high marks obtained by them at the viva voce examination tilted the balance in their favour, though the marks secured by them at the qualifying examination were much less than those

obtained by the petitioners and even in the written test, they had fared much worse than the petitioners. It is clear from the chart submitted to us on behalf of the petitioners that the marks awarded at the interview are by and large in inverse proportion to the marks obtained by the candidates at the qualifying examination and are also, in a large number of cases, not commensurate with the marks obtained in the written test. The chart does create a strong suspicion in our mind that the marks awarded at the viva voce examination might have been manipulated with a view to favouring the candidates who ultimately came to be selected, but suspicion cannot take the place of proof and we cannot hold the plea of mala fides to be established. We need much more cogent material before we can hold that the Committee deliberately manipulated the marks at the viva voce examination with a view to favouring certain candidates as against the petitioners. We cannot, however, fail to mention that this is a matter which required to be looked into very carefully and not only the State Government, but also the Central Government which is equally responsible for the proper running of the college, must take care to see that proper persons are appointed on the interviewing committees and there is no executive interference with their decision-making process. We may also caution the authorities that though, in the present case, for reasons which we have already given, we are not interfering with the selection for the academic year 1979-80, the selections made for the subsequent academic years would run the risk of invalidation if such a high percentage of marks is allocated for the oral interview. We are of the view that, under the existing circumstances, allocation of more than 15% of the total marks for the oral interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid.

22. The petitioners, arguing under the last ground of challenge, urged that the oral interview as conducted in the present case was a mere pretence or farce, as it did not last for more than 2 or 3 minutes per candidate on an average and the questions which were asked were formal questions relating to parentage and residence of the candidate and hardly any question was asked which had relevance to assessment of the suitability of the candidate with reference to any of the four factors required to be considered by the Committee. When the time spent on each candidate was not more 2 or 3 minutes on an average, contended the petitioners, how could the suitability of the candidate be assessed on a consideration of the relevant factors by holding such an interview and how could the Committee possibly judge the merit of the candidate with reference to these factors when no questions bearing on these factors were asked to the candidate. Now there can be no doubt that if the interview did not take more than 2 or 3 minutes on an average and the questions asked had no bearing on the factors required to be taken into account, the oral interview test would be vitiated, because it would be impossible in such an interview to assess the merit of a candidate with reference to these factors. This allegation of the petitioners has been denied in the affidavit in reply filed by H.L. Chowdhury on behalf of the college and it has been stated that each candidate was interviewed for 6 to 8 minutes and "only the relevant questions on the aforesaid subjects were asked". If this statement of H.L. Chowdhury is correct, we cannot find much fault with the oral interview test held by the Committee. But we do not think we can act on this statement made by H.L. Chowdhury, because there is nothing to show that he was present at the interviews and none of the three Committee members has come forward to make an affidavit denying the allegation of the petitioners and stating that each candidate was interviewed for 6 to 8 minutes and only relevant questions were asked. We must therefore, proceed on the basis that the interview of each candidate did not last for more than 2 or 3 minutes on an average and hardly any questions were asked having bearing on the relevant factors. If that be so, the oral interview test must be held to be vitiated and the selection made on the basis

of such test must be held to be arbitrary. We are, however, not inclined for reasons already given, to set aside the selection made for the academic year 1979-80, though we may caution the State Government and the Society that for the future academic years, selections may be made on the basis of observation made by us in this judgment lest they might run the risk of being struck down. We may point out that, in our opinion, if the marks allocated for the oral interview do not exceed 15% of the total marks and the candidates are properly interviewed and relevant questions are asked with a view to assessing their suitability with reference to the factors required to be taken into consideration, the oral interview test would satisfy the criterion of reasonableness and non-arbitrariness. We think that it would also be desirable if the interview of the candidates is tape-recorded, for in that event there will be contemporaneous evidence to show what were the questions asked to the candidates by the interviewing committee and what were the answers given and that will eliminate a lot of unnecessary controversy besides acting as a check on the possible arbitrariness of the interviewing committee.

23. We may point out that the State Government, the Society and the College have agreed before us that the best fifty students, out of those who applied for admission for the academic year 1979-80 and who have failed to secure admission so far, will be granted admission for the academic year 1981-82 and the seats allocated to them will be in addition to the normal intake of students in the College. We order accordingly.

24. Subject to the above direction, the writ petitions are dismissed, but having regard to the facts and circumstances of the present cases, we think that a fair order of costs would be that each party should bear and pay its own costs of the writ petitions.

MANU/SC/0330/2002

Equivalent Citation: (2002)5SCC111, [2002]3SCR100

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 992 of 2002

Decided On: 16.04.2002

Appellants: **Pradeep Kumar Biswas and Ors.**
Vs.
Respondent: **Indian Institute of Chemical Biology and Ors.**

Hon'ble Judges/Coram:
S.P. Bharucha, C.J., S.S.M. Quadri, R.C. Lahoti, N. Santosh Hegde, Doraiswamy Raju, Ruma Pal and Dr. Arijit Pasayat, JJ.

Counsels:
For Appearing parties: Soli J. Sorabjee, Attorney General, Mukul Rohatgi and R.N. Trivedi, Additional Solicitor General, Sanjoy Kumar Ghosh, Deba Prasad Mukherjee, B.D. Sharma, Narottam Vyas, S.N. Tiwari, Deepshikha Bharati, Madhu Sikri, V.K. Rao, Piyush Sharma, Ravi Sikri, Ajay Verma, Anuradha Priyadarshini, Prateek Jalan, Manish Singhvi and Shreekant N. Terdal, Advs

JUDGMENT

Ruma Pal, J.

1. In 1972 Sabhajit Tewary, a Junior Stenographer with the Council of Scientific and Industrial Research (CSIR) filed a write petition under Article 32 of the Constitution claiming parity of remuneration with the stenographers who were newly recruited to the CSIR. His claim was based on Article 14 of the Constitution. A Bench of five judges of this Court denied him the benefit of that Article because they held in **Sabhajit Tewari v. Union of India** that the writ application was not maintainable against CSIR as it was not an "authority" within the meaning of Article 12 of the Constitution. The correctness of the decision is before us for re-consideration.

2. The immediate cause for such re-consideration is a write application filed by the appellant in Calcutta High Court challenging the termination of their services by the respondent No. 1 which is a unit of CSIR. They prayed for an interim order before the learned Single Judge. That was refused by the Court on the prima view that the writ application was itself not maintainable against the respondent No. 1. The appeal was also dismissed in view of the decision of this Court in **Sabhajit Tewary's case.**

3. Challenging the order of the Calcutta High Court, the appellants filed an appeal by way of special leave before this Court. On 5th August, 1986 a Bench of two Judges of this Court referred the matter to a Constitution Bench being of the view that the decision in **Sabhajit Tewary** required re-consideration "having regard to the pronouncement of this Court in several subsequent decisions in respect of several other institutes of similar nature set up by the Union of India".

4. The questions therefore before us are - is the CSIR a State within the meaning of Article 12 of the Constitution and if it is should this Court reverse a decision which has

stood for over a quarter of a century?

5. The Constitution has to an extent defined the word 'State' in Article 12 itself as including:

> "the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India".

6. That an 'inclusive' definition is generally not exhaustive is a statement of the obvious and as far as Article 12 is concerned,has been so held by this Court. The words 'State' and 'Authority' used in Article 12 therefore remain, to use the words of Cardozo, among "the great generalities of the Constitution "the content of which has been and continues to be supplied by Courts from time to time.

7. It would be a practical impossibility and an unnecessary exercise to note each of the multitude of decisions on the point. It is enough for our present purposes to merely note that the decisions may be categorized broadly into those which express an arrow and those that express a more liberal view and to consider some decisions of this Court as illustrative of this apparent divergence. In the ultimate analysis the difference may perhaps be attributable to different stages in the history of the development of the law by judicial decisions on the subject.

8. But before considering the decisions in must be emphasized that the significance of Article 12 lies in the fact that it occurs in Part III of the Constitution which deals with fundamental rights. The various Articles in Part-III have placed responsibilities and obligations on the 'State' vis-a-vis the individual to ensure constitutional protection of the individual's rights against the state, including the right to equality under Article 14 and equality of opportunity in matters of public employment under Article 16 and most importantly the right to enforce all or any of these fundamental rights against the 'State' as defined in Article 12 either under Article 32 by this Court or under Article 226 by the High Courts by issuance of writs or directions or orders.

9. The range and scope of Article 14 and consequently Article 16 have widened by a process of judicial interpretation so that the right to equality now not only means the right not to be discriminated against but also protection against any arbitrary or irrational act of the State. It has been said that:

> "Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment".

10. Keeping pace with this broad approach to the concept of equality under Article 14 and 16, Courts have whenever possible, sought to curb an arbitrary exercise of power against individuals by 'centers of power', and there was correspondingly an expansion in the judicial definition of 'State' in Article 12.

11. Initially the definition of State was treated as exhaustive and confined to the authorities or those which could be read *ejusdem generis* with the authorities mentioned in the definition of Article 12 itself. The next stage was reached when the definition of 'State' came to be understood with reference to the remedies available against it. For example, historically, a writ of mandamus was available for enforcement of statutory duties or duties of a public nature. Thus a statutory corporation, with regulations farmed by such Corporation pursuant to statutory powers was considered a State, and the public duty was limited to those which were created by statute.

12. The decision of the Constitution Bench of this Court in **Rajasthan Electricity Board v. Mohan Lal and Ors. MANU/SC/0360/1967 : (1968)ILLJ257SC** is illustrative of this. The question there was whether the Electricity Board - which was a Corporation constituted under a statute primarily for the purpose of carrying on commercial activities could come within the definition of 'State' in Article 12.After considering earlier decisions, it was said:

> "These decisions of the Court support our view that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities".

13. It followed that since a Company incorporated under the Companies Act is not formed statutorily and is not subject to any statutory duty via a vis an individual, it was excluded from the preview of 'State' In **Praga Tools Corporation v. Shri C.A.Imanual and Ors.** where the question was whether an application under Article 226 for issuance of a writ of mandamus would lie impugning an agreement arrived at between a Company and its workmen, the Court held that:

> "....there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court,therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company".

14. By 1975 Mathew, J. in **Sukhdev Singh and Ors. v.Bhagatram Sardar Singh Raghuvanshi and Ors.** noted that the concept of "State" in Article 12 had undergone "drastic changes in recent year". The question in that case was whether the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation each of which were public corporations set up by statutes were authorities and therefore within the definition of State in Article 12. The Court affirmed the decision in **Rajasthan State Electricity Board v. MohanLal**(supra) and held that the Court could compel compliance of statutory rules. But the majority view expressed by A.N. Ray, CJ also indicated that the concept would include a public authority which:

> "is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making profit for the public benefit".
>
> (emphasis added)

15. The use of the alternative is significant. The Court scrutinised the history of the formation of the three Corporations,the financial support given by the Central Government, the utilization of the finances so provided, the nature of service rendered and noted that despite the fact that each of the Corporations on profits earned by it nevertheless the structure of each of the Corporation showed that the three Corporations represented the 'voice and hands' of the Central Government. The Court came to the conclusion that although the employees of the three Corporations were not servants of the Union or the State,"these statutory bodies are 'authorities' within the meaning of Article 12 of the Constitution".

16. Mathew J. in his concurring judgment went further and propounded a view which

presaged the subsequent development sin the law. He said:

> "A state is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore,there is nothing strange in the notion of the state acting through a corporation and making it an agency or instrumentality of the State....."

17. For identifying such an agency or instrumentality he propounded four indicia:

> (1) "A finding of the state financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as state action."
>
> (2) ..... "Another factor which might be considered is whether the operation is an important public function."
>
> (3) "The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to a governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description then mere addition of state money would not influence the conclusion."
>
> (4) "The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business?"

18. Sabhajit Tewary was decided by the same Bench on the same day as **Sukhdev Singh** (supra). The contentions of the employee was the CSIR is an agency of the Central Government on the basis of the CSIR Rules which, it was argued, showed that the Government controlled the functioning of CSIR in all its aspect. The submission was some what cursorily negatived by this Court on the ground that all this

> ....."will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and Industrial Research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner."

19. Although the Court noted that it was the Government which was taking the "special care" nevertheless the writ petition was dismissed ostensibly because the Court factored into its decision two premises:

> i) "The society does not have a statutory character like the Oil and Natural Gas Commission or the Life Insurance Corporation or Industrial Finance Corporation. It is a Society incorporated inaccordance with the provisions of the Society's Registration Act", and

> ii) "This Court has held in Praga Tools Corporation v. Shri C.A. Imanual and Ors. MANU/SC/0327/1969 : (1969)IILLJ479SC . Heavy Engineering Mazdoor Union v. The State of Bihar and Ors. MANU/SC/0309/1969 : (1969)IILLJ549SC and in S.L. Agarwal v. General Manager Hindustan Steel Ltd. MANU/SC/0498/1969 : (1970)IILLJ499SC : (1970)IILLJ499SC that the Praga Tools Corporation, Heavy Engineering Mazdoor Union and Hindustan Steel Ltd. are all companies incorporated under the Companies Act and the employees of these companies do not enjoy the protection available to Government servants as contemplated in Article 311. the Companies were held in these cases to have independent existence of the Government and by the law relating to corporations. These could not be held to be departments of the Government".

20. With respect, we are of the view that both the premises were not really relevant and in fact contrary to the 'voice' and 'hands' approach in **Sukhdev Singh** . Besides reliance by the Court on decisions pertaining to Article 311 which is contained in Part XIV of the Constitution was inapposite. What was under consideration was Article 12 which by definition is limited to Part III and by virtue of Article 36 to Part IV of the Constitution. as said by another Constitution Bench later in this context:

> "Merely because a juristic entity may be an "authority" and therefore "State" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in Part XIV. The definition of "State" in Article 12 which includes an "authority" within the territory of India or under the control of the Government of India is (sic) in its application only to Part III and by virtue of Article 36, to Part IV: it does note xtend to the other provisions of the Constitution and hence a juristic entity which may be "State" for the purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. This is why the decisions of this Court in *S.L. Aggarwal v. Hindustan Steel Ltd.* , and other cases involving the applicability of Article 311 have no relevance to the issue before us".

21. Normally, a precedent like **Sabhajit Tewary** which has stood for a length of time should not be reversed, however erroneous the reasoning if it has stood unquestioned, without its reasoning being 'distinguished' out of all recognition by subsequent decisions and if the principles enunciated in the earlier decision can stand consistently and be reconciled with subsequent decisions of this Court, same equally authoritative. In our view **Sabhajit Tewary** fulfills both conditions.

22. Side-stepping the majority approach in **Sabhajit Tewary,** the 'drastic changes' in the perception of 'State' heralded in **Sukhdev Singh** by Mathew, J and the tests formulated by him were affirmed and amplified in **Ramana v. International Airport Authority of India** . Although the International Airport Authority of India is a statutory corporation and therefore within the accepted connotation of State, the Bench of three Judges developed the concept of State, The rationale for the approach was the one adopted Mathew J. in **Sukhdev Singh** :

> ....." In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the frame work of civil service was not sufficient to handle the new tasks which were often of

specialised and highly technical character. The inadequacy of the civil service to deal with these new problems came to be realized and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm on the Government".

23. From this perspective, the logical sequitur is that it really does not matter what guise the State adopts for this purpose, whether by a Corporation established by statute or incorporated under a law such as the Companies Act or formed under the Societies Registration Act, 1860. Neither the form of the Corporation, nor its ostensible autonomy would take away from its character as 'State' and its constitutional accountability under Part III vis-a-vis the individual if it were in fact acting as an instrumentality or agency of Government.

24. As far as **Sabhajit Tewary** was concerned it was 'explained' and distinguished in **Ramana** saying:

"The Court no doubt took the view on the basis of facts relevant to the constitution and functioning of the Council that it was not an 'authority', but we do not find any discussion in this case as to what are the features which must be present before a corporation can be regarded as an 'authority' within the meaning of Article 12. This decision does not lay down any principle or test for the purpose of determining when a corporation can be said to be an 'authority'. If at all any test can be gleaned from the decision, it is whether the Corporation is 'really an agency of the Government'. The Court seemed to hold on the facts that the Council was not an agency of the Government and was, therefore, not an 'authority'".

25. The tests propounded by Mathew, J in **Sukhdev Singh** were elaborated in Ramana and were re-formulated two years later by a Constitution Bench in **Ajay Hasia v. Khalid Mujib Sehravardi**. What may have been technically characterised as 'obiter dicta' in **Sukhdev Singh** and **Ramana** (since in both cases the "authority" in fact involved was a statutory corporation), formed the ratio decidendi of **Ajay Hasia**. The case itself dealt with a challenge under Article 32 to admissions made to a college established and administered by a Society registered under the Jammu & Kashmir Registration of Societies Act 1898. The contention of the Society was that even if there were an arbitrary procedure followed for selecting candidates for admission, and that this may have resulted in denial of equality to the petitioners in the matter of admission in violation of Article 14, nevertheless Article 14 was not available to the petitioners because the Society was nota State within Article 12.

The Court recognised that:

.... " Obviously the Society cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression "other authorities" if it is to fall within the definition of 'State' ".

But it said that:

"The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the government or through the

> corporate personality of which the government is acting, so as to subject the government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the Fundamental Rights".

26. It was made clear that the genesis of the corporation was immaterial and that:

> ..... " The concept of instrumentality or agency of the government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the government so as to come within the meaning of the expression "authority" in Article 12".

27. **Ramana** was noted and quoted with approval in extenso and the tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government therein were culled out and summarised as follows:

> (1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.
>
> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
>
> (3) It may also be a relevant factor.....whether the corporation enjoys monopoly status which is State conferred or State protected.
>
> (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
>
> (5) If the functions of the corporation are of public importance and closely related a governmental functions it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.
>
> (6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

28. In dealing with **Sabhajit Tewary** the Court in Ajay Hasia noted that since **Sabhajit Tewary** was a decision given by a Bench of Five Judges of this Court it was undoubtedly binding. The Court read **Sabhajit Tewary** as implicity assenting to the proposition that CSIR could have been an instrumentality of agency of the Government even though it was a Registered Society and limited the decision to the facts of the case. It held that the Court in **Sabhajit Tewari** :

> "did not rest its conclusion on the ground that the council was a society registered under the Societies Registration Act, 1860, but proceeded to consider various other features of the council for arriving at the conclusion that it was not an agency of the government and therefore not an 'authority'".

29. The conclusion was then reached applying the test formulated to the facts that the Society in **Ajay Hasia** was an authority falling within the definition of "State" in Article 12.

30. On the same day that the decision in **Ajay Hasia** was pronounced came the decision of **Som Prakash Rekhi v. Union of India**. Here too, the reasoning in Ramana was followed and Bharat Petroleum Corporation was held to be a 'State' within the "enlarged meaning of Article 12". Sabhajit Tewary was criticised and distinguished as being limited to the facts of the case. It was said:

> "The rulings relied on are, unfortunately, in the province of Article 311 and it is clear that a body may be 'State' under Part III but not under Part XIV. Ray, C.J., rejected the argument that merely because the Prime Minister was the Present or that the other members were appointed and removed by Government did not make the Society a 'State'. With great respect, we agree that in the absence of the other features elaborated in Airport Authority case MANU/SC/0048/1979 : (1979)IILLJ217SC : (1979)IILLJ217SC the composition of the Government Body alone may not be decisive. The laconic discussion and the limited ratio in Tewary MANU/SC/0059/1975 : (1975)ILLJ374SC : (1975)ILLJ374SC hardly help either side here."

31. The tests to determine whether a body falls within the definition of 'State' in Article 12 laid down in **Ramana** with the Constitution Bench imprimatur in **Ajay Hasia** form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited.

32. In **P.K. Ramachandra Iyer and Ors. v. Union of India and Ors. MANU/SC/0395/1983 : (1984)ILLJ314SC**, it was held that both the Indian Council of Agricultural Research (ICAR) and its affiliate Indian Veterinary Research Institute were bodies as would be comprehended in the expression 'other authority' in Article 12 of the Constitution. Yet another judicial blow was dealt to the decision in **Sabhajit Tewary** when it was said:

> "Much water has flown down the Jamuna since the dicta in **Sabhajit Tewary case** and conceding that it is not specifically overruled in later decision, its ratio is considerably watered down so as to be a decision confined to its own facts."

33. **B.S. Minhas v. Indian Statistical Institute and Ors.** held that the Indian Statistical Institute, a registered Society is an instrumentality of the Central Government and as such is an 'authority' within the meaning of Article 12 of the Constitution. The basis was that the composition of respondent No. 1 is dominated by the representatives appointed by the Central Government. The money required for running the Institute is provided entirely by the Central Government and even if any other moneys are to be received by the Institute it can be done only with the approval of the Central Government, and the accounts of the Institute have also to be submitted to the Central Government for its scrutiny and satisfaction. The Society has to comply with all such directions as may be issued by the Central Government. It was held that the control of the Central Government is deep and pervasive.

34. The decision in **Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguli** held that the appellant company was covered by Article 12 because it is financed entirely by three Governments and is completely under the control of the Central Government and is managed by the Chairman and Board of Directors appointed by the Central Government and removable by it and also that the activities carried on by the Corporation are of vital national importance.

35. However, the tests propounded in **Ajay Hasia** were not applied in **Tekraj Vasandi**

alias K.S. Basandhi v. Union of India and Ors.1988 (1) SCC 237 , where the Institute of Constitutional and Parliamentary Studies (ICPS), a society registered under the Societies Registration Act, 1860 was held not to be an "other authority" within the meaning of Article 12.The reasoning is not very clear. All that was said was:

> "Having given our anxious consideration to the facts of this case,we are not in a position to hold that ICPS is either an agency or instrumentality of the State so as to come within the purview of 'other authorities' in Article 12 of the Constitution".

36. However, the Court was careful to say that "ICPS is a case of its type - typical in many ways and the normal tests may perhaps not properly apply to test its character".

37. All India Sainik Schools Employees' Association v. Defence Minister-cum-Chairman Board of Governors,Sainik Schools Society, New Delhi and Ors. MANU/SC/0014/1988 : 1989 Supp.(1)SCC 205held applying the tests indicated in **Ajay Hasia** that the Sainik School Society is a 'State'.

38. Perhaps this rather over - enthusiastic application of the broad limits set by **Ajay Hasia** may have persuaded this Court to curb the tendency in **Chander Mohan Khanna v. National Council of Educational Research and Training and Ors. MANU/SC/0010/1992 : (1992)ILLJ331SC** The Court referred to the tests formulated in **Sukhdev Singh, Ramana, Ajay Hasia, and Som Prakash Rekhi**but striking a note of caution said that "these are merely indicative indicia and are by no means conclusive or clinching in any case". In that case, the question arose whether the National Council of Educational Research (NCERT) was a 'State' as defined under article 12 of the Constitution. The NCERT is a society registered under the Societies Registration Act. After considering the provisions of its Memorandum of Association as well as the rules of NCERT, this Court came to the conclusion that since NCERT was largely an autonomous body and the activities of the NCERT were not wholly related to governmental functions and that the Government control was confined only to the proper utilisation of the grant and since its funding was not entirely from Government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in **Tekraj Vasandi @ K.S. Basandhi v. Union of India** (supra) However, as far as the decision in Sabhajit Tewary v. Union of India (supra) was concerned, it was noted that "the decision has been distinguished and watered down in the subsequent decisions".

39. Fresh off the judicial anvil is the decision in the **Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers Association MANU/SC/0003/2002 : (2002)ILLJ1088SC**which fairly represents what we have seen as a continuity of thought commencing from the decision in **Rajasthan Electricity Board** in 1967 upto the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government is 'an authority' within the meaning of Article 12.

40. The picture that ultimately emerges is that the tests formulated in **Ajay Hasia** are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially,functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be

pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

41. Coming now to the facts relating to CSIR, we have no doubt that it is well within the range of Article 12, a conclusion which is sustainable when judged according to the tests judicially evolved for the purpose.

The Formation of CSIR

42. On 27th April 1940 the Board of Scientific and Industrial Research and on 1st February 1941, the Industrial Research Utilisation Committee were set up by the Department of Commerce, Government of India with the broad objective of promoting industrial growth in this country. On 14th November 1941, a resolution was passed by the Legislative Assembly and accepted by the Government of India to the following effect:

> "This Assembly recommends to the Governor General in Council that a fund called the Industrial Research Fund be constituted, for the purpose of fostering industrial development in this country and that provision be made in the Budget for an annual grant of rupees ten lakhs to the fund for a period of five years."

43. For the purpose of coordinating and exercising administrative control over the working of the two research bodies already set up by the Department of Commerce, and to oversee the proper utilisation of the Industrial Research Fund, by a further resolution dated 26th September 1942, the Government of In dia-decided to set up a Council of Industrial Research on a permanent footing which would be a registered society under the Registration of Societies Act, 1860. Pursuant to the resolution, on 12th March,1942 the CSIR was duly registered. Bye-laws and Rules were framed by the Governing Body of the Society in 1942 which have been subsequently revised and amended. Unquestionably this shows that the CSIR was 'created' by the Government to carry on in an organized manner what was being done earlier by the Department of Commerce of the Central Government. In fact the two research bodies which were part of the Department of Commerce have since been subsumed in the CSIR.

Objects and Functions:

44. The 26th September 1942 Resolution had provided that the functions of the CSIR would be:

> (a) to implement and give effect to the following resolution moved by the Hon'ble Dewan Bahadur Sir A.R.Mudaliar and passed by the Legislative Assembly on the 14th Nov. 1941 and accepted by the Government of India..... (quoted earlier in this Judgment)
>
> (b) the promotion, guidance and co-ordination of scientific and Industrial Research in India including the institution and the financing of specific researches:
>
> (c) the establishment or development and assistance to special institutions or Department of existing institutions for scientific study of problems affecting particular industries and trade;

(d) the establishment and award of research student-ships and fellowships;

(e) the utilisation of the results of the researches conducted under the auspices of the Council towards the development of industrial in the country and the payment of a share of royalties arising out of the development of the results of researches to those who are considered as having contributed towards the pursuit of such researches;

(f) the establishment, maintenance and management of laboratories, workshops, institutes, and organisation to further scientific and industrial research and utilise and exploit for purposes of experiment or otherwise any discovery or invention likely to be of use Indian Industries.

(g) the collection and dissemination or information in regard not only to research but to industrial matters generally;

(h) publication of scientific papers and a journal of industrial research and development, and

(i) any other activities to promote generally the objects of the resolution mentioned in (a) above.

45. These objects which have been incorporated in the Memorandum of Association of CSIR manifestly demonstrate that CSIR was set up in the national interest to further the economic welfare of the society by fostering planned industrial development in the country. That such a function is fundamental to the governance of the country has already been held by a Constitution Bench of this Court as far back as in 1967 in **Rajasthan Electricity Board v. Mohan Lal** (Supra) where it was said:

"The State, as defined in Article 12, as thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people".

46. We are in respectful agreement with this statement of the law. The observations to the contrary in **Calender Mohan Khanna v. NCERT**(supra) relied on by the Learned Attorney General in this context, do not represent the correct legal position.

47. Incidently, the CSIR was and continues to be a non-profit making organization and according to clause (4) of CSIR's Memorandum of Association, all its income and property, however derived shall be applied only 'towards the promotion of those objects subject nevertheless in respect of the expenditure to such limitations as the Government of India may from time to time impose'.

Management and Control:

When the Government of India resolved to set up the CSIR on 26th February, 1942 it also decided that the Governing Body would consist of the following members:

(1) The Honourable Member of the Council of His Excellency the Governor General incharge of the portfolio of Commerce (Ex-officio).

(2) A representative of the Commerce Department of the Government of India, appointed by the Government of India.

(3) A representative of the Finance Department of the Government of India, appointed by the Government of India.

(4) Two members of the Board of Scientific and Industrial Research elected by the said Board.

(5) Two members of the Industrial Research Utilisation committee elected by the said Committee.

(6) The Director of Scientific and Industrial Research.

(7) One or more members to be nominated by the Government of India to represent interests not otherwise represented.

The present Rules and Regulations 1999 of CSIR provide that:

(a) The Prime Minister of India shall be the ex-office President of the Society.

(b) The Minister-in-Charge of the Ministry or Deptt. dealing with the Council of Scientific & Industrial Research shall be the ex-officio Vice President of the Society.

Provided that during any period when the Prime Minister is also such Minister, any person nominated in this behalf by the Prime Minister shall be the Vice-President.

(c) Ministers Incharge of Finance and Industry (ex-officio).

(d) The members of the Governing Body.

(e) Chairman, Advisory Board.

(f) Any other person or persons appointed by the President, CSIR."

The Governing Body of the Society is constituted by the:

(a) Director General,

(b) Member Finance,

(c) Directors of two National Laboratories,

(d) Two eminent Scientists/ Technologists, one of whom shall be from Academia;

(e) Heads of two Scientific Departments/Agencies of the Government of India.

48. The dominant role played by the Government of India in the Governing Body of CSIR is evident. The Director-General who is ex-officio Secretary of the Society is appointed by the Government of India [Rule 2(iii)]. The submission of the learned Attorney General that the Governing Body consisted of members, the majority of whom were non-governmental members is, having regard to the facts on record, unacceptable. Furthermore, the members of the Governing Body who are not there *ex officio* are nominated by the President and the irmembership can also be terminated by him and

the Prime Minister is the ex-officio President of CSIR. It was then said that although the Prime Minister was *ex-officio* President of the Society but the power being exercised by the Prime Minister is as President of the Society. This is also the reasoning in **Sabhajit Tewary**. With respect, the reasoning was and the submission is erroneous. An *ex-officio* appointment means that the appointment is by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer, in this case the Prime Minister, which are not specifically conferred upon him, but are necessarily implied in his office (as Prime Minister), these are *ex-officio.*

49. The control of the Government in the CSIR is ubiquitous. The Governing Body is required to administer, direct and control the affairs and funds of the Society and shall, under Rule 43, have authority 'to exercise all the powers of the Society subject nevertheless in respect of expenditure to such limitations as the Government of India may from time to time impose'. The aspect of financial control by the Government is not limited to this and is considered separately. The Governing Body also has the power to frame, amend or repeal the bye-laws or CSIR but only with the sanction of the Government of India. Bye-law 44 of the 1942 Bye-laws had provided 'any alteration in the bye-laws shall require the prior approval of the Governor General in Council'.

50. Rule 41 of the present Rules provide that:

> "The President may review/amend/vary any of the decisions of the Governing Body and pass such orders as considered necessary to be communicated to the Chairman of the Governing Body within a month of the decision of the Governing Body and such order shall be binding on the Governing Body. The Chairman may also refer any question which in his opinion is of sufficient importance to justify such a reference for decision of the President, which shall be binding on the Governing Body."
>
> (emphasis added)

51. Given the fact that the President of CSIR is the Prime Minister, under this Rule the subjugation of the Governing Body to the will of the Central Government is complete.

52. As far as the employees of the CSIR are concerned the Central Civil Services (Classification, Control & Appeal)Rules and the Central Civil Services (Conduct) Rules, for the time being in force, are from the outset applicable to them subject to the modification that references to the President' and 'Government Servant' in the Conduct Rules would be construed as 'President of the Society' and 'Officer & establishments in the service of the Society' respectively. (Bye Law 12). The scales of pay applicable to all the employees of CSIR are those prescribed by the Government of India for similar personnel, save in the case of specialists (Bye Law 14) and in regard to all matter sconcerning service conditions of employees of the CSIR, the Fundamental and Supplementary Rules framed by the Govt. of India and such other rules and orders issued by the Govt. of India from time to time are also, under Bye Law 15 applicable to the employees of the CSIR. Apart from this, the rules/Orders issued by Government of India regarding reservation of posts for SC/ST apply in regard to appointments to posts to be made in CSIR. (Bye Law 19)The CSIR cannot lay down or change the terms and conditions of service of its employees and any alteration in the bye-laws can be carried out only with the approval of Government of India. (Bye Laws 20).

Financial Aid

53. The initial capital of the CSIR was Rs. 10 lakhs, made available pursuant to the Resolution of the Legislative Assembly on 14th November, 1941. Paragraph 5 of the 26th September, 1942 Resolution of the Government of India pursuant to which CSIR was formed reads:

> "The Government of India have decided that a fund, viz., the Industrial Research Fund, should be constituted by grants from the Central Revenues to which additions are to be made from time to time as moneys flow in from other sources. These 'other sources' will comprise grants, if any, by Provincial Governments by industrialists for special or general purposes, contributions from Universities or local bodies, donations or benefactions, royalties, etc., received from the development of the results of Industrial Research, and miscellaneous receipts. the Council of Scientific and Industrial Research will exercise full powers in regard to the expenditure to be met out of the Industrial Research Fund subject to its observing the Bye-laws framed by the Governing Body of the Council, from time to time, with the approval of the Governor General-in-Council,and to its annual budget being approved by the Governor General-in-Council."

54. As already noted, the initial capital of Rs. 10 lakhs was made available by the Central Government. According to the statement handed up to the Court on behalf of CSIR the present financial position of CSIR is that at least 70% of the funds of CSIR are available from grants made by the Government of India. For example out of the total funds available to CSIR for the years 1998-99, 1999-2000, 2000-01 of Rs. 1023.68 crores, Rs. 1136.69 crores and Rs. 1219.04crores respectively, the Government of India has contributed Rs. 713.32 crores, Rs. 798.74 crores and Rs. 877.88 crores. Amaj or portion of the balance of the funds available is generated from charges for rendering research and development works by CSIR for projects such as the Rajiv Gandhi Drinking Water Mission Technology Mission on oilseeds and pulses and maize or grant in aid projects from other Government Departments. Funds are also received by CSIR from sale proceeds of its products, publications,royalties etc. Funds are also received from investments but under Bye-Law 6 of CSIR, funds of the Society may be invested only in such manner as prescribed by the Government of India. Some contributions are made by the state Governments and to a small extent by 'individuals, institutions and other agencies'. The non-governmental contributions are a pittance compared to the massive governmental input.

55. As far as expenditure is concerned, under Bye-law (1) as it stands at present, the budget estimates of the Society are to be prepared by the Governing Body 'keeping in view the instructions issued by the Government of India from time to time in this regard'. Apart from an internal audit, the accounts of the CSIR are required to be audited by the controller and Auditor General and placed before the table of both Houses of Parliament (Rule 69).

56. In the event of dissolution, unlike other registered societies which are governed by Section 14 of the Societies Registration Act, 1860, the members of CSIR have no say in the distribution of its assets and under clause (5) of the Memorandum of Association of CSIR, on the winding up or dissolution of CSIR any property remaining after payment of all debts shall have to be dealt with "in such manner as the Government of India may determine". CSIR is therefore both historically and in its present operation subject to the financial control of the Government of India. The assets and funds of CSIR though nominally owned by the Society are in the ultimate analysis owned by the Government.

57. From whichever perspective the facts are considered there can be no doubt that the conclusion reached in **Sabhajit Tewary** was erroneous. If the decision of **Sabhajit Tewary** had sought to lay down as a legal principle that a society registered under the Societies Act or a company incorporated under the Companies Act is, by that reason alone, excluded from the concept of State under Article 12, it is a principle which has long since been discredited. "Judges have made worthy, if shamefaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow".

58. In the assessment of the facts, the Court had assumed certain principles, and sought precedential support from decisions which were irrelevant and had "followed a groove chased amidst a context which has long since crumbled". Had the facts been closely scrutinised in the proper perspective, it could have led and can only lead to the conclusion that CSIR is a State within the meaning of Article 12.

59. Should **Sabhajit Tewary** still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the fact sleading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and "there is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public." Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake.

60. Besides a new fact relating to CSIR has come to light since the decision in **Sabhajit Tewary** which unequivocally vindicates the conclusion reached by us and fortifies us in delivering the *coup de grace* to the already attenuated decision in **Sabhajit Tewary**. On 31st October 1986 in exercise of the powers conferred by Sub-section (2) of Section 14 of the Administrative Tribunals Act, 1985, the Central Government specified 17th November 1986 as the date on and from which the provisions of Sub-section (3) of Section 14 of the 1985 Act would apply to CSIR 'being the Society owned and controlled by Government'.

61. The learned Attorney General contended that the notification was not conclusive of the fact that the CSIR was a State within the meaning of Article 12 and that even if an entity is not a State within the meaning of Article 12, it is open to the Government to issue a notification for the purpose of ensuring the benefits of the provisions of the Act to its employees.

62. We cannot accept this. Reading Article 323(A) of the Const. (sic) Section 14 of the 1985 Act it is clear that no notification under Section 14(2) of the Administrative Tribunals Act could have been issued by the Central Government unless the employees of the CSIR were either appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Once such a notification has been issued in respect of CSIR, the consequence will be that an application would lie at the instance of the appellants at least before the Administrative Tribunal. No new jurisdiction was created in the Administrative Tribunal. The notification which was issued by the Central Government merely served to shift the service disputes of the employees of CSIR from the constitutional jurisdiction of the High Court under Article 226 to the Administrative Tribunals on the factual basis that CSIR was amenable to the writ jurisdiction as a State

or other authority under Article 12 of the Constitution.

63. Therefore, the notification issued in 1986 by the Central Government under Article 14(2) of the Administrative Tribunals Act, 1985 serves in removing any residual doubt as to the nature of CSIR and decisively concludes the issues before us against it.

64. **Sabhajit Tewary's** decision must be and is in the circumstances overruled. Accordingly the matter is remitted back to the appropriate Bench to be dealt with in the light of our decision. There will be no order as to costs.

R.C. Lahoti, J.

(For Self and Behalf of Doraiswamy Raju, J.)

65. We have had the advantage of reading the judgment proposed by our learned sister Rama Pal, J. With greatest respect to her, we find ourselves not persuaded to subscribe to her view overruling ***Sabhajit Tewary's*** case and holding Council for Scientific and Industrial Research (CSIR) 'the State' within the meaning of Article 12 of the Constitution. The development of law has travelled through apparently a zig-zag track of judicial pronouncements, rhythmically traced by Rama Pal, J. in her judgment. Of necessity, we shall have to retread the track, for, we find that though the fundamentals and basic principles for determining whether a particular body is 'the State' or not many substantially remain the same but we differ in distributing the emphasis within the principles in their applicability to the facts found. We also feel that a distinction has to be borne in mind between an instrument ality or agency of 'the State' and an authority includible in 'other authorities'. The distinction cannot be obliterated.

66. Article 12 of the Constitution reads as under:

> "12. In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

67. This definition is for the purpose of attracting applicability of the provisions contained in Part III of the Constitution dealing with fundamental rights. It is well-settled that the definition of 'the State' in Article 12 has nothing to do with Articles 309, 310 and 311 of the Constitution which find place in Part XIV. Merely because an entity is held to be the State within the meaning of Article 12, its employees do not ipso facto become entitled to protection of Part XIV of the Constitution.

68. Dr. B.R. Ambedkar explaining the scope of Article 12 and reason why this Article was placed in the Chapter on Fundamental Rights so spoke in the Constituent Assembly :

> "The object of the fundamental rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly they must be binding upon every authority --I shall presently explain what the word "authority" means -- upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the Fundamental Rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards,

> Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-laws.
>
> If that proposition is accepted - and I do not see anyone who cares for Fundamental Rights can object to such a universal obligation being imposed upon every authority created by law -then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as "the State", as we have done in Article 7; or, to keep on repeating every time, "the Central Government, the Provincial Government the State Government, the Municipality, the Local Board, the Port Trust, or any other authority". It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words".
>
> (1948 (7) CAD 610
> [emphasis supplied]

69. Thus the framers of the Constitution used the word "the State" in a wider sense than what is understood in the ordinary or narrower sense. So far as 'other authorities' are concerned they were included subject to their satisfying the test of being 'within the territory of India' or being 'under the control of the Government of India'. It is settled that the expression 'under the control of the Government of India' in Article 12 does not qualify the word 'territory'; it qualifies 'other authorities'.

70. The terms - 'instrumentality' or 'agency' of the State - are not to be found mentioned in Article 12. It is by the process of judicial interpretation - nay, expansion - keeping in view the sweep of Article 12 that they have been included as falling within the net of Article 12 subject to satisfying certain tests. While defining, the use of 'includes' suggest - what follows is not exhaustive. The definition is expansive of the meaning of the term defined. However, we feel that expanding dimension of 'the State' doctrine through judicial wisdom ought to accompanied by wise limitations else the expansion may go much beyond what even the framers of Article 12 may have thought of.

Instrumentality, Agency, Authority - meaning of

71. It will be useful to understand what the terms - instrumentality, agency and authorities mean before embarking upon a review of judicial decisions dealing with the principal issue which arises for our consideration.

72. Black's Law Dictionary (Seventh Edition) defines 'instrumentality' to mean "a means or agency through which a function of another entity is accomplished, such as a branch of a governing body." 'Agency' is defined as "a fiduciary relationship created by express or implied contract or by law in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." Thus instrumentality and agency are the two terms which to some extent overlap in their meaning; 'instrumentality' includes 'means' also, which 'agency' does not, in its meaning. 'Quasi- governmental agency' is "a government - sponsored enterprise or Corporation (sometimes called a government-controlled corporation)". Authority, as Webster Comprehensive Dictionary (International Edition) defines, is "the person or persons in whom government or command is vested; often in the plural". The applicable meaning of the word "authority" given in Webster's Third New International

Dictionary, is 'a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise'. This was quoted with approval by Constitution Bench in **RSEB's case** (infra) wherein the Bench held - "This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of Constitution".

(emphasisadded)

73. With the pronouncements in ***N. Masthan Sahib*** v. ***The Chief Commissioner, Pondicherry and Anr.,*** - (1962) Supp 1 SCR 981 and ***K.S. Ramamurthy Reddiar*** v. ***Chief Commissioner, Pondicherry and Anr.*** - MANU/SC/0029/1963 : [1964]1SCR656 it is settled that Article 12 of the Constitution has to be so read :

> "12. In this part, unless the context otherwise requires, the state' includes
>
> (i) the Government and Parliament of India,
>
> (ii) the Government and the Legislature of each State,
>
> (iii) (A) all local or other authorities within the territory of India,
>
> (b) all local or other authorities under the control of the Government of India."
>
> The definition of the State as contained in Article 12 is inclusive and not conclusive. The net of Article 12 has been expanded by 'progressive' judicial thinking, so as to include within its ken several instrumentalities and agencies performing State function or entrusted with State action. To answer the principal question in the context in which it has arisen, incidental but inseparable issue do arise: Wide expansion but how far wide? Should such wide expansion be not subject to certain wise limitations? True, the width of expansion and the wisdom of limitations both have to be spelled out from Article 12 itself and the fundamentals of constitutional jurisprudence.

74. We now deal with a series of decisions wherein tests were propounded, followed (also expanded) and applied to different entities so as to find out whether they satisfied the test of being "the State'.

A review of judicial opinion

75. Though judge-made law is legend on the issue, we need not peep too much deep in the past unless it becomes necessary to have a glimpse of a few illuminating points thereat. It would serve our purpose to keep ourselves confined, to being with, to discerning the principles laid down in ***Rajasthan State Electricity Board, Jaipur*** v. ***Mohal Lal and Ors.*** - MANU/SC/0360/1967 : (1968)ILLJ257SC ***Sukhdev Singh and Ors.*** v. ***Bhagatram Sardar Singh Raghuvanshi and Anr.*** - MANU/SC/0667/1975 : (1975)ILLJ399SC ,***Ramana Dayaram Shetty*** v . ***The International Airport Authority of India and Ors.*** - MANU/SC/0048/1979 : (1979)IILLJ217SC , ***Ajay Hasia etc.*** v. ***Khalid Mujib Sehravardi and Ors. etc.*** - MANU/SC/0498/1980 : (1981)ILLJ103SC : (1981)ILLJ103SC and ***Som Prakash Rekhi*** v. ***Union of India and***

Anr. - : : (1981)ILLJ79SC which have come to be known as landmarks on the State conceptualisation. Out of these five decisions, **R.D. Shetty** and **Som Prakash** are three-Judge Bench decisions; the other 3 are each by Constitution Bench of five Judges.

76. The Constitution Bench decision in **Rajasthan State Electricity Board (RSEB)'s case** was delivered by a majority of 4:1. v. Bhargava, J. spoke for himself and K. Subba Rao, C.J. and M. Shelat and G.K. Mitter, JJ. J.C. Shah, J. delivered his dissenting opinion. We will refer to majority opinion only. The Court quoted the interpretation placed by Ayyangar, J. form the pronouncement of seven-Judges Bench of this Court in ***Smt. Ujjam Bai*** v. ***State of Uttar Pradesh and Anr.*** - MANU/SC/0101/1961 : [1963]1SCR778 that the words 'other authorities' employed in Article 12 are of wide amplitude and capable of comprehending every authority created under a statute and though there is no characterisation of the nature of the "authority" in there siduary clause of Article 12 it must include every authority set up under a statue for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duties to make decisions in order to implement those laws. The Court refused to apply the doctrine of *ejusdem generis* for interpretation of the other authorities' in Article 12. "Other authorities" in Article 12 include, held the Court, "all constitutional or statutory authorities on whom powers are conferred by law" without regard to the fact that some of the powers conferred may be for the purpose of carrying on commercial activities or promoting the educational and economic interests of the people. Regard must be had (i) not only to the sweep of fundamental rights over the power of the authority, (ii) but also to the restrictions which may be imposed upon the exercise of certain fundamental rights by the authority. This dual phase of fundamental rights would determine "authority". Applying the test formulated by it to Rajasthan State Electricity Board, the Court found that the Board though it was required to carry on some activities of the nature of trade or commerce under the Electricity Supply Act, yet the statutory powers conferred by the Electricity Supply Act on the Board included power to give directions, the disobedience of which is punishable as a criminal office and therefore the Board was an authority for the purpose of Part III of the Constitution.

77. ***Praga Tools Corporation*** v. ***C.V. Imanual and Ors.*** - MANU/SC/0327/1969 : (1969)IILLJ479SC may not be of much relevance. The question posed before the Court was not one referable to Article 12 of the Constitution. The question was whether a prayer seeking issuance of a mandamus or an order in the nature of mandamus could lie against a company incorporated under the companies Act wherein the Central and the state Governments held respectively 56 and 32 per cent shares. The two Judge Bench of this Court held that the company was a separate legal entity and could not be said to be either a government Corporation or an industry run by or under the authority of the Union Government. A mandamus lies to secure the performance of a public or statutory duty in the performance of which the petitioner has a sufficient legal interest. A mandamus can issue to an official or a society to compel him to carry out the terms of the Statute under or by which the society is constituted or governed and also to companies or Corporation to carry out duties placed on them by the Statute authorizing their undertaking. A mandamus would also lie against a company constituted by a Statute for the purpose of fulfilling public responsibilities. The Court held that the company being a non-statutory body with neither a statutory nor a public duty imposed on it by a Statute, a writ petition for mandamus did not lie against it. The limited value of this decision, relevant for our purpose, is that because a writ of mandamus can issue against a body solely by this test it does not become 'State' within the meaning of Article 12.

78. In ***Sukhdev Singh and Ors.*** v. ***Bhagatram Sardar Singh Raghuvanshi and***

Anr. (supra), question arose whether Oil and Natural Gas Commission, the Industrial Finance Corporation and Life Insurance Corporation are 'authorities' within the meaning of Article 12. The case was decided by a majority of 4:1. A.N. Ray, CJ speaking for himself and on behalf of Y.V. Chandrachud and A.C. Gupta, JJ. held that all the three were statutory Corporation, i.e., given birth by Statutes. The circumstance that these statutory bodies were required to carry on some activities of the nature of trade or commerce did not make any difference. The Life Insurance Corporation is (i) an agency of the Government (ii) carrying on the exclusive business of Life Insurance (i.e. in monopoly), and (iii) each and every provision of the Statute creating it showed in no uncertain terms that the Corporation is the voice and the hands of the Central Government. The Industrial Financial Corporation is in effect managed and controlled by the Central Government, citizens cannot be its shareholder. ONGC (i) is owned by the Government, (ii) is a statutory body and not a company and (iii) has the exclusive privilege of extracting petroleum. Each of the three, respectively under the three Acts under which they are created, enjoy power to do certain acts and to issue directions obstruction in or breach whereof is punishable as an offence. These distinguish them from a mere company incorporated under the Indian Companies Act. The common features of the three are (i) rules and regulations framed by them have the force of law, (ii) the employees have a statutory status, and (iii) they are entitled to declaration of being in employment when the dismissal or removal is in contravention of statutory provisions. The learned Chief Justice added, by way of abundant caution, that these provisions did not however make the employees as servants of the Union or the state though the three statutory bodies are authorities within the meaning of Article 12 of the Constitution.

79. Mathew, J. recorded his separate concurring opinion. As to ONGC he hastened to arrive at a conclusion that the Commission was invested with sovereign power of the State and could issue binding directions to owners of land and premises, not to prevent employees of the Commission from entering upon their property if the Commission so directs. Disobedience of its direction is punishable under the relevant provisions of the Indian Penal Code as the employees are deemed to be public servants. Hence the Commission is an authority. As to the other two Corporations, viz., LIC and IFC,Mathew, J. entered into a short question and began by observing that in recent years the concept of State has undergone drastic change "Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority". Having reviewed some decisions of United States and English decisions and some other authorities, he laid down certain principles with which we will deal with a little later and at appropriate place. He observed that institutions engaged in matters of high public interest or performing public functions are, by virtue of the nature of the function performed by them, governmental agencies. He noticed the difficulty in separating vital government functions from non-governmental functions in view of the contrast between governmental activities which are private and private activities which are governmental. For holding Life Insurance Corporation "the State" he relied on the following features : (i) the Central Government has contributed the original capital of the Corporation, (ii) part of the profit of the Corporation goes to Central Government, (iii) the Central Government exercises control over the policy of the Corporation, (iv) the Corporation carries on a business having great public importance, and (v) it enjoys a monopoly in the business. As to Industrial Financial Corporation he relied on the circumstances catalogued in the judgment of A.N. Ray, J. The common feature of the two Corporations was that they were instrumentalities or agencies of the state for carrying on business which otherwise would have been run by the State departmentally and if the State had chosen to carry on these businesses through the medium of government departments, there would have been no question that actions of these departments would be "state

actions". At the end Mathew, J. made it clear that he was expressing no opinion on the question whether private Corporation or other like organizations though they exercise power over their employees which might violate their fundamental rights would be the State within the meaning of Article 12. What is 'state action' and how far the concept of 'state action' can be expanded, posing the question, Mathew J. answered - ".....it is against that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy under Article 32 may be available against them. But by the large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State." So also commenting on the relevance of 'state help' and 'state control' as determinative tests, Mathew, J. said -- "It may be stated generally that State financial aid alone does not render the institution receiving such aid a state agency. Financial aid plus some additional factor might lead to a different conclusion. A mere finding of state control also is not determinative of the question, since a state has considerable measure of control under its police power over all types of business operations."

80. Alagiriswami, J. recorded, a dissenting opinion which however we propose to skip over. It is pertinent to note that the dispute in ***Sukhdev Singh*** v. ***Bhagat Ram*** was a service dispute and the employees were held entitled to a declaration of being in employment when their dismissal or removal was in contravention of statutory provisions; the rules and regulations framed by corporations or commission were found having the force of law, being delegated legislation and these statutory bodies were held to be 'authorities' within the meaning of Article 12.

81. In **Ramanna Dayaram Shetty** v. **The International Airport Authority of India and Ors.** (supra), the dispute related to trends within the domain of administrative law. A question arose whether International Airport Authority of India (IA. for short) was within the scope of 'other authorities' in Article 12 so as to be amendable to Article 14 of the Constitution. P.N. Bhagwati, J. who delivered the judgment for the three-Judge Bench stated the ratio of ***Rajasthan State Electricity Boards case,*** in these words:

> "The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression other authorities', if it i has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulation shaving the force of law".

82. He then referred to what he termed as a 'broad test' laid down by Mathew, J. in ***Sukhdev Singh's case*** and said that judgment by Mathew, J. provided 'one more test and perhaps a more satisfactory one' for determining whether a statutory corporation, body or other authority falls within the definition of 'the State' and the test is--"If a statutory corporation, body or other authority is an instrumentality or agency of government, it would be an authority and therefore 'the state' within the meaning of the expression in Article 12." Having minutely examined the provisions of the International Airport Authority Act, 1971 he found out the following features of IA :- (i)The Chairman and Members are all persons nominated by the Central Government and Central Government has power to terminate the appointment or remove them: (ii) The Central Government is vested with the power to take away the management of any airport from

the IA; (iii) The Central Government has power to give binding directions in writing on questions of policy; (iv) The capital of IA needed for carrying out its functions is wholly provided by Central Government;(v) The balance of net profit made by IA, after making certain necessary provisions, does not remain with the IA and is required to be taken over to the Central Government; (vi) The financial estimates,expenditure and programme of activities can only be such as approved by Central Government; (vii) The Audit Accounts and the Audit Report of IA, forwarded to the Central Government, are required to be laid before both Houses of Parliament; (viii) It was a department of the Central Government along with its properties, assets, debts,obligations, liabilities, contracts, cause of action and pending litigation taken over by the IA; (ix) IA was charged with carrying out the same functions which were being carrying out by the Central Government; (x) The employees and officials of IA are public servants and enjoy immunity for anything done or intended to be done , in good faith, in pursuance of the Act or any rules or regulations made by it; (xi) IA is given (delegated) power to legislate and contravention of certain specified regulations entails penal consequences. Thus, in sum, the IA was held to be an instrumentality or agency of the Central Government falling within the definition of the State both on the narrower view propounded in the judgment of A.N. ray, CJ and broader view propounded by Mathew, J. in ***Sudh dev Singh's case*** .

83. Ajay Hasia etc. v. **Khalid Mujib Sehravardi and Ors. etc.** (supra), is a Constitution Bench judgment where in P.N. Bhagwati, J.spoke for the Court. The test which he had laid down in **Ramanna's** case were summarized by him as six in number and as under:

> "1. One thing is clear that if the entire share capital of the Corporation is held by Government it would go a lone way towards indicating that the Corporation is an instrumentality or agency of Government.
>
> **2.** Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
>
> **3.** It may also be a relevant factor.... whether the corporation enjoys monopoly status which is the State conferred or State protected.
>
> **4.** Existence of "deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality".
>
> **5.** If the functions of the Corporation of public importance and closely related to government functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.
>
> **6.** "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government."

The footnote to the tests, as put by him, is -- "if on a consideration of all these relevant factors it is found that the corporation is aninstrumentality or agency of government, it would..... be an authority, and therefore, 'the State' within the meaning of Article 12.Bhagwati, J. placed a prologue to the above said tests emphasizing the need to use care and caution, "because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realized that it should not be stretched so far as to bring in every autonomous body which has some nexus with the

Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation."

84. In **Ajay Hasia,** the 'authority' under consideration was a society registered under the Jammu & Kashmir Registration of Societies Act, 1898, administering and managing the Regional Engineering College, Srinagar. The College was sponsored by the Government of India. The prominent features of the society indicated complete financing and financial control of the Government, complete administrative control over conducting of the affairs of the society and administration and assets of the College being taken over by the State Government with the prior approval of the Central Government. These are some of the material features. Some of the observations made by the Court during the course of its judgment are pertinent and we proceed to notice them quickly. The society could not be equated with the Government of India or the Government of any State nor could it be said to be 'local authority', and therefore, should have come within the expression of 'other authorities' to be 'the State'.The Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. With the enlargement of governmental activities, specially those in the field of trade and commerce and welfare, corporation is most resourceful legal contrivance resorted to frequently by the Government. Though a distinct juristic entity came into existence because of its certain advantages in the field of functioning over a department of the Government but behind the formal ownership cast in the corporate would, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the Corporation and the juristic veil of corporate personality is worn for the purpose of convenience of management and administration which cannot be allowed to obliterate the true nature of the reality behind which is the Government. Dealing at length with the corporate contrivance, the Court summed up its conclusion by saying that if a Corporation is found to be a mere agency or surrogate of the Government, 3 tests being satisfied viz., (i)in fact, owned by the Government, (ii) in truth, control by the Government, and (iii) in effect , an incarnation of the Government,then the Court would hold the Corporation to be Government, and therefore, subject to constitutional limitations including for enforcement of fundamental rights. The Court went on to say that where a Corporation is an instrumentality or agency of the Government, it must be held to be an 'authority' for Article 12.

85. Here itself we have few comments to offer. Firstly, the distinction between 'instrumentality and agency' on the one hand, and authority (for the purpose of 'other authorities')' on the other, was totally obliterated. In our opinion, it is one thing to say that it an entity veiled or disguised as a Corporation or a society or in any other form is found to be an instrumentality or agency of the State then in that case it will be the State itself in narrower sense acting through it instrumentality or agency and therefore, included in 'the State' in the wider sense for the purpose of Article 12. Having found an entity whether juristic or natural to be an instrumentality or agency of the state, it is not necessary to call it an 'authority'. It would make a substantial difference to find whether an entity is an instrumentality or agency or an authority. Secondly, **Ajay Hasia** was the case of are gistered society; it was not an appropriate occasion for dealing with corporations or entities other than society. On the inferences drawn by reading of the Memorandum of Association of the society and rules framed thereunder, and subjecting such inferences to the tests laid down in the decision itself, it was found that the society was an instrumentality or agency of the State and on tearing the veil of society what was to be seen was the State itself though in disguise. It was not thereafter necessary to hold the society an 'authority' and proceed to record "that the society is an

instrumentality or the agency of the State and the Central Government and it is an 'authority' within the meaning of Article 12", entirely obliterating, the dividing line between 'instrumentality or agency of the State' and 'other authorities'. This has been a source of confusion and misdirection in thought process as we propose to explain a little later. Thirdly, though six tests are laid down but there is no clear indication in the judgment whether in order to hold a legal entity the State, all the tests must be answered positively and it is the cumulative effect of such positive answers which will solve the riddle or positive answer to one or two or more tests would be enough to find out a solution. It appears what the court wished was reaching a final decision on an overall view of the result of the tests. Compare this with what was said by Bhagwati, J. in **Ramanna's case** . We have already noticed that in **Ajay Hasia,** Bhagwati, J. has in his own words summarized the test laid down by him in **Ramanna's case** . In **Ramanna's case** he had said that The question whether a corporation is governmental instrumentality or agency would depend on a variety of factors which defy exhaustive enumeration and moreover even amongst these factors described in **Ramanna's** case "the Court will have to consider the cumulative effect of these various factors and arrive at its decision." "It is the aggregate or cumulative effect of all the relevant factors that is controlling ".

86. Criticism of too broad a view taken of the scope of the State under Article 12 in **Ramanna's case** invited some criticism which was noticed in **Som Prakash Rekhi's case** (infra). It was pointed out that the observations in **Ramanna's case** spill over beyond there quirements of he case and must be dismissed as obiter; that IA is a Corporation created by a statute and there was no occasion to go beyond the narrow needs of the situation and expand the theme of the state in Article 12 vis-a-vis government companies, registered society , and what not; and that there was contradiction between **Sukhdev Singh's case** and **Ramanna's case** .

87. On 13.11.1980, the Constitutional Bench presided over by Y.V.Chandrachud, C.J. and consisting of P.N. Bhagwati, V.R. KrishnaIyer, S. Murtaza Fazal Ali and A.D. Koshal, JJ. delivered the judgment in **Ajay Hasia's case,** speaking through P.N. Bhagwati, J..It is interesting to note that on the same day another three-Judges Bench consisting V.R. Krishna Iyer, O. Chinnappa Reddy and R.S.Pathak, JJ. delivered judgment in **Som Prakash Rekhi** v . **Union of India and another** (supra). V.R. Krishna Iyer, J. speaking for himself and O. Chinnappa Reddy, J. delivered the majority opinion.R.S. Pathak, J. delivered a separate opinion.

88. The Court in **Som Prakash Rekhi** v. **Union of India and another** (supra), was posed with the question - whether Bharat Petroleum Corporation Ltd., a statutory corporation, was an 'authority', and therefore 'the State' under Article 12. Certain observations made by Krishna Iyer, J. are pertinent. To begin with, hesaid, "any authority under control of the Government of India comes within the definition." While dealing with the corporate personality, it has to be remembered that "while the formal ownership is cast in the corporate mould, the reality reaches down to State control". The care fact is that the Central Government chooses to make over for better management , its own property to its own offspring. A Government Company is a mini-incarnation of Government itself, made up of its blood and bones and given corporate shape and status for defined objectives and not beyond. The device is too obvious for deception. A Government Company though, is but he alter ego of the Central Government and tearing of the juristic veil worn, would bring out the true character of the entity being 'the State'. Krishna Iyer, J. held it to be immaterial whether the Corporation is formed by a statute or under a statute, the true test is functional. "Not how the legal person is born but why it is created." He further held that both the things

are essential : (i) discharging functions or doing business as the proxy of the State by wearing the corporate mask, and (ii) an element of ability to effect legal relations by virtue of power vested in it by law. Thesetests, if answered in positive, would entail the Corporation being aninstrumentality or agency of the State. What is an 'authority'? Krishna Iyer, J. defined 'authority' as one which in law belongs to the province of power and the search here must be to see whether the Act vests authority, as agent or instrumentality of the State, to affect the legal relations of oneself or others. He quoted the definition of 'authority' from the Law Lexicon by P. Ramnath Iyer to say "Authority is a body having jurisdiction certain matters of a public nature" and from Salmond's Jurisprudence, to say that the "ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons' must be present ab extra to make a person an 'authority'." He held BPL to be "a limb of Government and agency of the State, a vicarious creature of statute", because of these characteristics , which he found from the provisions of the Act which created it and other circumstances, viz., (i) it has a statutory flavour in its operations and functions, in its powers and duties and in its personality itself,(iii) it is functionally and administratively under the thumb of Government; and (iv) the Company had stepped into the shoes of the executive power of the State and had unique protection, immunity and powers. In conclusion Krishna Iyer, J. held that the case of BPL was a close parallel to the **Airport Authority's case (Ramananna's case)** excepting that Airport Authority is created by a statute while BPL is recognized by and clothed with rights and duties by the statute. Krishna Iyer, J. having called out the several tests from Ramanna's case added a clinching footnote - the finale is reached when the cumulative effect of all the relevant factors above set out is assessed and once the body is found to be an instrumentality or agency of Government, the further conclusion emerges that it is 'the State' and is subject to the same constitutional limitations as Government and it is this divagation which explains the ratio of **Ramanna's case** .

89. The three-Judges Bench in ***The Workmen, Food Corporation of India*** v. ***Food Corporation of India*** , - MANU/SC/0240/1985, held Food Corporation of India to be an instrumentality of the State covered by the expression 'other authority' in Article 12. It was found : (i) FCI was set up under the Food Corporation Act. 1964 (ii)initial capital was provided by Central Government and capital could be increased in such manner as the government may determine; (iii)the Board of Directors in whom the management of the Corporation is to vest shall act according to instructions on question of policy given by the Central Government; (iv) the annual net profit of FCI is to be paid to the Central Government; (v) annual report of its working and affairs is to be laid before the Houses of Parliament; (vi) statutory power conferred to make rules and regulations for giving effect to the provisions of the parent act as also be provide for service matters relating to officers and employees.

90. The Mysore Paper Mills Ltd. has been held by a two-Judges Bench in ***Mysore Paper Mills Ltd.*** v . ***The Mysore Paper Mills Officers Association and Anr.*** - MANU/SC/0003/2002 : (2002)ILLJ1088SC , to be aninstrumentality and agency of the State Government, the physical form of company being a mere cloak or cover for the Government. What is significant in this decision is that the conclusion whether an independent entity satisfies the test of instrumentality or agency of the Government is not whether it owes its origin to any padicular Statute or Order but really depends upon a combination of one or more of the relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

What is 'Authority' and when includible in 'other authorities', re: Article 12

91. We have, in the earlier part of this judgment, referred to the dictionary meaning of 'authority', often used as plural, as in Article 12 viz. 'other authorities'. Now is the time to find out the meaning to be assigned to the term as used in Article 12 of the Constitution.

92. A reference to Article 13(2) of the Constitutions apposite. It provides - "The State shall not make any law which takes away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention,be void". Clause (3) of Article 13 defines 'law' as including any Ordinance order, bye-law, rule, regulation, notification, custom or uses having in the territory of India the force of law. We have also referred to the speech of Dr. B.R. Ambedkar in Constituent Assembly explaining the purpose sought to be achieved by Article 12. In ***RSEB's case***, the majority adopted the test that a statutory authority "would be within the meaning of 'other authorities' if it has been invested with statutory power to issue binding directions to the parties, disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law". In ***Sukhdev Singh's case***, the principal reason which prevailed with A.N. Ray, CJ for holding ONGC, LIC and IFC as authorities and hence 'the State' was that rules and regulations framed by them have the force of law. In Sukhdev Singh's case,Mathew J. held that the test laid down in ***RSEB's*** case was satisfied so far as ONGC is concerned but the same was not satisfied in the case of LIC and IFC and, therefore, he added to the list of tests laid down in ***RSEB's case,*** by observing that though there are no statutory provisions , so far as LIC and IFC are concerned, for issuing binding directions to third parties, the disobedience of which would entail penal consequences, yet these corporations (i) set up under statutes,(ii) to carry on business of public importance or which is fundamental to the life of the people - can be considered as the State within the meaning of Article 12. Thus, tit is the functional test which was devised and utilized by Mathew J. and there he said, "the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. The State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it agency or instrumentality of the State". It is pertinent to note that functional tests became necessary because of the State having chosen to entrust its own functions to an instrumentality or agency in absence whereof that function would have been a State activity on account of its public importance and being fundamental to the life of the people.

93. The philosophy underlying the expansion of Article 12 of the Constitution so as to embrace within its ken such entitles which would not otherwise be the State within the meaning of Article 12 of the Constitution has been pointed out by the eminent jurist H.M.Seervai in Constitutional Law of India (Silver Jubilee Edition, Vol.1)."The Constitution should be so interpreted that the governing power,wherever located, must be subjected to fundamental constitutional limitations..... Under Article 13(2) it is State action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Article 13(2). For although Article 17, 23 and 24 show that fundamental rights can be violated by private individuals and relief against them would be available under Article 32, still, by the large, Article 13(2) is directed against State action. A public corporation being the creation of the state, is subject to

the same constitutional limitations as the State itself. Two conditions are necessary, namely, that the Corporation must be created by the State and it must invade the constitutional rights of individuals" (Para 7.54). "The line of reasoning developed by Mathew J. prevents a large-scale evasion of fundamental rights by transferring work done in Govt. Departments to statutory Corporations, whilst retaining Govt. control. Company legislation in India permits tearing of the corporate veil in certain cases and to look behind the real legal personality. But Mathew J. achieved the same result by a different route, namely, by drawing out the implications of Article 13(2)" (Para 7. 57 ibid).

94. The terms instrumentality or agency of the State are not to be found mentioned in Article 12 of the Constitution. Nevertheless they fall within the ken of Article 12 of the Constitution for the simple reason that if the State chooses to set up an instrumentality or agency and entrusts it with the same power, function or action which would otherwise have been exercised or undertaken by itself, there is no reason why such instrumentality or agency should not be subject to same constitutional and public law limitations as the State would have been. In different judicial pronouncements, some of which we have reviewed, any company, corporation, society or any other (sic)having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having found to be an alter ego, a doubt or a proxy or a limit or an off-spring or a mini-incarnation or a vicarious creature or a surrogate and so on -- by whatever name called -- of the State. In short, the material available must justify holding of the entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise. Then it is an instrumentality or agency of the State.

95. It is this basic and essential distinction between an instrumentality or agency' of the State and 'other authorities' which has to be borne in mind. An authority must be an authority sui juristo fall within the meaning of the expression 'other authorities' under article 12. A juridical entity, though an authority, may also satisfy the test of being an instrumentality or agency of the State in which event such authority may be held to be an instrumentality or agency of the State but not the vice versa.

96. We sum up our conclusions as under:-

(1) Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of 'other authorities' in Article 12, To be anauthority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public. Further the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people --their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power -- constitutional or statutory and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a even case,depending on the facts and circumstances, an authority

may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in ***Ajay Hasia*** enable determination of Governmental ownership or control. Tests 3, 5 and 6 are 'functional' tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between 'instrumentality and agency' of the state and an 'authority' having been lost sight of sub-silentio,unconsciously and un-deliberated. In our opinion, and keeping in view the meaning which 'authority' carries, the question whether an entity is an 'authority' cannot be answered by applying ***Ajay Hasia*** tests.

(2) The tests laid down in ***Ajay Hasia's case*** are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered to positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the Court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the State.

CSIR if 'the State'?

97. Applying the tests formulated hereinabove, we are clearly of the opinion that CSIR is not an 'authority' so as to fall within the meaning of expression 'other authorities' under Article 12. It has no statutory flavour -- neither it owes its birth to a statute nor is there any other statute conferring it with such powers as would enable it being branded an authority. The indicia of power is absent. It does not discharge such functions as are governmental or closely associated therewith or being fundamental to the life of the people.

98. We may now examine the characteristics of CSIR. On a careful examination of the material available consisting of the memorandum of association, rules and regulations and bye-laws of the society and its budget and statement of receipts and outgoings, we proceed to record our conclusions. The Government does not hold the entire share capital of CSIR. It is not owned by the Government. Presently,the Government funding is about 70% and grant by Government of India is one out of five categories of avenues to derive its funds. Receipts from other sources such as research, development,consultation activities, monies received for specific projects and job work, assets of the society, gifts and donations are permissible sources of funding of CSIR without any prior permission/consent/sanction from the Government of India. Financial assistance from the Government does not meet almost all expenditure of the CSIR and apparently it fluctuates too depending upon variation from its ownsources of income. It does not enjoy any monopoly status, much less conferred or protected by Government. The governing body does not consist entirely of Government nominees. The membership of the Society and the manning of its governing body - both consist substantially of private individuals of eminence and independence who cannot be regarded a hands and voice of the State. There is no provision in the rules or the byelaws that the government can issue such directives as it deems necessary of CSIR and the latter is bound to carry out the same. The functions of the CSIR cannot be

regardedas governmental or of essential public importance or as closely related to governmental functions or being fundamental to the life of the people or duties and obligations to public at large. The functions entrusted to CSIR can as well be carried out by any private (sic)organization. Historically it was not a department of government which was transferred to CSIR. There was a Board of Scientific and Industrial Research and an Industrial Research Utilisation Committee. The CSIR was set up as a society registered under the Societies Registration Act, 1860 to coordinate and generally exercise administrative control over the two organizations which would tender their advice only to CSIR. The membership of the society and the Governing body of the counsel may be terminated by the President not by the Government of India. The governing body is headed by the Director General of CSIR and not by the President of Society (i.e. the Prime Minister). Certainly the board and the committee, taken over by CSIR, did not discharge any regal, governmental or sovereign functions. The CSIR is not the offspring or the blood and bones or the voice and hands of the government. The CSIR does not and cannot make law.

99. However, the Prime Minister of India is the President of the Society. Some of the members of the society and of the governing body are persons appointed ex-officio by virtue of their holding some office under the Government also. There is some element of control exercised by the government in matters of expenditure such as on the quantum and extent of expenditure more for the reason that financial assistance is also granted by the Government of India and the later wishes to see that its money is properly used and not misused. The President is empowered to renew, amend and vary any of the decisions of the governing body which is in the nature of residual power for taking corrective measures vesting in the President but then the power is in the President in that capacity and not as Prime Minister of India. On winding up or dissolution of CSIR any remaining property is not available to members but 'shall be dealt with in such manner as Government of India may determine'. There is nothing special about such a provision in Memorandum of Association of CSIR as such a provision is a general one applicable to all societies under Section 14 of the Societies Registration Act, 1860.True that there is some element of control of the government but nota deep and pervasive control. To some extent, it may be said that Government's presence or participation is felt in the society but such presence cannot be called a brooding presence or the overlordship of government. We are satisfied that the tests in ***Ajay Hasia's case*** are not substantially or on essential aspects even satisfied to call CSIR an instrumentality or agency of the State. A mere government at patronage, encouragement, push or recognition would not make an entity 'the State'.

100. On comparison, we find that in substance CSIR stands on a footing almost similar to the Institute of Constitutional and Parliamentary Studies (in ***Tekraj Vasandi @ K.S. Basandhi*** v. ***Union of India and Ors.,*** MANU/SC/0154/1987 : (1988)ILLJ341SC : (1988)ILLJ341SC and National Council of Educational Research and Training (in ***Chander Mohan Khanna*** v. ***NCERT,*** MANU/SC/0010/1992 : (1992)ILLJ331SC : (1992)ILLJ331SC , and those cases were correctly decided.

101. Strong reliance was placed by the learned counsel for the appellants on a notification dated 31.10.1986 issued in exercise of the powers conferred by Sub-section (2) of Section 14 of the Administrative Tribunals Act, 1985 whereby the provisions of Sub-section(3) of Section 14 of the said Act have been made applicable to the Council of Scientific and Industrial Research, "being the society owned or controlled by government". On point of fact we may state that this notification, though of the year 1986, was not relied on or referred to in the pleading of the appellants. We do not find it mentioned anywhere in the proceedings before the High Court and not even in the

SLP filed in this Court. Just during the course of hearing this notification was taken out from this brief by the learned counsel and shown to the Court and to opposite counsel. It was almost sprung as a surprise without affording the opposite party an opportunity of giving an explanation. The learned Attorney General pointed out that the notification was issued by Ministry of Personal,Public Grievances and Pensions (Department of personnel and Training) and he appealed to the Court not to overlook the practical side in the working of the government where at times on department does not know what the other department is doing. We do not propose to enter into a deeper scrutiny of the notification. For our purpose, it would suffice to say that Section 14 of the Administration Tribunals Act, 1985, and Articles 323A of the Constitution to which the Act owes its original, do not apparently contemplate a society being brought within the ambit of the Act by a notification of Central Government. Though, we guardedly abstain from expressing any opinion on this issue as the present one cannot be an occasion for entering into that exercise. Moreover, on the material available, we have recorded a positive finding that CSIR is not a society "owned or controlled by Government". We cannot ignore that finding solely by relying on the contents of the notification wherein we find the user of relevant expression having been mechanically copied but factually unsupportable.

102. For the foregoing reasons, we are the opinion that Council for Scientific and Industrial Research (CSIR) is not the State within the meaning of Article 12 of the Constitution. ***Sabhajit Tewary's case*** was correctly decided and must hold the field. The High Court has rightly followed the decision of this Court in ***Sabhajit Tewary***. The appeal is liable to be dismissed.

MANU/SC/0004/2023

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 113 of 2016 and Special Leave Petition (Arising out of (Diary) No. 34629 of 2017)

Decided On: 03.01.2023

Appellants: **Kaushal Kishor**
Vs.
Respondent: **State of Uttar Pradesh and Ors.**

Hon'ble Judges/Coram:
S. Abdul Nazeer, B.R. Gavai, A.S. Bopanna, V. Ramasubramanian and B.V. Nagarathna, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Aparjitha Singh, Sr. Adv. (A.C.), Uttara Babbar, AOR, Shipra Jain, Kaleeswaram Raj, Thulasi K. Raj, Advs., Suvidutt M.S., AOR, Somlagna Biswas, Rishesh Sikarwar, Aman Khullar, Renu Yadav, Samer Jit Singh Chaudhry, Hitesh Kumar Sharma, Akhileshwar Jha, Niharika Dewivedi, E. Vinay Kumar, Amit Kumar Chawla, Nitin Sharma, Ravish Kumar Goyal, Narendra Pal Sharma, Shweta Sand, Mirdula Singh Chauhan, Advs. and Manju Jetley, AOR

For Respondents/Defendant: R. Venkataramani, AG, Tushar Mehta, SG, Balbir Singh, Madhavi Divan, ASGs, R. Bala, Sr. Adv., Naman Tandon, Samarvir Singh, Presenjeet Mohapatra, Rajat Nair, Ankur Talwar, Kanu Agrawal, Anirudh Bhatt, Shyam Gopal, Monica Benjamin, Sujatha Bagadhi, Shraddha Deshmukh, Udai Khanna, Anu S., Mayank Pandey, Vinayak Mehrotra, Chitvan Singhal, Sonali Jain, Abhishek Kumar Pandey, Advs., Arvind Kumar Sharma, Mukesh Kumar Maroria, AORs, Garima Prasad, A.A.G., Ajay Vikram Singh, AOR, Vikas Bansal, Priyanka Singh, Sharjheel Ahmad, Advs., Swarupama Chaturvedi, Pradeep Misra, Abhishek, Lakshmi Raman Singh, AORs, Renjith B. Marar, Adv., Lakshmi N. Kaimal, AOR, Arun Poomuli, Ashu Jain and Davesh Kumar Sharma, Advs.

JUDGMENT

V. Ramasubramanian, J.

தீயினாற் சுட்டபுண் உள்ளாறும் ஆறாதே
நாவினாற் சுட்டவடு

Said the Tamil Poet-Philosopher Tiruvalluvar of the Tamil Sangam age (31, BCE) in his classic "Tirukkura". Emphasizing the importance of sweet speech, he said that the scar left behind by a burn injury may heal, but not the one left behind by an offensive speech. The translation of this verse by G.U. Pope in English reads thus:

> In flesh by fire inflamed, nature may thoroughly heal the sore; In soul by tongue inflamed, the ulcer health never more.

A Sanskrit Text contains a piece of advice on what to speak and how to speak.

सत्यं ब्रूयात् प्रियं ब्रूयान्न ब्रूयात् सत्यमप्रियम् ।
प्रियं च नानृतं ब्रूयादेष धर्मः सनातनः ॥

satyam brūyāt priyaṃ brūyān na brūyāt satyam apriyam |
priyaṃ ca nānṛtaṃ brūyād eṣa dharmaḥ sanātanaḥ ||

The meaning of this verse is: "Speak what is true; speak what is pleasing; Do not speak what

is unpleasant, even if it is true; And do not say what is pleasing, but untrue; this is the eternal law."

The "Book of Proverbs" (16:24) says:

> Pleasant words are a honeycomb, sweet to the soul and healing to the bones

Though religious texts of all faiths and ancient literature of all languages and geographical locations are full of such moral injunctions emphasising the importance of sweet speech (more than free speech), history shows that humanity has consistently defied those diktats. The present reference to the Constitution Bench is the outcome of such behaviour by two honourable men, who occupied the position of Ministers in two different States.

I. Questions formulated for consideration

1. By an order dated 05.10.2017, a Three Member Bench of this Court directed Writ Petition (Criminal) No. 113 of 2016 to be placed before the Constitution Bench, after two learned Senior Counsel, appointed as amicus curiae, submitted that the questions arising for consideration in the writ petition were of great importance. Though the Bench recorded, in its order dated 05.10.2017, the questions that were submitted by the learned amicus curiae, the Three Member Bench did not frame any particular question, but directed the matter to be placed before the Constitution Bench.

2. At this juncture, a Special Leave Petition (Diary) No. 34629 of 2017 arising out a judgment of the Kerala High Court came up before the same Three Member Bench. Finding that the questions raised in the said SLP were also similar, this Court passed an order on 10.11.2017, directing the said SLP also to be tagged with Writ Petition (Criminal) No. 113 of 2016.

3. Thereafter, the Constitution Bench, by an order dated 24.10.2019, formulated the following five questions to be decided by this Court:

> **...**1) Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?
>
> 2) Can a fundamental right Under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities?
>
> 3) Whether the State is under a duty to affirmatively protect the rights of a citizen Under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?
>
> 4) Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?
>
> 5) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort"?...

II. A brief backdrop

4. Without a brief reference to the factual matrix, the questions to be answered by us may look abstract. Therefore, we shall now refer to the background facts in both these cases.

5. Writ Petition (Criminal) No. 113 of 2016 was filed Under Article 32 of the Constitution praying for several reliefs including monitoring the investigation of a criminal complaint in FIR No. 0838/2016 Under Section 154 Code of Criminal Procedure, for the offences Under Sections

395, 397 and 376-D read with the relevant provisions of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and for the trial of the case outside the State and also for registering a complaint against the then Minister for Urban Development of the Government of U.P. for making statements outrageous to the modesty of the victims. The case of the Petitioner in Writ Petition (Criminal) No. 113 of 2016 in brief was that on 29.7.2016 when he and the members of his family were travelling from Noida to Shahjahanpur on National Highway 91 to attend the death ceremony of a relative, they were waylaid by a gang. According to the writ Petitioner, the gang snatched away cash and jewelry in the possession of the Petitioner and his family members and they also gang raped the wife and minor daughter of the Petitioner. Though an FIR was registered on 30.7.2016 for various offences and newspapers and the television channels reported this ghastly incident, the then Minister for Urban Development of the Government of U.P. called for a press conference and termed the incident as a political conspiracy. Therefore, the Petitioner apprehended that there may not be a fair investigation. The Petitioner claims that he was also offended by the irresponsible statement made by the Minister and hence he was compelled to file the said writ petition for the reliefs stated supra.

6. Insofar as Special Leave Petition (Diary) No. 34629 of 2017 is concerned, the same arose out of a judgment of the Division Bench of the Kerala High Court dismissing two writ petitions. The writ petitions were filed in public interest on the ground that the then Minister for Electricity in the State of Kerala issued certain statements in February 2016, 7.4.2017 and 22.4.2017. These statements were highly derogatory of women. Though according to the Petitioners in the public interest litigation, the political party to which the Minister belonged, issued a public censure, no action was taken officially against the Minister. Therefore, the Petitioner in one writ petition prayed among other things for a direction to the Chief Minister to frame a Code of Conduct for the Ministers who have subscribed to the oath of office as prescribed by the Constitution with a further direction to the Chief Minister to take suitable action if any of the Ministers failed to live upto the oath. The prayer in the second writ petition was for a direction to the concerned Authorities to take action against the Minister for his utterances.

7. Both the writ petitions were dismissed by a Division Bench of the Kerala High Court, on the ground that the prayer of the public interest writ Petitioners were in the realm of moral values and that the question whether the Chief Minister should frame a code of conduct for the Ministers of his cabinet or not, is not within the domain of the Court to decide. Therefore, challenging the said common order, the Petitioner in one of those public interest writ petitions has come up with Special Leave Petition (Diary) No. 34629 of 2017. Since the questions raised by the Petitioner in the Special Leave Petition overlapped with the questions raised in the Writ Petition, they have been tagged together.

III. Contentions

8. We have heard Shri R. Venkataramani, learned Attorney General for India, Ms. Aparajita Singh, learned Senior Counsel who assisted us as amicus curiae, Shri Kaleeswaram Raj, learned Counsel for the Petitioner in the special leave petition and Shri Ranjith B. Marar, learned Counsel appearing for the person who sought to intervene/implead.

III.A. Preliminary note submitted by learned Attorney General for India

9. The learned Attorney General for India submitted a preliminary note containing his submissions question-wise, which can be summed up as follows:

Question No. 1

(i) On question No. 1 it is his submission that as a matter of constitutional principle, any addition, alteration or change in the norms or criteria for imposition of restrictions on any fundamental right has to come up through a legislative process. The restrictions already enumerated in Clauses (2) and (6)

of Article 19 have to be taken to be exhaustive. Therefore, the Court cannot, under the guise of invoking any other fundamental right such as the one in Article 21, impose restrictions not found in Article 19(2). Under the Constitutional scheme, there can be no conflict between two different fundamental rights or freedoms.

Question No. 2

(ii) The Constitution itself sets out the scheme of claims of fundamental rights against the State or its instrumentalities and it has also enacted in respect of breaches or violations of fundamental rights by persons other than State or its instrumentalities. Any proposition, to add or insert subjects or matters in respect of which claims can be made against persons other than the State, would amount to Constitutional change. The concept of State action propounded and applied in US Constitutional Law and the enactment of 42 US Code 1983 have to be seen in the context of peculiar state of affairs dealing with governmental and official immunities from legal proceedings. In view of specific provisions in Articles 15(2), 17, 23 and 24 of the Indian Constitution, there may not be a strict need to take recourse to the law obtaining in the USA. Claims against persons other than the State, either through enacted law or otherwise must be confined to constitutionally enacted subjects or matters.

Question No. 3

(iii) There are sufficient Constitutional and legal remedies available for a citizen whose liberty is threatened by any person. Beyond the Constitutional and legal remedy and protection available, there may not be any other additional duty to affirmatively protect the right of a citizen Under Article 21. Cases of infringement of fundamental rights are taken care of Under Articles 32 and 226.

Question No. 4

(iv) Conduct of public servants like a Minister, if it is traceable to the discharge of public duty or the duties of the office, is subject to scrutiny of the law. Sanction for prosecution can be granted if misconduct is committed under colour of office. Such misconduct including statements that may be made by a Minister cannot be linked to the principles of collective responsibility. The concept of vicarious liability is incapable of being applied to situations and no government can ever be vicariously liable for malfeasance or misconduct of Minister not traceable to statutory duty or statutory violations for the purpose of legal remedies. Ministerial misdemeanors, which have nothing to do with the discharge of public duty and not traceable to the affairs of the State, will have to be treated as acts of individual violation and individual wrong. To extend in the abstract, the liability of the State to such situations or instances without necessary limitations can be problematic. Post M/s. Kasturi Lal Ralia Ram Jain v. The State of Uttar Pradesh MANU/SC/0086/1964 : AIR 1965 SC 1039 and following Rudul Sah v. State of Bihar MANU/SC/0380/1983 : (1983) 4 SCC 141, this Court has treated misconduct of public servants or officers and consequent infringement of Constitutional rights as ground for grant of compensation. However, there is need for clarity and certainty as far as the conceptual basis is concerned. This may be better resorted through enacted law.

Question No. 5

(v) While the principle of Constitutional tort has been conceived in Nilabati Behera (Smt.) alias Lalita Behera (Through the Supreme Court Legal Aid

Committee) v. State of Orissa MANU/SC/0307/1993 : (1993) 2 SCC 746, and subsequently applied to provide in regard to the constitutional remedies, the matter pre-eminently deserves a proper legal framework in order that the principles and procedures are coherently set out without leaving the matter open-ended or vague.

III.B. Notes of submissions by Amicus

10. Ms. Aparajita Singh, learned Senior Counsel and amicus curiae submitted a written note question-wise, which can be summed up as follows:

Question No. 1

(i) The right to free speech Under Article 19(1)(a) is subject to clearly defined restrictions Under Article 19(2). Therefore, any law seeking to limit the right Under Article 19(1)(a) has to necessarily fall within the limitations provided Under Article 19(2). Whenever two fundamental rights compete, the Court will balance the two to allow the meaningful exercise of both. This conundrum is not new, as the rights Under Article 21 and Under Article 19(1)(a) have been interpreted and balanced on numerous occasions. Take for instance the Right to Information Act, 2005. The Act balances the citizen's right to know Under Article 19(1)(a) with the right to fair investigation and right to privacy Under Article 21. This careful balancing was explained by this Court in Thalappalam Service Cooperative Bank Ltd. v. State of Kerala MANU/SC/1020/2013 : (2013) 16 SCC 82. The decision of this Court in R. Rajagopal alias R.R. Gopal v. State of T.N. MANU/SC/0056/1995 : (1994) 6 SCC 632 is another example of reading down the restrictions (in the form of defamation) on the right to free speech Under Article 19(2), in its application to public officials and public figures in larger public interest. Again, in People's Union for Civil Liberties (PUCL) v. Union of India MANU/SC/0234/2003 : (2003) 4 SCC 399, the right to privacy of the spouse of the candidate contesting the election was declared as subordinate to the citizens' right to know Under Article 19(1)(a). In Jumuna Prasad Mukhariya v. Lachhi Ram MANU/SC/0104/1954 : (1955) 1 SCR 608, a challenge to Sections 123(5) and 124(5) of the Representation of the People Act, 1951 (as they prevailed at that time) was rejected, on the ground that false personal attacks against the contesting candidate was not violative of the right to free speech. But when it comes to private citizens who are not public functionaries, the right to privacy Under Article 21 was held to trump the right to know Under Article 19(1)(a). This was in the case of Ram Jethmalani v. Union of India MANU/SC/0711/2011 : (2011) 8 SCC 1, which concerned the right to privacy of account holders. In Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India MANU/SC/0735/2012 : (2012) 10 SCC 603, this Court struck a balance between the right of the media Under Article 19(1)(a) with the right to fair trial Under Article 21. The argument that free speech Under Article 19(1)(a) was a higher right than the right to reputation Under Article 21 was rejected by this Court in Subramanian Swamy v. Union of India, Ministry of Law MANU/SC/0621/2016 : (2016) 7 SCC 221 in which Section 499 Indian Penal Code was under challenge. The right to free speech was balanced with the right to pollution free life in Noise Pollution (V.), in Re MANU/SC/0415/2005 : (2005) 5 SCC 733 and the right to fair trial of the Accused was balanced with the right to fair trial of the victim in Asha Ranjan v. State of Bihar MANU/SC/0159/2017 : (2017) 4 SCC 397.

Question No. 2

(ii) There are some fundamental rights which are specifically granted against non-State actors. Article 15(2)(a) - access to shops, public restaurants, hotels and places of public entertainment, Article 17 - untouchability, Article 23 -

forced labour and Article 24- prohibition of employment of children in factories, mines etc., are rights which are enforceable against private citizens also. Some aspects of Article 21 such as the right to clean environment have been enforced against private parties as well. The State is also under a Constitutional duty to ensure that the rights of its citizens are not violated even by non-State actors and ensure an environment where each right can be exercised without fear of undue encroachment. In People's Union for Democratic Rights v. Union of India MANU/SC/0038/1982 : (1982) 3 SCC 235, while rejecting the contention of the State that it was the obligation of the private party i.e., the contractor to follow the mandate of Article 24 of the Constitution and the relevant laws, it was clarified that the primary obligation to protect fundamental rights was that of the State even in the absence of an effective legislation. In Bodhisattwa Gautam v. Subhra Chakraborty (Ms.) MANU/SC/0245/1996 : (1996) 1 SC 490, interim compensation was awarded holding that fundamental rights Under Article 21 can be enforced even against private bodies and individuals. Public law remedy has been repeatedly resorted to even against non-State actors when their acts have violated the fundamental rights of other citizens. Award of damages against non-State actors for violation of the right to clean environment Under Article 21 was laid down in M.C. Mehta v. Kamal Nath MANU/SC/0416/2000 : (2000) 6 SCC 213. Similarly, the majority and concurring opinion in Justice K.S. Puttaswamy v. Union of India MANU/SC/1044/2017 : (2017) 10 SCC 1, while elaborating on the duty of the State and non-State actors to protect the rights of citizens, pointed out that recognition and enforcement of claims qua non-State actors may require legislative intervention. However, when it comes to Article 19, a Constitution Bench in P.D. Shamdasani v. Central Bank of India Ltd. MANU/SC/0017/1951 : 1952 SCR 391, has held it to be inapplicable against private persons.

Question No. 3

(iii) Fundamental rights of citizens enshrined in the Constitution are not only negative rights against the State but also constitute a positive obligation on the State to protect those rights. The Constitution Bench in State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal MANU/SC/0121/2010 : (2010) 3 SCC 571, while upholding the power of the Constitutional Court to transfer an investigation to the CBI without the consent of the concerned State, emphasized the duty of the State to conduct a fair investigation which is a fundamental right of the victim Under Article 21. The majority judgment in Justice K.S. Puttaswamy (supra), defines the positive obligation of the State to ensure the meaningful exercise of the right of privacy. In S. Rangarajan v. P. Jagjivan Ram MANU/SC/0475/1989 : (1989) 2 SCC 574, this Court has categorically laid down that the State cannot plead its inability to protect the fundamental rights of the citizens. In Union of India v. K.M. Shankarappa MANU/SC/0726/2000 : (2001) 1 SCC 582, Section 6(1) of the Cinematograph Act, 1952 which granted the Central Government, the power to review the decision of the quasi-judicial Tribunal under the Act, was sought to be defended on the ground of law and order. The contention was rejected holding that it was the duty of the Government to ensure law and order. In Indibly Creative Private Limited v. Government of West Bengal MANU/SC/0518/2019 : (2020) 12 SCC 436, the negative restraint and positive obligation Under Article 19(1) (a) has been explained. In Pt. Parmanand Katara v. Union of India MANU/SC/0423/1989 : (1989) 4 SCC 286, it was held that even the doctors in Government hospitals are duty bound to fulfil the constitutional obligation of the State Under Article 21.

Question No. 4

(iv) The Minister being a functionary of the State, represents the State when acting in his official capacity. Therefore, any violation of the fundamental rights of the citizens by the Minister in his official capacity, would be attributable to the State. The State also has a positive obligation to protect the rights of citizens Under Article 21, whether the violation is by its own functionaries or a private person. It would be preposterous to suggest that while the State is under an obligation to restrict a private citizen from violating the fundamental rights of other citizens, its own Minister can do so with impunity. However, the factum of violation would need to be established on the facts of a given case. It would involve a detailed inquiry into questions such as (a) whether the statement by the Minister was made in his personal or official capacity; (b) whether the statement was made on a public or private issue; (c) whether the statement was made on a public or private platform. In Amish Devgan v. Union of India MANU/SC/0921/2020 : (2021) 1 SCC 1, while dealing with hate speech, the impact of the speech of "a person of influence" such as a Government functionary, was explained. State of Maharashtra v. Sarangdharsingh Shivdassingh Chavan MANU/SC/1055/2010 : (2011) 1 SCC 577, provides a clear instance of direct interference with the investigation by a Chief Minister. The Court held the action of the Chief Minister to be "wholly unconstitutional" and contrary to the oath of allegiance to the Constitution and imposed costs on the State. The concurring opinion emphasizes the responsibility that the oath of office casts on the Minister under the Constitution. In Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain MANU/SC/1002/1997 : (1997) 1 SCC 35, while dealing with a case involving the misuse of public office by a Minister, this Court elaborated on the responsibility and liability of the Ministerial office under the Constitution. The importance of the Oath of Office under the Constitution was also emphasized by the Constitution Bench in Manoj Narula v. Union of India MANU/SC/0736/2014 : (2014) 9 SCC 1. However, the Ministerial code of conduct was held to be not enforceable in a court of law in R. Sai Bharathi v. J. Jayalalitha MANU/SC/0956/2003 : (2004) 2 SCC 9, as it does not have any statutory force. An argument can be made that the Minister is personally bound by the oath of his office to bear true faith and allegiance to the Constitution of India Under Articles 75(4) and 164(3) of the Constitution. The Constitution imposes a solemn obligation on the Minister as a Constitutional functionary to protect the fundamental rights of the citizens. The code of conduct for Ministers (Both for Union and States) specifically lays down that the Code is in addition to the "... observance of the provisions of the Constitution, the Representation of the People Act, 1951". Therefore, a Constitutional functionary is duty bound to act in a manner which is in consonance with this constitutional obligation of the State.

Question No. 5

(v) The State acts through its functionaries. Therefore, the official act of a Minister which violates the fundamental rights of the citizens, would make the State liable under constitutional tort. The principle of sovereign immunity of the State for the tortious acts of its servant, has been held to be inapplicable in the case of violation of fundamental rights. The principle of State liability under Constitutional tort was expounded in Nilabati Behera (supra). In Common Cause, A Registered Society v. Union of India. MANU/SC/0437/1999 : (1999) 6 SCC 667, the position in the case of a public functionary was explained.

III.C. Written submissions of Shri Kaleeswaram Raj, Advocate for the SLP Petitioner

11. Shri Kaleeswaram Raj, learned Counsel appearing for the Petitioner in the special leave

petition submitted an elaborate note. This note is divided into several chapters dealing with the nature and extent of the freedom of speech, the restrictions on the same, the horizontality of fundamental rights, constitutional rights and constitutional values, statements made by Ministers and collective responsibility, self-Regulation as the best mode of Regulation, hate speech not being a protected speech and the way forward. The contents of this note are summarized as follows:

(i) The Constitutional mandate of freedom of expression and free speech is to be preserved without imposing unconstitutional restrictions. It is a right available to everyone including political personalities.

(ii) But even while upholding such a right, efforts should be taken to frame a voluntary code of conduct for Ministers etc., to ensure better accountability and transparency;

(iii) There is an imperative need to evolve a device such as Ombudsman to act as a Constitutional check on the misuse of the freedom of expression by public functionaries using the apparatus of the State;

(iv) The right Under Article 19(1)(a) is limited by restrictions expressly indicated in Article 19(2), under which the restrictions should be reasonable and must be provided for by law, by the State. Therefore this Court cannot provide for any additional restriction by an interpretative exercise or otherwise;

(v) It is too remote to suggest that the right of a victim Under Article 21 stands violated if there is a statement by someone that the case was born out of political conspiracy. Therefore, there is actually no conflict of any other right with Article 21;

(vi) Unlike Article 25 which makes the right thereunder subject to public order, morality and health, Article 19(1)(a) does not contain such restrictions. As held by this Court in Sakal Papers (P) Ltd. v. The Union of India MANU/SC/0090/1961 : (1962) 3 SCR 842, freedom of speech can be restricted only in the interest of security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot be curtailed, in the interest of the general public, as in the case of freedom to carry on business;

(vii) Restricting speech by public figures, such as politicians, on serious crimes will have great impact on the freedom of speech. Such criticism which calls out true conspiracies and true miscarriage of justice, plays an important role in a democracy;

(viii) In so far as the enforcement of fundamental rights against non-State actors is concerned, the vertical approach is giving way to the concept of horizontal application. The vertical approach connotes a situation where the enforceability is only against the Government and not against private actors. But with Nation States gradually moving from laissez faire governance to welfare governance, the role of the State is ever expanding, which justifies the shift.

(ix) While the South African Constitution has adopted a horizontal application by providing in Section 9(4) of the Bill of Rights of Final Constitution of 1996 that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of Sub-section (3) which sets out the grounds that bind the State, the judiciary itself has adopted a direct horizontal effect, in Ireland as could be seen from the decisions in John Meskell v. Coras Iompair Eireann 1973 IR 121 and Murtagh Properties Limited v. Cleary 1972 IR 330. In John Meskell (supra), the Irish Supreme Court granted damages against the employer who dismissed the employee for not joining a particular union after serving a due notice to persuade him. In Murtagh Properties Limited (supra), the High Court recognized and enforced the right to earn livelihood without any discrimination based on sex against a private employer.

Countries like Canada and Germany have developed indirect horizontal application, meaning thereby that the rights regulate the laws and statutes, which in turn regulate the conduct of citizens;

(x) In the Indian context, direct horizontal effect has limited application as can be seen from Articles 15(2), 17 and 24;

(xi) Paradigm cases of horizontality should be distinguished from ordinary cases. For instance, the U.S. Supreme Court held in Shelly v. Kraemer MANU/USSC/0145/1948 : 334 U.S. 1 (1948) a covenant contained in a contract prohibiting the sale of houses in a neighbourhood to African-Americans, as unenforceable, for they have the effect of denying equal protection under the laws. The Federal Constitutional Court of Germany took a similar view in Lüth Luth (1958) BVerfGE 7, 198 case (1958) where a call for boycott of a film directed by a person who had worked on anti-semitic Nazi propaganda was challenged. The German Court held that there was an objective order of values that must affect all spheres of law;

(xii) It has been repeatedly held by this Court that the power Under Article 226 is available not only against the Government and its instrumentalities but also against "any person or authority". A reference may be made in this regard to two decisions namely Praga Tools Corporation v. Shri C.A. Imanual MANU/SC/0327/1969 : (1969) 1 SCC 585 and Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotasav Smarak Trust v. V.R. Rudani MANU/SC/0028/1989 : (1989) 2 SCC 691;

(xiii) There are several instances where this Court has issued writs Under Article 32 against non-State actors. Broadly those cases fall under two categories, namely, (i) private players performing public duties/functions; and (ii) non-State actors performing statutory activities that impact the rights of citizens. Cases which fall under these two categories have been held by this Court to be amenable to writ jurisdiction as seen from several decisions including M.C. Mehta v. Union of India MANU/SC/0092/1986 : AIR 1987 SC 1086. Absent any of these parameters, the Court has refused to exercise writ jurisdiction as seen from Binny Ltd. v. V. Sadasivan MANU/SC/0470/2005 : (2005) 6 SCC 657.;

(xiv) Even in jurisdictions where socio economic rights have been elevated in status to that of constitutional rights, the enforcement of those rights were made available only against the State and not against private actors, as held by this Court in Society for Unaided Private Schools of Rajasthan v. Union of India MANU/SC/0311/2012 : (2012) 6 SCC 1;

(xv) On the issue of potential conflict of rights, it is important to bear in mind the distinction between constitutional rights and constitutional values. On a formal level, values are understood teleologically as things to be promoted or maximized. Rights, on the other hand, are not to be promoted but rather to be respected. It would not show proper concern for a right to allow the violation of one right in order to prevent the violation of other rights. This would promote the non-violation of rights, but it would not respect rights[1];

(xvi) Instead of values whose satisfaction is to be maximized, rights act as constraints on the actions of the state. They confer individuals with a sphere of liberty that is inviolable. Rights thereby act as restrictions on the government on how to pursue values, including constitutional values. It is, therefore, crucially important that we draw a distinction between the constitutional rights and constitutional values. Not every increase in liberty or every improvement in leading a dignified life is a constitutional right. This position has been accepted by this Court;

(xvii) As held by this Court in Justice K.S. Puttaswamy, the Court will strike a balance, wherever a conflict between two sets of fundamental rights is projected. Strictly

speaking, what is actually conceived by some and noted in several decisions including Justice K.S. Puttaswamy, is not the conflict of rights in abstractum, at a doctrinal level, but the conflict in the notion/invocation/practice of rights;

(xviii) On the issue of statements made by Ministers and collective responsibility, a reference has to be made to Articles 75(3) and 164(2). Both these Articles speak of collective responsibility of the Council of Ministers. Though the language employed in these Articles indicate that such a collective responsibility is to the House of the People/Legislative Assembly, it is actually a responsibility to the people at large. Since every utterance by a Minister will have a direct bearing on the policy of the Government, there is an imperative need for a voluntary code of conduct. As pointed out by this Court in Common Cause (supra), collective responsibility has two meanings, namely, (i) that all members of the Council of Ministers are unanimous in support of its policies and exhibit such unanimity in public; and (ii) that they are personally and morally responsible for its success and failure;

(xix) Individual aberrations on the part of Ministers are serious threats to constitutional governance and as such the head of the Council of Ministers has a duty to ensure that such breaches do not happen;

(xx) A code of conduct to self-regulate the speeches and actions of Ministers is constitutionally justifiable and this Court can definitely examine its requirement. Ideally, a Minister is not supposed to breach his collective responsibility towards the Cabinet and the Legislature and hence, it is advisable to have a cogent code of conduct as occurring in advanced democracies;

(xxi) While it is not possible to impose additional restrictions on the freedom of speech, it is certainly desirable to have a code of conduct for public functionaries, as followed in other jurisdictions. The Court may keep in mind the fact that this Court in Sahara India Real Estate Corporation Limited (supra) cautioned against framing guidelines across the board to restrict the freedom of Press;

(xxii) Coming to hate speeches, there has been a steep increase in the number of hate speeches since 2014. From May-2014 to date, there have been 124 reported instances of derogatory speeches by 45 politicians. Social media platforms have connived the proliferation of targeted hate speech. Such speeches provide fertile ground for incitement to violence;

(xxiii) On the role of the Court in dealing with the question of hate speech, the decisions in Pravasi Bhalai Sangathan v. Union of India MANU/SC/0197/2014 : (2014) 11 SCC 477; Kodungallur Film Society v. Union of India MANU/SC/1107/2018 : (2018) 10 SCC 713 and Amish Devgan (supra) lay down broad parameters;

(xxiv) At the international level, the definition of hate speech was formulated in the UN Strategy and Plan of Action on Hate Speech, to mean

> ... any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.

The Role and Responsibilities of Political Leaders in Combating Hate Speech and Intolerance (Provisional version) dated 12 March 2019, was submitted by the Committee on Equality and Non-Discrimination to the Parliamentary Assembly of the Council of Europe. The Assembly passed the resolution adopting the text proposed by rapporteur Ms. Elvira Kovacs, Serbia;

(xxv) Finally, the way forward is, (i) for the legislature to adopt a voluntary model

code of conduct for persons holding public offices, which would reflect Constitutional morality and values of good governance; and (ii) the creation of an appropriate mechanism such as Ombudsman, in accordance with the Venice principles and Paris principles. Till such an Ombudsman is constituted, the National and State Human Rights Commissions have to take pro-active measures, in terms of the provisions of Protection of Human Rights Act, 1993.

IV. Discussion and Analysis

Question No. 1

12. Question No. 1 referred to us, is as to whether the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law are exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?

History of evolution of Clause (2) of Article 19

13. For finding an answer to this question, it may be necessary and even relevant to take a peep into history. Since Dr. B.R. Ambedkar's original draft in this regard followed Article 40(6) of the Irish Constitution, the original draft of the Advisory Committee included restrictions such as public order, morality, sedition, obscenity, blasphemy and defamation. Sardar Vallabhbhai Patel suggested the inclusion of libel also. These restrictions were sought to be justified by citing the decision in Gitlow v. New York 286 US 652 (1925).

14. Since the country had witnessed large scale communal riots at that time, Sir Alladi Krishnaswamy Iyer forcefully argued for the inclusion of security and defence of the State or national security as one of the restrictions. Discussion also took place about restricting speech that is intended to spoil communal harmony and speech which is seditious in nature. With suggestions, counter suggestions and objections so articulated, the initial report of the Sub-Committee on Fundamental Rights underwent a lot of changes. The evolution of Clauses (1) and (2) of Article 19 stage by stage, from the time when the draft report was submitted in April 1947, upto the time when the Constitution was adopted, can be presented in a tabular form[2] as follows:

Draft	Provision
Draft Report of the Subcommittee on Fundamental Rights, April 1947 (BSR II, 139)	**9.** There shall be liberty for the exercise of the following rights subject to public order and morality: (a) The right of every citizen to freedom of speech and expression. The publication or utterance of seditious, obscene, slanderous, libellous or defamatory matter shall be actionable or punishable in accordance with law.
Final Report of the Sub-Committee on Fundamental Rights, April 1947 (BSR II, 172)	**10.** There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the unit, as the case may be.
Interim Report of the Advisory Committee, April 30, 1947	There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned

	whereby the security of the Union or the Unit, as the case may be, is threatened: (a) The right of every citizen to freedom of speech and expression: Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable.
Draft Constitution prepared by B.N. Rau, October 1947 (BSR III, 8-9)	**15.** (1) There shall be liberty for the exercise of the following rights subject to public order and morality, namely: (a) the right of every citizen to freedom of speech and expression; ... (2) Nothing in this section shall restrict the power of the State to make any law or to take any executive action which under this Constitution it has power to make or to take, during the period when a Proclamation of Emergency issued Under Sub-section (I) of Section 182 is in force, or, in the case of a unit during the period of any grave emergency declared by the Government of the unit whereby the security of the unit is threatened.
Draft Constitution prepared by the Drafting Committee and submitted to the President of the Constituent Assembly, February 1948 (BSR III, 522)	**13.** (1) Subject to the other provisions of this Article, all citizens shall have the right - (a) to freedom of speech and expression; ... (2) Nothing in Sub-clause (a) of Clause (1) of this Article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the State.
Proposal introduced in the Constituent Assembly in October 1948 (BSR IV, 39)	**13.** (1) Subject to the other provisions of this Article, all citizens shall have the right - (a) to freedom of speech and expression; ... (2) Nothing in Sub-clause (a) of Clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the security of, or tends to overthrow, the State.
Revised Draft Constitution, introduced and adopted in	**19.** (1) All citizens shall have the right ---(a) to freedom of speech and expression;

November 1949 (BSR IV, 755)	(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

15. Immediately after the adoption of the Constitution, this Court had an occasion to deal with a challenge to an order passed by the Government of Madras in exercise of the powers conferred by Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949[3], banning the entry and circulation of a weekly journal called 'Cross Roads' printed and published in Bombay. The ban order was challenged on the ground that it was violative of Article 19(1)(a). The validity of the statutory provision under which the ban order was issued, was also attacked on the basis of Article 13(1) of the Constitution. A Seven Member Constitution Bench of this Court, while upholding the challenge in Romesh Thappar v. State of Madras MANU/SC/0006/1950 : AIR 1950 SC 124 held as follows:

> [12] We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation Under Clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order....

16. An argument was advanced in Romesh Thappar (supra) that Section 9(1-A) of the 1949 Act could not be considered wholly void, as the securing of public safety or maintenance of public order would include the security of the State and that therefore the said provision, as applied to the latter purpose was covered by Article 19(2). However, the said argument was rejected on the ground that where a law purports to authorise the imposition of restrictions on a fundamental right, in language wide enough to cover restrictions, both within or without the limits of Constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the Constitutional limits, as it is not severable.

17. On the same date on which the decision in Romesh Thappar was delivered, the Constitution Bench of this Court also delivered another judgment in Brij Bhushan v. The State of Delhi MANU/SC/0007/1950 : AIR 1950 SC 129. It alsoarose out of a writ petition Under Article 32 challenging an order passed by the Chief Commissioner of Delhi in exercise of the powers conferred by Section 7(1)(c) of the East Punjab Public Safety Act, 1949, requiring the Printer and the Publisher as well as the Editor of an English weekly by name 'Organizer', to submit for scrutiny, before publication, all communal matters and news and views about Pakistan including photographs and cartoons, other than those derived from the official sources. Following the decision in Romesh Thappar, the Constitution Bench held that the imposition of pre-censorship on a journal is a restriction on the liberty of the Press, which is an essential part of the right to freedom of speech and expression. The Bench went on to hold that Section 7(1)(c) of the East Punjab Public Safety Act, 1949 does not fall within the reservation of Clause (2) of Article 19.

18. After aforesaid two decisions, the Parliament sought to amend the Constitution through the Constitution (First Amendment) Bill, 1951. In the Statement of Objects and Reasons to the First Amendment, it was indicated that the citizen's right to freedom of speech and expression guaranteed by Article 19(1)(a) has been held by some Courts to be so comprehensive as not to render a person culpable, even if he advocates murder and other crimes of violence. Incidentally, the First Amendment also dealt with other issues, about which we are not concerned in this discussion. Clause (2) of Article 19 was substituted by a new Clause under the Constitution (First Amendment) Act, 1951. For easy appreciation of the metamorphosis that Clause (2) of Article 19 underwent after the first amendment, we present in a tabular column,

Article 19(2) pre-first amendment and post-first amendment as under:

Pre-First Amendment - Article 19(2)	Post-First Amendment - Article 19(2)
(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.	(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

19. It is significant to note that Section 3(1)(a) of the Constitution (First Amendment) Act, 1951, declared that the newly substituted Clause (2) of Article 19 shall be deemed always to have been enacted in the amended form, meaning thereby that the amended Clause (2) was given retrospective effect.

20. Another important feature to be noted in the amended Clause (2) of Article 19 is the inclusion of the words 'reasonable restrictions'. Thus, the test of reasonableness was introduced by the first amendment and the same fell for jural exploration within no time, in State of Madras v. V.G. Row MANU/SC/0013/1952 : (1952) 1 SCC 410. The said case arose out of a judgment of the Madras High Court quashing a Government Order declaring a society known as 'People's Education Society' as an unlawful association and also declaring as unconstitutional, Section 15(2)(b) of the Indian Criminal Law Amendment Act, 1908, as amended by the Indian Criminal Law Amendment (Madras) Act, 1950. While upholding the judgment of the Madras High Court, this Court indicated as to how the test of reasonableness has to be expounded. The relevant portion of the judgment reads as follows:

> **23.** It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable.

21. After the First Amendment to the Constitution, the country witnessed cries for secession, with parochial tendencies showing their ugly head, especially from a southern State. Therefore, a National Integration Conference was convened in September-October, 1961 to find ways and means to combat the evils of communalism, casteism, regionalism, linguism and narrow mindedness. This Conference decided to set up the National Integration Council. Accordingly, it was constituted in 1962. The constitution of the Council assumed significance in the wake of the Sino-India war in 1962. This National Integration Council had a Committee on national integration and regionalism. This Committee recommended two amendments to the Constitution, namely, (i) the amendment of Clause (2) of Article 19 so as to include the words

"the sovereignty and integrity of India" as one of the restrictions; and (ii) the amendment of 8 Forms of oath or affirmation contained in the Third Schedule. Until 1963, no one taking a constitutional oath was required to swear that they would "uphold the sovereignty and integrity of India". But, the Constitution (Sixteenth Amendment) Act, 1963 expanded the forms of oath to ensure that "every candidate for the membership of a State Legislature or Parliament, and every aspirant to, and incumbent of, public office" - to quote its Statement of Objects and Reasons - "pledges himself... to preserve the integrity and sovereignty of the Union of India." Thus, by the Constitution (Sixteenth Amendment) Act, 1963, "the sovereignty and integrity of India", was included as an additional ground of restriction on the right guaranteed Under Article 19(1)(a).

22. Having seen the history of evolution of Clause (2) of Article 19, let us now turn to the first question.

Two parts of Question No. 1

23. Question No. 1 is actually in two parts. The first part raises a poser as to whether reasonable restrictions on the right to free speech enumerated in Article 19(2) could be said to be exhaustive. The second part of the Question raises a debate as to whether additional restrictions on the right to free speech can be imposed on grounds not found in Article 19(2), by invoking other fundamental rights.

First part of Question No. 1

24. The judicial history of the evolution of Clause (2) of Article 19 which we have captured above shows that lot of deliberations went into the articulation of the restrictions now enumerated. The draft Report of the Sub-Committee on Fundamental Rights itself underwent several changes until the Constitution was adopted in November, 1949. In the form in which the Constitution was adopted in 1949, the restrictions related to (i) libel; (ii) slander; (iii) defamation; (iv) contempt of court; (v) any matter which offends against decency or morality; and (vi) any matter which undermines the security of the State or tends to overthrow the State.

25. After the 1st and 16th Amendments, the emphasis is on reasonable restrictions relating to, (i) interests of sovereignty and integrity of India; (ii) the security of the State; (iii) friendly relations with foreign states; (iv) public order; (v) decency or morality; (vi) contempt of court; (vii) defamation; and (viii) incitement to an offence.

26. A careful look at these eight heads of restrictions would show that they save the existing laws and enable the State to make laws, restricting free speech with a view to afford protection to (i) individuals (ii) groups of persons (iii) Sections of society (iv) classes of citizens (v) the Court (vi) the State and (vii) the country. This can be demonstrated by providing in a table, the provisions of the Indian Penal Code that make some speech or expression a punishable offence, thereby impeding the right to free speech, the heads of restriction under which they fall and the category/class of person/persons sought to be protected by the restriction:

Table of Provisions under Indian Penal Code restricting freedom of speech and expression

Laws restricting free speech	Heads of Restriction traceable to Article 19(2)	Person/Class of Person sought to be protected and the nature of protection.
Section 117 of the Indian Penal Code -Abetting commission of offence by the public or by more than ten persons. There is an illustration under the section which forms part of the	**1.** Public Order **2.** Incitement to an Offence	Individual Persons - Protection from incitement to commit offence.

statute. This illustration seeks to restrict freedom of expression Illustration: A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.		
Section 124A of the Indian Penal Code - Sedition[4]	**1.** Public Order **2.** Decency and Morality	State - Protection against disaffection
Section 153A(1)(a) of the Indian Penal Code - Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony	**1.** Public Order **2.** Decency and Morality	Groups of Persons - Protection from disrupting harmony among different sections of society.
Section 153B of the Indian Penal Code -Imputations, assertions prejudicial to the national-integration	**1 .** Sovereignty and Integrity of the State **2.** Public Order **3.** Decency and Morality	**1.** Nation **2 .** Group of persons belonging to different religions, races, languages, etc,.
Section 171C of the Indian Penal Code -Undue Influence at Elections	**1.** Public Order	Candidates contesting the Election and Voters -To ensure free and fair election and to keep the purity of the democratic process
Section 228 of the Indian Penal Code -Intentional insult or interruption to public servant sitting in judicial proceedings	Contempt of Court	Court -To prevent people from undermining the authority of the court.
Section 228A of the Indian Penal Code-Disclosure of identity of the victim of certain offences etc.	**1.** Public Order **2.** Decency and Morality	Individual persons (Victims of offences Under Section 376)- Protection of identity of women and minors.
Section 295A of the Indian Penal Code -Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.	**1.** Public order, **2.** Decency and morality	Sections of society professing and practicing different religious beliefs/sentiments.
Section 298 of the Indian Penal Code-Uttering words, etc., with deliberate intent to	**1.** Public order, **2.** Decency and morality	Sections of society professing and practicing different religious

wound religious feelings.		beliefs/sentiments.
Section 351 of the Indian Penal Code -Assault. The definition of assault includes some utterances, as seen from the Explanation under the Section. Explanation: Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.	**1.** Public Order **2.** Decency and morality	Individual Persons - Protection from Criminal Force.
Section 354 of the Indian Penal Code-Assault to woman with intent to outrage her modesty Note: The Definition of Assault includes the use of words.	**1.** Public Order **2.** Decency and morality **3.** Defamation	Individual Persons - Protection of Modesty of a Woman.
Section 354A of the Indian Penal Code - Sexual Harassment (It includes sexually colored remarks).	**1.** Public Order **2.** Decency and morality **3.** Defamation	Individuals - Protection of Modesty of a Woman.
Section 354C of the Indian Penal Code - Voyeurism	**1.** Public Order **2.** Decency and morality **3.** Defamation	Individuals - Protection of Modesty of a Woman.
Section 354D of the Indian Penal Code - Stalking	**1.** Decency and Morality **2.** Defamation	Individuals - Protection of Modesty of a Woman.
Section 354E of the Indian Penal Code - Sextortion	**1.** Public Order **2.** Decency and morality **3.** Defamation	Individual Persons - Protection of Modesty of a Woman.
Section 355 of the Indian Penal Code -Assault or criminal force with intent to dishonour person, otherwise than on grave provocation. Note: The Definition of Assault includes use of words.	**1.** Public Order **2.** Decency and morality **3.** Defamation	Individual Persons - Protection of reputation.
Section 383 of the Indian Penal Code -Extortion (The illustration under the Section includes threat to publish	**1.** Public Order **2.** Decency and Morality	Individuals - Protection from fear of injury/Protection of Property.

defamatory libel). Illustration: A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.		
Section 390 of the Indian Penal Code - Robbery Note: In all robbery there is either theft or extortion.	**1.** Public Order **2.** Decency and Morality	Individuals - Protection from fear of injury/Protection of Property.
Section 499 of the Indian Penal Code - Defamation	Defamation	Individual Persons and Group of People - Reputation sought to be protected.
Section 504 of the Indian Penal Code -Intentional insult with intent to provoke breach of peace.	**1.** Incitement to an offense **2.** Public Order **3.** Decency and morality	The public - Protection of Peace.
Section 505(1)(b) of the Indian Penal Code - Statement likely to cause fear or alarm to the public whereby any person may be induced to commit an offence against the State or against the public tranquility.	**1 .** Sovereignty and Integrity of the State **2.** Incitement to an offense **3.** Public Order	State - Protection from the commission of offences against the State and protection of public tranquility.
Section 505(1)(c) of the Indian Penal Code-Statement intended to incite any class or community of persons to commit any offence against any other class or community.	Public Order	Class/community of people. Protection from incitement to commit violence against class or community.
Section 509 of the Indian Penal Code -Word, Gesture or Act intended to insult the modesty of a woman.	**1.** Defamation **2.** Decency or Morality	Individual persons - Protection of Modesty of a Woman.

27. We have taken note of, in the above Table, only the provisions of the Indian Penal Code that curtail free speech. There are also other special enactments such as The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Prevention of Insults to National Honour Act, 1971 etc., which also impose certain restrictions on free speech. From these it will be clear that the eight heads of restrictions contained in Clause (2) of Article 19 are so exhaustive that the laws made for the purpose of protection of the individual, Sections of society, classes of citizens, court, the country and the State have been saved.

28. The restrictions Under Clause (2) of Article 19 are comprehensive enough to cover all possible attacks on the individual, groups/classes of people, the society, the court, the country and the State. This is why this Court repeatedly held that any restriction which does not fall

within the four corners of Article 19(2) will be unconstitutional. For instance, it was held by the Constitution Bench in Express Newspapers (Private) Ltd. v. The Union of India MANU/SC/0157/1958 : 1959 SCR 12, that a law enacted by the legislature, which does not come squarely within Article 19(2) would be struck down as unconstitutional. Again, in Sakal Papers (supra), this Court held that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom.

29. That the Executive cannot transgress its limits by imposing an additional restriction in the form of Executive or Departmental instruction was emphasised by this Court in Bijoe Emmanuel v. State of Kerala MANU/SC/0061/1986 : (1986) 3 SCC 615. The Court made it clear that the reasonable restrictions sought to be imposed must be through "a law" having statutory force and not a mere Executive or Departmental instruction. The restraint upon the Executive not to have a back-door intrusion applies equally to Courts. While Courts may be entitled to interpret the law in such a manner that the rights existing in blue print have expansive connotations, the Court cannot impose additional restrictions by using tools of interpretation. What this Court can do and how far it can afford to go, was articulated by B. Sudharshan Reddy, J., in Ram Jethmalani (supra) as follows:

> **85.** An argument can be made that this Court can make exceptions under the peculiar circumstances of this case, wherein the State has acknowledged that it has not acted with the requisite speed and vigour in the case of large volumes of suspected unaccounted for monies of certain individuals. There is an inherent danger in making exceptions to fundamental principles and rights on the fly. Those exceptions, bit by bit, would then eviscerate the content of the main right itself. Undesirable lapses in upholding of fundamental rights by the legislature, or the executive, can be rectified by assertion of constitutional principles by this Court. However, a decision by this Court that an exception could be carved out remains permanently as a part of judicial canon, and becomes a part of the constitutional interpretation itself. It can be used in the future in a manner and form that may far exceed what this Court intended or what the constitutional text and values can bear. We are not proposing that Constitutions cannot be interpreted in a manner that allows the nation-State to tackle the problems it faces. The principle is that exceptions cannot be carved out willy-nilly, and without forethought as to the damage they may cause.
>
> **86.** One of the chief dangers of making exceptions to principles that have become a part of constitutional law, through aeons of human experience, is that the logic, and ease of seeing exceptions, would become entrenched as a part of the constitutional order. Such logic would then lead to seeking exceptions, from protective walls of all fundamental rights, on grounds of expediency and claims that there are no solutions to problems that the society is confronting without the evisceration of fundamental rights. That same logic could then be used by the State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale.

30. Again, in Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal MANU/SC/0246/1995 : (1995) 2 SCC 161, this Court cautioned that the restrictions on free speech can be imposed only on the basis of Article 19(2). In Ramlila Maidan Incident, in re. MANU/SC/0131/2012 : (2012) 5 SCC 1, this Court developed a three-pronged test namely, (i) that the restriction can be imposed only by or under the authority of law and not by exercise of the executive power; (ii) that such restriction must be reasonable; and (iii) that the restriction must be related to the purposes mentioned in Clause (2) of Article 19.

31. That the eight heads of restrictions contained in Clause (2) of Article 19 are exhaustive can be established from another perspective also. The nature of the restrictions on free speech imposed by law/judicial pronouncements even in countries where a higher threshold is maintained, are almost similar. To drive home this point, we are presenting in the following table, a comparative note relating to different jurisdictions:

Jurisdiction	The Document from which the Right to Freedom of Speech and Expression flows	The Document from which the restrictions on the right to freedom of Speech and Expression flow	Nature of Restrictions
India	Article 19(1)(a) - Constitution of India	Article 19(2) Constitution of India	**1 .** Sovereignty and integrity of the State, **2.** Security of the State, **3 .** Friendly relations with foreign countries, **4.** Public order, **5.** Decency and morality, **6.** Contempt of court, **7.** Defamation, **8 .** Incitement to an offense.
UK	Article 10(1) of the Human Rights Act, 1998	Article 10(2) of the Human Rights Act, 1998	**1.** National security, **2 .** Territorial integrity or public safety, **3 .** For the prevention of disorder or crime, for the protection of health or morals, **4 .** For the protection of the reputation or rights of others, **5 .** For preventing the disclosure of information received in confidence, or **6 .** For maintaining the authority and impartiality of the judiciary.
USA	First Amendment to the US Constitution	No restriction is specifically provided in the Constitution. But Judicial Review by the Supreme Court has admitted certain restrictions	Recognised forms of Unprotected Speech: **1 .** Obscenity as held in Roth v. United States, MANU/USSC/0157/1957 : 354 U.S. 476, 483 (1957). **2 .** Child Pornography as held in Ashcroft v. Free Speech Coalition, MANU/USSC/0029/2002 : 435 U.S. 234 (2002).

			3 . Fighting Words and True Threat as held in Chaplinsky v. New Hampshire, MANU/USSC/0058/1942 : 315 U.S. 568 (1942) a n d Virginia v. Black, MANU/USSC/0028/2003 : 538 U.S. 343, 363 (2003), respectively.
Australia	Australian Constitution does not expressly speak about freedom of expression. However, the High Court has held that an implied freedom of political communication exists as an indispensible part of the system of representative and responsible government created by the Constitution. It operates as a freedom from government restraint, r a t h e r than a right conferred directly on individuals. Australia is a party to seven core international human rights treaties. The right to freedom of opinion and expression is contained in Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Articles 12 and 13 of the Convention on the Rights of the Child (CRC) and Article 21 of the Convention on the Rights of Persons w i t h Disabilities (CRPD).	**1 .** Article 19(3), 20 of the ICCPR contains mandatory limitations o n freedom of expression, and requires countries, subject to reservation/declaration, to outlaw vilification of persons on national, racial or religious grounds. Australia has made a declaration in relation to Article 20 to the effect that existing Commonwealth and state legislation is regarded as adequate, and that the right is reserved not to introduce any further legislation imposing further restrictions on these matters. **2 .** Code of Criminal Procedure Act 1995 **3 .** Racial Discrimination Act 1975	Under International Treaties: **1 .** Rights of Reputation of Others, **2.** National Security, **3.** Public Order, **4.** Public Health, or **5.** Public Morality Under the Code of Criminal Procedure Act, 1995 **1 .** Offences relating to urging by force or violence the overthrow of t h e Constitution or the lawful authority of the Government; and **2 .** Offences relating to the use of a telecommunications carriage service in a way which is intentionally menacing, harassing or offensive, and using a carriage service to communicate content which is menacing, harassing or offensive. Speech or Expression amounting to Racial Discrimination under the Racial Discrimination Act, 1975

European Union	Article 10(1), European Convention on Human Rights, 1950	Article 10(2), European Convention on Human Rights, 1950	**1 .** In the interests of national security, territorial integrity or public safety, **2 .** For the prevention of disorder or crime, **3 .** For the protection of health or morals, **4 .** For the protection of the reputation or rights of others, **5 .** For preventing the disclosure of information received in confidence, or **6 .** For maintaining the authority and impartiality of the judiciary.
Republic of South Africa	Bill of Rights, Article 16(1) of the Constitution of the Republic of South Africa, 1996	Bill of Rights, Article 16(2) of the Constitution of the Republic of South Africa, 1996	**1.** Propaganda for war, **2 .** Incitement of imminent violence, **3 .** Advocacy of hatred that is based on race, ethnicity, gender, religion, and that constitutes incitement to cause harm.

32. Since the eight heads of restrictions contained in Clause (2) of Article 19 seek to protect:

(i) the individual - against the infringement of his dignity, reputation, bodily autonomy and property;

(ii) different Sections of society professing and practicing, different religious beliefs/sentiments - against offending their beliefs and sentiments;

(iii) classes/groups of citizens belonging to different races, linguistic identities etc.- against an attack on their identities;

(iv) women and children - against the violation of their special rights;

(v) the State - against the breach of its security;

(vi) the country - against an attack on its sovereignty and integrity;

(vii) the Court - against an attempt to undermine its authority,

we think that the restrictions contained in Clause (2) of Article 19 are exhaustive and no further restriction need to be incorporated.

33. In any event, the law imposing any restriction in terms of Clause (2) of Article 19 can only

be made by the State and not by the Court. The role envisaged in the Constitutional scheme for the Court, is to be a gate-keeper (and a conscience keeper) to check strictly the entry of restrictions, into the temple of fundamental rights. The role of the Court is to protect fundamental rights limited by lawful restrictions and not to protect restrictions and make the rights residual privileges. Clause (2) of Article 19 saves (i) the operation of any existing law; and (ii) the making of any law by the State. Therefore, it is not for us to add one or more restrictions than what is already found.

Second part of Question No. 1

34. The second part of Question No. 1 is as to whether additional restrictions on the right to free speech can be imposed on grounds not found in Article 19(2) by invoking other fundamental rights.

35. This part of Question No. 1 already stands partly answered while dealing with the first part of Question No. 1. The decisions of this Court in Express Newspapers (Private) Ltd. (supra), the Cricket Association of Bengal (supra) and Ramlila Maidan Incident, in re. (supra), provide a complete answer to the question whether additional restrictions on the right to free speech can be imposed on grounds not found in Article 19(2).

36. The question whether additional restrictions can peep into Article 19(2), by invoking other fundamental rights, also stands answered by this Court in Sakal Papers. In Sakal Papers, the Central Government issued an order called Daily Newspaper (Price and Page) Order, 1960 in exercise of the power conferred under the Newspaper (Price and Page) Act, 1956, fixing the maximum number of pages that might be published by a newspaper according to the price charged. Therefore, the publisher of a Marathi Newspaper challenged the constitutionality of both the Act and the Order. One of the arguments raised on behalf of the State in the said case was that there are two aspects of the activities of newspapers namely, (i) the dissemination of news and views; and (ii) the commercial aspect. While the former would fall Under Article 19(1)(a), the latter would fall Under Article 19(1)(g).

37. Since these two rights are independent and since the restrictions on the right Under Article 19(1)(g) can be placed in the interest of the general public Under Article 19(6), it was contended by the State in Sakal Papers that the Act and the Order are saved by Clause (6) of Article 19. But the said argument of the State was rejected by the Constitution Bench in Sakal Papers, in the following words:

> It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in Clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged it is no answer that the restrictions enacted by it are justifiable under Clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and Clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore, for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom.

38. We are conscious of the fact that Sakal Papers was a case where the Petitioner before the Court had two different fundamental rights and the law made by the State fell within the permitted restrictions upon the exercise of one of those two fundamental rights. However, the restriction traceable to Clause (6) of Article 19 was not available in Clause (2) of Article 19. It is in such circumstances that this Court held that the restriction validly imposed upon the exercise of one fundamental right cannot automatically become valid while dealing with another fundamental right of the same person, the restriction of which stands Constitutionally on different parameters.

39. In Sakal Papers the conflict was neither between one individual's fundamental right qua another individual's fundamental right nor one fundamental right qua another fundamental right of the same individual. It was a case where a restriction validly made upon a fundamental right was held invalid qua another fundamental right of the same individual. In the cases on hand, what is sought to be projected is a possible conflict arising out of the exercise of a fundamental right by one individual, in a manner infringing upon the free exercise of the fundamental right of another person. But this conflict is age old.

40. The exercise of all fundamental rights by all citizens is possible only when each individual respects the other person's rights. As acknowledged by the learned Attorney General and Ms. Aparjita Singh, learned Amicus, this Court has always struck a balance whenever it was found that the exercise of fundamental rights by an individual, caused inroads into the space available for the exercise of fundamental rights by another individual. The emphasis even in the Preamble on "fraternity" is an indication that the survival of all fundamental rights and the survival of democracy itself depends upon mutual respect, accommodation and willingness to co-exist in peace and tranquility on the part of the citizens. Let us now see a few examples. The Fundamental Duty enjoined upon every citizen of the country Under Article 51-A (e) to "promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women", is also an indicator that no one can exercise his fundamental right in a manner that infringes upon the fundamental right of another.

41. As articulated by Jeevan Reddy, J. in Cricket Association of Bengal, no one can exercise his right of speech in such a manner as to violate another man's right. In paragraph 152 of the decision in Cricket Association of Bengal, Jeevan Reddy, J. said: "Indeed it may be the duty of the State to ensure that this right is available to all in equal measure and that it is not hijacked by a few to the detriment of the rest. This obligation flows from the Preamble to our Constitution, which seeks to secure all its citizens liberty of thought, expression, belief and worship.....Under our Constitutional scheme, the State is not merely under an obligation to respect the fundamental rights guaranteed by Part-III but under an equal obligation to ensure conditions in which those rights can be meaningfully and effectively enjoyed by one and all."

42. The above passage from the opinion of Jeevan Reddy, J., in Cricket Association of Bengal, was quoted with approval by the Constitution Bench in Sahara India Real Estate Corporation Limited case.

43. There are several instances where this Court either struck a balance or placed on a slightly higher pedestal, the fundamental right of one over that of the other. Interestingly, the competing claims arose in many of those cases, in the context of Article 19(1)(a) right of one person qua Article 21 right of another. Let us now take a look at some of them.

(i) In R. Rajagopal (supra), the rights pitted against one another were the freedom of expression Under Article 19(1)(a) and the right to privacy of the Officers of the Government Under Article 21. This Court propounded:

> **26.** We may now summarise the broad principles flowing from the above discussion:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent -- whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The Rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the Rule in (1) above -- indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the Defendant) with reckless disregard for truth. In such a case, it would be enough for the Defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the Defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

(ii) In People's Union for Civil Liberties (PUCL) (supra), the rights that were perceived

as competing with each other were the right to privacy of the spouse of a candidate contesting election qua the voter's right to information. In his separate but near concurring opinion, P. Venkatarama Reddi, J. articulated the position thus:

> **121.**...
>
> **...**When there is a competition between the right to privacy of an individual and the right to information of the citizen, the former right has to be subordinated to the latter right as it serves the larger public interest....

(iii) In Noise Pollution (V.), in Re (supra), the rights that competed with one another, were the rights enshrined in Article 19(1)(a) and Article 21. The clash was between individuals and the persons in the neighborhood. This Court held:

> **11.** Those who make noise often take shelter behind Article 19(1)(a) pleading freedom of speech and right to expression. Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge into aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels, then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21....

(iv) In Ram Jethmalani the right to know, inhering in Article 19(1)(a) and the right to privacy Under Article 21, were seen to be in conflict. Right to privacy was asserted by individuals holding bank accounts in other countries. The court had to balance the same with the citizens' right to know. This Court propounded as follows:

> **84.** The rights of citizens, to effectively seek the protection of fundamental rights, Under Clause (1) of Article 32 have to be balanced against the rights of citizens and persons Under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.

(v) In Sahara India Real Estate Corporation Limited freedom of press and the right to fair trial were the competing rights. In this case, the Constitution Bench was dealing with a question whether an order for postponement of publication of the proceedings pending before a Court, would constitute a restriction Under Article 19(1)(a) and as to whether such restriction is saved Under Article 19(2). This question was answered by the Constitution Bench in para 42 as follows:

> **42.** At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen in the context of Article 19(1)(a) not being an absolute right. The US clash model based on collision between freedom of expression (including free press) and the right to a fair trial will not apply to the Indian Constitution. In certain cases, even the Accused seeks publicity (not in the pejorative sense) as openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the Judges are under scrutiny and at the same time people get to know what is going on inside the courtrooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, the Courts have to evolve balancing techniques or measures based on recalibration under which both the rights are given equal space in the constitutional scheme and this is what the "postponement order" does, subject to the parameters mentioned hereinafter. But, what happens when the courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognised as a human right. These presumptions existed at the time when the Constitution was framed [existing law Under Article 19(2)] and they continue till date not only as part of Rule of law Under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free speech Under Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is "the end and purpose of all laws". However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period....

(vi) In Thalapplam Service Cooperative Bank Ltd. (supra), the right to know held as part of Article 19(1)(a) and the right to privacy being part of Article 21 were perceived as competing with each other, in a matter between holders of accounts in cooperative banks and members of the public who wanted details. This Court in paragraph 64 held:

> **64.** Recognising the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights Under Section 8(j), as already indicated. If the information sought for is personal and has no relationship with any public activity or interest or it will not subserve larger public interest, the public authority or the officer concerned is not legally obliged to provide those information. Reference may be made to a recent judgment of this Court in Girish Ramchandra Deshpande v. Central Information Commr., MANU/SC/0816/2012 : (2013) 1 SCC 212, wherein this Court held that since there is no bona fide public interest in seeking information, the disclosure of said information would cause unwarranted invasion of privacy of the individual Under Section 8(1)(j) of the Act. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person from

whom information is sought for, has also a right to privacy guaranteed Under Article 21 of the Constitution.

(vii) In Subramanian Swamy (supra), the right to freedom of speech of an individual guaranteed Under Article 19(1)(a) qua the right to dignity and reputation of another individual guaranteed Under Article 21 were the competing rights. In this case, the Court held as follows:

> **98.** Freedom of speech and expression in a spirited democracy is a highly treasured value. Authors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as it permits argument, allows dissent to have a respectable place, and honours contrary stances. There are proponents who have set it on a higher pedestal than life and not hesitated to barter death for it. Some have condemned compelled silence to ruthless treatment. William Dougles has denounced Regulation of free speech like regulating diseased cattle and impure butter. The Court has in many an authority having realised its precious nature and seemly glorified sanctity has put it in a meticulously structured pyramid. Freedom of speech is treated as the thought of the freest who has not mortgaged his ideas, may be wild, to the artificially cultivated social norms; and transgression thereof is not perceived as a folly. Needless to emphasise, freedom of speech has to be allowed specious castle, but the question is: should it be so specious or regarded as so righteous that it would make reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion...

(viii) In Asha Ranjan (supra), the right to free trial, of an Accused vis-à-vis the victim, came up for consideration. The Court propounded in paragraph 61:

> **61.** Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right. To elaborate, as in this case, the Accused has a fundamental right to have a fair trial Under Article 21 of the Constitution. Similarly, the victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. However, when there is intra-conflict of the right conferred under the same article, like fair trial in this case, the test that is required to be applied, we are disposed to think, it would be "paramount collective interest" or "sustenance of public confidence in the justice dispensation system". An example can be cited. A group of persons in the name of "class honour", as has been stated in Vikas Yadav v. State of U.P., MANU/SC/1167/2016 : (2016) 9 SCC 541 : (2016) 3 SCC (Cri.) 621], cannot curtail or throttle the choice of a woman. It is because choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognised in the Constitution Under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion. Therefore, if the collective interest

> or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law"....

(ix) In Railway Board representing the Union of India v. Niranjan Singh MANU/SC/0507/1969 : (1969) 1 SCC 502, a trade union worker was charged of the misconduct of addressing meetings within the railway premises, in contravention of the directions issued by the employer. When he sought protection under Clauses (a), (b) and (c) of Article 19(1), this Court rejected the same by holding "that the exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes." This Court went on to state that "the validity of that limitation is not to be judged by the test prescribed in Sub-articles (2) and (3) of Article 19".

(x) In Life Insurance Corporation of India v. Prof. Manubhai D. Shah MANU/SC/0032/1993 : (1992) 3 SCC 637, two fundamental rights were not competing or in conflict with each other. But the right to free speech and the right to propagate one's ideas, in the context of censorship under the Cinematograph Act, 1952 and in the context of a State institution refusing to publish an Article in an in-house magazine were in question. In Paragraph 23 of the Report, this Court said: "every right has a corresponding duty or obligation and so is the fundamental right of speech and expression. The freedom conferred by Article 19(1)(a) is therefore not absolute as perhaps in the case of the US First Amendment: it carries with it certain responsibilities towards fellow citizens and society at large. A citizen who exercises this right must remain conscious that his fellow citizen too has a similar right. Therefore, the right must be so exercised as not to come in direct conflict with the right of another citizen.

44. The series of decisions discussed above shows that whenever two or more fundamental rights appeared either to be on a collision course or to be seeking preference over one another, this Court has dealt with the same by applying well-established legal tools. Therefore, we are of the view that under the guise of invoking other fundamental rights, additional restrictions, over and above those prescribed in Article 19(2), cannot be imposed upon the exercise of one's fundamental rights.

45. In fine, we answer Question No. 1 in the following manner:

> The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two fundamental rights staking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual.

Question No. 2

46. The second question referred to us is as to whether a fundamental right Under Article 19 or 21 can be claimed against anyone other than the State or its instrumentalities. Actually, the question is not about "claim" but about "enforceability".

47. To use the phraseology adopted by the philosophers of Law, the question on hand is as to whether Part III of the Constitution has a "vertical" or "horizontal" effect. Wherever Constitutional rights regulate and impact only the conduct of the Government and Governmental actors, in their dealings with private individuals, they are said to have "a vertical effect". But wherever Constitutional rights impact even the relations between private individuals, they are said to have "a horizontal effect".

48. In his scholarly article, "The 'Horizontal Effect' of Constitutional Rights", published in Michigan Law Review (Volume 2. Issue 3, 2003) Stephen Gardbaum, states that the horizontal position has been adopted to varying degrees in Ireland, Canada, Germany, South Africa and European Union. According to the learned author, this issue has also been the topic of sustained debate in the United Kingdom following the enactment of the Human Rights Act of 1998[5].

49. No jurisdiction in the world appears to be adopting, at least as on date, a purely vertical approach or a wholly horizontal approach. A vertical approach provides weightage to individual autonomy, choice and privacy, while the horizontal approach seeks to imbibe Constitutional values in all individuals. These approaches which appear to be bipolar opposites, raise the age-old question of 'individual v. society'.

50. Even in countries where the individual reigns supreme, as in the United States, the Thirteenth Amendment making slavery and involuntary servitude a punishable offence, has actually made inroads into individual autonomy. Therefore, some scholars think that the Thirteenth Amendment provided a shift from the 'purely vertical' approach in a direct way. Subsequently, an indirect effect of the horizontality was found in certain decisions of the U.S. Supreme Court, two of which are of interest.

51. After the American Civil War (1861-1865), the Reconstruction Era began in the United States. During this period, the Fourteenth Amendment came (1866-1868) followed by the Civil Rights Act, 1875 (also called Enforcement Act or Force Act). This Civil Rights Act, 1875 entitled everyone, to access accommodation, public transport and theaters regardless of race or color. Finding that despite the Act, they were excluded from "whites only" facilities in hotels, theaters etc., the victims of discrimination (African-Americans) filed cases. All those five cases were tagged together and the U.S. Supreme Court held in (year 1883) what came to be known as "Civil Rights Cases" MANU/USSC/0280/1883 : 109 US 3 (1883) that the Thirteenth and Fourteenth Amendments did not empower Congress to outlaw racial discrimination by private individuals. But after nearly 85 years, this decision was overturned in Jones v. Alfred H. Mayer Co MANU/USSC/0167/1968 : 392 US 409 (1968) wherein it was held that Congress could regulate sale of private property to prevent racial discrimination. This was done in terms of 42 U.S. Code § 1982 which entitled all citizens of the United States to have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

52. But a good 20 years before the decision in Jones (supra) was delivered, the U.S. Supreme Court had an occasion to consider a clash between contractual rights and Constitutional rights. It was in Shelly (supra) where an African-American family (Shellys) who purchased a property in a neighbourhood in St. Louis, Missouri was sought to be restrained from taking possession, because of a racially restrictive covenant contained in an Agreement of the year 1911 to which a majority of property owners in the neighbourhood were parties. The covenant restricted the sale of any property or part thereof for a term of 50 years to African-Americans and Asian-Americans. The Missouri Supreme Court upheld the racially restricted covenant. But the U.S. Supreme Court reversed it holding that the enforcement of such covenants violated the Equal Protection Clause of the Fourteenth Amendment. In other words the contractual rights were trumped by the Constitutional obligations.

53. Then came the decision in New York Times v. Sullivan MANU/USSC/0245/1964 : 376 U.S. 254 (1964). It was a case where the City Commissioner in Montgomery, Alabama filed an action for libel against the New York Times for publishing an allegedly defamatory statement in a paid advertisement. The jury awarded damages and the judgment was affirmed by the Supreme Court of Alabama. However, the U.S. Supreme Court reversed the decision and held that the First Amendment which prohibited a public official from recovering damages for a defamatory falsehood relating to the public official's official conduct except in the case of actual malice, bound the Plaintiff from exercising his private right.

54. The above decisions of the U.S. Supreme Court were seen by scholars as indicating a shift

from a 'purely vertical approach' to a 'horizontal approach'.

55. While the U.S. Constitution represented (to begin with) a purely vertical approach, the Irish Constitution was found to be on the opposite side of the spectrum, with the rights provided therein having horizontal effect. Article 40 of the Irish Constitution deals with Personal Rights under the Chapter "Fundamental Rights". Sub- Article (3) of Article 40 states that "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen". In other words, two rights are guaranteed namely (i) respect for the personal rights of the citizen; and (ii) to defend and vindicate the personal rights of its citizen.

56. The second Clause of Sub-article (3) of Article 40 of the Irish Constitution states that "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen".

57. The above provisions have been interpreted by the Irish Supreme Court as imposing a positive obligation on all State actors, including the Courts to protect and enforce the rights of individuals. It appears that full horizontal effect was given by the Irish Supreme Court to Constitutional rights such as freedom of association, freedom from sex discrimination and the right to earn a livelihood. For instance, the Irish Supreme Court had an occasion to consider in John Meskell, the Constitutional rights of citizens to form associations and unions guaranteed by Article 40.6.1. This case arose out of an agreement reached between certain trade unions and the employer to terminate the services of all workers and to reemploy them on condition that they agree to be members of the specified trade unions at all times. One employee whose services were terminated was not reemployed, as he refused to accept the special condition. Therefore, he sued the company for damages and claimed a declaration that his dismissal was a violation of the Constitutional rights. Holding that the Constitutional right of citizens to form associations and unions necessarily recognized a correlative right to abstain from joining associations and unions, the Irish Supreme Court awarded damages on the ground that the non-State actors actually violated the Constitutional right of the Plaintiff. In other words, the Constitutional rights were considered to have horizontal effect.

58. The Constitution of the Republic of South Africa, 1996 also provides horizontal effect to certain rights. Section 8.2 of the said Constitution states: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

59. The manner in which Section 8.2 has to be applied is spelt out in Section 8.3. The same reads thus:

> **8.** Application
>
> .....
>
> **3.** When applying a provision of the Bill of Rights to a natural or juristic person in terms of Sub-section (2), a court
>
> a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> b. may develop Rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1).

60. Section 9 of the Constitution of the Republic of South Africa guarantees equality before law and equal protection and the benefit of the law to everyone. Section 9.3 mandates the State not to unfairly discriminate directly or indirectly against anyone, on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. If Section 9.3 is a

mandate against the State, what follows in Section 9.4 is a mandate against every person. Section 9.4 reads as follows:

> **9.** Equality
>
> .....
>
> **4.** No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of Sub-section (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

61. Again, Section 10 recognises the right to human dignity. While doing so, it employs a language, which applies to non-State actors also. Section 10 states that "Everyone has inherent dignity and the right to have their dignity respected and protected".

62. During the period from April 1994 to February 1997, when the Republic of South Africa had an Interim Constitution, the Constitutional Court of South Africa had an occasion to deal with a defamation action in Du Plessis and Ors. v. De Klerk and Anr. MANU/SACC/0002/1996 : 1996 ZACC 10. The defamation action was instituted by an Airline company, against a newspaper for publishing an Article implicating the Airline in the unlawful supply of arms to UNITA (National Union for the Total Independence of Angola). After the Interim Constitution came into force, the Defendant-newspaper raised a defence that they were insulated against the defamation action, Under Section 15 of the Constitution which protected the freedom of the press. The Transvaal Provincial Division of the Supreme Court referred two issues to the Constitutional Court. One of the issues was whether Chapter 3 (fundamental rights) of the Constitution was applicable to legal relationships between private parties. The majority (11:2) of the Court held that Chapter 3 could not be applied directly to the common law in actions between private parties. But they left open the question whether there were particular provisions of the Chapter that could be so applied. However, the Court held that in terms of Section 35(3) of the Interim Constitution, Courts were obliged in the application and development of common law, to have due regard to the spirit, purport and objects of Chapter 3. The majority held that it was the task of the Supreme Court to apply and develop the common law as required by Section 35(3).

63. Interestingly, the dissenting opinion given by Kriegler, J. became the subject matter of lot of academic debate. To begin with, Kriegler, J. rejected the idea that the debate was one of "verticality versus horizontality". He said that Chapter 3 rights do not operate only as against the State but also horizontally as between individuals where Statutes are involved. Calling "direct horizontality" as a bogeyman, Kriegler, J. said as follows:

> The Chapter has nothing to do with the ordinary relationships between private persons or associations. What it does govern, however, is all law, including that applicable to private relationships. Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. As far as the Chapter is concerned a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry. One cannot claim rescission of a contract or specific performance thereof if such claim, albeit well-founded at common law, infringes a Chapter 3 right. One cannot raise a defence to a claim in law if such defence is in conflict with a protected right or freedom. The whole gamut of private relationships is left undisturbed. But the state, as the maker of the laws, the administrator of laws and the interpreter and applier of the law, is bound to stay within the four corners of Chapter 3. Thus, if a man claims to have the right to beat his wife, sell his daughter into bondage or abuse his son, he will not be allowed

> to raise as a defence to a civil claim or a criminal charge that he is entitled to do so at common law, under customary law or in terms of any statute or contract. That is a far cry from the spectre of the state placing its hand on private relationships. On the contrary, if it were to try to do so by legislation or administrative action, Sections 4, 7(1) and the whole of Chapter 3 would stand as a bastion of personal rights.

64. After the Final Constitution was adopted and it came into force on February 4, 1997, the first case to come up on this issue was Khumalo v. Holomisa MANU/SACC/0004/2002 : (2002) ZACC 12. In this case, Bantu Holomisa, the leader of the South African opposition political party sued a newspaper for publishing an Article alleging as though he was under a police investigation for his involvement with a gang of bank robbers. Heavy reliance was placed in this case on the majority decision of the Constitutional Court of South Africa in Du Plessis (supra). But as pointed out earlier, Du Plessis was a case which was decided at a time when South Africa had only an Interim Constitution. Therefore, while dealing with Khumalo (supra), the Constitutional Court of South Africa applied the Final Constitution, as it had come into force by then. What is relevant for our purpose is the opinion of the Constitutional Court in paragraph 33 which dealt with the enforcement of the rights against non-State actors. Paragraph 33 reads thus:

> [33] In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by Section 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by Section 8(3) of the Constitution.

65. The horizontal effect was taken to another extreme by the Constitutional Court of South Africa in Governing Body of the Juma Musjid Primary School and Ors. v. Essay N.O. and Ors. (CCT 29/10) MANU/SACC/0004/2011 : [2011] ZACC 13 : 2011 (8) BCLR 761 (CC) wherein was held that an eviction order obtained by the owner of a private land on which a public school was located, could not be enforced as it would impact the students' right to basic education and the best interests of the child under the South African Constitution (Sections 28 and 29). The Court held that a private landowner and non-State actor has a Constitutional obligation not to impair the right to basic education Under Section 29 of the Constitution. The relevant portion reads thus:

> [57] In order to determine whether the right to a basic education in terms of Section 29(1)(a) binds the Trust, Section 8(2) requires that the nature of the right of the learners to a basic education and the duty imposed by that right be taken into account. From the discussion in the previous paragraphs of the general nature of the right and the MEC's obligation in relation to it, the form of the duty that the right to a basic education imposed on the Trustees emerges. It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC. There was also no obligation on the Trust to make its property available to the MEC for use as a public school. A private landowner may do so, however, in accordance with Section 14(1) of the Act which provides that a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the property.
>
> [58] This Court, in Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct

> infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however that the purpose of Section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State.

66. Coming to the United Kingdom, they ratified the European Convention on Human Rights in 1951. But the rights conferred by the Convention had to be enforced by British citizens only in the European Court of Human Rights, for a long time. Finding that it took an average of five years to get an action in the European Court of Human Rights after all domestic remedies are exhausted and also finding that on an average, the same costed £ 30,000, a white paper was submitted in 1997 under the title "Rights Brought Home". This led to the enactment of the Human Rights Act, 1998 by the Parliament of the United Kingdom. It came into force on 2.10.2000 (coincidentally Gandhi Jayanti Day). This Act sought to incorporate into the domestic law, the rights conferred by the European Convention, so that the citizens need not go to the European Court of Human Rights in Strasbourg. After the enactment of the Human Rights Act, the horizontal effect of Convention Rights became the subject matter of debate in several cases.

67. For instance, Douglas v. Hello! Ltd. MANU/UKWA/0302/2000 : [2001] QB 967 was a case where the right to privacy of an individual was pitted against the right of free speech and expression. In that case, a magazine called OK! was given the exclusive right to publish the photographs of the wedding reception of a celebrity couple that took place at New York. On the day of the wedding, certain paparazzo had infiltrated the venue and took few unauthorized photographs which were shared with potential competitor viz. Hello! Ltd. (another magazine). Hello! published the photographs in the next issue of their magazine even before Ok! could publish it. The question before the Court of Appeal (Civil Division) was whether there was violation of right to privacy, among others and whether it could be enforced against a private person. The Court said:

> **49.** It follows that the ECtHR has recognised an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way which will achieve that result.
>
> **50.** Some, such as the late Professor Sir William Wade, in Wade & Forsyth Administrative Law (8th Ed.) p 983, and Jonathan Morgan, in Privacy, Confidence and Horizontal Effect:" Hello" Trouble (2003) CLJ 443, contend that the Human Rights Act should be given 'full, direct, horizontal effect'. The courts have not been prepared to go this far....
>
> ...
>
> **102.** To summarise our conclusion at this stage: disregarding the effect of the OK! contract, we are satisfied that the Douglases' claim for invasion of their privacy falls to be determined according to the English law of confidence. That law, as extended to cover private and personal information, protected information about the Douglases' wedding.

68. In X v. Y [2004] EWCA Civ 662, the Court of Appeals dealt with the case of an employee X, who was cautioned by the Police for committing a sex offence with another man in a public bathroom. The offence occurred when X was off duty. On finding about the incident, the employer Y suspended X and dismissed him after a disciplinary hearing. The dismissal was challenged as violative of Convention Rights. An argument was raised that these rights are not enforceable against private parties. Though on facts, the claim of the dismissed employee was

dismissed, the legal issue was articulated by the Court thus:

> **55.** The applicant invoked Articles 8 and 14 of the Convention in relation to his cause of action in private law.
>
> (1) As appears from the authorities cited in Section C above, Article 8 is not confined in its effect to relations between individuals and the state and public authorities. It has been interpreted by the Strasbourg court as imposing a positive obligation on the state to secure the observance and enjoyment of the right between private individuals.
>
> (2) If the facts of the case fall within the ambit of Article 8, the state is also under a positive obligation Under Article 14 to secure to private individuals the enjoyment of the right without discrimination, including discrimination on the ground of sexual orientation.
>
> (3) A person's sexual orientation and private sex life fall within the scope of the Convention right to respect for private life (see ADT v. UK [2000] 2 FLR 697) and the right to non-discrimination in respect that right. Interference with the right within Article 8.1 has to be justified Under Article 8.2.

69. In Platform "Arzte Fur Das Leben" v. Austria [1988] ECHR 15, a question arose as to the enforceability of the right to freedom of assembly against non-State actors, who obstructed the assembly. The case arose out of these facts. On 28 December 1980, the anti-abortion NGO "Arzte fur das Leben" (Physicians for Life) organised a religious service and a march to the clinic of a doctor who carried out abortions in Stadl-Paura. A number of counter-demonstrators disrupted the march to the hillside by mingling with the marchers and shouting down their recitation. At the end of the ceremony, special riot-control units - which had until then been standing by - formed a cordon between the opposing groups. One person caught in the act of throwing eggs was fined. The association lodged a disciplinary complaint against police for failing to protect the demonstration, which was refused. When the matter was taken to the Constitutional Court, it held that it had no jurisdiction over the case. Therefore, the association applied to the European Commission on 13 September 1982, alleging violation of Articles 9 (conscience and religion), 10 (expression), 11 (association) and 13 (effective remedy) of the European Convention on Human Rights. The European Court on Human Rights held:

> **32.** A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.
>
> Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (Article 11). Like Article 8 (Article 8), Article 11 (Article 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be (see, mutatis mutandis, the X and Y v. the Netherlands judgment of 26 March 1985, Series A No. 91, p. 11, § 23)

70. In X and Y v. The Netherlands [1985] ECHR 4, a privately-run home for children with mental disabilities was sued on the ground that a 16-year-old inmate was subjected to sexual assault. When the case was dismissed by the domestic court on a technical plea, the father of the victim approached the European Court of Human Rights. ECHR outlined the extent of State obligation on the protection of the right to life even against private persons as follows:

> **23.** The Court recalls that although the object of Article 8 (Article 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A No. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

71. Having taken an overview of the theoretical aspect of "verticality v. horizontality" and the approach of Constitutional Courts in other jurisdictions, let us now come back to the Indian context.

72. Part-III of the Indian Constitution begins with Article 12 which defines the expression "the State" to include the Government and the Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

73. After defining the expression "the State" in Article 12 and after declaring all laws inconsistent with or in derogation of the fundamental rights to be void Under Article 13, Part-III of the Constitution proceeds to deal with rights. There are some Articles in Part-III where the mandate is directly to the State and there are other Articles where without injuncting the State, certain rights are recognized to be inherent, either in the citizens of the country or in persons. In fact, there are two sets of dichotomies that are apparent in the Articles contained in Part III. One set of dichotomy is between (i) what is directed against the State; and (ii) what is spelt out as inhering in every individual without reference to the State. The other dichotomy is between (i) citizens; and (ii) persons. This can be illustrated easily in the form of a table as follows:

Sl. Nos.	Provisions containing a mandate to the State	Provisions declaring the rights of the individuals without reference to "the State"	on whom the right is conferred
1.	Article 14 mandates the State not to deny to any person equality before law or the equal protection of the laws within the of India.	-	Any person
2.	Article 15(1) mandates the State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.	-	Any citizen
3.	-	Article 15(2) mandates that no citizen shall be subject to any disability, liability, restriction or condition, with regard to-- (i) access to shops, public restaurants, hotels and places of public entertainment; or (ii) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of	Citizen

		State funds or dedicated to the use of general public, only on grounds of religion, race, caste, sex, place of birth or any of them.	
4.	Article 16(1) declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.	-	Only citizens
5.	Article 16(2) states that no citizen shall on grounds of only religion, race, caste, sex, descent, place of birth, resident or any of them be ineligible for or discriminated against in respect of any employment or office under the State.	-	Citizen
6.	-	Article 17 abolishes untouchability and forbids the practice of the same in any form and declares it to be a punishable offence.	Neither the word "citizen" nor the word "person" is mentioned in Article 17. It means that what is abolished is the practice and any violation of this injunction is punishable.
7.		Six types of rights are listed in Article 19(1), as available to all citizens.	Citizens
8.	Article 20 confers three different rights namely (i) not to be convicted except by the application of a law in force at the time of the commission of offence; (ii) not to be prosecuted and punished for the same offence more than once; and (iii) right against self-incrimination.	-	Persons
9.	-	Article 21 protects life and liberty of all persons.	Persons
10.	Article 21A mandates the State to provide free and compulsory education to all children of the age of six to fourteen years.	-	Children
11.	Article 22 provides protection against arrest and detention generally and saves preventive detention with certain limitations.	-	All persons except an enemy alien (Article 22(3) (a) makes the provision inapplicable to an

			enemy alien).
12.		Article 23(1) prohibits traffic in human beings and begar and other similar forms of forced labour. Any contravention is made a punishable offence.	Any person
13.	-	Article 24 prohibits the employment of children below the age of fourteen years in any factory or mine.	Children
14.	-	Article 25(1) declares the right of all persons to freedom of conscience and the right freely to profess, practice and propagate religion.	Persons
15.	-	Article 26 confers four different types of rights upon every religious denomination or any section thereof.	Religious denomination
16.	Article 27 confers right not to be compelled to pay any taxes, for the promotion of any particular religion.		Person
17.	-	Article 28(1) forbids religious instructions being provided in any educational institution wholly maintained out of State funds, with the exception of those established under any endowment or trust.	Person
18.	-	A right not to take part in any religious instruction imparted in an educational institution recognised by the State or receiving aid out of State funds, is conferred by Article 28(3).	Person
19.	-	A right to conserve the language, script or culture distinct to any part of the territory of India is conferred by Article 29(1).	Citizens
20.	A right not to be denied admission into any educational institution maintained by the State or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them is conferred by Article 29(2).	This applies to institutions maintained by the State or even to institutions receiving aid out of State funds.	Citizen
21.	(i) A right to establish and	-	Religious and

	a d m i n i s t e r educational institutions of their choice is conferred by Article 30(1) upon the religious as well as linguistic minorities. (ii) The State is mandated Under Article 30(2) not to discriminate against any educational institution while granting aid.		linguistic minorities
22.	-	The right to move the Supreme Court for the enforcement of the rights conferred by Part III is guaranteed Under Article 32.	The words "State", "citizen" or "person" are not mentioned in Article 32, indicating thereby that the right is available to one and all, depending upon which right is sought to be enforced.

74. The above table would show that some of the Articles of Part-III are in the form of a directive to the State, while others are not. This is an indication that some of the rights conferred by Part-III are to be honored by and also enforceable against, non-State actors.

75. For instance, the rights conferred by Articles 15(2)(a) and (b), 17, 20(2), 21, 23, 24, 29(2) etc., are obviously enforceable against non-State actors also. The owner of a shop, public restaurant, hotel or place of entertainment, though a non-State actor cannot deny access to a citizen of India on grounds only of religion, race etc., in view of Article 15(2)(a). So is the case with wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public, in view of Article 15(2)(b). The right not to be enforced with any disability arising out of untouchability is available against non-State actors Under Article 17. The right against double jeopardy, and the right against self-incrimination available Under Sub-articles (2) and (3) of Article 20 may also be available even against non-State actors in the case of prosecution on private complaints. We need not elaborate more, as the table given above places all rights in perspective.

76. That takes us to the question as to how the Courts in India have dealt with cases where there were complaints of infringement by non-State actors, of fundamental rights, other than those covered in column 2 of the Table in para 73 above. To begin with, this Court was weary of extending the enforcement of fundamental rights against private individuals. But this reluctance changed over a period of time. Let us now see how the law evolved:

(i) In P.D. Shamdasani (supra), a Five Member Bench of this Court was dealing with a writ petition Under Article 32, filed by a person who lost a series of proceedings both civil and otherwise, against the Central Bank of India Limited, which was at that time a company incorporated under Companies Act. The grievance of the Petitioner in that case was that the shares held by him in the company were sold by the bank in exercise of its right of lien for recovery of a debt. Therefore, the Petitioner pitched his claim Under Article 19(1)(f) and Article 31(1)(which was available at that time). But while making a comparison between Article 31(1) (as it stood at that time) and Article 21, both of which contained a declaration in the same negative form, this Court observed in P.D. Shamdasani as follows: "There is no express reference to the State in Article

21. But could it be suggested on that account that that Article was intended to afford protection to life and personal liberty against violation by private individuals? The words "except by procedure established by law" plainly exclude such a suggestion".

(ii) The aforesaid principle in P.D. Shamdasani was reiterated by another Five Member Bench of this Court in Smt. Vidya Varma v. Dr. Shiv Narain Varma MANU/SC/0072/1955 : AIR 1956 SC 108 holding that the language of Article 31(1) and Article 21 are similar and that they do not apply to invasions of a right by a private individual and that consequently no writ will lie in such cases.

(iii) In Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi MANU/SC/0667/1975 : (1975) 1 SCC 421 two questions arose before a Constitution Bench of this Court. One of the questions was whether an employee of a statutory corporation is entitled to protection of Articles 14 and 16 against the corporation on the premise that these statutory corporations are authorities within the meaning of Article 12. In his separate but concurring opinion, Mathew, J. pointed out that the concept of State has undergone drastic changes in recent years and that today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. The learned Judge quoted the decision of the US Supreme Court in Marsh v. Alabama MANU/USSC/0102/1946 : 326 US 501 (1946), where a person who was a Jehovah's witness was arrested for trespassing and distributing pamphlets, in a company town owned by a corporation. Though the property in question was private, the Court said that the operation of a town was a public function and that therefore, the private rights of the corporation must be exercised within constitutional limitations. After quoting the decision in Marsh, K.K. Mathew, J. went on to hold as follows:

> **95.** But how far can this expansion go? Except in very few cases, our Constitution does not, through its own force, set any limitation upon private action. Article 13(2) provides that no State shall make any law which takes away or abridges the rights guaranteed by Part III. It is the State action of a particular character that is prohibited. Individual invasion of individual right is not, generally speaking, covered by Article 13(2). In other words, it is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy Under Article 32 may be available against them. But, by and large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State...

(iv) In People's Union for Democratic Rights (supra) this Court pointed out that the fundamental right guaranteed Under Article 24 is enforceable against everyone, including the contractors. The Court went a step further by holding that the Union of India, the Delhi Administration and the Delhi Development Authority have a duty to ensure that this Constitutional obligation is obeyed by the contractors. Going further, this Court held that certain fundamental rights such as those found in Articles 17, 23 and 24 are enforceable against the whole world.

(v) S. Rangarajan (supra) was a case where a division Bench of the Madras High Court revoked the 'U' certificate issued to a Tamil feature film, on the ground that it offended the reservation policy. The Government of Tamil Nadu supported the decision of the High Court on the ground that several organizations in Tamil Nadu were agitating that the film should be banned as it hurt the sentiments of people belonging to the reserved categories. After pointing out that this Court was amused and troubled by the stand taken by the State Government, this Court indicated that it is the duty of the State to protect the freedom of expression since it is a liberty granted against the State and that the State cannot plead its inability to handle the hostile audience problem. Holding that

the State cannot negate the Rule of law and surrender to blackmail and intimidation, this Court said that it the obligatory duty of the Court to prevent it and protect the freedom.

(vi) In Smt. Nilabati, this Court made a distinction between, (i) the decision in Kasturi Lal upholding the State's plea of sovereign immunity for tortious acts of its servants, which was confined to the sphere of liability in tort; and (ii) the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme. In paragraph 34, which contains the separate but concurring opinion of Dr. A.S. Anand, J., the law was summarised as follows:

> **34.** The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings Under Article 32 by this Court or Under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed Under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings Under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

(vii) In Lucknow Development Authority v. M.K. Gupta MANU/SC/0178/1994 : (1994) 1 SCC 243 this Court pointed out that the administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides and that it is now accepted by both by this Court and English Courts that the State is liable to compensate for the loss or injury suffered by a citizen due to arbitrary actions of its employees.

(viii) The decision in Bodhisattwa Gautam (supra), arose under special circumstances. A girl student of a college lodged a complaint against a Lecturer for alleged offences Under Sections 312, 420, 493, 496 and 498A Indian Penal Code. The Lecturer moved the High Court Under Section 482 Code of Criminal Procedure for quashing the complaint. The High Court dismissed the quash petition. When the Lecturer filed a special leave petition, this Court not only dismissed the SLP but also issued notice suo motu on the question as to why he should not be asked to pay reasonable monthly maintenance during the pendency of the prosecution. Finally, this Court ordered payment of a monthly interim compensation after holding that what was violated was the fundamental right of the women Under Article 21 and that therefore a remedy can be provided by this Court Under Article 32 even against the non-state actor (namely the Accused). This decision was cited with approval in Chairman, Railway Board and Ors. v. Chandrima Das (Mrs.) and Ors. MANU/SC/0046/2000 : (2000) 2 SCC 465.

(ix) As rightly highlighted by the learned Amicus, this Court has awarded damages against non-State actors under the environmental law regime, whenever they were found to have violated the right Under Article 21. For instance this Court was concerned with a case in M.C. Mehta v. Kamal Nath MANU/SC/1007/1997 : (1997) 1 SCC 388 where a company built a club on the banks of River Beas, partly taken on lease from the Government and partly by encroaching into forest land and virtually turning the course of the River. Invoking the "polluter pays principle" and "precautionary principle" landscaped in Vellore Citizens' Welfare Forum v. Union of India MANU/SC/0686/1996 : (1996) 5 SCC 647 and also applied in Indian Council for Enviro-Legal Action v. Union of India MANU/SC/1112/1996 : (1996) 3 SCC 212, this Court held the owner of the private motel to be liable to pay compensation towards the cost of restoration of the ecology of the area. Thereafter, a show cause notice was issued to the motel as to why they should not be asked to pay compensation to reverse the degraded environment and as to why a pollution fine should not be imposed. In response, the motel contended before this Court that though in proceedings Under Article 32 it was open to this Court to grant compensation to the victims whose fundamental rights were violated or who are victims of arbitrary Executive action or victims of atrocious behavior of public authorities, the Court cannot impose any fine on those who are guilty of that action. The motel also contended that fine is a component of criminal jurisprudence and hence the imposition of fine would be violative of Articles 20 and 21. This Court, even while accepting the said argument in so far as the component of fine is concerned, directed the issue of fresh notice to the motel to show cause why exemplary damages be not awarded, in addition to the damages already awarded. Thereafter, this Court held in M.C. Mehta v. Kamal Nath (supra) MANU/SC/0416/2000 : (2000) 6 SCC 213 as follows:

> **10.** In the matter of enforcement of fundamental rights Under Article 21, under public law domain, the Court, in exercise of its powers Under Article 32 of the Constitution, has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the "POLLUTER-PAYS PRINCIPLE" which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment.

(x) In Consumer Education & Research Centre and Ors. v. Union of India and Ors. MANU/SC/0175/1995 : (1995) 3 SCC 42, this Court held that in appropriate cases the Court could give appropriate directions to the employer, be it the State or its undertaking or private employer, to make the right to life meaningful, to prevent pollution of work place, protection of environment, protection of the health of the workmen and to preserve free and unpolluted water for the safety and health of the people. The Court was dealing in that case with the occupational health hazards and diseases afflicting the workmen employed in asbestos industries. In paragraph 29 of the Report, this Court said, "...It is therefore settled law that in public law claim for compensation is a remedy available Under Article 32 or Article 226 for the enforcement and protection of fundamental and human rights.... It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law."

(xi) In Vishaka v. State of Rajasthan MANU/SC/0786/1997 : (1997) 6 SCC 241, this Court laid down guidelines, in the absence of a legislation, for the enforcement of the right to gender equality of working women, in a class action petition that was filed to enforce fundamental rights of working women and to prevent sexual harassment of women in workplace. The guidelines imposed an obligation upon both public and

private employers not to violate the fundamental rights guaranteed to working women Under Article 14, 15, 19(1)(g) and 21. In Medha Kotwal Lele and Ors. v. Union of India MANU/SC/0898/2012 : (2013) 1 SCC 297, this Court noted that even after 15 years of the judgment in Vishaka (supra), many States had not made the necessary amendments or failed to effectively implement the guidelines. This Court issued a direction in Paragraph 44.4:

> **4 4 . 4** The State functionaries and private and public sector undertakings/organisations/bodies/institutions, etc. shall put in place sufficient mechanism to ensure full implementation of Vishaka [Vishaka v. State of Rajasthan, MANU/SC/0786/1997 : (1997) 6 SCC 241 : 1997 SCC (Cri.) 932] guidelines and further provide that if the alleged harasser is found guilty, the complainant victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that harassment and intimidation of witnesses and the complainants shall be met with severe disciplinary action.

(xii) In Githa Hariharan (Ms.) and Anr. v. Reserve Bank of India and Anr. MANU/SC/0117/1999 : (1999) 2 SCC 228, this Court was dealing with a challenge to Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 which declared the father to be the natural guardian of the person and property of a minor son and unmarried daughter. The mother was recognised as the natural guardian under these provisions "after the father". These provisions resulted in hardship to spouses separated from each other while dealing with the wards. Reading the obligations of the State under certain International Conventions like CEDAW into the right to dignity of women and gender equality, traceable to Article 21 and 14, this Court read down the word "after" to mean "in the absence of". By such interpretation, this Court invoked fundamental rights to interpret a word in the sphere of family law.

(xiii) In Indian Medical Association v. Union of India MANU/SC/0608/2011 : (2011) 7 SCC 179, the policy of an Army College of Medical Sciences to admit only those who are wards of army personnel, based on scores obtained in an entrance test, was under challenge. The question that came up for consideration was whether this discriminatory practice by a private entity would be in violation of Article 15 of the Constitution. This Court in Paragraph 187 stated:

> **187.** Inasmuch as education, pursuant to T.M.A. Pai [MANU/SC/0905/2002 : (2002) 8 SCC 481], is an occupation Under Sub-clause (g) of Clause (1) of Article 19, and it is a service that is offered for a fee that takes care of all the expenses of the educational institution in rendering that service, plus a reasonable surplus, and is offered to all those amongst the general public, who are otherwise qualified, then such educational institutions would also be subject to the discipline of Clause (2) of Article 15. In this regard, the purport of the above exposition of Clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which equality of status and opportunity, and justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages.

(xiv) In Society for Unaided Private Schools of Rajasthan (supra), the constitutionality of Section 12 of the Right of Children to Free and Compulsory Education Act, 2009 was challenged on the ground that it violated Articles 19(1)(g) and 30 of those who had established schools in the private sector. While upholding the Constitutionality of the provision, which required all schools, private and State-funded, to reserve 25% of its intake for students from disadvantaged background, this Court held:

> **222.** The provisions referred to above and other provisions of international conventions indicate that the rights have been guaranteed to the children and those rights carry corresponding State obligations to respect, protect and fulfil the realisation of children's rights. The obligation to protect implies the horizontal right which casts an obligation on the State to see that it is not violated by non-State actors. For non-State actors to respect children's rights casts a negative duty of non-violation to protect children's rights and a positive duty on them to prevent the violation of children's rights by others, and also to fulfil children's rights and take measures for progressive improvement. In other words, in the spheres of non-State activity there shall be no violation of children's rights.

(xv) In Jeeja Ghosh v. Union of India MANU/SC/0574/2016 : (2016) 7 SCC 761, the Petitioner, a disabled person suffering from cerebral palsy, was unceremoniously ordered off a SpiceJet aircraft by the flight crew on account of the disability. The petition was filed for putting in place a system to ensure such a violation of human dignity and inequality is not meted out to similarly placed persons. This Court observed as follows:

> **10.** It is submitted by the Petitioner that the Union of India (Respondent 1) has an obligation to ensure that its citizens are not subject to such arbitrary and humiliating discrimination. It is a violation of their fundamental rights, including the right to life, right to equality, right to move freely throughout the territory of India, and right to practise their profession. The State has an obligation to ensure that these rights are protected -- particularly for those who are disabled....

This Court awarded compensation to the Petitioner against the private Airline on the ground that the airline, though a private enterprise, ought not to have violated her fundamental right.

(xvi) In Zee Telefilms Ltd. v. Union of India MANU/SC/0074/2005 : (2005) 4 SCC 649, this Court held that though BCCI does not fall within the purview of the term "State", it discharges public duties and that therefore even if a remedy Under Article 32 is not available, the aggrieved party can always seek a remedy before the ordinary courts of law or by way of a writ petition Under Article 226. This Court pointed out that the violator of a constitutional right could not go scot-free merely because it is not a State. The said logic was extended by this Court to a "Deemed to be University" in Janet Jeyapaul v. SRM University MANU/SC/1438/2015 : (2015) 16 SCC 530, on the ground that though it is a private university, it was discharging "public functions", by imparting education.

77. All the above decisions show that on a case-to-case basis, this Court applied horizontal effect, considering the nature of the right violated and the extent of obligation on the part of the violator. But to enable the courts to have certain basic guidelines in place, for dealing with such cases, this Court developed a tool in Justice K.S. Puttaswamy. While affirming the right to privacy as a fundamental right, this Court laid down the landscape as follows:

> **397.** Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: that a right must either be a common law right or a fundamental right. The only material distinctions between the two classes of right--of which the nature and content may be the same--lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the "State", as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being

individuals clothed with the powers of the State. It is perfectly possible for an interest to simultaneously be recognised as a common law right and a fundamental right. Where the interference with a recognised interest is by the State or any other like entity recognised by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-State actor, an action at common law would lie in an ordinary court.

398. Privacy has the nature of being both a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.

78. Thus, the answer to Question No. 2 is partly found in the 9-Judge Bench decision in Justice K.S. Puttaswamy itself. We have seen from the line of judicial pronouncements listed above that after A.K. Gopalan v. State of Madras MANU/SC/0012/1950 : AIR 1950 SC 27 lost its hold this Court has expanded the width of Article 21 in several areas such as health, environment, transportation, Education and Prisoner's life etc. As Vivian Bose, J., put it in a poetic language in S. Krishnan v. State of Madras MANU/SC/0008/1951 : AIR 1951 SC 301 "Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and "and" or "or ", or "may" and "must ". Look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution.". The original thinking of this Court that these rights can be enforced only against the State, changed over a period of time. The transformation was from "State" to "Authorities" to "instrumentalities of State" to "agency of the Government" to "impregnation with Governmental character" to "enjoyment of monopoly status conferred by State" to "deep and pervasive control"[6] to the "nature of the duties/functions performed"[7]. Therefore, we would answer Question No. 2 as follows:

A fundamental right Under Article 19/21 can be enforced even against persons other than the State or its instrumentalities

Question No. 3

79. "Whether the State is under a duty to affirmatively protect the rights of a citizen Under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?" is the third question referred to us.

80. Before we proceed further, it is necessary to make a small correction. Article 21 right is available not only to citizens but to all persons. Therefore, the word 'citizen' mentioned in Question No. 3 has to be read as 'person'.

81. As we have pointed out in the Table under paragraph 73 above, the expression "the State" is not used in Article 21. This Article 21 guarantees every person that he shall not be deprived of his life and liberty except according to the procedure established by law. Going by the scheme of Part-III which we have outlined both in the preceding paragraphs and in the Table in paragraph 73, it is clear that the State has two obligations, (i) not to deprive a person of his life and liberty except according to procedure established by law; and (ii) to ensure that the life and liberty of a person is not deprived even otherwise. Article 21 does not say "the State shall not deprive a person of his life and liberty", but says that "no person shall be deprived of his life or personal liberty".

82. When the Constitution was adopted, our understanding of the words "life" and "personal liberty" was not as it has evolved over the past seven decades. Similarly, it was not imagined or conceived at that time that anyone other than the State is capable of depriving the life and personal liberty of a person, except by committing a punishable offence. But with the expanding horizons of our philosophical understanding of law, life and liberty and the advancement of science and technology, we have come to realize that "life is not an empty dream" and "our hearts are not muffled drums beating funeral marches to the grave"[8], nor is "life a tale told by an idiot, full of sound and fury signifying nothing"[9].

83. Over a period of time, this Court has interpreted 'the right to life' to include, (i) livelihood; (ii) all those aspects of life which go to make a man's life meaningful, complete and worth living; (iii) something more than mere survival or animal existence; (iv) right to live (and die) with human dignity; (v) right to food, water, decent environment, medical care and shelter etc.; (vi) all that gives meaning to a man's life, such as his tradition, culture, heritage and protection of that heritage in its full measure; and (vii) the right to Privacy. There are certain jurisdictions which have taken this right to include "the right to be forgotten" or the "right not to be remembered".

84. When the word "life" was understood to mean only physical existence, the deprivation of the same was generally conceived to be possible only by the State, except in cases where someone committed an offence punishable under the Penal Code. But the moment the right to life Under Article 21 was developed into a bouquet of rights and science and technology intruded into all spheres to life, the deprivation of the right by non-State actors also became possible. Another development that has taken place in the past 3 to 4 decades is that several of the functions of the Government have either been out-sourced to non-State actors or been entrusted to public-private partnerships. This is why, the High Courts and this Court modulated the tests to be applied for finding out the maintainability of an action Under Article 226 or Article 32. Once upon a time, the maintainability of a petition Under Article 32/226 depended upon "who the Respondent was". Later, the focus shifted to "the nature of the duties/functions performed" by the Respondent, for finding out his amenability to the jurisdiction Under Article 226.

85. Life and personal liberty are two different things, even while being an integral part of a whole and they have different connotations. Question No. 3 is so worded that the focus is not on 'deprivation of life' but on (i) 'deprivation of personal liberty' and that too by the acts or omissions of another person or private agency; and (ii) the duty of the State to affirmatively protect it. Therefore, we shall, in our discussion, focus more on two aspects, namely, (i) deprivation of personal liberty by non-State actors; and (ii) the duty of the State. An elaborate exposition of the expression "personal liberty" and its origin in Greek civilization may be found in the judgment of this Court in Siddharam Satlingappa Mhetre v. State of Maharashtra MANU/SC/1021/2010 : (2011) 1 SCC 694. Suffice it to say for our purpose that in this judgment, this Court identified in paragraph 53 of the Report that Article 21 guarantees two rights, namely, (i) right to life; and (ii) right to personal liberty. Therefore, because of the manner in which Question No. 3 is framed, we shall try to confine our discussion to personal liberty, though at times both may overlap or get interchanged.

86. The expression "personal liberty" appearing in Article 21 was held by this Court in A.K. Gopalan (supra) to mean freedom from physical restraint of a person by incarceration or otherwise. However, the understanding of the expression "personal liberty" got enlarged in Kharak Singh v. State of U.P. MANU/SC/0085/1962 : AIR 1963 SC 1295. It was a case where a person who was originally charged for the offence of dacoity and later released for lack of evidence, was put under surveillance by the Police, and his name included in the history-sheet under the U.P. Police Regulations. As a result, he was required to make frequent visits to the Police Station. Sometimes the Police made domiciliary visits at night to his house. They would knock at the door, disturb his sleep and ask to report to the Police, whenever he went out of the village. Though by a majority, the Constitution Bench held in Kharak Singh (supra) that the Regulation permitting domiciliary visits is unconstitutional, the majority upheld the Police surveillance on the ground that (at that time) right to privacy had not become part of the fundamental rights. But K. Subba Rao, J. speaking for himself and J.C. Shah, J. held that the concept of personal liberty in Article 21 is comprehensive enough to include privacy. The thinking reflected in A.K. Gopalan that physical restraint was necessary to constitute infringement of personal liberty, was completely changed by K. Subba Rao, J. in his minority opinion in Kharak Singh. Giving a completely new dimension to personal liberty, K. Subba Rao, J. said:

(31)...The expression is wide enough to take in a right to be free from restrictions

> placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in (1948) 338 US 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. It so understood, all the acts of surveillance Under Regulation 236 infringe the fundamental right of the Petitioner Under Article 21 of the Constitution.

As pointed out by Rohinton Nariman, J., in Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India and Ors. MANU/SC/0754/2014 : (2014) 9 SCC 737 "The minority judgment of Subba Rao and Shah, JJ. eventually became law in Rustom Cavasjee Cooper v. Union of India MANU/SC/0011/1970 : (1970) 1 SCC 248 (Bank Nationalisation case), where the 11-Judge Bench finally discarded the view expressed in A.K. Gopalan and held that various fundamental rights contained in different articles are not mutually exclusive...".

87. If U.P. Police Regulations were challenged in Kharak Singh, identical Regulations issued by the State of Madhya Pradesh were challenged in Gobind v. State of Madhya Pradesh MANU/SC/0119/1975 : (1975) 2 SCC 148. Though this Court upheld the impugned Regulations, K.K. Mathew, J. pointed out:

> **25.** Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality, and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against Government" a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.
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> **27.** There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures. [See 26 Stanford Law Rev. 1161, 1187]

88. Thus, the understanding of this Court in A.K. Gopalan, that deprivation of personal liberty required a physical restraint, underwent a change in Kharak Singh and Gobind (supra). From there, the law marched to the next stage in Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer, New Delhi MANU/SC/0040/1967 : AIR 1967 SC 1836 where a Constitution Bench of this Court held by a majority, that the right to personal liberty included the right of locomotion and right to travel abroad. It was held in the said decision that "liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. Constitution and the expression "personal liberty" in Article 21 only excludes the ingredients of "liberty" enshrined in Article 19 of the Constitution. The Court went on to hold that "the expression "personal liberty" in Article 21 takes in the right of loco-motion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Article 19."

89. Satwant Singh (supra) was the case of a businessman, who was directed to surrender his passport, with a view to prevent him from travelling out of India, on account of an investigation pending against him under the Export and Import Control Act. It must be noted that this case was before the enactment of The Passports Act, 1967.

90. After The Passports Act came into force, the decision of the 7-Judge Bench in Maneka Gandhi v. Union of India MANU/SC/0133/1978 : (1978) 1 SCC 248 came. It was held therein that the right to travel abroad is part of the right to personal liberty and that the same cannot be deprived except according to the procedure established by law.

91. Next came the decision in Bandhua Mukti Morcha v. Union of India and Ors. MANU/SC/0051/1983 : (1984) 3 SCC 161. It was a case where a letter addressed by an NGO to the Court exposing the plight of persons working in stone quarries under inhuman conditions, was treated as a public interest litigation. Some of those workers were actually bonded labourers. After this Court issued notice to the State Governments and the lessees of the quarries, a preliminary objection was raised as to the maintainability of the writ petition. While rejecting the preliminary objection, this Court broadly indicated how the fundamental rights of those bonded labourers were violated and what were the duties of the State and the Court in cases of that nature. The relevant portion of the decision reads thus:

> **9.**... We should have thought that if any citizen brings before the Court a complaint that a large number of peasants or workers are bonded serfs or are being subjected to exploitation by a few mine lessees or contractors or employers or are being denied the benefits of social welfare laws, the State Government, which is, under our constitutional scheme, charged with the mission of bringing about a new socio-economic order where there will be social and economic justice for everyone and equality of status and opportunity for all, would welcome an enquiry by the Court, so that if it is found that there are in fact bonded labourers or even if the workers are not bonded in the strict sense of the term as defined in the Bonded Labour System (Abolition) Act, 1976 but they are made to provide forced labour or are consigned to a life of utter deprivation and degradation, such a situation can be set right by the State Government. Even if the State Government is on its own enquiry satisfied that the workmen are not bonded and are not compelled to provide forced labour and are living and working in decent conditions with all the basic necessities of life provided to them, the State Government should not baulk an enquiry by the Court when a complaint is brought by a citizen, but it should be anxious to satisfy the Court and through the Court, the people of the country, that it is discharging its constitutional obligation fairly and adequately and the workmen are being ensured social and economic justice....

92. Therefore, three major breakthroughs happened, the first in Kharak Singh, the second in Satwant Singh and Maneka Gandhi (supra) and the third in Bandhua Mukti Morcha (supra). The first breakthrough was the opinion, though of a minority, that physical restraint was not a necessary sine qua non for the deprivation of personal liberty and that even a psychological restraint may amount to deprivation of personal liberty. The second breakthrough was the

opinion in Satwant Singh and Maneka Gandhi that the right of locomotion and to travel abroad are part of the right to personal liberty. The third breakthrough was the opinion in Bandhua Mukti Morcha that the State owed an obligation to take corrective measures when there was an infraction of Article 21.

93. In National Human Rights Commission v. State of Arunachal Pradesh and Anr. MANU/SC/1047/1996 : (1996) 1 SCC 742, this Court was confronted with a situation where private citizens, namely, the All Arunachal Pradesh Students' Union held out threats to forcibly drive chakmas, out of the State. The National Human Rights Commission itself filed a writ petition Under Article 32. While allowing the writ petition and issuing directions, this Court indicated the role of the State in the following words:

> **20.**...Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty-bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics....

94. In Mr. 'X' v. Hospital 'Z' MANU/SC/0733/1998 : (1998) 8 SCC 296, the Appellant had accompanied a patient to the hospital for treatment and offered to donate blood, for the purpose of surgery. Before allowing him to donate blood, samples were taken from "X". It was detected that he was HIV positive. The fact that Mr. "X" tested positive was disclosed by the hospital to the fiancee of Mr. "X". Therefore, the proposal for marriage was called off and Mr. "X" was ostracised by the community. Mr. "X" sued the hospital for damages, pitching his claim on the right to privacy and the duty of confidentiality that the hospital had in their relationship with him. Though this Court partly agreed with Mr. "X" the court found that the disclosure made by the hospital actually saved the life of a lady. But while dealing with a right Under Article 21 vis-à-vis the hospital (a private hospital), this Court held as follows:

> **27.** Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed.
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> **28.** Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

95. In Pt. Parmanand Katara (supra), a human rights activist filed a writ petition Under Article 32 seeking a direction to the Union of India that every injured person brought for treatment to a hospital should instantaneously be given medical aid to preserve life and that the procedural Criminal Law should be allowed to operate thereafter. The basis of the said writ petition was a report about a scooterist who got injured in a road traffic accident, being turned away by the nearby hospital on the ground that they were not authorized to handle medico-legal cases.

Before the victim could be taken to an authorized hospital located 20 kilometers away, he died, which prompted the writ petition. While issuing directions, this Court expressed an opinion about the affirmative duty of court in paragraph 8 as follows:

> **8.** Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasized and reiterated with gradually increasing emphasis that position. A doctor at the government hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way....

That the State has an obligation to help preserve life, guaranteed Under Article 21 was spelt out clearly in Pt. Parmanand Katara. What applies to life applies equally to personal liberty. This is because there may be cases involving both the right to life as well as liberty.

9 6 . For instance, in Suchita Srivastava and Anr. v. Chandigarh Administration MANU/SC/1580/2009 : (2009) 9 SCC 1, this Court had an occasion to consider the reproductive rights of a mentally-challenged woman. This right was read as part of the right to life and liberty Under Article 21. In Devika Biswas v. Union of India MANU/SC/0999/2016 : (2016) 10 SCC 726, this Court considered certain issues concerning the entire range of conduct and management, under the auspices of State Governments, of sterilization procedures, either in camps or in accredited centres and held that the right to health and reproductive rights of a person are part of the right Under Article 21. While doing so, this Court quoted with approval the decision in Bandhua Mukti Morcha where the obligation of the State to ensure that the fundamental rights of weaker Sections of society are not exploited, was underlined.

97. Tapping of telephones in exercise of the power conferred by Section 5(2) of the Indian Telegraph Act, 1885 became the subject matter of challenge in People's Union for Civil Liberties (PUCL) v. Union of India MANU/SC/0149/1997 : (1997) 1 SCC 301. This Court held tha conversation on telephone is an important facet of a man's private life and that tapping of telephone would infringe Article 21. Technological eavesdropping except in accordance with the procedure established by law was frowned upon by the Court. This was at a time when mobile phones had not become the order of the day and the State monopoly was yet to be replaced by private players such as intermediaries/service providers. Today, the infringement of the right to privacy is mostly by private players and if fundamental rights cannot be enforced against non-State actors, this right will go for a toss.

98. In District Registrar and Collector, Hyderabad and Anr. v. Canara Bank and Ors. MANU/SC/0935/2004 : (2005) 1 SCC 496, what was under challenge was an amendment made to The Indian Stamp Act, 1899 by the State of Andhra Pradesh, empowering a public officer to inspect the registers, books, papers and documents kept in any premises, including a private place where such registers, books etc., are kept. Taking cue from the decision in R. Rajagopal and Maneka Gandhi, this Court held in paragraphs 55 and 56 of the decision as follows:

> **55.** The A.P. Amendment permits inspection being carried out by the Collector by having access to the documents which are in private custody i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents "tending" to or leading to the various facts stated in Section 73 are in existence and Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to R. Rajagopal case [MANU/SC/0056/1995 : (1994) 6 SCC 632]wherein the learned Judges have held that the right to personal liberty also means life free from

encroachments unsustainable in law, and such right flowing from Article 21 of the Constitution.

56. In Maneka Gandhi v. Union of India [MANU/SC/0133/1978 : (1978) 1 SCC 248] a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection Under Article 19 (emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred Under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21.

99. In Indian Woman says Gang-raped on orders of village Court published in Business and Financial News dated 23-1-2014, in Re MANU/SC/0242/2014 : (2014) 4 SCC 786, this Court was dealing with a suo motu writ petition relating to the gang-rape of a women Under Orders of a community panchayat as punishment for having a relationship with a man belonging to a different community. After taking note of two earlier decisions, one in Lata Singh v. State of U.P. MANU/SC/2960/2006 : (2006) 5 SCC 475 which dealt with honour killings of youngsters involved in inter-caste, inter-religious marriages and the other in Arumugam Servai v. State of Tamil Nadu MANU/SC/0434/2011 : (2011) 6 SCC 405, which dealt with khap panchayats, this Court opined in paragraph 16 as follows:

16. Ultimately, the question which ought to consider and assess by this Court is whether the State police machinery could have possibly prevented the said occurrence. The response is certainly a "yes". The State is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the State's incapacity or inability to protect the fundamental rights of its citizens.

In fact, this Court observed in the aforesaid decision that the obligation of the State does not get extinguished upon payment of compensation and that the rehabilitation of the victims of such nature was a must.

100. In Shakti Vahini v. Union of India and Ors. MANU/SC/0291/2018 : (2018) 7 SCC 192, while dealing with a writ petition seeking a direction to the State Governments and Central Government to take preventive measures to combat honour crimes and to submit a National/State plan of action, this Court issued a slew of directions directing the State Governments to take both punitive and remedial measures, on the ground that the State has a positive obligation to protect the life and liberty of persons. In paragraph 49 this Court said, "We are disposed to think so, as it is the obligation of the State to have an atmosphere where the citizens are in a position to enjoy their fundamental rights." After quoting the previous decision in S. Rangarajan (supra), which arose out of the infringement of the freedom of expression in respect of a cinematograph film, this Court said in Shakti Vahini (supra) as follows:

49....

We are absolutely conscious that the aforesaid passage has been stated in respect of a different fundamental right, but the said principle applies with more vigour when the life and liberty of individuals is involved. We say so reminding the States of their constitutional obligations to comfort, nurture the sustenance of fundamental rights of

the citizens and not to allow any hostile group to create any kind of trench in them.

101. At last, while dealing with the right to privacy, in Justice K.S. Puttaswamy, this Court made it clear that, "it is a right which protects the inner sphere of the individuals from interference by both the State and non-State actors".

102. Before we conclude this chapter, we must point out that some academics feel that the same level of justification for infringement by the State, for all rights recognized by the Court, end up being problematic[10] and that the idea of a hierarchy of rights, as articulated by Das, J. in A.K. Gopalan may have to be examined. In fact, Rohinton Nariman, J. articulated this idea in Mohd. Arif (supra) where the question was as to whether a petition for review in the Supreme Court should be heard in open Court at least in death penalty cases. The learned Judge said:

> **36.** If a pyramidical structure is to be imagined, with life on top, personal liberty (and all the rights it encompasses under the new doctrine) immediately below it and other fundamental rights below personal liberty it is obvious that this judgment will apply only to death sentence cases. In most other cases, the factors mentioned by Krishna Iyer, J. in particular the Supreme Court's overcrowded docket, and the fact that a full oral hearing has preceded judgment of a criminal appeal on merits, may tilt the balance the other way.

Therefore, the importance of the right to personal liberty over and above all the other rights guaranteed Under Articles 19 and 14 need hardly to be over-emphasized.

103. Therefore, our answer to Question No. 3 would be that the State is under a duty to affirmatively protect the rights of a person Under Article 21, whenever there is a threat to personal liberty, even by a non-State actor.

Question No. 4

104. Question No. 4 referred to us is this: "Can a statement made by a Minister, traceable to any affairs of the State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?"

105. The above question revolves around the role and responsibility of a Minister and the vicarious liability/responsibility of a Government to any statement made by him. For answering the said question, we may need to understand the role of a Minister under our Constitutional scheme.

106. Part V of the Constitution providing for matters connected with "The Union" contains five chapters, dealing respectively with, (i) the Executive; (ii) Parliament; (iii) Legislative powers of the President; (iv) the Union Judiciary; and (v) Comptroller and Auditor General of India. Part VI of the Constitution dealing with "The States" contains six chapters, dealing respectively with, (i) general provision containing the definitions; (ii) the Executive; (iii) the State Legislature; (iv) Legislative power of the Governor; (v) the High Courts in the States; and (vi) Subordinate Courts.

107. While Articles 74 and 75 provide for, (i) 'Council of Ministers to aid and advise the President'; and (ii) 'Other provisions as to Ministers', insofar as the Union is concerned, Articles 163 and 164 provide for, (i) 'Council of Ministers to aid and advise the Governor'; and (ii) 'Other provisions as to Ministers', insofar as the States are concerned. Similarly, Article 77 provides for the conduct of business of the Government of India and Article 166 provides for the conduct of business of the Government of a State. The duties of the Prime Minister are dealt with in Article 78 and the duties of Chief Ministers are dealt with in Article 167.

108. Article 75(3) states that "the Council of Ministers shall be collectively responsible to the House of the People." Similarly, Article 164(2) states "the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State".

109. Generally, all executive action of the Government of India shall be expressed to be taken in the name of the President Under Article 77(1). However, for more convenient transaction of the business of the Government of India, the President shall make Rules. These Rules shall also provide for the allocation of the business among Ministers. This is Under Article 77(3). Similar provisions are found in Sub-articles (1) and (3) of Article 166.

110. There are special duties assigned to the Prime Minister and the Chief Ministers, Under Articles 78 and 167 respectively.

111. While dealing with the scheme of Article 166(3), the Constitution Bench of this Court pointed out in A. Sanjeevi Naidu v. State of Madras MANU/SC/0381/1970 : (1970) 1 SCC 443, that under our Constitution, the Governor is essentially a constitutional head and the administration of the State is run by the Council of Ministers. Since it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government, the Governor is authorized Under Article 166(3) to make Rules for the more convenient transaction of the business of the Government of the State and for allocation amongst its Ministers the business of the Government. In paragraph 10 of the said decision, the Constitution Bench spoke about "joint responsibility" and not about collective responsibility. The relevant portion of paragraph 10 reads as follows:

> **10.** The cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Council of Ministers to discharge all or any of the Governmental functions. Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility....

112. The expression "collective responsibility" can be traced to some extent, to Article 75(3) insofar as the Union is concerned and to Article 164(2) insofar as the States are concerned. But in both the Articles, it is the Council of Ministers who are stated to be collectively responsible to the House of the People/Legislative Assembly of the State. Generally collective responsibility of the Council of Ministers either to the House of the People or to the Assembly should be understood to correlate to the decisions and actions of the Council of Ministers and not to every statement made by every individual Minister.

113. In State of Karnataka v. Union of India MANU/SC/0144/1977 : (1977) 4 SCC 608, a Seven Member Constitution Bench of this Court, while dealing with a challenge made by the State of Karnataka in the form of a civil suit Under Article 131, to the appointment by the Central Government, of a commission of enquiry against the Chief Minister of Karnataka, had an occasion to consider the exposition of the words "collective responsibility" appearing in Article 164(2). After indicating that collective responsibility is basically political in origin and mode of operation, Beg, C.J. opined in the said case as follows:

> **46.** The object of collective responsibility is to make the whole body of persons holding Ministerial office collectively, or, if one may so put it, "vicariously" responsible for such acts of the others as are referable to their collective volition so that, even if an individual may not be personally responsible for it, yet, he will be deemed to share the responsibility with those who may have actually committed some wrong....
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> **47.** Each Minister can be and is separately responsible for his own decisions and acts and omissions also. But, inasmuch as the Council of Ministers is able to stay in office only so long as it commands the support and confidence of a majority of members of the Legislature of the State, the whole Council of Ministers must be held to be politically responsible for the decisions and policies of each of the Ministers and of his department which could be presumed to have the support of the whole Ministry. Hence, the whole Ministry will, at least on issues involving matters of policy, have to be treated as one entity so far as its answerability to the Legislative Assembly

representing the electors is concerned. This is the meaning of the principle underlying Article 164(2) of the Constitution. The purpose of this provision is not to find out facts or to establish the actual responsibility of a Chief Minister or any other Minister or Ministers for particular decisions or Governmental acts. That can be more suitably done, when wrongful acts or decisions are complained of, by means of inquiries under the Act. As already indicated above, the procedure of Parliamentary Committees to inquire into every legally or ethically wrong act was found to be unsatisfactory and unsound. The principle of individual as well as collective ministerial responsibility can work most efficiently only when cases requiring proper sifting and evaluation of evidence and discussion of questions involved have taken place, where this is required, in proceedings before a Commission appointed Under Section 3 of the Act.

48. Text-book writers on Constitutional Law have indicated how collective ministerial responsibility to Parliament, which has essentially a political purpose and effects, developed later than individual responsibility of Ministers to Parliament which was also political in origin and operation. It is true that an individual Minister could, in England, where the principle of individual and collective responsibility of Ministers was evolved, be responsible either for wrongful acts done by him without the authority of the whole cabinet or of the monarch to support them, or Under Orders of the King who could, in the eye of law, do no wrong. But, apart from an impeachment, which has become obsolete, or punishment for contempts of a House, which constitute only a limited kind of offences, the Parliament does not punish the offender. For establishing his legal liability recourse to ordinary courts of law is indispensable.

114. Quoting from Wade and Phillips on Constitutional Law, this Court pointed out in the State of Karnataka (supra) that "responsibility to Parliament only means that the Minster may be compelled by convention to resign."

115. The extent to which the enforcement of collective responsibility can be taken was also indicated in the above decision as follows:

50. The whole question of responsibility is related to the continuance of a Minister or a Government in office. A Minister's own acts or omissions or those of others in the department in his charge, for which he may feel morally responsible, or, for which others may hold him morally responsible, may compel him to resign. By an extension of this logic, applied to individual Ministers at first, emerged the principle of "collective responsibility" which we find enacted in Articles 75(2) and 164(2) of our Constitution. The only sanction for its enforcement is the pressure of public opinion expressed particularly in terms of withdrawal of political support by members of Parliament or the State Legislature as the case may be.

116. In other words, this Court indicated that while a Minister may be compelled to resign for his individual acts of omission or commission, the only sanction for the enforcement of collective responsibility is the "pressure of public opinion".

117. In R.K. Jain v. Union of India MANU/SC/0291/1993 : (1993) 4 SCC 119, this Court was concerned with a public interest litigation relating to the functioning of the Customs, Excise and Gold Control Appellate Tribunal. At that time the office of the President of the Tribunal was lying vacant for over six months. But after Rule nisi was issued in the first writ petition, the Government appointed someone as the President of the Tribunal. Immediately, a second writ petition was filed challenging the appointment and also some of the recruitment Rules relating to the appointment. The file relating to the appointment was produced in a sealed cover and the Government claimed privilege in terms of Section 123 of the Indian Evidence Act, 1872 and Article 74(2) of the Constitution. While dealing with the executive power of the President and the role of the Council of Ministers, K. Ramasamy, J., said "The principle of ministerial responsibility has a variety of meanings precise and imprecise, authentic and vague". Paragraphs 29 and 30 of the report in R.K. Jain (supra) may be usefully extracted as follows:

29. It would thus be held that the Cabinet known as Council of Ministers headed by Prime Minister Under Article 75(3) is the driving and steering body responsible for the governance of the country. They enjoy the confidence of the Parliament and remain in office so long as they maintain the confidence of the majority. They are answerable to the Parliament and accountable to the people. They bear collective responsibility and shall be bound to maintain secrecy. Their executive function comprises of both the determination of the policy as well as carrying it into execution, the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, direction of foreign policy. In short the carrying on or supervision of the general administration of the affairs of Union of India which includes political activity and carrying on all trading activities, the acquisition, holding and disposal of property and the making of contracts for any purpose. In short the primary function of the Cabinet is to formulate the policies of the Government in conformity with the directive principles of the Constitution for the governance of the nation; place the same before the Parliament for acceptance and to carry on the executive function of the State as per the provisions of the Constitution and the laws.

3 0 . Collective responsibility Under Article 75(3) of the Constitution inheres maintenance of confidentiality as enjoined in oaths of office and of secrecy set forth in Schedule III of the Constitution that the Minister will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under his/her consideration or shall become known to him/her as Minister except as may be required for the "due discharge of his/her duty as Minister". The base and basic postulate of its significance is unexceptionable. But the need for and effect of confidentiality has to be nurtured not merely from political imperatives of collective responsibility envisaged by Article 75(3) but also from its pragmatism.

118. In paragraph 33 of the report in R.K. Jain, this Court indicated that the Cabinet as a whole is collectively responsible for the advice tendered to the President and for the conduct of business of each of his/her department. The question as to what happens when an individual Minister is in total disagreement with the collective decision of the Cabinet was also spelt out in R.K. Jain in the following words:

33....Each member of the Cabinet has personal responsibility to his conscience and also responsibility to the Government. Discussion and persuasion may diminish disagreement, reach unanimity, or leave it unaltered. Despite persistence of disagreement, it is a decision, though some members like it less than others. Both practical politics and good government require that those who like it less must still publicly support it. If such support is too great a strain on a Minister's conscience or incompatible to his/her perceptions of commitment and he/she finds it difficult to support the decision, it would be open to him/her to resign. So the price of the acceptance of Cabinet office is the assumption of the responsibility to support Cabinet decisions. The burden of that responsibility is shared by all.

119. In Secretary, Jaipur Development Authority, Jaipur (supra), the abuse of official position by the Minister of Urban Development and Housing Department and the officers working in the Jaipur Development Authority in the matter of allotment of plots became the subject matter. While dealing with the question of individual and collective accountability and responsibility of Ministers, this Court said in paragraph 10 as follows:

10....The Governor runs the Executive Government of a State with the aid and advice of the Chief Minister and the Council of Ministers which exercise the powers and performs its duties by the individual Ministers as public officers with the assistance of the bureaucracy working in various departments and corporate sectors etc. Though they are expressed in the name of the Governor, each Minister is personally and collectively responsible for the actions, acts and policies. They are accountable and answerable to the people. Their powers and duties are regulated by the law and the rules. The legal and moral responsibility or liability for the acts done or omissions,

duties performed and policy laid down rest solely on the Minister of the Department. Therefore, they are indictable for their conduct or omission, or misconduct or misappropriation. The Council of Ministers are jointly and severally responsible to the Legislature. He/they is/are also publicly accountable for the acts or conducts in the performance of duties.

120. Again, in paragraph 11, this Court outlined the responsibility of the Ministers as follows:

> **11.** The Minister holds public office though he gets constitutional status and performs functions under the Constitution, law or executive policy. The acts done and duties performed are public acts or duties as the holder of public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society governed by Rule of law, power is conferred on the holder of the public office or the authority concerned by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, Under Rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the Rule of law to further socio-economic democracy. The Executive Government should frame its policies to maintain the social order, stability, progress and morality. All actions of the Government are performed through/by individual persons in collective or joint or individual capacity. Therefore, they should morally be responsible for their actions.

121. In Vineet Narain v. Union of India MANU/SC/0827/1998 : (1998) 1 SCC 226, this Court was concerned with a public interest litigation Under Article 32 complaining about the inaction on the part of the Central Bureau of Investigation in a matter relating to the disclosures contained in what came to be known as "Jain Diaries". After taking note of the Report of Lord Nolan on "Standards in Public Life", this Court issued certain directions, though confined only to the Central Bureau of Investigation, Enforcement Directorate and Prosecution Agency. But Lord Nolan's Report dealt mainly with principles of public life and code of conduct.

122. The decision in Common Cause was little peculiar and riddled with some problems. The allotment of petroleum outlets by the then Minister of State for Petroleum and Natural Gas, under what was claimed to be a discretionary quota, was first set aside by this Court by a judgment reported in MANU/SC/0976/1996 : (1996) 6 SCC 530. Simultaneously, a show-cause notice was issued to the then Minister Capt. Satish Sharma as to why a criminal complaint should not be lodged against him and why he should not be directed to pay damages for his malafide action in wrongfully allotting the petrol outlets. After the Minister responded to the show-cause notice, an order was passed, reported in MANU/SC/1287/1996 : (1996) 6 SCC 593, directing the Minister to pay exemplary damages and also directing the initiation of prosecution. Later, a petition for review was filed by the Minister for recalling the order which directed payment of exemplary damages and also the registration of a case by the Central Bureau of Investigation. The decision in the petition for review, reported in MANU/SC/0437/1999 : (1999) 6 SCC 667, dealt with the question of collective responsibility in the context of the contention raised. It was argued by the delinquent Minister in the said case that under the business Rules of the Cabinet, the act of a Minister is to be treated as the act of the President or the Governor as the case may be and that therefore the allotment made by him should be treated to have been made while acting only on behalf of the President. As an extension of this argument, it was also contended that the Minister having acted as a part of the Council of Ministers, his act should be treated to be the act of the entire Cabinet on the principle of collective responsibility. While rejecting the said contention, this Court held in Common Cause that the immunity available to the President Under Article 361 of the Constitution cannot be extended to the orders passed in the name of the President Under Article 77(1) or 77(2). Dealing with the concept of collective responsibility, this Court held in paragraph 31 as follows:

> **31.** The concept of "collective responsibility" is essentially a political concept. The country is governed by the party in power on the basis of the policies adopted and laid

> down by it in the Cabinet meeting. "Collective responsibility" has two meanings: the first meaning which can legitimately be ascribed to it is that all members of a Government are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for its success and failure.

123. After having dealt with the concept of collective responsibility, this Court carved out an exception in paragraph 34 as follows:

> **34.** From the above, it will be seen that in spite of the fact that the Council of Ministers is collectively responsible to the House of the People, there may be an occasion where the conduct of a Minister may be censured if he or his subordinates have blundered and have acted contrary to law.

124. Again in paragraph 36 this Court held as follows:

> **36.** Even in England, all Ministers and servants of the Crown are accountable to the courts for the legality of their actions, and may be held civilly and criminally liable, in their individual capacities, for tortious or criminal acts. This liability may be enforced either by means of ordinary criminal or civil proceedings or by means of impeachment, a remedy which is probably obsolete. They are also subject to the judicial review jurisdiction of the courts. [See: Halsbury's Laws of England, Fourth Edn., (Re-issue), Vol. 8(2), para 422.]

125. In State (NCT of Delhi) v. Union of India MANU/SC/0680/2018 : (2018) 8 SCC 501, the Constitution Bench of this Court was concerned with the interpretation of Article 239AA of the Constitution. The concept of collective responsibility was dealt with extensively by Dipak Misra, C.J., as he then was, from paragraphs 82 to 85. In his independent but concurring opinion Dr. D.Y. Chandrachud, J. also dealt with the question of collective responsibility from paragraphs 318 onwards.

126. What follows from the above discussion is, (i) that the concept of collective responsibility is essentially a political concept; (ii) that the collective responsibility is that of the Council of Ministers; and (iii) that such collective responsibility is to the House of the People/Legislative Assembly of the State. Generally, such responsibility correlates to (i) the decisions taken; and (ii) the acts of omission and commission done. It is not possible to extend this concept of collective responsibility to any and every statement orally made by a Minister outside the House of the People/Legislative Assembly.

127. Shri Kaleeswaram Raj, learned Counsel appearing for the special leave Petitioner drew our attention to the code of conduct for Ministers of the Government of Australia, code of conduct for Ministers of the Government of India and the Ministerial Code of the United Kingdom. However, attractive such prescriptions may be, it is not possible to enforce such code of conduct in a court of law. Government servants stand on a different footing, as any misconduct on their part with reference to the Government Servants (Conduct) Rules, may attract disciplinary action under the Civil Services (Discipline and Appeal) Rules. Even in the case of Government servants, it may not be possible to justify a dismissal/removal from service on the basis of a statement uttered by a Government servant, as it may not pass the proportionality test, viz-a-viz the gravity of the misconduct.

128. The suggestion made by Shri Kaleeswaram Raj that the Prime Minister, in the case of a Minister of the Union of India and the Chief Minister, in the case of a Minister of the State should be allowed to take appropriate action, against the erring Minister, is just fanciful. The Prime Minister or the Chief Minister does not have disciplinary control over the members of the Council of Ministers. It is true that in practice, a strong Prime Minister or Chief Minister will be able to drop any Minister out of the Cabinet. But in a country like ours where there is a multi-

party system and where coalition Governments are often formed, it is not possible at all times for a Prime Minister/Chief Minister to take the whip, whenever a statement is made by someone in the Council of Ministers.

129. Governments which survive on wafer-thin majority (of which we have seen quite a bit), sometimes have individual Ministers who are strong enough to decide the very survival of such Governments. This problem is not unique to our country.

130. We have followed the Westminster Model but the Westminster Model itself became shaky after the United Kingdom saw the first coalition Government in 2010, since the Churchill Caretaker Ministry of 1945. It is interesting to note that in a Report submitted by the Constitution Committee (UK) in the year 2014, under the title, "Constitutional Implications of Coalition Government" it was pointed out that "collective ministerial responsibility has been the convention most affected by coalition Government". The Report proceeds to state that the coalition Government formed in 2010 (in UK) set out five specific issues on which the parties would agree to differ. But, in reality the number of areas of disagreement has been greater resulting on one occasion, in Ministers being whipped to vote in opposite lobbies and on another, in MPs on the Treasury Benches attempting to amend the Address on the Queen's speech.

131. In the "Briefing Paper" (Number 7755, 14 November 2016) on "Collective responsibility" by Michael Everett available in the House of Commons Library, (i) the early origins and development of the concept of collective responsibility; (ii) what is collective responsibility; (iii) the conventions of collective responsibility; and (iv) departures from collective responsibility are dealt with. This Paper traces early beginnings of the doctrine of collective responsibility to the reign of George III (1760-1820). According to the Briefing Paper, the development of today's concept of collective responsibility arose during the Victorian golden age of Parliamentary Government. In fact, the Briefing Paper quotes some commentators who have questioned whether the convention of collective responsibility remains appropriate for the Government of today. The Briefing Paper quotes Barry Winetrobe, a Research Fellow at the Constitution Unit who said that the doctrine of collective responsibility was developed at a time when a sense of coherence was required to be maintained among disparate ministerial forces in the face of the Monarch and that it is not necessarily appropriate in an age, not just of democracy, but of greater and more direct participative democracy.

132. It will be useful to quote a portion of Chapter 2.3 under the heading "Enforcing collective responsibility" from the Briefing Paper as follows:

> **...**Dr Felicity Matthews, Senior Lecturer in Governance and Public Policy at the University of Sheffield, has also argued that the respect accorded to the doctrine of collective responsibility "has varied", with its maintenance and disregard "owing as much to politics as to propriety".
>
> An interesting example of this occurred in 2003 during the build-up to the Iraq war. Robin Cook, the Leader of the House of Commons, resigned in protest in March 2003 over the then Labour Government's policy toward Iraq, being unable to maintain the official Government position. His actions were therefore consistent with the doctrine of collective responsibility. However, Clare Short, the Secretary of State for International Development, was allowed to stay in the Cabinet despite her own vocal opposition to military intervention and despite publicly denouncing the then Prime Minister as "deeply reckless" in March 2003.
>
> According to Felicity Matthews, despite her "extraordinary breach" of collective responsibility, Clare Short was persuaded and allowed to retain her ministerial portfolio. She then remained in the Cabinet for a further two months, until she decided to resign on 12 May 2003, following perceived mistakes in the US/UK coalition after the invasion. This example, according to Matthews, "underlines the extent to which Prime Ministers have proven unwilling or unable to enforce a strict interpretation of

collective responsibility, even when their personal credibility has been besmirched".

133. Thus, the convention developed in the United Kingdom for Ministers, itself appears to have gone for a toss and hence, it is not possible to draw any inspiration from the UK Model.

134. We are not suggesting for a moment that any public official including a Minister can make a statement which is irresponsible or in bad taste or bordering on hate speech and get away with it. We are only on the question of collective responsibility and the vicarious liability of the Government.

135. As all the literature on the issue shows, collective responsibility is that of the Council of Ministers. Each individual Minister is responsible for the decisions taken collectively by the Council of Ministers. In other words, the flow of stream in collective responsibility is from the Council of Ministers to the individual Ministers. The flow is not on the reverse, namely, from the individual Ministers to the Council of Ministers.

136. Our attention was also drawn to the decision of this Court in Amish Devgan. Though the said decision considered extensively the impact of the speech of "a person of influence", we are not, in this reference dealing with the same. This is for the reason that the said decision concerned "hate speech". None of the questions referred to us, including Question No. 4 with which we are presently concerned, relates to hate speech, and understandably so. The writ petition as well as the special leave petition out of which this reference arose, concerned speeches made by the Ministers of the State of Uttar Pradesh and the State of Kerala. The speech made by the Minister of the State of Uttar Pradesh attempted to paint a case of robbery and gang-rape as a political conspiracy. The speech of the Minister of the State of Kerala portrayed women in a disrespectful way. Since the statements concerned in both the cases were attributed to the Ministers, Question No. 4 referred to us, specifically relates to "statement made by a Minister". Amish Devgan did not deal with the statement of a Minister traceable to any affairs of the State, though a Minister would fall under the category of "person of influence". Moreover, the statements attributed to the Ministers in the cases on hand may not come under the category of hate speech. Therefore, we do not wish to enlarge the scope of this reference by going into the questions which were answered in Amish Devgan.

137. Therefore, our answer to Question No. 4 would be that a statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility.

Question No. 5

138. Question No. 5 referred to us for consideration is "whether a statement by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'?"

139. To begin with, we have some difficulty with the words "a statement by a Minister", appearing in Question No. 5. A statement may be made by a Minister either inside or outside the House of People/Legislative Assembly of the State. A statement may also be made by a Minister in writing or by words spoken. A statement may be made in private or in public. A statement may also be made by a Minister either touching upon the affairs of the Ministry/department of which he is in control or touching generally upon the policies of the Government of which he is a part. A Minister may also make a statement, in the form of an opinion on matters about which he or his department is not concerned or over which he has no control. All such statements need not necessarily give rise to an action in tort or in constitutional tort.

140. Take for instance a case where a Minister makes a statement that women are unfit to be employed in a particular avocation. It may reflect his insensitivity to gender equality and also may expose his low constitutional morality. The fact that due to his insensitivity or lack of understanding or low constitutional morality, he speaks a language that has the potential to

demean the constitutional rights of women, cannot be a ground for action in Constitutional tort. Needless to say that no one can either be taxed or penalised for holding an opinion which is not in conformity with the constitutional values. It is only when his opinion gets translated into action and such action results in injury or harm or loss that an action in tort will lie. With this caveat, let us now get into the core of the issue.

141. A tort is a civil wrong, that causes a claimant to suffer loss or harm resulting in legal liability for the person who commits the tortious act. Halsbury's Law of England states: "Those civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of right imposed or conferred by law rather than by agreement are rights of action in tort."

142. If Crown Proceedings Act, 1947 changed the course of the law relating to tort in England, the Federal Tort Claims Act, 1946 changed in America, the course of law relating to the liability of the State for the tortious acts of its servants. Nevertheless, the claims for damages continued to be resisted for a long time both here and elsewhere on the principle of sovereign immunity. It is interesting to note that on the initiative of the President of India, the Law Ministry took up for consideration the question whether legislation on the lines of the Crown Proceedings Act, 1947 of the United Kingdom is needed and if so, to what extent. After the constitution of the Law Commission, the Law Ministry referred the matter to the Commission for consideration and report. In its First Report submitted on 11.5.1956 on "Liability of the State in Tort", the Law Commission took note of (i) the existing law in India; (ii) law in England; (iii) law in America; (iv) law in Australia; (v) law in France; (vi) Rule of statutory construction; and (vii) conclusions and proposals.

143. In Chapter VIII containing the conclusions and proposals, the First Report of the Law Commission suggested: (i) that in the context of a welfare State, it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State; (ii) that when the Constitution was framed, the question to what extent, if any, the Union and the States should be made liable for the tortious acts of their servants or agents was left for future legislation; (iii) that the question of demarcating the line up to which the State should be made liable for the tortious acts, involves a nice balancing of considerations, so as not to unduly restrict the sphere of the activities of the State and at the same time to afford sufficient protection to the citizen; (iv) that it is necessary that the law should, as far as possible, be made certain and definite, instead of leaving it to courts to develop the law according to the views of the judges; and (v) that the old distinction between sovereign and the non-sovereign functions or Governmental and the non-Governmental functions should no longer be invoked to determine the liability of the State.

144. Paragraph 66 of the First Report of the Law Commission contained the principles on which appropriate legislation should proceed. It will be useful to extract paragraph 66 of the First Report of the Law Commission, to understand the sweep of constitutional tort, as it was conceived within a few years of the adoption of the Constitution. In fact, it has laid down the road map very clearly with lot of foresight. Paragraph 66 reads thus:

> **66.** The following shall be the principles on which legislation should proceed:
>
> I. Under the general law:
>
> Under the general law of torts i.e., the English Common Law as imported into India on the principle of justice, equity and good conscience, with statutory modifications of that law now in force in India (vide the Principles of General Law, Appendix VI)--
>
> (i) The State as employer should be liable for the torts committed by its employees and agents while acting within the scope of their office or, employment.

(ii) The State as employer should be liable in respect of breach of those duties which a person owes to his employees or agents under the general law by reason of being their employer.

(iii) The State should be liable for torts committed by an independent contractor only in cases referred to in Appendix VI.

(iv) The State also should be liable for torts where a corporation owned or controlled by the State would be liable.

(v) The State should be liable in respect of breach of duties attached under the general law to the ownership, occupation, possession or control of immoveable properly from the moment the State occupies or takes possession or assumes control of the property.

(vi) The State should be subject to the general law liability for injury caused by dangerous things (chattels).

In respect of (i) to (vi) the State should be entitled to raise the same defences, which a citizen would be entitled to raise under general law.

II. In respect of duties of care imposed by statute:

(i) If a statute authorises the doing of an act which is in itself injurious, the State should not be liable.

(ii) The State should be liable, without proof of negligence, for breach of a statutory duty imposed on it or its employees which causes damage.

(iii) The State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees act negligently or maliciously, whether or not discretion is involved in the exercise of such duty.

(iv) The State should be liable if in the exercise of the powers conferred upon it or its employees the power is so exercised as to cause nuisance or trespass or the power is exercised negligently or maliciously causing damage.

N.B.--Appendix V shows some of the Acts which contain protection clauses. But under the General Clauses Act a thing is deemed to be done in good faith even if it is done negligently. Therefore, by suitable legislation the protection should be made not to extend to negligent acts however honestly done and for this purpose the relevant clauses in such enactments should be examined.

(v) The State should be subject to the same duties and should have the same rights as a private employer under a statute, whether it is specifically binding on the State or not.

(vi) If an Act negatives or limits the compensation payable to a citizen who suffered damage, coming within the scope of the Act, the liability of the State should be the same as under that Act and the injured person should be entitled only to the remedy, if any, provided under the Act.

III. Miscellaneous:

Patents, Designs and Copyrights: The provisions of Section 3 of the Crown Proceedings Act may be adopted.

IV. General Provisions:

(i) Indemnity and contribution: To enable the State to claim indemnity or contribution, a provision on the lines of Section 4 of the Crown Proceedings Act may be adopted.

(ii) Contributory negligence: In England, the Law Reform (Contributory Negligence) Act, 1945 was enacted amending the law relating to contributory negligence and in view of the provisions of the Crown Proceedings Act the said Act also binds the Crown. In India, the trend of judicial opinion is in favour of holding that the Rule in Merryweather v. Nixan [MANU/ENRP/0635/1799 : (1799) 8 T.R. 186] does not apply and that there is no legal impediment to one tortfeasor recovering compensation from another.

But the law should not be left in an uncertain state and there should be legislation on the lines of the English Act.

(iii) Appropriate provision should be made while revising the Code of Civil Procedure to make it obligatory to implead as party to a suit in which a claim for damages against the State is made, the employee, agent or independent contractor for whose act the State is sought to be made liable. Any claim based on indemnity or contribution by the State may also be settled in such proceeding as all the parties will be before the court.

V. Exceptions:

(i) Acts of State: The defence of "Act of State" should be made available to the State for any act, neglect or default of its servants or agents. "Act of State" means an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owning temporary allegiance, in pursuance of sovereign rights.

(ii) Judicial acts and execution of judicial process: The State shall not be liable for acts done by judicial officers and persons executing warrants and orders of judicial officers in all cases where protection is given to such officers and persons by Section 1 of the Judicial Officers Protection Act, 1850.

(iii) Acts done in the exercise of political functions of the State such as acts relating to:

(a) Foreign Affairs (entry 10, List I, Seventh Schedule of the Constitution);

(b) Diplomatic, Consular and trade representation (entry 11);

(c) United Nations Organisation(entry 12);

(d) Participation in international conferences, associations and other bodies and implementing of decisions made thereat (entry 13);

(e) entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign

countries (entry 14);

(f) war and peace (entry 15);

(g) foreign jurisdiction (entry 16);

(h) anything done by the President, Governor or Rajpramukh in the exercise of the following functions:

Power of summoning, proroguing and dissolving the Legislature, vetoing of laws and anything done by the President in the exercise of the powers to issue Proclamations under the Constitution;

(i) Acts done under the Trading with the Enemy Act, 1947;

(j) Acts done or omitted to be done under a Proclamation of Emergency when the security of the State is threatened.

(iv) Acts done in relation to the Defence Forces:

(a) Combatant activities of the Armed Forces during the time of war;

(b) Acts done in the exercise of the powers vested in the Union for the purpose of training or maintaining the efficiency of the Defence Forces;

The statutes relating to these already provide for payment of compensation and the machinery for determining the compensation: See Manoeuvres, Field Firing and Artillery Practice Act, 1948; Seaward Artillery Practice Act, 1949;

(c) The liability of the State for personal injury or death caused by a member of the Armed Forces to another member while on duty shall be restricted in the same manner as in England (Section 10 of the Crown Proceedings Act)

(v) Miscellaneous:

(a) any claim arising out of defamation, malicious prosecution and malicious arrest,

(b) any claim arising out of the operation of quarantine law,

(c) existing immunity under the Indian Telegraph Act, 1885 and Indian Post Offices Act, 1898,

(d) foreign torts. (The English provision may be adopted.)

145. It appears that based on the First Report of the Law Commission, a Bill known as the Government (Liability in Torts) Bill was introduced in 1967, but the same did not become the law. As a consequence, a huge burden was cast on the Courts to develop the law through judicial precedents, some of which we shall see now.

146. The judicial journey actually started off on a right note with the decision in The State of Bihar v. Abdul Majid MANU/SC/0120/1954 : AIR 1954 SC 245, where a Government servant who was dismissed but later reinstated, filed a suit for recovery of arrears of salary. Though the State raised a defence on the basis of the doctrine of pleasure, this Court rejected the same on the ground that said doctrine based on the Latin phrase "durante bene placito" (during pleasure) has no application in India. This decision was followed in State of Rajasthan v. Mst. Vidhyawati MANU/SC/0025/1962 : AIR 1962 SC 933, which involved a claim for compensation

by the widow of a person who was fatally knocked down by a jeep owned and maintained by the State. When sovereign immunity was pleaded, this Court observed in Vidhyawati (supra): "when the Rule of immunity in favour of the Crown, based on common law in the United Kingdom has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution."

147. On the question of the liability of the State, for the tortious acts of its servants, this Court opined in Vidhyawati, as follows:

> (10) This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the Constitution we have established a welfare state, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them....

148. But despite the decisions in Abdul Majid (supra) and Vidhyawati, this Court fell into a slippery slope in Kasturi Lal. It was a case where the partner of a firm dealing in bullion and other goods was arrested and detained in police custody and the gold and silver that he was carrying was seized by the police. When he was released later, the silver was returned but the Head Constable who effected the arrest misappropriated the gold and fled away to Pakistan in October, 1947. The suit filed by Kasturi Lal for recovery of the value of the gold, was resisted on the ground that this was not a case of negligence of the servants of the State and that even if negligence was held proved against the police officers the State could not be held liable. While upholding the contention of the State, this Court said "if a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose."

149. In fact, it was suggested by this Court in Kasturi Lal that the Legislatures in India should seriously consider making legislative enactments to regulate and control their claim for immunity. Before proceeding further with the journey in the chronological sequence, it must be mentioned that the decision in Kasturi Lal was diluted to some extent after nearly 30 years which we shall take note of at the appropriate stage.

150. In Khatri (II) v. State of Bihar MANU/SC/0518/1981 : (1981) 1 SCC 627, which came tc be popularly known as Bhagalpur blinding case, this Court was dealing with a brutal incident of Police atrocity which resulted in twenty-four prisoners being blinded. Though an opportunity was provided to this Court to signal the arrival of Constitutional tort in the said case and though the Petitioners sought compensation for the violation of their Article 21 right, this Court simply postponed the decision to a future date by holding that they are issues of the gravest Constitutional importance, involving the exploration of new dimension of the right to life and personal liberty.

151. But within a couple of years, another opportunity arose in Rudul Sah (supra), which related to the unlawful detention of a prisoner for fourteen years even after his acquittal. This shook the conscience of this Court. Therefore, this Court awarded compensation in an arbitrary sum of money, even while reserving the right of the Petitioner to bring a suit for recovery of appropriate damages. This Court said that the order of compensation passed by this Court was in the nature of palliative. When it is suggested by the State that the appropriate remedy would be only to file a suit for damages, this Court said that by refusing to order anything (towards

compensation), this Court would be doing mere lip-service to the fundamental right to liberty and that one of the telling ways in which the violation of the right by the State can be reasonably prevented, is to mulct its violators with monetary compensation.

152. After Rudul Sah, there was no looking back. Instead of providing elaborate details, we think it is sufficient to provide in a tabular form, details of the cases where this Court awarded compensation in public law, invoking the principle of constitutional tort, either expressly or impliedly.

Sr. No.	Case Laws	Decision
1.	Sebastian M. Hongray v. Union of India MANU/SC/0080/1984 (1984) 3 SCC 82	• Two men who were taken for questioning by 21st Sikh Regiment never returned home. • When a writ of habeas corpus was filed by a JNU student, this Court directed that the missing men be produced before the Court. This order could not be complied with. • Court awarded compensation of Rs. 1 lac to the wives of the missing men on account of mental agony suffered by them.
2.	Bhim Singh, MLA v. State of J&K. MANU/SC/0064/1985 (1985) 4 SCC 677	• An MLA was illegally arrested and detained to prevent him from attending a session of the Jammu & Kashmir State Legislative Assembly. • FIR was registered Under Section 153A, Indian Penal Code and order of remand was obtained from the Magistrate without producing the MLA before Court. • In a writ for habeas corpus filed by his wife, this Court observed that there had been a violation of his fundamental rights Under Articles 21 and 22(2) of the Constitution and accordingly directed the State of Jammu and Kashmir to pay Bhim Singh a sum of Rs. 50,000/- as compensation.
3.	Peoples' Union for Democratic Rights v. State of Bihar and Ors. MANU/SC/0104/1986 : (1987) 1 SCC 265	• A public interest litigation was filed against the illegal shooting by police officers against members of a peaceful assembly. • Several were injured and 21 died (including children) due to this incident. • While the State had paid a compensation of Rs. 10,000 each to heirs of the deceased, this Court found it insufficient and directed payment of Rs. 20,000 to dependants of each deceased and Rs. 5,000 to each injured person.
4.	Saheli, a Women's Resources Centre through Ms. Nalini	• Two women were forcefully evicted from their homes. The landlord was aided by the

	Bhanot and Ors. v. Commissioner of Police, Delhi Police Headquarters and Ors. MANU/SC/0478/1989 : (1990) 1 SCC 422	SHO and SI in the assault that led to demise of the nine-year-old son of one of the women. • This Court awarded compensation of Rs. 75,000 to the mother of the deceased child.
5.	Supreme Court Legal Aid Committee through its Hony. Secretary v. State of Bihar and Ors. MANU/SC/0604/1991 (1991) 3 SCC 482	• A person injured in a train robbery, was taken to the nearest hospital by the Police by tying him to the footboard of a vehicle. This led to his death. • This Court observed that had timely care been given to the victim he might have been saved. • The State of Bihar was directed to pay Rs. 20,000 to the legal heirs of the deceased.
6.	Nilabati Behera (Smt.) alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v. State of Orissa and Ors. MANU/SC/0307/1993 (1993) 2 SCC 746	• Petitioner was a mother whose son had died in police custody. • This Court directed the State to pay compensation of Rs. 1.5 lacs.
7.	Arvinder Singh Bagga v. State of U.P. and Ors. MANU/SC/0025/1995 : (1994) 6 SCC 565	• A married woman was detained and physically assaulted in a police station with a view to coerce her to implicate her husband and his family in a case of abduction and forcible marriage. • After taking her statement, her husband and his family were also harassed by the police. • This Court observed that the police had exhibited high-handedness and uncivilized behaviour and awarded the woman a compensation of Rs. 10,000 and members of her family Rs. 5,000 each.
8.	N. Nagendra Rao & Co. v. State of A.P. MANU/SC/0530/1994 (1994) 6 SCC 205	• Appellant was in the business of food grains and fertiliser. On an inspection by the concerned authorities, his stocks were seized. • As was the practice, the food grains in custody were sold and the proceeds deposited in the Treasury, but the fertilisers were not dealt with in the same manner causing great loss to the Petitioner. • In a suit for negligence and misfeasance of public authorities, this Court further developed the concept of Constitutional Tort and limited the scope of sovereign immunity laid down in Kasturilal The State was held vicariously liable for the actions of the authorities.
9.	Inder Singh v. State of Punjab	• A Deputy Superintendent of Police along

	and Ors. MANU/SC/0380/1995 : (1995) 3 SCC 702	with his subordinates abducted and killed seven persons due to personal vengeance. • This Court ordered an inquiry by the CBI. After CBI filed a report, this Court directed the State to pay Rs. 1.5 lacs to the legal heirs (to be recovered from guilty policemen later) and State to pay costs quantified at Rs. 25,000.
10.	Paschim Banga Khet Mazdoor Samity and Ors. v. State of W.B. and Anr. MANU/SC/0611/1996 : (1996) 4 SCC 37	• The callous attitude on the part of the medical authorities at various Government-run hospitals in Calcutta in providing treatment to a train accident victim was highlighted in this case. • This Court directed the State to pay Rs. 25,000 for the denial of its constitutional obligations of care.
11.	D.K. Basu v. State of W.B. MANU/SC/0157/1997 : (1997) 1 SCC 416	• In a public interest litigation involving incidents of custodial violence in West Bengal, this Court issued guidelines for law enforcement agencies to follow when arresting and detaining any person. • This Court also discussed the award of compensation as a remedy for violation of fundamental rights as a punitive measure against State action.
12.	People's Union for Civil Liberties v. Union of India and Anr. MANU/SC/0274/1997 : (1997) 3 SCC 433	• Two persons alleged to be terrorists were killed by the police in a false encounter. • This Court directed the State of Manipur to pay Rs. 1 lac to the family of the deceased and Rs. 10,000 to PUCL for pursuing the case for many years.
13.	Municipal Corporation of Delhi, Delhi v. Uphaar Tragedy Victims Association and Ors. MANU/SC/1255/2011 : (2011) 14 SCC 481	• A fire in a cinema hall resulted in injury to over 100 persons and death of 59 cinemagoers. • • The fire was caused by a transformer installed by Delhi Vidyut Board (DVB). • HC had found the Municipal Corporation, Delhi Police, and the DVB responsible for the accident. • This Court held only DVB and theatre owner liable to pay compensation in the ratio of 15:85. • While doing so, this Court dealt extensively with the concept of Constitutional Tort.

153. It will be clear from the decisions listed in the Table above that this Court and the High Courts have been consistent in invoking Constitutional tort whenever an act of omission and commission on the part of a public functionary, including a Minister, caused harm or loss. But

as rightly pointed out by the learned Attorney General in his note, the matter pre-eminently deserves a proper legal framework so that the principles and procedure are coherently set out without leaving the matter open ended or vague. In fact, the First Report of the Law Commission submitted a draft bill way back in 1956. This Court recommended a legislative measure in Kasturi Lal in 1965 and a bill called Government (Liability in Torts) Bill was introduced in 1967. But nothing happened in the past 55 years. In such circumstances, courts cannot turn a blind eye but may have to imaginatively fashion the remedy to be provided to persons who suffer injury or loss, without turning them away on the ground that there is no proper legal frame work.

154. Therefore, our answer to Question No. 5 is as follows:

> A mere statement made by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, may not constitute a violation of the constitutional rights and become actionable as Constitutional tort. But if as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort".

SUMMING UP

155. To sum up, our answers to the five questions referred to the Bench, are as follows:

QUESTIONS		ANSWERS
1.	Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?	The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two fundamental rights staking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual.
2.	Can a fundamental right Under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities?	A fundamental right Under Article 19/21 can be enforced even against persons other than the State or its instrumentalities.
3.	Whether the State is under a duty to affirmatively protect the rights of a citizen Under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?	The State is under a duty to affirmatively protect the rights of a person Under Article 21, whenever there is a threat to personal liberty, even by a non-State actor.
4.	Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?	A statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility.
5.	Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable	A mere statement made by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, may not constitute a violation of the constitutional rights

	as 'Constitutional Tort"?	and become actionable as Constitutional tort. But if as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort.

156. Now that we have answered the questions, the writ petition and the special leave petition are directed to be listed before the appropriate bench after getting orders from Hon'ble the Chief Justice of India.

Sl. No.	Particulars
1.	Introduction
2.	Submissions
3.	Preface
4.	Article 19(1)(a) and 19(2) - An Overview
5.	Wesley Hohfeld's analysis of the form of rights
6.	The content of Article 19(1)(a)
7.	'Hate speech'
8.	Human dignity as a value as well as a right under the Constitution of India
9.	The preambular goals of 'Equality' and 'Fraternity'
10.	Re: Question No. 2
11.	Re: Question No. 3
12.	Re: Question No. 4
13.	Re: Question No. 5
14.	Conclusions

B.V. Nagarathna, J.

157. I have had the benefit of reading the erudite judgment proposed by His Lordship V. Ramasubramanian, J. While I agree with the reasoning and conclusions arrived at by his Lordship on certain questions referred to this Constitution Bench, I wish to lend a different perspective to some of the issues by way of my separate opinion.

158. In the words of one of the Indian philosophers, Basaveshwara:

> NuDidare muttina haaradantirabeku,
>
> NuDidare maanikyada deeptiyantirabeku,
>
> NuDidare spatikada shalaakeyantirabeku,
>
> NuDidare Lingamecchi ahudenabeku."
>
> One should speak only when the words uttered are as pure as pearls strung on a thread;
>
> Like the lustre shed by a ruby;
>
> Like a crystal's flash that cleaves the blue;
>
> And such that the Lord, on listening to such speech, must say "yes, yes, that is true!

Introduction:

159. The concern of the Petitioners in these cases is the misuse of the right to freedom of speech and expression Under Article 19(1)(a) of the Constitution, particularly, by those persons holding political offices, public servants, public functionaries or others holding responsible positions in Indian polity and society. The concern of the Petitioners is with regard to the manner in which public functionaries make disparaging and insulting remarks against certain Sections of the society, against countrymen and against certain individuals such as women who may be victims of crime. Such indiscreet speech is a cause of concern in recent times as it is thought to be hurtful and insulting. The questions raised in these matters are with regard to remedies available in law so as to counter such kind of hurtful or disparaging speech made, particularly, by public functionaries.

160. The facts giving rise to the present petitions may be encapsulated as under:

160.1. Writ Petition (Crl.) No. 113 of 2016, relates to the unsavory public comments made by a former Uttar Pradesh Cabinet Minister, in the context of an alleged gang rape of a woman and her minor daughter that took place on 29th July, 2016 on the Noida-Shahjahanpur National Highway (NH 91). Relying on certain news articles, the Petitioner in Writ Petition (Crl.) No. 113 of 2016 has brought to the notice of this Court the remarks made by the said public functionary, terming the alleged incident as an "opposition conspiracy," which was proliferated merely because "elections were near, and the desperate opposition could stoop to any level to defame the government."

160.2. In relation to such statements, a First Information Report, being FIR No. 0838 of 2016 was registered against the said Minister on 30th July, 2016 by the Kotwali Police Station, Dehat, Bulandshahr, Uttar Pradesh, for offences Under Sections 395, 397, 376-D, 342 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC' for the sake of convenience).

160.3. In the above background, the Writ Petition has been preferred, praying as follows:

PRAYER:

In view of the above stated submissions, it is therefore, most humbly prayed that this Hon'ble Court; may in the interests of justice, be pleased to:

a. Issue a writ of mandamus and/or any other appropriate writ and/or direction against the Respondents directing them to stop the infringement of the fundamental rights of the Petitioner to live a lawful life; in addition to passing other appropriate directions to the Respondents.

b. Direct the state to pay the appropriate compensation to the Petitioner, other victims and the family members as per Law.

c. Direct the state to provide and ensure respectable and appropriate free of cost and safe education arrangements till the attainments of the highest degree in the interest of justice.

d. Direct the state to provide and ensure sufficient life security and appropriate job security to the Petitioner, other victims and family members.

e. Summon the status report from the investigation agency in the interests of justice.

f. Monitor the investigation of FIR No. 0838/2016 Under Section 154 Code of Criminal Procedure 395, 397, 376-D and POCSO Act, 342.

g. Transfer the trial of the FIR No. 0838/2016 to Delhi from Bulandshahar in the interest of justice.

h. Pass directions to Respondent No. 1 to register F.I.R. against Sh. Azam Khan, Minister for Urban Development, Govt. of UP; for making statements being outrageous to the modesty of the Petitioner in the matters of the present case.

i. Direct to the Respondent No. 1 for registration of F.I.R. No. 0838/2016 against erring police officials for disobeying the directions of law in the present case.

j. Pass any other or further orders as this Hon'ble Court may deem fit and proper in the light of the facts and circumstances of the present case in favour of the Petitioners and against the Respondents.

160.4. Special Leave Petition bearing Diary No. 34629 of 2017 has been filed impugning the common order dated 31st May, 2017 passed by the High Court of Kerala, at Ernakulam dismissing Writ Petition (C) No. 15869 and Writ Petition (C) No. 14712 of 2017. The said Writ Petitions were filed before the High Court alleging inaction on the part of Government of Kerala in connection with the derogatory statements made on separate occasions, by the then Minister of Electricity, Government of Kerala, against a woman Principal of a polytechnic college in Kerala, the mother of a student who allegedly committed suicide due to the alleged harassment by the college authorities and against women labourers of a tea plantation. Aggrieved by the dismissal of the said Writ Petition, SLP bearing Diary No. 34629 of 2017 came to be filed before this Court, which was directed to be tagged with Writ Petition (Crl.) No. 113 of 2016.

161. The questions raised for the consideration of this Constitution Bench are enumerated as under:

1) Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?

2) Can a fundamental right Under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities?

3) Whether the State is under a duty to affirmatively protect the rights of a citizen Under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?

4) Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?

5) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'?

162. His Lordship, Ramsubramanian, J. has answered the questions referred to this Constitution Bench in the scholarly judgment proposed by him. My view on each of such questions, as contrasted with those of His Lordship's have been expressed in a tabular form hereinunder, for easy reference.

Questions	His Lordship's views	My views
1) Are the grounds	The grounds lined up in	I respectfully agree with the

specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?	Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two fundamental rights taking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual.	reasoning and conclusion of His Lordship, in so far as Question No. 1 is concerned.
2) Can a fundamental right Under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities?	A fundamental right Under Article 19/21 can be enforced even against persons other than the State or its instrumentalities.	The rights in the realm of common law, which may be similar in their content to the Fundamental Rights Under Article 19/21, operate horizontally; However, the Fundamental Rights Under Articles 19 and 21, do not except those rights which have also been statutorily recognised. Therefore, a fundamental right Under Article 19/21 cannot be enforced against persons other than the State or its instrumentalities. However, they may be the basis for seeking common law remedies. But a remedy in the form of writ of Habeas Corpus, if sought against a private person on the basis of Article 21 of the Constitution can be before a Constitutional Court i.e., by way of Article 226 before the High Court or Article 32 read with Article 142 before the Supreme Court. As far as non-State entities or those entities which do not fall within the scope of Article 12 of the Constitution are concerned, a writ petition to enforce fundamental rights would not be entertained as against them. This is primarily because such

		matters would involve disputed questions of fact.
3) Whether the State is under a duty to affirmatively protect the rights of a citizen Under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?	The State is under a duty to affirmatively protect the rights of a person Under Article 21, whenever there is a threat to personal liberty even by a private actor.	The duty cast upon the State Under Article 21 is a negative duty not to deprive a person of his life and personal liberty except in accordance with law. The State however has an affirmative duty to carry out obligations cast upon it under constitutional and statutory law. Such obligations may require interference by the State where acts of a private party may threaten the life or liberty of another individual. Hence, failure to carry out the duties enjoined upon the State under constitutional and statutory law to protect the rights of a citizen, could have the effect of depriving a citizen of his right to life and personal liberty. When a citizen is so deprived of his right to life and personal liberty, the State would have breached the negative duty cast upon it Under Article 21.
4) Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?	A statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility.	A statement made by a Minister if traceable to any affairs of the State or for protecting the Government, can be attributed vicariously to the Government by invoking the principle of collective responsibility, so long as such statement represents the view of the Government also. If such a statement is not consistent with the view of the Government, then it is attributable to the Minister personally.
5) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'	A mere statement made by a Minister, inconsistent with the rights of a citizen under Part-III of the Constitution, may not constitute a Violation of constitutional rights and become actionable as a Constitutional tort. But if as	A proper legal framework is necessary to define the acts or omissions which would amount to constitutional torts, and the manner in which the same would be redressed or remedied on the basis of judicial precedent.

	a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort.	It is not prudent to treat all cases where a statement made by a public functionary resulting in harm or loss to a person/citizen, as constitutional torts. Public functionaries could be proceeded against personally if their statement is inconsistent with the views of the Government. If, however, such views are consistent with the views of the Government, or are endorsed by the Government, then the same may be vicariously attributed to the State on the basis of the principle of collective responsibility and appropriate remedies may be sought before a court of law.

Submissions:

163. We have heard learned Senior Counsel, Sri Kaleeswaram Raj, for the Petitioners and learned Attorney General for the Respondents, and learned Senior Counsel Ms. Aparajita Singh, amicus curiae.

Arguments on behalf of the Petitioners:

164. The submissions of learned Senior Counsel, Sri Kaleeswaram Raj, appearing on behalf of the Petitioners may be epitomized as under:

164.1. That while upholding the constitutional right to freedom of speech and expression of Ministers, efforts should be made to frame a voluntary code of conduct for Ministers and public officials, which would ensure better accountability and transparency in their political activities and also place a check on the misuse of freedom of speech and expression exercised by public functionaries using the apparatus of the State.

164.2. That while the state's duty to protect life and liberty broadly falls within the right Under Article 21, it is difficult to chain the State with responsibility in every instance where speech by a public functionary strikes at the dignity of another person. That in the absence of such a provision to vicariously attribute responsibility to the State, every instance of such speech cannot be actionable and remediable through the judiciary. That no duty corresponding to Article 21 is imposed on individual Ministers nor such duty is imposed on any government machinery to regulate the conduct of individual Ministers warranting judicial intervention. Therefore, even though no actionable breach of public duty can be said to have taken place when statements are made by people in power, this in turn, postulates the desirability to have a voluntary code of conduct in the better interest of the government as well as the governed.

164.3. Reliance was placed on Article 75(3) of the Constitution to contend that Ministers have a collective responsibility towards the legislature and thus, a code of conduct to self-regulate the speech and actions of Ministers is constitutionally justifiable. That a Minister is not supposed to breach her/his collective responsibility towards the Cabinet and the Legislature, hence, it is advisable to have a cogent code of

conduct as available in advanced democracies.

164.4. Learned Senior Counsel lastly submitted that the instant cases do not involve a question as to conflict of any other right with Article 19. That the question herein, in sum and substance, is, whether, any restraint justifiable under the Constitution, can be placed on Ministers and public functionaries, to regulate their speech.

Arguments on behalf of the Respondent-Union of India:

165. Submissions of Learned Attorney General for India, Sri R. Venkataramani and Learned Solicitor General of India, Sri Tushar Mehta, appearing on behalf of the Respondent-Union of India, may be summarized as under:

165.1. At the outset, Sri R. Venkataramani, Learned Attorney General fairly submitted that restrictions on the freedom of speech enumerated Under Article 19(2) have to be taken to be exhaustive and thus, the court cannot invoke any other fundamental right, namely, Article 21 to impose restrictions on grounds which are not enumerated Under Article 19(2). Further, that as a matter of constitutional principle, any addition, alteration or change in the norms or criteria for imposition of restrictions, on any fundamental right has to come through a legislative process. That the balancing of fundamental rights, either to avoid overlapping or to ensure mutual enjoyment, is different from treating one right as a restriction on another right.

165.2. It was next submitted that the Constitution of India sets out the scheme of claims of fundamental rights against the State or its instrumentalities and such scheme also addresses breaches or violations of fundamental rights by persons other than the State or its instrumentalities. Thus, any proposition to add or insert subjects or matters in respect of which claims can be made against persons other than the State, would amount to a constitutional change. That any enlargement of such constitutional principles would have the consequence of opening a flood gate of constitutional litigation.

165.3. It was further contended that there are sufficient constitutional and legal remedies available to a citizen whose liberty is threatened by any person and beyond the constitutional and legal remedies, there may not be any other additional duty to affirmatively protect the right of a citizen Under Article 21.

165.4. Learned Attorney General urged that Ministerial misdemeanors, which have nothing to do with the discharge of public duty and are not traceable to the affairs of the State will have to be treated as acts of individual violation and individual wrongs. Thus, the state cannot be vicariously liable for the same. That the conduct of a public servant like a Minister in the government, if was traceable to the discharge of a public duty or duties of the office, was subject to the scrutiny of law. However, such misconduct including statements that may be made by a Minister, cannot be linked to the principles of collective responsibility.

Submissions of learned amicus curiae, Ms. Aparajita Singh, Senior Advocate:

166. The submissions of learned Amicus Curiae, Ms. Aparajita Singh, may be summarized as under:

166.1. At the outset she submitted that the right to freedom of speech and expression Under Article 19(1)(a) is subject to clearly defined restrictions Under Article 19(2). Therefore, any law seeking to limit the right Under Article 19(1)(a) has to fall within the limitation provided Under Article 19(2).

166.2. That the right to freedom of speech and expression of a public functionary who represents the state has to be balanced with a citizen's right to fair investigation Under Article 21 and if the exercise of a Minister's right Under Article 19(1)(a) violates a

citizen's right Under Article 21 then the same would have to be read down to protect the right of the citizen. Thus, a Minister cannot claim the protection of Article 19(1)(a) to violate Article 21 rights of citizens.

166.3. Ms. Aparajita Singh next contended that a Minister, being a functionary of the State represents the State when acting in his official capacity. Therefore, any violation of the fundamental rights of citizens by the Minister in his official capacity, would be attributable to the State. Thus, it would be preposterous to suggest that while the State is under an obligation to restrict a private citizen from violating the fundamental rights of other citizens, its own Minister can do so with impunity. However, learned amicus curiae qualified such submission by stating that the factum of violation would need to be established on the facts of a given case and hence the law has to evolve from case to case. It would involve a detailed inquiry into questions such as i) whether the statement by the Minister was made in his personal or official capacity; ii) whether the statement was made on a public or private issue; iii) whether the statement was made on a public or private platform.

166.4. It was submitted that a Minister is personally bound by the oath of office to bear true faith and allegiance to the Constitution of India Under Articles 75(4) and 164(3) of the Constitution. That the code of conduct for Ministers (both for Union and States) specifically lays down that the Code is in addition to the "...observance of the provisions of the Constitution, the Representation of the People Act, 1951". Therefore, a constitutional functionary is duty bound to act in a manner which is in consonance with the constitutional obligations.

166.5. It was lastly submitted that the State acts through its functionaries. Therefore, an official act of a Minister which violates the fundamental rights of the citizens, would make the State liable by treating the said act of the Minister as a constitutional tort. However, the principle of sovereign immunity of the state for the tortious acts of its servants, has been held to be inapplicable in the case of violation of fundamental rights.

Question No. 1 referred to this Constitution Bench reads as under:

> Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking fundamental rights?

Preface:

167. In my view, these cases call for an analysis of the content of Article 19(1)(a) of the Constitution of India which grants to all citizens of India the right to freedom of speech and expression. Before proceeding to analyse the relevant constitutional provisions, it may be appropriate to preface the discussion with the thought that freedom of speech is not contingent only upon the laws of a nation. The compulsion of social relations and the informal pressures of conformity, exerted in a pervasive manner, determine to a great extent, the content and limits of permissible speech in society. It is the laws, however, through their own unique methods, which reinforce social sanctions. Therefore, the Constitution, which is the fundamental law of the land, as well as the other laws which are measured on the touchstone of the Constitution, are to be interpreted, having regard, inter-alia, to the content and permissible limits of free speech in a peaceful society.

It is necessary to observe that freedom of speech and expression has always been closely linked with certain socio-political ideals that constitute the foundation of democracy: respect for individual dignity and equality; fraternity; ideals of tolerance; cultural and religious sensitivity. Many of these ideals are written into the text of our Constitution and permeate its structure through the very Preamble to the Constitution. These ideals form the philosophical

foundations of the discourse on free speech and therefore, any analysis of the same should be compatible with these ideals. It is in that background that one must set out to examine whether additional accountability and thus, a legal obligation can be cast upon public functionaries with respect to the permissible extent of free speech. Further, it is also necessary to examine the difference between restraints on the exercise of freedom of speech and expression, vis-à-vis restrictions thereon, and in that background examine the degree of self-restraint that needs to be exercised by every citizen, whether a public functionary or not, in exercising his/her right to freedom of speech and expression in a Country like ours which is so unique because of its diversity and pluralism.

Article 19(1)(a) and Article 19(2): An overview

168. At this stage, it would be useful to dilate on Article 19(1)(a) and Article 19(2) as under:

168.1. Article 19(1)(a) to (f) of the Constitution guarantees certain fundamental rights to the citizens of India. These fundamental rights are however, subject to reasonable restrictions as enumerated in Articles 19(2) to (6) thereof which could be imposed by the State. These fundamental rights are in the nature of inalienable rights of man or basic human rights which inhere in all citizens of a free country. Yet, these rights are not unrestricted or absolute, and are regulated by restrictions, which may be imposed by the State, which have to be reasonable. The object of prescribing restraints or reasonable restrictions on the fundamental freedoms is to avoid anarchy or disorder in society. Hence, the founding fathers of our Constitution while enumerating the fundamental rights, have alongside prescribed reasonable restrictions in Clauses (2) to (6) of Article 19 and the laws enacted within the strict limits of such restrictions are constitutionally permissible.

168.2. Since, these cases involve the freedom of speech and expression, it is unnecessary to analyse the nature of the other fundamental rights in Article 19(1) of the Constitution. Articles 19(1) (a) and 19(2) of the Constitution read as under:

> **19.** Protection of certain rights regarding freedom of speech, etc.
>
> (1) All citizens shall have the right -
>
> (a) to freedom of speech and expression;
>
> xxx xxx xxx
>
> (2) Nothing in Sub-clause (a) of Clause (a) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said Sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

168.3. The freedom of speech and expression as envisaged Under Article 19(1)(a) of the Constitution means the right to free speech and to express opinions through various media such as by word of mouth, through the print or electronic media, through pictographs, writings, graphics or any other manner that can be discerned by the mind. The right includes the freedom of press. The content of this right also includes propagation of ideas through publication and circulation, the right to seek information and to acquire or impart ideas. In short, the right to free speech would include every nature of right that would come within the scope and ambit of free speech. Hence, Article 19(1)(a) in very broad and in wide terms states that all citizens shall have the right to freedom of speech and expression. The said right can be curtailed only by reasonable restrictions which are enumerated in Article 19(2) thereof

which can be imposed by the State under the authority of law but not by exercise of executive power in the absence of any law. Further, the nature of restrictions on right to free speech must be reasonable, and in the interest of the sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. (Article 19(2)).

168.4. For a country like ours which is a Parliamentary Democracy, freedom of speech and expression is a necessary right as well as a concomitant for the purpose of not only ensuring a healthy democracy but also to ensure that the citizens could be well informed and educated on governance. The dissemination of information through various media, including print and electronic media or audio visual form, is to ensure that the citizens are enlightened about their rights and duties, the manner in which they should conduct themselves in a democracy and for enabling a debate on the policies and actions of the Governments and ultimately for the development of the Indian society in an egalitarian way.

168.5. The right to freedom of speech and expression in Article 19(1)(a) of the Constitution has its genesis in the Preamble of the Constitution which, inter alia, speaks of liberty of thought, expression, belief. Since, India is a sovereign democratic republic and we follow a parliamentary system of democracy, liberty of thought and expression is a significant freedom and right under our constitutional setup.

168.6. This Court has, since the enforcement of the Constitution, been zealously upholding the right to freedom of speech and expression in innumerable judgments which may be highlighted with reference to a few of them.

i) In Romesh Thappar v. State of Madras MANU/SC/0006/1950 : AIR 1950 SC 124 : 1950 SCC 436, ("Romesh Thappar") while highlighting that the freedom of speech is the foundation of all democratic organisations, held that said freedom would also include the right to freedom of the press. This judgment highlighted that the free flow of opinion and ideas is necessary to sustain collective life of the well informed citizenry which is a sine qua non for effective governance.

ii) In S. Khushboo v. Kanniammal, MANU/SC/0310/2010 : (2010) 5 SCC 600, ("Khushboo") this Court held that the freedom Under Article 19(1)(a) envisaged dissemination of all kinds of views, both popular as well as unpopular.

iii) Recently in Shreya Singhal v. Union of India, MANU/SC/0329/2015 : (2015) 5 SCC 1, ("Shreya Singhal") this Court speaking through Nariman, J. highlighted on the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2) in the following words:

> **15.** It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the US First Amendment--Congress shall make no law which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject-matters--that is, any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-

matters set out in Article 19(2).

It was further observed that insofar as the first apparent difference is concerned, the United States Supreme Court has never given effect to the declaration that Congress shall, under some circumstances, make any law abridging the freedom of speech. Insofar as the second apparent difference is concerned, para 17 of Shreya Singhal is extracted as under:

> **17.** So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered Under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject-matters that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out Under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law.

In Shreya Singhal, there was a challenge to Section 66-A of the Information Technology Act, 2000, which was struck down as being violative of Article 19(1)(a) and was not saved Under Article 19(2) on the ground of vagueness and not providing manageable standards and clear guidance for citizens, authorities and courts for drawing a precise line between allowable and forbidden speech, expression or information. When a law uses vague expressions capable of misuse or abuse without providing notice to persons of common intelligence to guess their meaning, it leaves them in a boundless sea of uncertainty, conferring wide, unfettered powers on authorities to curtail freedom of speech and expression arbitrarily.

168.7. The present cases, however, are not really concerned with restrictions on the right to freedom of speech being imposed by the State. These cases are concerned with the content of Article 19(1)(a) of the Constitution, inasmuch as the grievance sought to be ventilated by the Petitioners is, whether, there could be an inherent constitutional restriction on freedom of speech and expression on the citizens vis-à-vis other citizens. These cases are not with regard to reasonable restrictions that could be imposed by the State on the freedom of speech and expression, rather, what would be the content of free speech that should not be exercised as a right by an individual citizen which would not in any way give rise to a cause of action to another citizen to seek a remedy.

169. The content of a free speech right, as described hereinabove, is to be understood in terms of the structural elements or components of a free speech right. Only when a free speech right is understood as such, deductions can be made as to the precise boundaries thereof and the basis on which such right can be limited or restrained. Stephen Gradbaum, in his essay titled "The Structure of a Free Speech Right," in the Oxford Handbook of Freedom of Speech has discussed six components of a free speech right, in the following words:

> The first is the **'force'** of a free speech right. This includes what type of legal right to free speech is formally recognized or at issue: for example, common law, statutory, or constitutional. This in turn helps to determine whether and how easily a free speech right can be legally superseded. Another aspect of force is whether and how the right is judicially enforceable. The second component is the **'subject'** of free speech rights,

> or who are the rights-holders: for example, all persons within a jurisdiction or only citizens; legal persons including corporations or only natural persons? The third is the **'scope'** of a free speech right: a right to say or do what exactly? Does it include falsehoods, hate speech, or baking a cake? The fourth, as a distinct structural element concerning content, addresses **whether the right includes not only negative prohibitions on relevant others but also positive obligations,** such as a duty to affirmatively protect the free speech of rights-holders from third-party threats? The fifth component is the **'object'** of a free speech right: who are these 'relevant others' that are bound by the holder's rights? Against whom can the right be validly asserted? Finally, there is the **'limitation'** of a free speech right. If the prior questions have all been answered to the effect that a free speech right is implicated and infringed in a particular situation, when, if ever, might there be a legally justified limitation of that right? Is the right an absolute bar or 'trump' against inconsistent action and, if not, what presumptive weight attaches to it? How, when, and why can the presumption be rebutted? Collectively, by constituting and expressing the underlying structure of the right to free speech, the answers to these six questions help to define the nature and extent of any particular such right in a given legal system.
>
> (Emphasis by me)

Referring to the aspect of limitation of a free speech right, the learned author has observed that the teleology of a Constitutional order, can also play a role in fashioning the contours of free speech protections. That is to say, a free speech right may be fashioned to serve Constitutional commitments.

170. According to Wesley Hohfeld's analysis of the form of rights, every right has a complex internal structure, and such structure determines what the rights mean for those who hold them. Such rights are ordered arrangements of basic components. One of the components of a right, is a correlative duty. That is to say, if X has a right, he is legally protected from interference in respect of such right and such right carries with it the duty of the State, not to interfere with such right. If the State (or any other person) is under no corelative duty to abstain from interfering with the exercise of a right, then such a right is not a 'right' in the strict Hohfeldian sense. The boundaries of the protective perimeter within which a person can exercise their rights, depend on the degree to which the State is duty bound to protect the right.

170.1. What emerges from the Hohfeldian conception of rights and corelative duties, qua the right to freedom of speech and expression may be summed up as follows:

a) The Constitution of India confers Under Article 19(1)(a), the right to freedom of speech and expression to all its citizens. The State has a corelative duty to abstain from interference with such right except as provided in Article 19(2) of the Constitution which are reasonable restrictions on the right conferred Under Article 19(1)(a). The extent of such duty depends upon the content of speech. For instance, in respect of speech that is likely to be adverse to the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality; or speech that constitutes contempt of court, defamation or is of such nature as would be likely to incite the commission of an offence, the duty of the State to abstain from interference, is nil. This principle is Constitutionally reflected Under Article 19(2) which enables the State to enact law which would impose reasonable restrictions on such speech as described under the eight grounds listed hereinabove which are the basis for reasonable restrictions.

b) Per contra, in respect of speech and expression which constitutes an exchange of ideas, including dissent or disagreement, and such ideas are expressed in a manner compatible with the ethos cultivated in a civilised

society, the duty of the State to abstain from interference, is high.

c) Similarly, in respect of commercial speech, the State is completely free to recall or curb commercial speech which is false, misleading, unfair or deceptive. Therefore, the threshold of tolerance towards commercial speech or advertisements depends on the content of such speech and the object of the material sought to be propagated/circulated. The duty of the State to abstain from interference would also depend upon the nature and effect of the commercial speech.

d) As is evident from the above illustrations, the extent of protection of speech would depend on whether, such speech would constitute a 'propagation of ideas' or would have any social value. If the answer to the said question is in the affirmative, such speech would be protected Under Article 19(1)(a); if the answer is in the negative, such speech would not be protected Under Article 19(1)(a). In respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference having regard to Article 19(2) of the Constitution and only the grounds mentioned therein.

e) Having noted that the protective perimeter within which a person can exercise his/her rights depends on the degree to which the State is duty bound to protect the right, it may also be said as a corollary that in respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference and therefore, speech such as hate speech, defamatory speech, etc. would lie outside the protective perimeter within which a person can exercise his right to freedom of speech. Such speech can be subjected to restrictions or restraints. While restrictions on the right to freedom of speech and expression are required to be made only under the grounds listed Under Article 19(2), by the State, restraints on the said right, do not gather their strength from Article 19(2). Restraints on the right to freedom of speech and expression are governed by the content of Article 19(1)(a) itself; i.e., any kind of speech, which does not conform to the content of the right Under Article 19(1)(a), may be restrained. Questions pertaining to the voluntary or binding nature of such restraint, the force behind the same, the persons on whom such restraints are to be imposed, the manner in which compliance thereof could be achieved, etc., are aspects left to be deliberated upon and answered by the Parliament. However, the finding made hereinabove is only to the extent of clarifying that any kind of speech, which does not form the content of Article 19(1)(a), may be restrained as such speech does not constitute an exchange of ideas, in a manner compatible with the ethos cultivated in a civilised society. Such restraints need not be traceable only to Article 19(2), which exhaustively lists eight grounds on which restrictions may be imposed on the right to freedom of speech and expression by the state.

The Content of Article 19(1)(a):

171. The freedom of speech and expression Under Article 19(1)(a) is a right with diverse facets, both with regard to the content of speech and expression, and the medium through which communication takes place. It is also a dynamic concept that has evolved with time and advances in technology. In short, Article 19(1)(a) covers the right to express oneself by word of mouth, through writing, pictorial form, graphics, or in any other manner. It includes the freedom of communication and the right to propagate or publish one's views and opinions. The communication of ideas may be through any medium such as a book, newspaper, magazine or movie, including electronic and audio-visual media.

171.1. Right to Circulate:

Freedom of the press takes within its fold a number of rights and one such

right is the freedom of publication. Publication also means dissemination and circulation; indeed, without circulation, publication would be of little value, vide Romesh Thappar; Sakal Papers (P) Ltd. v. Union of India, MANU/SC/0090/1961 : A.I.R. 1962 SC 305 ("Sakal Papers (P) Ltd.").

In Life Insurance Corporation v. Prof. Manubhai D. Shah, MANU/SC/0032/1993 : (1992) 3 SCC 637 ("Prof. Manubhai D. Shah") this Court reiterated that the freedom of speech and expression Under Article 19(1)(a) must be understood to take within its ambit the freedom to circulate one's view. That such circulation could be by word of mouth, in writing or through audio-visual media. The freedom to 'air one's view' was declared as a "lifeline of any democratic institution" and the Court expressed strong criticism at any attempt aimed at stifling or suffocating the right to circulation. In the said case, the appeals concerned separate instances of state-controlled entities (LIC and Doordarshan) refusing to publish or broadcast work that criticized the government. The Court reasoned that government-controlled means of publication have a greater burden to recognize an individual's right to defend themselves and if a state censors content, then it is obligated to provide reasons valid in law. That when a state-controlled entity refuses to circulate through its magazine or other platform, one's views, including one's defence, the right to circulate is violated.

This Court has therefore, on several occasions recognised the right to circulation, as a facet of the right to freedom of speech. The right to circulation includes, the right to optimise/maximise the volume of such circulation and also determine the content and reach thereof.

171.2. Right to dissent:

Article 19(1)(a) serves as a vehicle through which dissent can be expressed. The right to dissent, disagree and adopt varying and individualistic points of view inheres in every citizen of this Country. In fact, the right to dissent is the essence of a vibrant democracy, for it is only when there is dissent that different ideas would emerge which may be of help or assist the Government to improve or innovate upon its policies so that its governance would have a positive effect on the people of the country which would ultimately lead to stability, peace and development which are concomitants of good governance.

171.3. The following judgments of this Court on the right to dissent are noteworthy:

(i) In Romesh Thappar, this Court recognised that criticism or dissent directed against the Government, was not to be curtailed and any attempt to do so could not be justified as a reasonable restriction Under Article 19(2) of the Constitution. This declaration by this Court cemented the idea that the freedom of speech and expression covers the right to dissent or criticise, even when such right is employed with respect to criticism of governmental policy or action or inaction. It is now recognised that the right to dissent is an essential pre-requisite of a healthy democracy and a facet of free speech.

(ii) In Kedar Nath Singh v. State of Bihar, MANU/SC/0074/1962 : A.I.R. 1962 SC 955 ("Kedar Nath Singh") this Court considered a challenge to Sections 124-A and 505 of the Indian Penal Code, which criminalised attempts targeted at exciting disaffection towards the Government, by words, or through writing and publications which may disturb public tranquillity. Although this Court dismissed the challenge to the vires of the aforestated provisions, it was clarified that criticism of measures adopted by the government, would be within the limits of, and consistent with the freedom of speech and expression.

(iii) Subsequently, in Directorate General of Doordarshan v. Anand Patwardhan, MANU/SC/3637/2006 : (2006) 8 SCC 433 ("Anand Patwardhan") this Court observed that the State cannot prevent open discission, even when such discussion was highly critical of governmental policy.

(iv) The right of an individual to hold unpopular or unconventional views was once again upheld in Khushboo wherein this Court quashed First Information Reports (FIRs) registered pertaining to offences Under Sections 292, 499, 500, 504, 505, 509 of the Indian Penal Code, based on complaints regarding the unpopular comments made by the Appellant therein, an actor, in a news magazine on the subject of premarital sex wherein she had urged women and girls to take necessary precautions to avoid the transmission of venereal diseases. In doing so, this Court observed that criminal law could not be set into motion in a manner as would interfere with the domain of personal autonomy. The Court upheld the Appellant's freedom of speech and expression and quashed the FIRs, expressing the need for tolerance even qua unpopular views.

171.4. Right to advertise (commercial speech):

As per the dictionary meaning, the expression "advertise" means, to draw attention to, or describe goods for sale, services offered, etc., through any medium, such as newspaper, television or other electronic media, etc., in order to encourage people to buy or use them. In other words, it is to draw attention to any product or service. "Advertisement" is a public notice, announcement, picture in a newspaper or on a wall or hoarding in the street etc., which advertises something. In short, it is to advert attention to something and in the commercial sense, to draw attention to goods for sale or services offered. In that sense, an advertisement is commercial speech.

A glimpse of the following cases would be useful:

(i) In Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India, MANU/SC/0016/1959 : A.I.R. 1960 SC 554 ("Hamdard Dawakhana") this Court held that an advertisement is a form of speech, but its true character is reflected by the object for the promotion of which it is employed. However, this Court qualified its observations with the caveat that when advertisement takes the form of commercial advertisement which has an element of trade or commerce, it no longer falls within the concept of freedom of speech, for, the object is not propagation of ideas-social, political or economic or furtherance of literature or human thought; but the commendation of the efficacy, value and importance of the product it seeks to advertise. In the said case, this Court did not recognize commercial speech on par with other forms of speech by holding that it did not have the same value as political or creative expression. That broadly, the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution, but not every advertisement is a matter which comes within the scope of freedom of speech, nor can it be said that it is an expression of ideas. In every case, one has to see what is the nature of advertisement and what is the business/commercial activity falling Under Article 19(1)(g) it seeks to further.

In the aforesaid case, what was challenged was the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. It was held that the object of the Act was the prevention of self-medication and self-treatment by prohibiting advertisements, which may be used to

advocate the same or which tended to spread the evil. It was further held that the advertisements of Hamdard Dawakhana, Appellant in the said case, were relating to commerce or trade and not propagation of ideas. Such advertising of prohibited drugs or commodities the sale of which was not in the interest of the general public, cannot be "speech" within the meaning of freedom of speech and would not fall within Article 19(1)(a).

It is therefore evident that this Court in the said case placed weight on the aspect as to whether, the advertisement sought to be protected, did in fact constitute 'propagation of ideas.' The true content and object of the material sought to be propagated/circulated was to be assessed, in order to declare whether such content would enjoy the protection of Article 19(1)(a).

(ii) Subsequently, in Indian Express Newspaper (Bombay) Pvt. Ltd. v. Union of India, MANU/SC/0406/1984 : (1985) 1 SCC 641 ("Indian Express Newspaper (Bombay) Pvt. Ltd."), this Court considered the decision in Hamdard Dawakhana and observed that the main plank of said decision was the type of advertisement or the content thereof and that particular advertisement did not carry with it the protection of Article 19(1)(a). It was further clarified that the observations made in Hamdard Dawakhana are too broadly stated. That all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen.

(iii) Subsequently, in Tata Press Limited v. Mahanagar Telephone Nigam Limited, MANU/SC/0745/1995 : (1995) 5 SCC 139 ("Tata Press Limited"), this Court clarified that commercial speech, which is entitled to protection under the First Amendment in USA is also protected Under Article 19(1)(a) of the Indian Constitution. However, in the USA, the State was completely free to recall commercial speech which is false, misleading, unfair, deceptive and which proposes illegal transactions in USA. But, under the Indian Constitution, commercial speech which is deceptive, unfair, misleading and untruthful, would be hit by Article 19(2) of the Constitution and can be regulated/prohibited by the State.

171.5. Compelled Speech:

Compelled or forced speech is speech which compels a person to state a thing. It is in the form of a "must carry" provision in a statute. An example of compelled speech is a provision mandating printing of the ingredients, its measure and such other details on a food product or pharmaceutical item. The object is to inform and, in some cases, warn a potential consumer about the nature of the product. Such compelled speech cannot be a violation of the freedom of speech and expression. But if the State compels a citizen to carry out propaganda or a point of view contrary to his wish then it may be a restriction on his freedom of speech and expression, which must be justified as per Article 19(2) of the Constitution. But, if the "must carry" provision furthers informed decision making, which is the essence of free speech and expression, then it will not amount to a violation of Article 19(1)(a). The following judgments could be cited in the aforesaid context:

(i) In Union of India v. Motion Picture Association, MANU/SC/0404/1999 : A.I.R. 1999 SC 2334 ("Motion Picture Association"), this Court held that whether compelled speech will or will not amount to a violation of the freedom of speech and

> expression, would depend upon the nature of a "must carry" provision. It observed that, if a "must carry" provision further informed decision-making, which is the essence of the right to free speech and expression, it will not amount to any violation of the fundamental freedom of speech and expression. However, if such a provision compels a person to carry out propaganda or project a partisan or distorted point of view, contrary to his wish, it may amount to a restraint on his freedom of speech and expression. It may also violate other fundamental rights such as Article 19(1) (g) or right against self-incrimination which is protected Under Article 20(3) of the Constitution.
>
> (ii) Therefore, this Court, in the said case, once again laid stress on the ideas and information sought to be communicated, by way of compelling the transmission of such ideas. The content of the information which is compelled to be carried was found to be highly relevant.

Thus, the right Under Article 19(1)(a) is a multi-faceted freedom and includes within its expanse, inter-alia, the right to gender identity as a facet of freedom of expression, vide National Legal Services Authority v. Union of India, MANU/SC/0309/2014 : (2014) 5 SCC 438 ("National Legal Services Authority"); the right of the press to conduct interviews, vide Prabha Dutt v. Union of India, MANU/SC/0087/1981 : (1982) 1 SCC 1 ("Prabha Dutt"); the right to attend proceedings in Court and report the same, vide Swapnil Tripathi v. Supreme Court of India, MANU/SC/1066/2018 : (2018) 10 SCC 639 ("Swapnil Tripathi"); the right to fly the national flag vide Union of India v. Naveen Jindal, MANU/SC/0072/2004 : (2004) 2 SCC 510 ("Naveen Jindal"). The right to silence, often regarded as the very converse of 'speech,' is also implicit in the freedom of speech Under Article 19(1) (a), as recognised in Bijoe Emmanuel v. State of Kerala, MANU/SC/0061/1986 : (1986) 3 SCC 615 ("Bijoe Emmanuel").

172. 'Hate Speech':

172.1. The various nuances of what has come to be termed as 'hate speech' could be discussed with reference to judgments of this Court as under:

> Learned Counsel appearing for the Petitioner, Sri. Kaleeswaram Raj submitted that, the contention of the Petitioners in these cases is that the right to free speech which is a right against the State would also bring within its fold, a duty vis-à-vis not only the State but other citizens also in the matter of exercising the said freedom. In other words, what is sought to be addressed in these cases is what are the components or elements of the fundamental right of free speech and whether there could be limits on the right to free speech de hors Article 19(2) of the Constitution, with a view to check, what has ubiquitously come to be known as 'hate speech' or 'disparaging speech'. By this I do not restrict the scope of consideration in the instant cases only to speech made by public functionaries, but the same shall also extend to speech by ordinary citizens, especially on social media.

172.2. This Court, in Pravasi Bhalai Sangathan v. Union of India, MANU/SC/0197/2014 : (2014) 11 SC 477 ("Pravasi Bhalai Sangathan") speaking through Dr. B.S. Chauhan, J., has dealt with 'hate speech' as having an innate relationship with the idea of discrimination. That the impact of such speech is not measured by its abusive value alone, but rather by how successfully and systematically it marginalises people. The definition of 'hate speech' as propounded by this Court in the aforesaid case, is extracted hereinunder:

> Hate speech is an effort to marginalise individuals based on their membership in a group. **Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society.** Hate speech, therefore rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on [the] vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."
>
> (Emphasis by me)

This Court referred to the judgment of the Supreme Court of Canada in Saskatchewan Human Rights Commission v. William Whatcott, MANU/SCCN/0005/2013 : 2013 SCC 11 ("Saskatchewan") (Canada) wherein it was held that human rights obligations form the basis for the control of publication of "hate speeches." The Canadian Supreme Court further declared that the repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment, is irrelevant. That the key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination. Placing reliance on the observations of the Canadian Supreme Court, this Court in Pravasi Bhalai Sangathan observed that the offence of hate speech is not limited to causing individual distress but would target persons who are members of certain groups or Sections of society which breeds discrimination and consequently, hostility.

172.3. In India, human dignity is not only a value but a right that is enforceable. In a human-dignity-based democracy, freedom of speech and expression must be exercised in a manner that would protect and promote the rights of fellow-citizens. But hate speech, whatever its content may be, denies human beings the right to dignity. In this regard, it may be apposite to refer to a recent decision of this Court in Amish Devgan v. Union of India, MANU/SC/0921/2020 : (2021) 1 SCC 1 ("Amish Devgan") wherein this Court speaking through Sanjeev Khanna, J. undertook an analysis of 'hate speech' as being antithetical to, and incompatible with the foundations of human dignity. Protection of 'Dignity' as a justification for criminalization of 'hate speech' was discussed as follows:

> **46.** [...] Dignity, in the context of criminalisation of speech with which we are concerned, refers to a person's basic entitlement as a member of a society in good standing, his status as a social equal and as bearer of human rights and constitutional entitlements. It gives assurance of participatory equality in inter-personal relationships between the citizens, and between the State and the citizens, and thereby fosters self-worth. Dignity in this sense does not refer to any particular level of honour or esteem as an individual, as in the case of defamation which is individualistic.
>
> **47.** Preamble to the Constitution consciously puts together fraternity assuring dignity of the individual and the unity and integrity of the nation. Dignity of individual and unity and integrity of the nation are linked, one in the form of rights of individuals and other in the form of individual's obligation to others to ensure unity and integrity of the nation. The unity and integrity of the nation cannot be overlooked and slighted, as the acts that 'promote' or are 'likely' to 'promote' divisiveness, alienation and schematism do directly and indirectly impinge on the diversity and pluralism, and when they are with the objective and intent to cause public disorder or to demean dignity of the targeted groups, they have to be dealt with as per law. The purpose is not to

curtail right to expression and speech, albeit not gloss over specific egregious threats to public disorder and in particular the unity and integrity of the nation. Such threats not only insidiously weaken virtue and superiority of diversity, but cut-back and lead to demands depending on the context and occasion, for suppression of freedom to express and speak on the ground of reasonableness. **Freedom and rights cannot extend to create public disorder or armour those who challenge integrity and unity of the country or promote and incite violence. Without acceptable public order, freedom to speak and express is challenged and would get restricted for the common masses and law-abiding citizens. This invariably leads to State response and, therefore, those who indulge in promotion and incitement of violence to challenge unity and integrity of the nation or public disorder tend to trample upon liberty and freedom of others.**

(Emphasis by me)

Further, referring to the views of Alice E. Marwick and Ross Millers in the report titled "Online Harassment, defamation, and Hateful Speech: A Primer of the Legal Landscape," this Court in Amish Devgan elucidated as follows on three distinct elements that legislatures and courts can use to define and identify 'hate speech':

72.1. The content-based element involves open use of words and phrases generally considered to be offensive to a particular community and objectively offensive to the society. It can include use of certain symbols and iconography. By applying objective standards, one knows or has reasonable grounds to know that the content would allow anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender.

72.2. The intent-based element of 'hate speech' requires the speaker's message to intend only to promote hatred, violence or resentment against a particular class or group without communicating any legitimate message. This requires subjective intent on the part of the speaker to target the group or person associated with the class/group.

72.3. The harm or impact-based element refers to the consequences of the 'hate speech', that is, harm to the victim which can be violent or such as loss of self-esteem, economic or social subordination, physical and mental stress, silencing of the victim and effective exclusion from the political arena.

72.4. Nevertheless, the three elements are not watertight silos and do overlap and are interconnected and linked. Only when they are present that they produce structural continuity to constitute 'hate speech'.

It was further clarified that the effect of the words must be judged from the standard of "reasonable, strong-minded, firm and courageous men and not those who are weak and ones with vacillating minds, nor those who scent danger in every hostile point of view." That in order to ensure maximisation of free speech, the assessment should be from the perspective of a reasonable member of the public.

172.4. Further, in a landmark judgment of the United States' Supreme Court in the matter of Chaplinsky v. State of New Hampshire, MANU/USSC/0058/1942 : 315 U.S. 568 (1942) ("Chaplinsky") "hate speech" was defined by Murphy J. to mean "fighting words, which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been observed that such utterances are no essential part of any exposition of ideas, and are of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

172.5. The term 'hate speech' does not find a specific place in Article 19(2) of the Constitution and it appears that it does not constitute a specific exception to the freedom of speech and expression Under Article 19(1)(a). Possibly the framers of the Constitution did not find the same to be of relevance in the Indian social mosaic considering that the other cherished values of our Constitution such as fraternity and dignity of the individual would be strong factors which would negate any form of hate speech to be uttered in our Country. This may be having regard to our social and cultural values. However, with the passage of time, a wide range of Indian statutes have been enacted with a view to control hate speech. It may be useful to refer to a few of such provisions, with a view to examine the sufficiency of the existing framework in checking 'hate speech' although, the said term has not yet been precisely defined till date by the Parliament.

i) The Indian Penal Code ("IPC") contains provisions which prohibit hate speech. Section 153-A penalises the promotion of class hatred. Section 153-B penalises "imputations, assertions prejudicial to national integration". Section 295-A penalises insults to religion and to religious beliefs. Section 298 makes it a penal offence to utter words, makes sounds or gestures with the deliberate intention of wounding the religious feelings of another. Section 505 makes it a penal offence to incite any class or community against another. Chapter XXII, Indian Penal Code punishes criminal intimidation.

ii) Section 95 of the Code of Criminal Procedure, 1973 ("CrPC") empowers the State Government to forfeit publications that are punishable Under Sections 124-A, 153-A, 153-B, 292, 293 or 295-A of the Indian Penal Code. Section 107 empowers the Executive Magistrate to prevent a person from committing a breach of peace or disturbing public tranquillity or doing any wrongful act that may cause breach of peace or disturb public tranquillity. Section 144 empowers the District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf to issue orders in urgent cases of nuisance or apprehended danger. The above offences are cognizable.

iii) Section 7 of the Protection of Civil Rights Act, 1955 penalises incitement to, and encouragement of untouchability through words, either spoken or written, or by signs or by visible representations or otherwise.

iv) Section 3(g) of the Religious Institutions (Prevention of Misuse) Act, 1988 prohibits religious institutions to allow the use of any premises belonging to, or under their control for promoting or attempting to promote disharmony, feelings of enmity, hatred, ill-will between different religious, racial, linguistic or regional groups or castes or communities.

v) Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 punishes an intentional insult or intimidation with intent to humiliate a member of a Scheduled Caste or Tribe in any place within public view.

vi) Section 8 of the Representation of the People Act, 1951 disqualifies a person from contesting elections if he is convicted for indulging in acts amounting to illegitimate use of freedom of speech and expression. Section 123(3-A) of the same Act declares "the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate", a "corrupt practice".

vii) The Cable Television Networks (Regulation) Act, 1995 requires that all programmes and advertisements telecast on television conform to the Programme Code and the Advertisement Code. Rule 6, Cable Television Networks Rules, 1994 lays down the Programme Code and prohibits the carrying of any programme on the cable service which:

(a) contains an attack on religion or communities or contains visuals or words contemptuous of religious groups or which promotes communal attitudes;

(b) is likely to encourage or incite violence or contains anything against maintenance of law and order or which promotes anti-national attitudes;

(c) criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country;

(d) contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups.

Similarly, the Advertising Code Under Rule 7 of the Cable Television Networks Rules, 1994 prohibits the carriage of advertisements on the cable service which hurt the religious susceptibilities of subscribers, which derides any race, caste, colour, creed or nationality, or incite violence or disorder or breach of law.

The Cable Television Networks (Regulation) Act, 1995 empowers the authorised officer appointed under the Act to prohibit the transmission of a programme or channel, if it is not in conformity with the Programme Code or the Advertisement Code; or if it is likely to promote disharmony or feelings of enmity, hatred or ill-will between different religious, racial, linguistic or regional groups; or is likely to disturb public tranquillity. Further, the Central Government is empowered to prohibit the transmission or re-transmission of any channel or programme in the interest of the sovereignty, integrity or security of India or of public order.

viii) Under the Cinematograph Act, 1952, a film can be denied certification on various grounds, including on the ground that it is likely to incite the commission of an offence or that it is against the interests of the sovereignty and integrity of India or public order.

ix) The Information Technology Act, 2000 (IT Act) allows the interception of information by the authorities in the interest of public order, or the sovereignty and integrity of India, or for the purpose of preventing incitement to the commission of a cognizable offence. Section 66-A of the same Act which sought to penalise information that is "grossly offensive" or of "menacing character" or despite knowledge that it is false, is sent to cause annoyance, inconvenience, danger, obstruction, insult, criminal intimidation, enmity, hatred or ill-will, was struck down in Shreya Singhal on the ground of, inter alia, vagueness.

x) Norms of Journalistic Conduct, 2010 issued by the Press Council of India (constituted under the Press Council Act, 1978) contain extensive guidelines on the reporting of communal incidents.

The content of speech is sought to be controlled in all the aforesaid statutes when the same is made not only by public functionaries but any ordinary citizen also through

whatever medium of dissemination.

172.6. One of the recommendations of the 267th Law Commission was to insert Sections 153C and 505A and associated provisions in the Code of Criminal Procedure to deal with 'Hate Speech'. As per the Law Commission report, the proposed provisions would read as under:

> 153-C-Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe-
>
> > (a) uses gravely threatening words either spoken or written, signs, visible representations within the hearing or sight of a person with the intention to cause, fear or alarm; or
> >
> > (b) advocates hatred by words either spoken or written, signs, visible representations, that causes incitement to violence shall be punishable with imprisonment of either description for a term which may extend to two years, and fine up to Rs. 5000, or with both.
>
> 505-A-Causing fear, alarm, or provocation of violence in certain cases: Whoever in public intentionally on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe uses words, or displays any writing, sign, or other visible representation which is gravely threatening, or derogatory;
>
> > (i) within the hearing or sight of a person, causing fear or alarm, or;
> >
> > (ii) with the intent to provoke the use of unlawful violence, against that person or another, shall be punished with imprisonment for a term which may extend to one year and/or fine up to Rs. 5000, or both.

The proposed provision Under Section 505-A, seeks to control not only speech that could potentially incite violence or hurt the feelings of a community or dampen national integrity, but also seeks to check threatening or derogatory remarks, made on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe, and which cause fear or alarm. While speech of the former category has been traditionally regarded as 'hate speech,' generally vitriolic or 'derogatory' statements, which are made on the grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe, have traditionally not been considered to qualify as 'hate speech,' no matter how unwarranted or disparaging such statements may be.

172.7. Traditionally, 'hate speech' is the term used to describe speech that can potentially cause actual material harm through potential social, economic and political marginalisation of a community as declared by this Court in Pravasi Bhalai Sangathan. However, in the present case, in my opinion, we are concerned with a more overarching area of derogatory, vitriolic and disparaging speech, which is actually not 'hate speech' simplicitor as has been traditionally sought to be defined and understood. I am concerned with speech that may not be linked to systematic discrimination and eventual political marginalisation of a community, but which may nonetheless have insidious effects on the societal perception of human dignity, values of social cohesion, fraternity and equality cherished by "We the people" of India.

172.8. Andrew F. Sellars, in his essay published by Harvard University, titled 'Defining Hate Speech,' has examined the concept of 'hate speech' in different democratic

jurisdictions. The author has identified that certain remarks, which, although may not be 'hate speech' in the strict sense of the term, border on the said term. That even tacit elements of intent of the speaker to cause harm, may constitute some species of hate speech. Intent may refer to non-physical aspects like to demean, vilify, humiliate, or being persecutorial, disregarding or hateful. The author has also recognised that in some contexts, "at home speeches" may themselves amount to hate speeches as such speech can now be uploaded and circulated in the virtual world through internet etc. The only pre-requisite is that the speech should have no redeeming purpose, which means that "the speech primarily carries no meaning other than hatred, hostility and ill-will.

Beyond 'hate speech':

173. The expansive scope of 'hate speech' as set out above, would include within its sweep not only 'hate speech' simplicitor which is defined as speech aimed at systematic discrimination and eventual political marginalisation of a community, but also other species of derogatory, vitriolic and disparaging speech.

174. A philosophical justification to control and restrain derogatory, vitriolic and disparaging speech has been very poignantly conveyed by Lau Tzu, a celebrated Chinese philosopher and writer, in the following words:

Watch your thoughts; they become words.

Watch your words; they become actions.

Watch your actions; they become habit.

Watch your habits; they become character.

Watch your character; it becomes your destiny.

175. Theoretical and doctrinal underpinnings justifying restraints on derogatory and disparaging speech, may be traced to two primary factors: human dignity as a value as well as a right; the Preambular goals of 'equality' and 'fraternity.'

Human dignity as a value as well as a right under the Constitution of India:

176. As discussed supra, human dignity is not only a value but a right that is enforceable Under Article 21 of the Constitution of India. In a human-dignity-based democracy, freedom of speech and expression must be exercised in a manner that would protect and promote the rights of fellow-citizens.

International practice:

177. In attempting to justify restraints on free speech, on the argument founded on considerations of autonomy, dignity and self-worth of the person(s) against whom derogatory statements are made, reference may be made to international practice in this regard.

i) Canada: Canadian jurisprudence on the subject proceeds on the basis of inviolability of human dignity as its paramount value and specifically limits the freedom of expression when necessary to protect the right to personal honour. The Canadian approach emphasises on multiculturalism and group equality, as it places greater emphasis on cultural diversity and promotes the idea of an ethnic mosaic. Interestingly, the Canadian position, as discernible from the Canadian Supreme Court's verdict in R v. James Keegstra, (1990) 3 SCR 697 ("Keegstra") (Canada) considers the likely impact of hate speech on both the targeted groups and non-targeted groups. The former are likely to be degraded and humiliated and experience injuries to their sense of self-worth and acceptance in the larger society and may well, as a consequence,

avoid contact with members of the other group within the polity. The non-targeted members of the group, sometimes representing society at large, on the other hand, may gradually become de-sensitised and may in the long run start accepting and believing the messages of hate directed towards racial and religious groups. These insidious effects pose serious threats to social cohesion in the long run rather than merely projecting immediate threats to violence.

Further, Dixon C.J. of the Canadian Supreme Court in Canada Human Rights Commission v. Taylor, MANU/SCCN/0071/1990 : (1990) 3 SCR 892 ("Taylor") (Canada) has observed as follows, as regards the interrelationship between messages of hate propaganda and the values of dignity and equality:

> ...messages of hate propaganda undermine the dignity and self-worth of targeted group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open mindedness that must flourish in a multicultural society which is committed to the idea of equality.

ii) Australia: The position of law in Australia is substantially aligned with that in Canada. The Australian Federal Court, in the case of Pat Eatock v. Andrew Bolt,(2011) FCA 1103 ("Pat Eatock") (Australia) followed the dictum in Keegstra in holding that the right to freedom of expression could be restricted vide legislation which made racial hatred a criminal offence. The Australian Federal Court stated that the rationale for a legislation restraining free speech was as follows:

> (a) The justification from pursuit of truth does not support the protection of hate propaganda, and may even detriment our search for truth. The more erroneous or mendacious a statement, the less its value in the quest of truth. We must not overemphasize that rationality will overcome all falsehoods.
>
> (b) Self-fulfilment and autonomy, in a large part, come from one's ability to articulate and nurture an identity based on membership in a cultural or religious group. The extent to which this value furthers free speech should be modulated insofar as it advocates an intolerant and prejudicial disregard for the process of individual self-development and human flourishing.
>
> (c) The justification from participation in democracy shows a shortcoming when expression is employed to propagate ideas repugnant to democratic values, thus undermining the commitment to democracy. Hate propaganda argues for a society with subversion of democracy and denial of respect and dignity to individuals based on group identities.

iii) South Africa: The position which regards dignity as a paramount constitutional value has been recognised in South Africa. The Constitutional Court has expressed willingness to subjugate freedom of expression when the same sufficiently undermines dignity. The constitutional provision, therefore, enjoins the legislature and the court to limit free speech rights and the exercise of those rights which deprive others of dignity.

iv) Germany: The German law on the subject posits that freedom of expression is one amongst several rights which is limited by principles of equality, dignity and multiculturalism. Further, value of personal honour always triumphs over the right to utter untrue statements or facts made with the knowledge of their falsity. Also, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honour triumphs over the freedom of speech. If the expression of opinion as opposed to a fact constitutes a serious affront to the dignity of a person, the value of dignity triumphs over the speech. Therefore, German application strikes a balance between rights and duties, between the individual and the community on the one hand

> and between the self-expression needs of the speaker and the self-respect and dignity of the listeners on the other. It recognises the content-based speech Regulation and also recognises the difference between fact and opinion.

The inalienability of 'human dignity' under the Constitution of India vis-à-vis the right to freedom of speech and expression:

178. In Charu Khurana v. Union of India, MANU/SC/1044/2014 : (2015) 1 SCC 192 ("Charu Khurana"), this Court declared that dignity is the quintessential quality of personality and a basic constituent of the rights guaranteed and protected Under Article 21. Dignity is a part of the individual rights that form the fundamental fulcrum of collective harmony and interest of a society. That while the right to speech and expression is absolutely sacrosanct, dignity as a part of Article 21 has its own significance. That dignity of an individual cannot be overridden and blotched by malice and vile and venal attacks to tarnish and destroy the reputation of another by stating that the same curbs and puts unreasonable restriction on the freedom of speech and expression.

Further, in In Re. Noise Pollution (V), MANU/SC/0415/2005 : (2005) 5 SCC 733 it was observed that Article 19(1)(a) cannot be cited as a justification for defeating the fundamental right guaranteed by Article 21. That a person speaking cannot violate the rights of others to enjoy a peaceful, comfortable and (noise) pollution free environment, guaranteed by Article 21.

Having regard to the unequivocal declaration of this Court, to the effect that Article 21 could not be sacrificed at the altar of securing the widest amplitude of free speech rights, this premise can serve as a theoretical justification for prescribing restraints on derogatory and disparaging speech. Human dignity, being a primary element under the protective umbrella of Article 21, cannot be negatively altered on account of derogatory speech, which marks out persons as unequal and vilifies them leading to indignity.

179. Rule of Law, includes certain minimum requirements without which a legal system cannot exist. Professor Lon L. Fuller, a renowned American legal philosopher, has described these requirements collectively as the 'inner morality of law'. Such an understanding of the concept of Rule of Law places much emphasis on the centrality of individual dignity in a society governed by the Rule of Law. Justice Aharon Barak, former Chief Justice of Israel, has lucidly explained this facet of Rule of law in the following manner:

> The Rule of law is not merely public order, the Rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity and develop himself. The human being and human rights underlie this substantive perception of the Rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. **The substantive Rule of law "is the Rule of proper law, which balances the needs of society and the individual". This is the Rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. The Judge must protect this rich concept of the Rule of law.**
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> (Emphasis by me)

180. As recognised by this Court in K.S. Puttaswamy (Retd.) v. Union of India, MANU/SC/1054/2018 : (2019) 1 SCC 1 ("Puttaswamy"), a substantive aspect of the Rule of Law is the balance between the individual and society. In that background, this Court discussed the scope of Constitutional rights under our Constitutional scheme and the extent of their protection. While emphasising that there are no absolute constitutional rights, this Court laid down, in the following words that one of the only rights which is treated as "absolute" is the right to human dignity:

62. It is now almost accepted that there are no absolute constitutional rights [Though, debate on this vexed issue still continues and some constitutional experts claim that there are certain rights, albeit very few, which can still be treated as "absolute". Examples given are:(a) Right to human dignity which is inviolable,(b) Right not to be subjected to torture or to inhuman or degrading treatment or punishment. Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished. However, so far such attempts of the States have been thwarted by the judiciary.] and all such rights are related. As per the analysis of Aharon Barak [Aharon Barak, Proportionality: Constitutional Rights and Their Limitation (Cambridge University Press 2012).], two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the Rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in Clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon--of both the right and its limitation in the Constitution--exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "losing" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "constructive tension". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. **This tension between the two fundamental aspects--rights on the one hand and its limitation on the other hand--is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.**

[Emphasis by me]

181. It is clarified that at this juncture that it is not necessary to engage in the exercise of balancing our concern for the free flow of ideas and the democratic process, with our desire to further equality and human dignity. This is because no question would arise as to the conflict of two seemingly competing rights, being the right to freedom of speech and expression, vis-à-vis the right to human dignity and equality. The reason for the same is because, the restraint that is called for, is only in relation to unguided, derogatory, vitriolic speech, which in no way can be considered as an essential part of exposition of ideas, which has little social value. This discourse, in no way seeks to pose a potential danger to peaceful dissenters, who exercise their

right to freedom of speech and expression in a critical, but measured fashion.

The present cases pertain specifically to derogatory, disparaging speech, which closely resembles hate speech. Such speech does not fall within the protective perimeter of Article 19(1)(a) and does not constitute the content of the free speech right. Therefore, when such speech has the effect of infringing the fundamental right Under Article 21 of another individual, it would not constitute a case which requires balancing of conflicting rights, but one wherein abuse of the right to freedom of speech by a person has attacked the fundamental rights of another.

The Preambular goals of 'equality' and 'fraternity':

182. Equality, liberty and fraternity are the foundational values embedded in the Preamble of our Constitution. 'Hate speech', in the sense discussed hereinabove, strikes at each of these foundational values, by marking out a society as being unequal. It also violates fraternity of citizens from diverse backgrounds, the sine-qua-non of a cohesive society based on plurality and multi-culturalism such as in India that is, Bharat.

183. Fraternity is based on the idea that citizens have reciprocal responsibilities towards one another. The term takes within its sweep, inter-alia, the ideals of tolerance, co-operation, and mutual aid.

> **183.1**. The meaning of the term fraternity, in the context of criminal defamation and restraints on the freedom of speech and expression has been examined by this Court in Subramanian Swamy v. Union of India, MANU/SC/0621/2016 : (2016) 7 SCC 221 ("Subramanian Swamy") wherein it was observed that fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity. This Court qualified its observations with the caveat that 'fraternity' does not mean that there cannot be dissent or difference, more so because all citizens have the right to freedom of speech and expression. However, it was unequivocally declared that a constitutional value which is embedded in the idea of fraternity is dignity of the individual, which is required to be respected by fellow citizens. That the Preamble consciously chooses to assure the dignity of the individual, in the context of fraternity and therefore, rights enshrined in Part III have to be exercised by individuals against the backdrop of the ideal of fraternity. This Court observed that the fraternal ideal also finds resonance in Part IVA of the Constitution. In upholding the permissibility of the law on criminal defamation, on the touchstone of the concept of constitutional fraternity, this Court speaking through Dipak Misra, J. (as his Lordship then was) observed in paragraphs 155 and 163, as follows:
>
> > **155. It is a constitutional value which is to be cultivated by the people themselves as a part of their social behavior.** There are two schools of thought; one canvassing individual liberalization and the other advocating for protection of an individual as a member of the collective. The individual should have all the rights under the Constitution but simultaneously he has the responsibility to live upto the constitutional values like essential brotherhood-the fraternity-that strengthens the societal interest. Fraternity means brotherhood and common interest. Right to censure and criticize does not conflict with the constitutional objective to promote fraternity. Brotherliness does not abrogate and rescind the concept of criticism. In fact, brothers can and should be critical. Fault finding and disagreement is required even when it leads to an individual disquiet or group disquietude. Enemies Enigmas Oneginese on the part of some does not create a dent in the idea of fraternity but, a significant one, liberty to have a discordant note does not confer a right to defame the others.
> >
> > **163.** We have referred to two concepts, namely, constitutional fraternity and the fundamental duty, as they constitute core constitutional values. Respect for

the dignity of another is a constitutional norm. **It would not amount to an overstatement if it is said that constitutional fraternity and the intrinsic value inhered in fundamental duty proclaim the constitutional assurance of mutual respect and concern for each other's dignity. The individual interest of each individual serves the collective interest and correspondingly the collective interest enhances the individual excellence. Action against the State is different than an action taken by one citizen against the other. The constitutional value helps in structuring the individual as well as the community interest. Individual interest is strongly established when constitutional values are respected. The Preamble balances different and divergent rights. Keeping in view the constitutional value, the legislature has not repealed Section 499 and kept the same alive as a criminal offence.** The studied analysis from various spectrums, it is difficult to come to a conclusion that the existence of criminal defamation is absolutely obnoxious to freedom of speech and expression. As a prescription, it neither invites the frown of any of the Articles of the Constitution nor its very existence can be regarded as an unreasonable restriction.

(Emphasis by me)

183.2. The decision of this Court in Subramanian Swamy establishes precedent of justifying a restraint on free speech, on the ground of promotion of fraternity. It has been recognized that the constitutional value of fraternity imputes an obligation on all citizens to subserve collective interest and respect the dignity and equality of fellow citizen. Restraints on free speech prescribed to secure these ends, have been held to be justified, as being aimed at preserving the Preambular ideal of fraternity. It is also to be noted that this Court in the said case recognized that fraternity as a value is to be cultivated by citizens themselves as a part of their social behavior by refraining from uttering defamatory statements. This chord of the said judgment, acknowledges the idea of self-restraint or inherent restraints as being read into the right to freedom of speech and expression.

183.3. Democracy, being one of the basic features of our Constitution, it is implicit that in a Rule by majority there would be a sense of security and inclusiveness. Further, the Preamble of the Constitution which envisages, inter alia, fraternity, assures that the dignity of individuals cannot be dented by means of unwarranted speech being made by fellow citizens, including public functionaries. Thus, the Preamble of the Constitution and the values thereof assuring the people of India not only justice, liberty, equality but also fraternity and unity and integrity of the nation, must remind every citizen of this Country irrespective of the office or position or power that is held, of the sublime ideals of the Constitution and to respect them in their true letter and spirit. There is an inbuilt constitutional check to ensure that the values of the Constitution are not in any way undermined or violated. It is high time that we, as a society in general and as individuals in particular, re-dedicate ourselves to the sacred values of the Constitution and promote them not only at our individual level but at the macro level. Any kind of speech which undermines the values for which our Constitution stands would cause a dent on our social and political values.

Employing the Fundamental Duties under Part IV-A of the Constitution as a means to check disparaging, unwarranted speech:

184. Every right engulfs and incorporates a duty to respect another's right and secure mutual compatibility and conviviality of the individuals based on collective harmony, resulting in social order. The concept of fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity. In the context of constitutional fraternity, fundamental duties engrafted Under Article 51-A of the Constitution gain significance. Sub-clause (c), (e) and (j) of Article 51-A of the Constitution

which are relevant to these cases read as follows:

> Article 51-A. Fundamental Duties-.--It shall be the duty of every citizen of India--
>
> (a) xxx
>
> (b) xxx
>
> (c) to uphold and protect the sovereignty, unity and integrity of India;
>
> (d) xxx
>
> (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
>
> (f) xxx
>
> (g) xxx
>
> (h) xxx
>
> (i) xxx
>
> (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;

Fundamental duties also constitute core Constitutional values for good citizenship in a democracy such as ours. The duties enumerated above, enjoin all citizens with the obligations of promoting fraternity, harmony, unity, collective welfare etc. Fundamental duties have a keen bond of sorority with the Constitutional goals and must therefore be recognised not merely as Constitutional norms or precepts but as obligations, corelative to rights. In short, the permissible content of the right to freedom of speech and expression, ought to be tested on the touchstone of fraternity and fundamental duties as envisaged under our Constitution.

185. Although the questions for consideration before the Constitution bench, were with specific regard to the possible restraints on unwarranted and disparaging speech by public functionaries, the observations made hereinabove, will apply with equal force to public functionaries, celebrities/influencers as well as all citizens of India, more so because technology is being used as a medium of communication which has a wide spectrum of impact across the globe.

186. The internet represents a communication revolution and has enabled us to communicate with millions of people worldwide, with no more difficulty than communicating with a single person, at a click or by touch on a screen. Ironically, the very qualities of the internet that have revolutionised communication are amenable to misuse. The internet, through various social media platforms has accelerated the pace as well as the reach of messages, comments and posts to such an extent that the difference between a celebrity and a common man, has been practically negated, in so far as the reach of their speech is concerned.

187. However, given the specific submission of the Petitioners herein that disparaging and vitriolic speech expressed at various levels of political authority have exacerbated a climate bordering on intolerance and tension in the society, which perhaps may lead to insecurity, it may be appropriate to sound a strong word of warning in this regard.

188. It may be appropriate at this juncture to refer to the writings of Michael Rosenfeld, on the key variables which determine the impact of hate speech. One of the key variables highlighted by the learned author in his paper titled "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," published in Cardozo Law Review, is the question as to "who" the

speaker is. The learned author notes that speech made by a person of influence, such as a top government or executive functionary, opposition leader, political or social leader of following, or a credible anchor on a TV show carries far more credibility and impact than a statement made by a common person.

Public functionaries and other persons of influence and celebrities, having regard to their reach, real or apparent authority and the impact they wield on the public or on a certain Section thereof, owe a duty to the citizenry at large to be more responsible and restrained in their speech. They are required to understand and measure their words, having regard to the likely consequences thereof on public sentiment and behaviour, and also be aware of the example they are setting for fellow citizens to follow.

189. While there are no infallible Rules that can be formulated by the Court to define the precise threshold of acceptable speech, every citizen's conscious attempt to abide by the Constitutional values, and to preserve in letter and spirit the culture contemplated under the Constitution will significantly contribute in eliminating instances of societal discord, friction and disharmony, on account of disparaging, vitriolic and derogatory speech, particularly when made by public functionaries and/or public figures. This does not in any way imply that ordinary citizens who form the great mass of the citizenry of this Country can shun responsibility for vitriolic, unnecessarily critical, diabolical speech, bordering on all those aspects mentioned Under Article 19(2) either against public functionaries/figures or against other citizens in general or against particular individuals.

190. Every citizen of India must consciously be restrained in speech, and exercise the right to freedom of speech and expression Under Article 19(1)(a) only in the sense that it was intended by the framers of the Constitution, to be exercised. This is the true content of Article 19(1)(a) which does not vest with citizens unbridled liberty to utter statements which are vitriolic, derogatory, unwarranted, have no redeeming purpose and which, in no way amount to a communication of ideas. Article 19(1)(a) vests a multi-faceted right, which protects several species of speech and expression from interference by the State. However, it is a no brainer that the right to freedom speech and expression, in a human-rights based democracy does not protect statements made by a citizen, which strike at the dignity of a fellow citizen. Fraternity and equality which lie at the very base of our Constitutional culture and upon which the superstructure of rights are built, do not permit such rights to be employed in a manner so as to attack the rights of another.

Verse 15 of Chapter 17 of the Srimad Bhagavad Gita describes what constitutes discipline of speech or 'van-maya tapas:'

अनुद्वेगकरं वाक्यं सत्यं प्रियहितं च यत् ।
स्वाध्यायाभ्यसनं चैव वाङ्मयं तप उच्यते ।।

Anudvega-karaṁ vākyaṁ satyaṁ priya-hitaṁ cha yat
Svādhyāyābhyasanaṁ chaiva vāṅ-mayaṁ tapa uchyate

Words that do not cause distress, are truthful, inoffensive, pleasing and beneficial, are said to be included within the discipline of speech, and are likened to regular recitation of the Vedic scriptures.

191. The discussion presented hereinabove was with a view to rekindle some ideas on the content of Article 19(1) (a) of the Constitution and on other pertinent issues surrounding the right to free speech guaranteed under the aforesaid Article. However, as far as the substantial analysis of Question No. 1 is concerned, I respectfully agree with the reasoning and conclusions proposed by His Lordship, Ramasubramanian, J.

Re: Question No. 2: Can a fundamental right Under Article 19 or 21 of the Constitution be claimed other than against the 'State' or its instrumentalities?

192. All human beings are endowed at birth, with certain inalienable rights and among such rights are right to life and liberty, including liberty of thought and expression. These rights have been recognized as inalienable rights, having regard to the supreme value of human personality. Incidentally, some of such rights have come to be Constitutionally recognized under Part III of the Constitution of India. Fundamental Rights were selected from what were previously natural rights and were later termed as common law rights. However, it is to be noted that Part III of the Constitution, is not the sole repository of such rights. Even after some of such inalienable rights have come to be Constitutionally recognised as Fundamental Rights under the Constitution of India, the congruent rights under common law or natural law have not been obliterated. It also follows, that the corresponding remedies available in common law, are also not obliterated. The object of elevating certain natural and common law rights, as Fundamental Rights under the Constitution was to make them specifically enforceable against the State and its agencies through a Courts of law. These observations gain legitimacy from the judgment of Mathew, J. in His Holiness Kesavanada Bharati Sripadagalvaru v. State of Kerala, MANU/SC/0445/1973 : (1973) 4 SCC 225 (Kesavanada Bharati) wherein His Lordship recognized the object of Constitutions to declare recognised natural rights as applicable qua the state. Adopting the picturesque language of Roscoe Pound, the following observations were made:

1514. While dealing with natural rights, Roscoe Pound states on page 500 of Vol. I of his Jurisprudence:

> Perhaps nothing contributed so much to create and foster hostility to courts and law and Constitutions as this conception of the courts as guardians of individual natural rights against the state and against society; this conceiving of the law as a final and absolute body of doctrine declaring these individual natural rights; **this theory of Constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state; this theory of Constitutions as having for their purpose to guarantee and maintain the natural rights of individuals against the government and all its agencies.** In effect, it set up the received traditional social, political, and economic ideals of the legal profession as a super-Constitution, beyond the reach of any agency but judicial decision.

1515. I may also in this connection refer to a passage on the inherent and inalienable rights in A History of American Political Theories by C. Marriam: By the later thinkers the idea that men possess inherent and inalienable rights of a political or quasi-political character which are independent of the state, has been generally given up. It is held that these natural rights can have no other than an ethical value, and have no proper place in politics. There never was, and there never can be,' says Burgess, 'any liberty upon this earth and among human beings, outside of state organization'. In speaking of natural rights, therefore, it is essential to remember that these alleged rights have no political force whatever, unless recognized and enforced by the state. It is asserted by Willoughby that 'natural rights' could not have even a moral value in the supposed 'state of nature'; they would really be equivalent to force and hence have no ethical significance. (see p. 310).

x x xx x x x

1522. I am also of the view that the power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing the fundamental rights as natural rights or human rights. **The basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living. There was no Constitutional provision for fundamental rights before January 26, 1950 and yet can it be said that there did not exist conditions for dignified way of living for Indians during the period between August 15, 1947 and January**

> **26, 1950.** The plea that provisions of the Constitution, including those of Part III, should be given retrospective effect has been rejected by this Court. Article 19 which makes provision for fundamental rights, is not applicable to persons who are not citizens of India. Can it, in view of that, be said that the non-citizens cannot while staying in India lead a dignified life? It would, in my opinion, be not a correct approach to say that amendment of the Constitution relating to abridgement or taking away of the fundamental rights would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life.
>
> [Emphasis by me]

193. This proposition was further highlighted in the enlightened minority opinion of His Lordship, H.R. Khanna, J, in Additional District Magistrate, Jabalpur v. Shivakant Shukla, MANU/SC/0062/1976 : A.I.R. 1976 SC 1207 ("ADM Jabalpur") wherein while refusing to subscribe to the view that when the right to enforce Fundamental Right Under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law, observed, that Article 21 was not the sole repository of the right to life and personal liberty. That such rights inhered in men even prior to the enactment of the Constitution, and were not created for the first time by enacting the Constitution. It was also recognised that though the Constitutionally recognised remedy Under Article 32, for infringement of the Right Under Article 21 may not be available as the said rights remained suspended or notionally surrendered on account of declaration of an Emergency, remedies under the laws which were in force prior to the coming into effect of the Constitution would still operate to ensure that no person could be deprived of his life or liberty except in accordance with law. In that context, it was held that the rights Constitutionally recognised Under Article 21, represented 'higher values' which were elementary to any civilised State and therefore the sanctity of life and liberty was not traceable only to the Constitution. The relevant portions of His Lordship's judgment can be usefully extracted hereinunder:

> **152.** The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that Article for obtaining relief from the court daring the period of emergency. Question then arises as to whether the Rule that no one shall be deprived of ins life or personal liberty without the authority of law stiff survives during the period: of emergency despite the Presidential order suspending the right to move any court for the enforcement of the-right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is, the sole repository of the right to life and personal liberty. **After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered" to be the sole repository of the right to life and; personal liberty. The right to life, and personal: liberty is the most precious right of human beings in civilised societies governed by the Rule of law. Many modern constitutions incorporate certain fundamental rights, including the one relating to personal freedom.**
>
> xxx
>
> **155. Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a fact of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of ins life and liberty without the authority of law was not the gift of the Constitution.** It was a necessary corollary of the concept relating to the sanctity of life and liberty; it existed and was in force before the coming into force, of the Constitution. The idea about the sanctity of life and liberty as well as the principle that no one shall be deprived of his life and liberty without the authority of law are

essentially two facets of the same concept. This concept grew and acquired dimensions in response to the inner urges and nobler impulses with the march of civilisation. Great writers and teachers, philosophers and political thinkers nourished and helped in the efflorescence of the concept by rousing the conscience of mankind and by making it conscious of the necessity of the concept as necessary social discipline in self-interest and for orderly existence. According even to the theory of social compact many aspects of which have now been discredited, individuals have surrendered a part of their theoretically unlimited freedom in return or the blessings of the government. Those blessings include governance in accordance with certain norms in the matter of life and liberty of the citizens. Such norms take the shape of the Rule of law. Respect for law, we must bear in mind, has a mutual relationship with respect for government. Erosion of the respect for law, it has accordingly been said, affects the respect for the government. Government under the law means, as observed by Macdonald, that the power to govern shall be exercised only, under conditions laid down in constitutions and laws approved by either the people or their representatives. Law thus emerges as a norm limiting the application of power by the government over the citizen or by citizens over their fellows. Theoretically all men are equal before the law and are equally bound by it regardless of their status, class, office or authority. At the same time that the law enforces duties it also protects rights, even against the sovereign."

x x x

158. I am unable to subscribe to the view that when right to enforce the right Under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of ins life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in Gopalan's case, such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. **Recognition as fundamental right of one aspect of the pre-Constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because, of the vulnerability of fundamental rights accruing from Article 359.** I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coining into force of the Constitution.

x x x

162. It has been pointed out above that even before the coming into force of the Constitution, the position under the common law both in England and in India was that the State could not deprive a person of ins life and liberty without the authority of law. The same was the position under the penal laws of India. It was an offence under the Indian Penal Code, as already mentioned, to deprive a person of ins life or liberty unless such a course was sanctioned by the laws of the land. An action was also maintainable under the law of torts for wrongful confinement in case any person was deprived of ins personal liberty without the authority of law. In addition to that, we had Section 491 of the Code of Criminal Procedure which provided the remedy of habeas corpus against detention without the authority of law. Such laws continued to

remain in force in view of Article 372 after the coming into force of the Constitution. According to that article, notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. The law in force, as observed by the majority of the Constitution Bench in the case of Director of Rationing and Distribution v. The Corporation of Calcutta and Ors. MANU/SC/0061/1960 : 1960 CriLJ 1684, include not only the statutory law but also custom or usage haying the force of law as also the common law of England which, was adopted as the law of the country before the coming into force of the Constitution. The position thus seems to be firmly established that at the time, the Constitution came into force, the legal position was that no one could be deprived of ins life or liberty without the-authority of law.

163. It is difficult to accede to the contention that because of Article 21 of the Constitution, the law which was already in force that no one could be deprived of ins life or liberty without the authority of law was obliterated and ceased to remain in force. No Rule of construction interpretation warrants such an inference. Section 491 of the Code of Criminal Procedure continued to remain an integral part of that Code despite the fact that the High Courts were vested with the power of issuing writs of habeas corpus Under Article 226. No submission was ever advanced on the score that the said provision had become a dead letter of enforceable because of the fact that Article 226 was made a part of the Constitution, indeed, in the case of Makhan Singh (supra) Gajendragadkar J. speaking for the majority stated that after the coming into force of the Constitution, a party could avail of either the remedy of Section 491 of the Code of Criminal Procedure or that of Article 226 of the Constitution. The above observations clearly go to show that constitutional recognition of the remedy of writ of habeas corpus did not obliterate or abrogate the statutory remedy of writ of habeas corpus. Section 491 of the Code of Criminal Procedure continued to be part of that Code till that Code was replaced by the new Code. Although the remedy of writ of habeas corpus is not now available under the new Code of Criminal Procedure, 1973, the same remedy is still available Under Article 226 of the Constitution.

[Emphasis by me]

In holding thus, H.R. Khanna, J. refused to subscribe to the majority view in the said case that once a right is recognised and embodied in the Constitution and forms part of it, it could not have any separate existence apart from the Constitution, unless it were also enacted as a statutory principle by some positive law of the State. His Lordship rejected the proposition that the intention of the Constitution was not to preserve something concurrently in the field of natural law or common law; it was to exclude all other control or to make the Constitution the sole repository of ultimate control over those aspects of human freedom which were guaranteed therein.

194. The strength of H.R. Khanna, J's minority opinion was subsequently acknowledged and affirmed by this Court in Puttaswamy, wherein it was held that the rights to life and personal liberty were 'primordial rights' and were not bounties which were conferred by the State and created by the Constitution. That the right to life existed even before the advent of the Constitution and in recognising such right, the Constitution did not become the sole repository of such rights. That every constitutional democracy including our country, is rooted in an undiluted assurance that the Rule of law will protect their rights and liberties against any invasion by the State and that judicial remedies would be available when a citizen has been deprived of most precious inalienable rights. Dr. D.Y. Chandrachud. J. (as His Lordship then was) enunciated the aforesaid principles in the following words:

119. The judgments rendered by all the four judges constituting the majority in **ADM**

Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in **Kesavananda Bharati**, primordial rights. They constitute rights under natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the state without either the existence of the right to live or the means of enforcement of the right. **The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force Under Article 372 of the Constitution. Justice Khanna was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the Rule of law which imposes restraints upon the powers vested in the modern state when it deals with the liberties of the individual.** The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the Rule of law.

120. A constitutional democracy can survive when citizens have an undiluted assurance that the Rule of law will protect their rights and liberties against any invasion by the state and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Justice Khanna must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions.

[Emphasis by me]

195. What emerges from the aforesaid decisions of this Court, may be culled out as follows:

i) That some natural/primordial rights of man have been accorded a secure position under the Constitution so as to protect such rights against undue encroachments by organs of State. The object of elevation of such common law rights/natural rights to the Constitutional plane was to make them specifically enforceable against the State and its agencies through Courts of Law.

ii) Notwithstanding that such rights have been placed in Part III of the Constitution of India, the rights are concurrently preserved in the field of natural law or common law. Remedies available in common law for actualising such rights are also preserved. There are therefore two spheres of rights, and corresponding remedies: first, relatable to the Fundamental Rights enshrined under Part III the Constitution of India, which correspond to the remedies Under Article 32 and Article 226 of the Constitution of India; second, inalienable/natural/common law rights, which are pre-constitutional rights, and may be protected by having recourse to common law remedies.

iii) While the content of a certain common law right, may be identical to a Fundamental Right, the two rights would be distinct in two respects: first, incidence of the duty to respect such right; and second, the forum which would be called upon to adjudicate on the failure to respect such right. While the content of the right violated may be identical, the status of the violator, is what is relevant.

With that primer, I shall proceed to consider whether the Fundamental Rights Under Article 19

or 21 of the Constitution of India can be claimed against any person other than the State or its instrumentalities.

196. With historical and political changes and the advent of democracy and of Constitutional government, the "State" was created under and by a constitution and placed at a position which renders it capable of interfering with natural and common law rights. On the other hand, as is evident from the text of the Preamble of the Constitution of India, the "We the People of India created the State as an entity to serve their interests. In order to reconcile the competing effects of creation of the State, certain common law rights were elevated to the constitutional plane by accommodating them in Part III of the Constitution of India to make them specifically enforceable against the State and its agencies through the Courts. Part III of the Constitution was therefore enacted to dictate the relationship between citizens and the State-this is the true character and utility of Part III. This idea has also found resonance in Puttaswamy, wherein it was observed as follows:

> **251.** Constitutions address the rise of the new political hegemon that they create by providing for a means by which to guard against its capacity for invading the liberties available and guaranteed to all civilized peoples. Under our constitutional scheme, these means-declared to be fundamental rights-reside in Part III, and are made effective by the power of this Court and the High Courts Under Articles 32 and 226 respectively. This narrative of the progressive expansion of the types of rights available to individuals seeking to defend their liberties from invasion-from natural rights to common law rights and finally to fundamental rights-is consistent with the account of the development of rights that important strands in constitutional theory present.

Therefore, the primary object of Part III of the Constitution was to forge a new relationship between the citizens and the State, which was the new site of Governmental power. The realm of interaction between citizens inter-se, was governed by common law prior to the enactment of the Constitution and continued to be so governed even after the commencement of the Constitution because as recognised hereinabove, the common rights and remedies were not obliterated even after the Constitution was enacted. These inalienable rights, although subsequently placed in Part III of the Constitution, retained their identity in the arena of common law and continued to regulate relationships between citizens and entities, other than the State or its instrumentalities. It is therefore observed that the incidence of the duty to respect Constitutional and Fundamental Rights of citizens is on the State and the Constitution provides remedies against violation of Fundamental Rights by the State. These observations are in consonance with the recognition by this Court in People's Union for Civil Liberties v. Union of India, MANU/SC/0039/2005 : (2005) 2 SCC 436 ("People's Union for Civil Liberties") that the objective of Part III is to place citizens at centre stage and make the state accountable to them.

197. On the other hand, common law rights, regulate the relationship between citizens inter-se. Although the content of a common law right may be similar to a Fundamental Right, the two rights are distinct in so far as, the incidence of duty to respect a common law right is on citizens or entities other than State or its instrumentalities; while the incidence of duty to respect a Fundamental Right, except where expressly otherwise provided, is on the State. Remedies against violation of Fundamental Rights by the State are Constitutionally prescribed Under Articles 32 and 226; while common law remedies, some of which are statutorily recognised, are available against violation of common law rights. Such remedies are available even as against fellow citizens or entities other than State or its instrumentalities. To this extent, horizontality is recognised in common law. Further to some extent certain Fundamental Rights are recognised statutorily and some others are expressly recognised in the Constitution as being applicable as horizontal rights between citizens inter se such as Articles 15(2), 17, 23, 24. A similar declaration as regards the right to privacy is found in the decision of this Court in Puttaswamy. The relevant excerpts from the said decision have been reproduced hereinunder:

> **253.** Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: that a right must either

be a common law right or a fundamental right. The only material distinctions between the two classes of right-of which the nature and content may be the same-lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. **Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the 'state', as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state. It is perfectly possible for an interest to simultaneously be recognized as a common law right and a fundamental right. Where the interference with a recognized interest is by the state or any other like entity recognized by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.**

254. Privacy has the nature of being both a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.

[Emphasis by me]

It has therefore been unequivocally declared by this Court that while the content of a right recognised under Part III of the Constitution may coincide or overlap with a common law right, the remedies available against violation of the respective form of right, operate in different spheres of law. That is, although the content of a common law right and a fundamental right may be almost identical, the remedy against violation of a common law right, shall lie under common law and not under the Constitution; similarly, the remedy against violation of a Fundamental Right is provided for under the Constitution itself expressly against the State Under Article 19(2) thereof.

198. The status of the violator of the right, is also an essential parameter for distinction between the two rights and corresponding remedies. Where the interference with a recognized right is by the State or any other entity recognized Under Article 12, a claim for the violation of a fundamental right would lie Under Articles 32 and 226 of the Constitution before this Court or before the High Court respectively. Where interference is by an entity other than State or its instrumentalities, an action would lie under common law and to such extent, the legal scheme recognises horizontal operation of such rights.

199. Though the content of the Fundamental Right may be identical under the Constitution with the common law right, it is only the common law right that operates horizontally except when those Fundamental Rights have been transformed into statutory rights under specific enactments or where horizontal operation has been expressly recognised under the Constitution. This is because, the following difficulties would surface if the Fundamental Rights enshrined Under Article 19 and 21 are permitted to operate horizontally so as to seek the remedy by way of a writ petition before a Constitutional Court:

i) No recognition that Fundamental Rights enshrined Under Article 19 and 21 are permitted to operate horizontally can be made except by ignoring the elementary differences between a Fundamental Right and the congruent common law right. Such a recognition could proceed only by ignoring the fact that the incidence of the duty to respect a Fundamental Right is on the State and its instrumentalities. Recognition of horizontal enforceability of Fundamental Rights would also ignore the status of the violator of the right except when a Fundamental Right is also recognised as a statutory right against another person or citizen. Therefore, such a recognition is misplaced as it proceeds with total disregard to the elementary differences in status of the two forms of rights, incidence of duty to respect each of such forms of rights, and the forum which would be called upon to adjudicate on the failure to respect each of such rights.

ii) The following decisions of this Court are demonstrative of its disinclination or reluctance in recognising that Fundamental Rights enshrined Under Article 19 and 21 are permitted to operate horizontally:

a) In P.D. Shamdasani v. Central Bank of India Ltd., MANU/SC/0017/1951 : A.I.R. 1952 SC 59, a Constitution Bench of this Court refused to entertain a Writ Petition filed Under Article 32 of the Constitution, wherein a prayer was made to enforce the right Under Article 19(1)(f) and Article 31(1), as they then stood, against a private entity. In that context, it was held that the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms against State action. This Court declared that violation of rights of property by individuals or entities other than the State and its instrumentalities, was not within the purview of Article 19(1)(f).

Further, this Court made a comparison between Article 31(1), as it then stood, and Article 21 as both Articles cast a negative duty on the State. In that context it was held that although there is no express reference to the State in Article 21, it could not be suggested that the Article was intended to afford protection to life and liberty against violation by private individuals. That the words "except by procedure established by law" exclude such suggestion that Article 21 would operate horizontally.

The aforesaid decision is illustrative of this Court's reluctance to hold that the Fundamental Rights Under Articles 19 or 21 of the Constitution, would operate horizontally. It is also to be noted that in the aforesaid case, this Court has acknowledged that a suitable remedy exists under statutory law to redress the infraction complained of. Therefore, while this Court was mindful that the rights in the realm of common law, some of which have gained statutory recognition, operate horizontally, the Fundamental Rights Under Articles 19 and 21, do not, except in the case of seeking a writ in the nature of habeas corpus.

(b) In Zoroastrian Cooperative Housing Society Limited v. District Registrar, Cooperative Societies (Urban), MANU/SC/0290/2005 : (2005) 5 SCC 632, the Petitioner society was a registered society with its own bye-laws, under its parent legislation, the Bombay Cooperative Societies Act. As per bye-law 7, only members of the Parsi community were eligible to become members of the Society. The effect of this was that since housing shares could be transferred only to members, effectively, only Parsis could buy plots under the aegis of the Cooperative Society. This restrictive covenant in the bye-laws became the subject matter of challenge before this Court, inter-alia, on the ground that it violated the right to equality enshrined in the Constitution. This Court refused to accept such a challenge and held that the Society's bye-laws were in the nature of Articles of Association of a company and were not like a statute. The bye-laws were only "binding between the persons affected by them." That a private contractual agreement is not subject to general scrutiny under Part III of the Constitution. This Court further distinguished between a discriminatory legislation passed by the State and a discriminatory bye-laws of a society or association, which is not 'State'. Accordingly, it held that while a legislation may be subject to a challenge on the touchstone of Part III of the Constitution, bye-laws of a society or association, could not.

This decision is also demonstrative of this Court's disapproval of horizontal operation of fundamental rights, making them directly applicable to interactions, whether contractual or otherwise, between private parties.

iii) I am however mindful of the fact that over the years, the conception of "State" as

defined Under Article 12 of the Constitution has undergone significant metamorphosis. Through its jurisprudential labour, this Court has devised several principles and doctrines, so as to enable citizens to enforce their fundamental rights not only against "State" as defined in the strict sense to mean "agency of the Government," but also against entities imbued with public character, or entitles which perform functions which closely resemble governmental functions. [See: Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, MANU/SC/0330/2002 : (2002) 5 SCC 111; Zee Telefilms Ltd. v. Union of India, MANU/SC/0074/2005 : (2005) 4 SCC 649; Janet Jeyapaul v. S.R.M. University, MANU/SC/1438/2015 : (2015) 16 SCC 530]

This Court has progressively expanded the scope of Article 12 of the Constitution so as to ensure that a private entity, which performs a public duty/function and therefore informs our national life, does not get away scott-free merely because it is not "State" stricto sensu. Such entitles are imbued with constitutional obligations on account of the public or statutory functions performed by them. At this juncture, it is necessary to reflect on the difference between holding that Fundamental Rights may be enforced against a private entity on account of the public nature of its functions, as contrasted with universal operation of fundamental rights claims against all persons. A private body, acting in private capacity, fulfilling a private function, cannot be axiomatically amenable to the claims of fundamental rights violations.

The decision of this Court in Ramakrishna Mission v. Kago Kunya, MANU/SC/0413/2019 : (2019) 16 SCC 303 is also highly instructive on the issue of amenability of actions of private entities, to judicial review Under Article 226 of the Constitution of India. In the said case, the issue before this Court was whether the Hospital run by the Petitioner Mission performed a public function that made it amenable to writ jurisdiction Under Article 226. This Court found that the Hospital and the Mission were not amenable to writ jurisdiction Under Article 226 since running a hospital would not constitute a public function. This Court further highlighted that even when a private entity performs a public function, the Court would be required to enquire as to whether the grant in aid received by the said entity covers a significant portion of its expenditure. This Court went on to declare that Regulation of a private body by a statute does not give it the colour of a public function. A public function was held to be one which is "closely related to functions which are performed by the State in its sovereign capacity." Accordingly, it was held that the Hospital was not performing a public function since the functions it performed were not "akin to those solely performed by State authorities." It was held that medical services were provided by private as well as State entities and therefore, the nature of medical services was not such that they could be carried out solely by State authorities.

Thus, according to the decision of this Court in Ramakrishna Mission, Regulation by the State either through a statute or otherwise; receipt of a meagre amount of aid from the State; receipt of concessions by the State; do not make a private entity amenable to the writ jurisdiction of Courts Under Article 226 of the Constitution.

Thus, recognising a horizontal approach of Fundamental Rights between citizens inter se would set at naught and render redundant, all the tests and doctrines forged by this Court to identify "State" for the purpose of entertaining claims of fundamental rights violations. Had the intention of this Court been to allow Fundamental Rights, including the rights Under Articles 19 and 21, to operate horizontally, this Court would not have engaged in evolving and refining tests to determine the true meaning and scope of "State" as defined Under Article 12. This Court would have simply entertained claims of fundamental rights violations against all persons and entities, without deliberating on fundamental questions as to maintainability of the writ petitions. Although this Court has significantly expanded the scope of "State" as defined Under Article 12, such expansion is based on considerations such as the nature of functions performed by the entity in question and the degree of control exercised over it by the State as such. This

is significantly different from recognising horizontality of the fundamental rights Under Articles 19 and 21, except while seeking a writ in the nature of habeas corpus. Such a recognition would amount to disregarding the jurisprudence evolved by this Court as to the scope of Article 12 of the Constitution.

iv) Another aspect that needs consideration is that a Writ Court, does not ordinarily adjudicate to issue Writs in cases where alternate and efficacious remedies exist under common law or statutory law particularly against private persons. Therefore, even if horizontal operation of the Fundamental Rights Under Article 19/21 is recognised, such recognition would be of no avail because the claim before a Writ Court of fundamental rights violations would fail on the ground that the congruent common law right which is identical in content to the Fundamental Right, may be enforced by having recourse to common law remedies. Therefore, on the ground that there exists an alternate and efficacious remedy in common law, the horizontal claim for fundamental rights violations would fail before a Writ Court.

This may be better understood by way of an illustration. Let me assume for the purpose of argument that the Fundamental Right Under Article 19(1)(a) read with Article 21 is allowed to operate horizontally. A person would then be eligible to file a writ petition, against another private individual or entity for violation of such right. The violation may for instance be a verbal attack at the aggrieved person, which may have the effect of undermining such person's dignity or reputation. Dignity and reputation are essential facets of the right to life Under Article 21; at the same time, they are also recognised as common law rights as they are fundamental attributes of human personality which is regarded as a supreme value in common law. Common law remedies, including declarations, injunctions and damages, are available to redress any injury to common law rights, including the right to dignity and reputation. Such remedies are also statutorily recognised under the Specific Relief Act, 1963 and the Indian Penal Code. Therefore, on account of availability of an alternate remedy under common law, the Courts would be reluctant to entertain a writ petition Under Articles 226 or 32, as the case may be.

v) Further, it is trite that Writ Courts do not enter into adjudication of disputed questions of fact. But, questions regarding infringement of the fundamental rights Under Article 19/21, by a private entity, would invariably involve disputed questions of fact. Therefore, this is another difficulty that must be borne in mind while determining the horizontal operation of such rights in a writ proceeding.

However, there is another aspect of the matter that requires to be discussed. A writ of habeas corpus is an order directing the person who has detained another to produce the detainee before the court in order for the court to ascertain on what ground or for what reason he has been confined, and to release him if there is no legal justification for the detention. A writ of habeas corpus is granted ex debito justiae and the applicant must only demonstrate prima-facie, unlawful detention of himself or any other person. If there is no justification for the detention and the same is unlawful, a writ is issued as of right vide Union of India v. Paul Manickam, MANU/SC/0805/2003 : (2003) 8 SCC 342. The importance of a writ of habeas corpus is the duty being cast on a Constitutional Court to issue the writ to safeguard the freedom of a citizen against illegal and arbitrary detention. In my humble view, an illegal detention is a violation of Article 21 of the Constitution, irrespective of whether the detention is by the State or by a private person.

A petition Under Article 226 of the Constitution would therefore lie before the High Court, not only when the person has been detained by the State but also when he/she is detained by a private individual vide Mohd. Ikram Hussain v. State of Uttar Pradesh, MANU/SC/0241/1963 : A.I.R. 1964 SC 1625 at 1630. In my view, such a petition Under Article 32 of the Constitution would also lie before this Court for seeking a writ of habeas corpus in terms of Article 32(2). Such a writ could be issued not just against the State which may have illegally detained a person, but even as against a private person. Hence, in the context of illegal detention, Article

21 would operate horizontally against private persons also. Such a departure has to be made although Fundamental Rights are normally enforced against the State Under Article 32 of the Constitution. Otherwise, the remedy by way of a writ of habeas corpus would be rendered incomplete if the said remedy is not available against a private person Under Article 32 of the Constitution. Hence in the context of illegal detention, even by a private person, I would opine that Article 21 would operate horizontally and the writ of habeas corpus could be issued against a private person just as Under Article 226 of the Constitution, the High Court can issue such a writ against any person or authority. But even in the context of Article 32(2) of the Constitution, it may not be proper to restrict the said remedy only as against the State but the same may be made available even as against private persons, in which event the power exercised by this Court could be in accordance with Article 142(1) of the Constitution to do complete justice in the matter. For ease of reference Article 142(1) may be extracted as under:

> vi) "142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc.-(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

Therefore, a writ of habeas corpus could be issued by this Court Under Article 32 of the Constitution, not only against the 'State' as defined Under Article 12 of the Constitution but also against a private individual. This is because illegal detention by a private person is a tort and of a nature similar to a constitutional tort. The reason for saying so is because an illegal detention whether by a State or a private person has a direct and identical effect on the detainee. The detainee loses his liberty and there may be a threat to his life.

Directions in the nature of writs of habeas corpus have been issued by this Court on previous occasions, against private individuals, particularly in cases of kidnapping, child custody etc. [See for instance: Nirmaljit Kaur (2) v. State of Punjab, MANU/SC/2275/2005 : (2006) 9 SCC 364] In such cases, resorting to the process of instituting a criminal case before a police station, may prove to be futile because the need of the hour in such cases is swift action. The writ of habeas corpus Under Article 226 as well as Article 32 of the Constitution, is festium remidium, i.e., a speedy remedy, and such remedy needs to be made available even as against a private individual.

It is appropriate that the High Court concerned under whose jurisdiction the illegal detention has occurred should be approached first. In order to invoke jurisdiction of this Court Under Article 32 of the Constitution by approaching this Court directly, it has to be shown by the Petitioner as to why the concerned High Court has not been approached. In cases where it would be futile to approach the High Court, and where satisfactory reasons are indicated in this regard, a petition seeking issuance of a writ of habeas corpus, may be entertained. However, in the absence of such circumstances, filing a petition Under Article 32 of the Constitution is not to be encouraged, vide Union of India v. Paul Manickam, MANU/SC/0805/2003 : (2003) 8 SCC 342.

The judicial precedent referred to above are aligned with the aforesaid discussion.

In light of the aforesaid discussion, Question No. 2 is answered as follows:

> The rights in the realm of common law, which may be similar or identical in their content to the Fundamental Rights Under Article 19/21, operate horizontally: However, the Fundamental Rights Under Articles 19 and 21, may not be justiciable horizontally before the Constitutional Courts except those rights which have been statutorily recognised and in accordance with the applicable law. However, they may be the basis for seeking common law remedies. But a remedy in the form of writ of Habeas Corpus, if sought against a private person on the basis of Article 21 of the Constitution can be

before a Constitutional Court i.e., by way of Article 226 before the High Court or Article 32 read with Article 142 before the Supreme Court.

Re: Question No. 3: Whether the State is under a duty to affirmatively protect the rights of a citizen Under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?

200. In order to answer this question, it may be prudent to consider the circumstances under which this Court has previously observed that the State is bound to protect the life and liberty of every human being, from the following judgments:

i) In Pt. Parmanand Katara v. Union of India, MANU/SC/0423/1989 : A.I.R. 1989 SC 2039, this Court was confronted with the question as to whether a doctor has the professional obligation to instantaneously extend his services to a person brought for medical treatment, without any delay on the pretext of compliance with procedural criminal law. This Court declared that the obligation of a doctor to extend his services with due expertise, for protecting life was paramount and absolute and any laws of procedure which would interfere with the discharge of this obligation, would be antithetical to Article 21 of the Constitution. It was further observed that where there is delay on the part of medical professionals to administer treatment in emergencies, state action can intervene.

ii) In National Human Rights Commission v. State of Arunachal Pradesh, MANU/SC/1047/1996 : (1996) 1 SCC 742, this Court considered a writ petition filed Under Article 32 of the Constitution, pertaining to the threats held out by the All Arunachal Pradesh Students' Union, to force Chakmas out of the State of Arunachal Pradesh. It was the case of the Petitioner therein that a large number of Chakmas from erstwhile East Pakistan (now Bangladesh) were displaced by the Kaptai Hydel Power Project in 1964. They had taken shelter in Assam and Tripura. Most of them were settled in these States and became Indian citizens in due course of time. Since a large number of refugees had taken shelter in Assam, the State Government had expressed its inability to rehabilitate all of them and requested assistance in this regard from certain other States. As a result of such consultations between the North Eastern States, some population of Chakmas began residing in Arunachal Pradesh. It was also stated that many of such persons had made representations for the grant of citizenship Under Section 5(1)(a) of the Citizenship Act, 1955, however, no decision was communicated in this regard. In the interim, relations between citizens residing in Arunachal Pradesh and the Chakmas deteriorated and the latter were being subjected to repressive measures with a view to forcibly expel them from the State. In that background, a writ petition came to be filed, alleging, inter-alia, unwillingness on the part of the State to contain the hostile situation. In that background, this Court issued a writ of mandamus, inter-alia, directing the State of Arunachal Pradesh to ensure that the life and liberty of every Chakma residing in the State is protected, and any attempt by organised groups to evict or drive them out of the State is repelled, if necessary, by requisitioning the service of paramilitary or police force. It was also directed that the application made by Chakmas for the grant of citizenship Under Section 5(1)(a) of the Citizenship Act, 1955 be considered, and pending such consideration, no Chakma shall be evicted from the State.

It is to be noted that in the said case, this Court cited the Fundamental Rights of persons Under Article 21 in directing the State to protect the rights of Chakmas from threats by private actors. The said directions were issued in the backdrop of the State's inaction to mobilise the available machinery to contain the hostile situation and such inaction had or could have had the effect of depriving Chakmas of their right to life and personal liberties. It was in that context that this Court declared that the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise.

iii) In Gaurav Kumar Bansal v. Union of India, MANU/SC/0790/2014 : (2015) 2 SCC

130, this Court, in directing the Respondents therein to provide ex gratia monetary compensation to the families of the deceased who have succumbed to the pandemic of Covid-19, in view of Section 12 of the Disaster Management Act, 2005, relied on Article 21 of the Constitution.

iv) Similarly, in Swaraj Abhiyan v. Union of India, MANU/SC/0553/2016 : (2016) 7 SCC 498, this Court relied on Article 21 of the Constitution, in issuing a writ of mandamus to the Union of India, to effectively implement the National Food Security, 2013 in certain parts of the country which had been affected due to drought.

The aforesaid cases illustrate that this Court has observed that the State is bound to protect the life and liberty of every human being, in the following contexts:

a) Where inaction on the part of the State, to contain a hostile situation between private actors, could have had the effect of depriving persons of their right to life and liberty;

b) Where the State had failed to carry out its obligations under a statute or a policy or scheme, and such failure could have had the effect of depriving persons of their right to life and liberty.

c) It is therefore clear that the acknowledgement of this Court of the duty of the State Under Article 21, only pertains to a negative duty not to deprive a person of his right to life and personal liberty, except in accordance with law. This Court has not recognised an affirmative duty on the part of the State Under Article 21 of the Constitution to protect the rights of a citizen, against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency. Of course, there exist a plethora of statutes which cast an obligation on the State and its machinery to contain hostile situations between private actors; to repel any action by private actors which would undermine the life and liberty of other persons etc. This Court has, on several occasions, issued writs of mandamus directing State authorities to carry out such statutory obligations. In directing so, this Court may have referred to the right to life and personal liberties Under Article 21. However, such reference to Article 21 is not to be construed as an acknowledgement by the Court of an affirmative duty on the part of the State Under Article 21 of the Constitution to protect the rights of a citizen, against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency. Given that Article 21 only imposes a negative duty, a violation of the same would occur only when the State undertakes an obligation by enacting a statute or a scheme, but does not fulfil it. Thus, the violation will only occur when a scheme has been initiated but is not being appropriately implemented, as was noted in the aforecited cases.

In light of the aforesaid discussion, Question No. 3 is answered as follows:

The duty cast upon the State Under Article 21 is a negative duty not to deprive a person of his life and personal liberty except in accordance with law. The State has an affirmative duty to carry out obligations cast upon it under statutory and constitutional law, which are based on the Fundamental Right guaranteed Under Article 21 of the Constitution. Such obligations may require interference by the State where acts of a private actor may threaten the life or liberty of another individual. Failure to carry out the duties enjoined upon the State under statutory law to protect the rights of a citizen, could have the effect of depriving a citizen of his right to life and personal liberty. When a citizen is so deprived of his right to life and personal liberties, the State would have breached the negative duty cast upon it Under Article 21.

Re: Question No. 4: Can a statement made by a Minister, traceable to any affairs of State or for

protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?

201. A Minster may make statements in two capacities: first, in his personal capacity; second, in his official capacity and as a delegate of the Government. It is a no brainer that in respect of the former category of statements, no vicarious liability may be attributed to the Government itself. The latter category of statements may be traceable to any affair of the State or may be made with a view to protect the Government. If such statements are disparaging or derogatory and represent not only the personal views of the individual Minister making them, but also embody the views of the Government, then, such statements can be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility. In other words, if such views are endorsed not only in the statements made by an individual Minister, but are also reflective of the Government's stance, such statements may be attributed vicariously to the Government. However, if such statements are stray opinions of an individual Minister and are not consistent with the views of the Government, then they shall be attributable to the Minister personally and not to the Government.

Therefore, Question No. 4 is answered as follows:

> A statement made by a Minister if traceable to any affairs of the State or for protecting the Government, can be attributed vicariously to the Government by invoking the principle of collective responsibility, so long as such statement represents the view of the Government also. If such a statement is not consistent with the view of the Government, then it is attributable to the Minister personally.

Re: Question No. 5: Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'?

202. While public law and private law are in theory, treated as analytically different, in practice, the divide between the two spheres is often blurred. As a result, ideas, concepts and devices from one sphere, influence the other. Such an intermingling has given rise to the doctrine of horizontal effects as discussed hereinabove, wherein a constitutional directive or norm (Fundamental Right) is interpreted by Courts to apply between individuals.

203. Another concept which can be traced to the interaction between public law and private law is that of a Constitutional tort, which in essence attributes vicarious liability on the State for acts and omissions of its agents which result in violation of fundamental rights of an individual or group. A constitutional tort is a violation of one's constitutional rights, particularly fundamental rights, by an agent of the government, acting in his/her official capacity. The alleged constitutional violation creates a cause of action that is distinct from any other available state tort remedy. It however, carries with it, the essential element of tort law, which seeks to redress a harm or injury by awarding monetary compensation by a competent court of law.

Writ Petition: Principles of Procedure

204. Normally the filing of a writ petition invoking Article 32 of the Constitution before the Supreme Court or Article 226 before the High Court is resorted to seeking an extraordinary remedy. The prerogative powers of the High Court are not exercised for enforcement of private rights of the parties but are for the purpose of ensuring that public authorities act within the limits of law. Writ remedy is thus not a private law remedy except writ of habeas corpus. Thus, writ petition would lie against the State including local authorities and other authorities as defined Under Article 12 of the Constitution which is an inclusive definition which takes within its scope and ambit all statutory bodies instrumentalities and authorities or persons charged with, or expected to exercise, public functions or discharge public duties. A writ petition may be instituted for the enforcement of any fundamental rights guaranteed by Part III of the Constitution Under Article 32 before the Supreme Court but Under Article 226 of the

Constitution, the jurisdiction of the High Courts is wider than the jurisdiction of the Supreme Court inasmuch as the said Article may be invoked for enforcement of fundamental rights as also "for any other purpose".

Tortious liability:

205. In India, the government can be held liable for tortious acts of its servants and can be ordered to be paid compensation to the persons suffering as a result of the legal wrong. Article 294(b) of the Constitution declares that the liability of the Union Government or the State Government may arise "out of any contract or otherwise". The word otherwise implies that the said liability may arise for tortious acts as well. Article 300 enables institution of appropriate proceedings against the government for enforcing such liability.

206. Even prior to the commencement of the Constitution, the liability of the Government for tortious acts of its servants or agents were recognised vide Peninsular & Oriental Steam Navigation Co. v. Secy. of State, (1868-69) 5 Bom HCR APP 1 After the commencement of the Constitution, there have been several cases in which the Union of India and State Governments were held liable for tortious acts of their employees, servants and agents. All those cases were not necessarily by invoking the writ jurisdiction of the Supreme Court and the High Courts. Though, the Government is liable for tortious acts of its officers, servants or employees, normally, such liability cannot be enforced by a Writ Court. An aggrieved party has the right to approach the competent court or authority to seek damages or compensation in accordance with the law of the land.

207. But if fundamental rights have been violated, and if the court is satisfied that the grievance of the Petitioner is well founded, it may grant the relief by enforcing a person's fundamental right. Such relief may be in the form of monetary compensation/damages. Instances of such cases are Rudul Sah v. State of Bihar, MANU/SC/0380/1983 : (1983) 4 SCC 141; Sebastian M. Hongray v. Union of India, MANU/SC/0080/1984 : (1984) 3 SCC 82; Bhim Singh v. State of J&K, MANU/SC/0064/1985 : (1985) 4 SCC 677; People's Union for Democratic Rights v. Police Commissioner, MANU/SC/0409/1989 : (1989) 4 SCC 730; Saheli v. Commissioner of Police, MANU/SC/0478/1989 : (1990) 1 SCC 422; State of Maharashtra v. Ravikant S. Patil, MANU/SC/0561/1991 : (1991) 2 SCC 373; Kumari v. State of Tamil Nadu, MANU/SC/0408/1992 : (1992) 2 SCC 223; Shakuntala Devi v. Delhi Electric Supply Undertaking, MANU/SC/0599/1995 : (1995) 2 SCC 369; Tamil Nadu Electricity Board v. Sumanth, MANU/SC/0338/2000 : (2000) 4 SCC 543; Railway Board v. Chandrima Das, MANU/SC/0046/2000 : (2000) 2 SCC 465.

208. Article 21 has played a significant role in shaping the law on tortious liability of the Government. This Court has asserted that the concept of sovereign function, which acts as an exception to attracting tortious liability, ends where Article 21 begins. Therefore, this Court has been willing to defend life and liberty of persons against state lawlessness by holding that where Article 21 is violated, the State has to pay compensation and the concept of sovereign function does not prevail in this area.

209. This proposition may be specifically traced to early PILs, which began in India in the 1980s, primarily in cases where officials of the State, such as prison officials had mistreated prisoners. The focus of the first phase of PIL in India was on exposure of repression by the agencies of the state, notably the police, prison, and other custodial authorities. These early PILs were essentially Constitutional tort actions which concerned allegations of violation of protected fundamental rights, as a result of acts or omissions on the part of officials of the State. Therefore, Constitutional law and tort law came to be merged by this Court under the rubric of PIL, and this Court began allowing successful Petitioners to recover monetary damages from the State for infraction of their fundamental rights. In such cases, there may have been statutory rights of persons also which would then be an enunciation of an aspect of Fundamental Rights particularly Under Article 21 of the Constitution.

210. In Rudul Sah v. State of Bihar, MANU/SC/0380/1983 : (1983) 4 SCC 141, Y.V.

Chandrachud, C.J., gave further momentum to fundamental rights to combat state lawlessness by granting cash compensation to a victim of unlawful incarceration for fourteen years. It is to be noticed that His Lordship, in the said case, took note of the dilemma in allowing a litigant to seek damages in a writ petition/PIL action against the State. His Lordship noted that this could have the effect of ordinary civil action being circumvented on a routine basis, by invoking writ jurisdiction of the High Courts and the Supreme Court as an alternative to ordinary civil action. However, it was recognized that granting such remedies would enhance the legitimacy of the vehicle of PIL. Therefore, this Court in Rudul Sah ultimately chose to grant monetary damages, in order to 'mulct' the violators, as well as to offer a 'palliative' for victims. Subsequent to the decision in Rudul Sah, compensatory relief has been granted as a means to 'civilize public power' in several cases involving abrogation of Fundamental Rights, [See for instance, Sabastian M. Hongray v. Union of India, MANU/SC/0080/1984 : A.I.R. 1984 SC 1026; Bhim Singh, MLA v. State of Jammu and Kashmir, MANU/SC/0064/1985 : A.I.R. 1986 SC 494.]

211. In Nilabati Behera v. State of Orissa, MANU/SC/0307/1993 : (1993) 2 SCC 746, this Court observed that the award of compensation in a proceeding Under Article 32 or Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights. In respect of such actions, the doctrine of sovereign immunity does not apply, though it may be available as a defence in a private law in an action based on tort. Drawing a distinction between proceedings under the private and public law, it was observed that a public law proceeding may serve a different purpose than a private law proceeding. Public law proceedings are based on the concept of strict liability for contravention of guarantee basic and indivisible rights of the citizens by the State. The purpose of public law is not only to civilise governmental power and but also to assure the citizens that they live under a legal system which gains to protect their interest and preserve their rights. Therefore, when the court moulds the relief by granting compensation, in proceedings Under Article 32 and Article 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under public law by way of employing elements of the law of torts and fixing the liability on the State which has been negligent and has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation under such cases is not to be understood as it is generally understood in a civil action for damages under private law, but in the broader sense of providing relief by ordering monetary amounts to be paid for the wrong done due to breach of public duty which would have the effect of violation of fundamental rights of citizens. Such grant of damages in exercise of a writ jurisdiction by the constitutional courts is independent of the rights available to the aggrieved party to claim compensation under private law in an action based on tort. Therefore, a suit may be instituted in a competent court of law or proceedings may be initiated to prosecute the offender under the penal law.

212. Though, in D.K. Basu v. State of West Bengal, MANU/SC/0157/1997 : (1997) 1 SCC 416 monetary compensation was granted, in Hindustan Paper Corporation Ltd. v. Ananta Bhattacharjee, MANU/SC/0654/2004 : (2004) 6 SCC 213 this Court cautioned that a direction to pay compensation Under Article 226 of the Constitution is permissible as a public law remedy and resorted to only when there is a violation by the State or its agents acting in official capacity of the fundamental right guaranteed by Article 21 of the Constitution, and not otherwise. It was further observed that it is not every violation of the provisions of the Constitution or a statute which would enable the court to direct grant of compensation. The power of the court to grant compensation in public law is limited. Therefore, normally in case of tortious liability, the person aggrieved has to approach a civil court for ventilating his grievances and he cannot invoke the writ jurisdiction of the Supreme Court or a High Court. However, if the duty breached is of a public nature or there is violation or breach or infringement of a fundamental right by an act or omission on the part of the authority, it is open to the party who has suffered a "legal wrong" to invoke the jurisdiction of the Supreme Court or a High Court by instituting the writ petition. In that case, the court, in exercise of its extraordinary jurisdiction and discretion judiciously may grant relief to the person wronged without relegating him to avail a remedy, otherwise available to him under private law having regard to the facts and circumstances of the particular case.

213. In Chairman, Railway Board v. Chandrima Das, MANU/SC/0046/2000 : (2000) 2 SCC 465, this Court was presented with an appeal against an order of the Calcutta High Court in a writ petition filed by a civil rights lawyer on behalf of a foreign national-victim of rape, allegedly committed by railway employees at a government-owned railway station. The events in question happened when the employees were off duty, but were present at the premises owned and operated by the Government (Railways). The writ petition was filed against the employer, in addition to initiating criminal proceedings against the individuals. A specific prayer was made in the writ petition for monetary compensation for the victim, payable by the Government, alleging that its failure to protect the victim and prevent the crime, had violated the victim's fundamental right. The High Court awarded a sum of Rs. 10 Lakhs as compensation to the victim of rape, as it was of the opinion that the offence was committed at the building (Rail Yatri Niwas) belonging to the Railways and was perpetrated by the Railway employees. An appeal against the said judgment was preferred before this Court.

214. This Court dismissed the appeal holding that where public functionaries are involved and the matter relates to violation of Fundamental Rights, or the enforcement of public duties, the remedy would be available under public law, notwithstanding that a suit could be filed under private law, for damages. Since the crime of rape amounted to a violation of the victim's right to life Under Article 21 of the Constitution, this Court concluded that a public law remedy was wholly appropriate.

215. The decisions in Rudul Sah and Chandrima Das establish that a public law action seeking monetary compensation for violation of fundamental rights was no longer an action in lieu of a private law claim, but was to serve an independent and more important purpose. However, it cannot be ignored that the decisions of Courts to award compensation in such cases, proceed on the basis of lower evidentiary standards, as noted by this Court in Kumari v. State of Tamil Nadu, MANU/SC/0408/1992 : (1992) 2 SCC 223.

216. In Tamil Nadu Electricity Board v. Sumathi Das, MANU/SC/0338/2000 : (2000) 4 SCC 543, this Court held that exercise of writ jurisdiction would be inappropriate where there were disputed questions of fact that required proof through substantial evidence. However, it has been clarified that the restriction applied only to the higher judiciary's writ jurisdiction Under Articles 32 and 226, and that it did not restrain this Court's power to address the matter Under Article 142, which allows this Court to pass any order 'necessary for doing complete justice in any cause or matter.'

Therefore, this Court has recognised that factual disputes could operate as a limit on the Courts' ability to treat a matter as being actionable as a Constitutional tort but has nevertheless awarded monetary compensation in certain cases possibly having regard to the glaring facts of those cases by exercising power Under Article 142 of the Constitution.

217. Scholarly views suggest that the concept of Constitutional tort challenges the ability of law to deter socially harmful behaviour of different kinds, by forcing the perpetrator to internalise the costs of their actions. However, in case of a Constitutional tort action, the entity saddled with the cost, is not the same as the entity who is to be deterred. This absurdity is stated to be threatening to the corrective justice idea that tort law embodies. In other words, an actor's direct ability to alter the injury-causing behaviour is critical to the foundation of tort law. However, given that an action of Constitutional tort imposes the burden of damages on an entity, other than the violator of the right, a doubt has been cast on its effectiveness in serving as a vehicle of corrective justice.

218. In light of the aforesaid discussion, it is observed that it is not prudent to treat all cases where a statement made by a public functionary resulting in harm or loss to a person/citizen, as a constitutional tort. Regard must be had in every case to the nature of resultant harm or loss. Further, it is to be noted that even the cases cited hereinabove have permitted treating an act or omission as a constitutional tort only where there has been an infraction of fundamental right as a direct result of such act or omission. Therefore the causal connection between the act or omission and the resultant infraction of fundamental rights, is central to any determination

of an action of constitutional tort.

219. In Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers, MANU/SC/0794/2011 : (2011) 8 SCC 568, this Court refused to entertain a matter against an interim order passed by the Delhi High Court in a writ petition, whereby the Petitioner Board had been directed to deposit compensation in favour of the family of a sewerage worker who had died while performing his duties. Dismissing the case, this Court held that since the deceased had died due to insensitivity on the part of the State apparatus, to the safety and well-being of its employees, the State would be liable to pay compensation to the family of the deceased. This Court invoked Article 142 of the Constitution to enhance the amount of compensation payable.

220. At this juncture, it may be apposite to sound a word of caution as regards the approach of the Courts in granting monetary compensation as a means for vindication of fundamental rights. It is to be noted that in the absence of a clear, cogent and comprehensive legal framework based on judicial precedent, which would clarify what harm or injury is actionable as a constitutional tort, such a device is to be resorted to only in cases where there are brutal violations of fundamental rights, such as the violations that were involved in Rudul Sah and Chandrima Das. This Court has acknowledged such a view in Sebastian M. Hongray, by noting that compensation was being awarded in the said case having regard to "torture, the agony and the mental oppression" which the family of the victim therein had to endure due his death by an encounter. Similarly, this Court, in Bhim Singh stated that the compensation was awarded by taking note of the "bizzare acts" of police lawlessness. As already highlighted, compensation was awarded in Delhi Jal Board, by exercising power Under Article 142. Thus, the remedy provided is on a case to case basis on an evolution of the concept of constitutional tort through judicial dicta.

221. While it is true that the Courts must mould their tools to deal with particularly extreme and threatening situations, and the device of a 'constitutional tort' has evolved through such an exercise, it must be borne in mind that the tool of treating an action as a constitutional tort must not be wielded only in instances wherein state lawlessness and indifference to the right to life and personal liberties have caused immense suffering. The law would have to evolve in this regard, in respect of violation of other Fundamental Rights apart from issuance of the prerogative writs.

222. Therefore, it is observed that presently invocation of writ jurisdiction to grant damages, by treating acts and omissions of agencies of the State as Constitutional torts, must be an exception rather than a rule. The remedy before a competent court or under criminal law is, in any case available as per the existing legal framework. In light of the aforesaid discussion, Question No. 5 is answered as follows:

> A proper legal framework is necessary to define the acts or omissions which would amount to constitutional tort and the manner in which the same would be redressed or remedied on the basis of judicial precedent. Particularly, it is not prudent to treat all cases where a statement made by a public functionary resulting in harm or loss to a person/citizen, as a constitutional tort, except in the context of the answer given to Question No. 4 above.

223. In light of the above discussion as well as the answers given to the questions referred, the following other conclusions are drawn:

> a) It is for the Parliament in its wisdom to enact a legislation or code to restrain, citizens in general and public functionaries, in particular, from making disparaging or vitriolic remarks against fellow citizens, having regard to the strict parameters of Article 19(2) and bearing in mind the freedom Under Article 19(1) (a) of the Constitution of India. Hence, I am not inclined to issue any guideline in this regard, but the observations made hereinabove may be borne in mind.

b) It is also for the respective political parties to regulate and control the actions and speech of its functionaries and members. This could be through enactment of a Code of Conduct which would prescribe the limits of permissible speech by functionaries and members of the respective political parties.

c) Any citizen, who is prejudiced by any form of attack, as a result of speech/expression through any medium, targeted against her/him or by speech which constitutes 'hate speech' or any species thereof, whether such attack or speech is by a public functionary or otherwise, may approach the Court of Law under Criminal and Civil statutes and seek appropriate remedies. Whenever permissible, civil remedies in the nature of declaratory remedies, injunctions as well as pecuniary damages may be awarded as prescribed under the relevant statutes.

However, answers given to Question Nos. 4 and 5 may have a bearing in the context of collective responsibility of government and Constitutional tort.

Writ Petition (Crl.) No. 113 of 2016 and Special Leave Petition (Civil) bearing Diary No. 34629 of 2017 are directed to be listed before an appropriate Bench after seeking orders of Hon'ble the Chief Justice of India.

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[1]Frances Kamm, Morality, Mortality Vol. 2, Oxford University Press, 1996

[2]Sourced from the Article "Arguments from Colonial Continuity - the Constitution (First Amendment) Act, 1951" (2008) of Burra, Arudra, Assistant Professor, Department of Humanities and Social Sciences, IIT (Delhi),

[3]1949 Act

[4]Subject matter of challenge pending before this Court.

[5]Interestingly The Protection of Human Rights Act, 1993 was enacted in India five years before a similar Act came in United Kingdom.

[6]R.D. Shetty v. International Airport Authority MANU/SC/0048/1979 : (1979) 3 SCC 489

[7]Andi Mukta v. V.R. Rudani MANU/SC/0028/1989 : (1989) 2 SCC 691

[8]From H.W. Longfellow in "A Psalm of life"

[9]From Shakespeare in Macbeth

[10]Anup Surendranath in his Article "Life and Personal Liberty" in The Oxford Handbook of the Indian Constitution (South Asia Edition), 2016

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

THOMAS BONACUM, BISHOP, APPELLANT, V. LEWIS J. HARRINGTON, APPELLEE.

FILED OCTOBER 9, 1902. No. 11,986.

Commissioner's opinion, Department No. 2.

1. **Religious Organization**: GOVERNING AUTHORITY: REVIEW BY COURT. The courts will not review the judgments or acts of the governing authorities of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization. *Pounder v. Ashe*, 44 Nebr., 672.

2. **Governing Authority**: ONE MAN: SYNOD: CONFERENCE: PROCEDURE. For the purposes of this rule it can make no difference whether the governing authority is confided to one man or to a synod or conference, nor whether the mode of procedure permitted to such person is in accord with the ordinary course of investigations or trials. Each religious organization must be the judge of its own laws.

3. ———: ———: ———: ———: INJUNCTION. When the governing authority of such an organization has deprived one of its clergymen of his authority to officiate as such, he may be enjoined from making use of church property in that capacity, or under color of the functions of which he has been deprived.

4. **Local Church**: GENERAL ORGANIZATION: GOVERNING AUTHORITY: REVIEW. Where a local church congregation is a member of a general organization having general rules for the government and conduct of all its adherents, congregations and officers, the orders and judgments of the general organization through its governing authority, so far as they relate exclusively to church affairs and church government, are binding on the local associations, and will not be re-examined by the courts. *Pounder v. Ashe, supra.*

5. **Property Contributed to General Church Organization for Religious Purposes.** In case property has been contributed and conveyed to the authorities of the general church organization for the purpose of religious worship in accordance with the doctrine and discipline of a particular denomination, persons claiming under said denomination and not pretending in any

way to hold adversely thereto, or to have any title of their own except as members thereof, may be enjoined from using such property contrary to the determination of the governing authority of the denomination. *Pounder v. Ashe, supra.*

APPEAL from the district court for Harlan county. Heard below before ADAMS, J. *Reversed.*

Riley L. Keester, for appellant.

Webster S. Morlan, A. M. Beresford and *J. G Thompson, contra.*

POUND, C.

Thomas Bonacum, as bishop of the Roman Catholic Church for the diocese of Lincoln, brought this suit against Lewis J. Harrington to obtain an injunction restraining the latter from exercising the powers or faculties of parish priest in the parish of Orleans in said diocese, in contravention of the action of plaintiff, as such bishop and as the governing authority of the church in said diocese, withdrawing his faculties and depriving him of his authority as such parish priest, and from acting or assuming to act in that capacity, exercising the functions of which he had been deprived, or excluding the regularly appointed priest of said parish from the church property therein, or interfering with him in the exercise of his office. A decree was rendered dismissing the suit, from which the bishop appeals.

The controversy involves the interpretation and application of several paragraphs of the decrees of the third plenary council of Baltimore, shown by the evidence to be an authoritative statement of the rules, customs, canons and discipline of the Catholic church in this country. It appears in evidence that the church distinguishes between priests who belong to and are incorporated in a diocese, and those who are proper to some other diocese, but are in process of acquiring a new situs. With respect to the latter, a further distinction is made between secular

clergy, the ordinary parish priests, and regular clergy, those who are members of religious orders and have taken special vows. Thus much is conceded by all parties. It is also conceded that the bishop may not deprive or dismiss a priest who has become incorporated in his diocese except upon due trial, after notice and opportunity to defend. With respect to priests who have not been incorporated in the diocese, the evidence appears to show that the bishop may not incorporate them in the first instance when they come to him, but must receive them upon probation for a period of three or five years, as he may determine, after which he may incorporate them by formal act, or may allow them to become incorporated by non-action.

In the case of regular clergy who have taken vows, it is provided that the bishop shall not admit them, even to the preliminary probation in the first instance, unless they have already become secular priests before they come to him; but on their producing letters of secularization and after making secret investigation as to the character and qualifications of the priest, he may transmit the result of his investigation to the authorities at Rome, who may finally complete the secularization, whereupon the ordinary process of incorporation will ensue. A written agreement between the bishop and Father Harrington is in evidence, in which it is set forth that the latter is received as a "guest" of the diocese, and that in case the bishop determines to receive him on probation the period thereof shall be five years. It is also agreed that the bishop, for reasons of which he shall be the sole judge, may at any time prior to the expiration of the period of probation refuse to incorporate the defendant, and dismiss him. The bishop contends that under the customs and law of the church in this country there is a recognized practice of receiving priests from other dioceses as guests, without taking them on probation, and without their acquiring any rights to be incorporated until so taken; and he insists that Father Harrington was received in this capacity only, and that he at no time permitted the latter

to enter upon the stipulated five-year period of probation, or to become incorporated. He also claims that the necessary steps toward complete secularization have never been gone through with, and consequently that Father Harrington, as a member of a religious order, was not entitled to be received on probation. On the other hand, Father Harrington asserts that the paragraphs relied upon by the bishop as his authority for receiving clergymen as guests of the diocese, refer to what he calls "borrowed priests" or priests loaned by one bishop to another for a temporary purpose, and have no application to his case. He also insists that by virtue of certain letters of secularization, introduced in evidence, he was eligible to be received on probation and was so received, and produces some written statements of the bishop, which tend to show that he was regarded as on a permanent footing in the diocese. The bishop contends that the letters of secularization produced are merely a necessary preliminary to the procedure provided for full secularization, and points to a paragraph of the church laws which might be so construed. The lower court, construing the several paragraphs of the church law in evidence, seems to have held that Father Harrington, having been in the diocese a little longer than five years, had become presumptively incorporated, and was entitled to the mode of trial provided for incorporated priests, so that the bishop could not dismiss him or refuse to receive him after a secret investigation, as in the case of those who had not acquired a permanent situs.

The laws and decrees of the church in evidence presuppose a considerable knowledge of the canon law, and their interpretation by a court, which has no knowledge and can not take judical notice of that system, must necessarily be very unsatisfactory, in the absence of more complete and explicit expert evidence than is before us in this case. The books in evidence, and the witnesses who testified with regard to them, take many things for granted, of which the court is ignorant, and we should feel greatly embarrassed were it necessary for us to attempt to con-

strue them. Such an endeavor, indeed, would amount to nothing less than making law for the church. In order to reach a sound construction on controverted points, the court should be able to enter into and give effect to the reason and intention of the lawgivers; it must know the general spirit of the organization and its attitude towards its governing authorities,—whether it construes the laws relating to their powers liberally or strictly; and it must consider the construction, if any, which usage and common consent has determined. We have only to turn to the annotations of our public statute books to see that scarcely less law is made by construction and interpretation than by direct legislative enactment. In such a case as this there would be great danger that the ideas of the court would run counter to those of the fathers of the church, and make laws by construction which were never intentionally adopted. We think we are relieved of the duty of so doing under the decision of this court in *Pounder v. Ashe,* 44 Nebr., 673. It is in evidence that the bishop is the governing authority of the Catholic church in his diocese. He is said to be "the supreme pastor, the supreme teacher, the supreme governor." It is his duty, under the laws and discipline of the church, to administer the regulations above mentioned, and, in so doing, necessarily to construe and interpret them. His decision is to be final and conclusive, except as reviewed by his ecclesiastical superiors at Rome. Under such circumstances, we do not think we ought to attempt to review his decision, or put ourselves in his place and determine for the church the meaning of its rules and canons. In *Pounder v. Ashe, supra,* it was settled, after elaborate review of the authorities, that courts will not review judgments or acts of the governing authorities of a religious organization with reference to its internal affairs, for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization. This case and that are very much alike. In *Pounder v. Ashe* the controversy related to the action of a conference, which was the govern-

ing authority of a religious organization in this jurisdiction, depriving a clergyman of his office and dismissing him; and the question presented was which of two distinct sections of the book of discipline of said organization was to be applied to his case. The conference proceeded under one section, and he claimed its action was irregular, because it should have proceeded under the other. At the first hearing this court reviewed the action of the conference, determined that it proceeded under the wrong section, and rendered judgment accordingly. *Pounder v. Ashe,* 36 Nebr., 564. But upon rehearing the court altered its position, refused to review the action of the superior church authorities, and granted an injunction against the deprived clergyman. *Pounder v. Ashe,* 44 Nebr., 672. In this case the questions are whether the provisions relating to the incorporation of secular priests, or instead those relating to members of religious orders, were proper to be applied, and what character and effect belonged to the letter of secularization produced by the defendant. The construction of the provision by virtue whereof the bishop claims the right to receive priests as guests of the diocese is also in issue. It is manifest that these questions are of exactly the same nature, in their substance, as those before the court in *Pounder v. Ashe.*

For the purpose of the rule announced in *Pounder v. Ashe,* we think it can make no difference whether the governing authority of a religious denomination is confided to one man or to a synod or conference, nor whether the mode of procedure permitted to such person is in accord with the ordinary course of investigations or trials among laymen. Each religious organization must determine its own polity, and be the judge of its own laws. While Anglo-Saxon notions of fair play may lead us to look with disfavor upon secret investigations and summary determinations by one person, we must not forget that contentious methods of investigation are largely English, and that the Roman system, from which the Roman church has derived its procedure, has always been

and still is to a large degree inquisitorial. However much we may think that open and public proceedings and hearings upon due notice ought to be had in every investigation of every sort of charge or issue, we must remember that it is not our province to impose our views as to such matters upon religious denominations. We must not forget that ideas and methods which may seem strange to us are often older than those which, from familiarity, we are prone to think part of the order of nature, and that large bodies of men have been governed by them, and are still governed by them, in the internal affairs of the Roman church, without questioning their entire propriety. When the governing authority of a religious denomination has deprived one of its clergymen of his authority to officiate as such, he may be enjoined from making use of church property in that capacity, or under color of the functions of which he has been deprived. *Pounder v. Ashe,* 44 Nebr., 672. No other remedy is adequate or practicable in such a case. The denomination at large, of which the local congregation forms a part, has generally contributed, and did contribute in this instance, a large portion of the funds and property wherewith the local society is maintained. If the property and the proceeds of such funds may be diverted from the purpose for which they were contributed and administered in contravention of the discipline, doctrines and canons of the denomination, it is obvious that a wrong is perpetrated not without an analogy to a breach of trust. After the decision of this court in *Pounder v. Ashe* the question is not an open one. The remedy of the deprived clergyman is to be found within the organization itself. So long as the judgment or act of his superiors and of the governing authority of the church relates merely to its internal affairs and to church discipline, and he is not deprived or sought to be deprived of any property rights, he has no standing in court to procure a review of the proceedings dismissing him. In *Pounder v. Ashe* the court said: "Mr. Ashe as a member, and also a minister, and from all the evidence, a bright and active one, must be pre-

sumed to have been fully acquainted with the discipline and rules and regulations, and the right of the association to try him in the manner it did, if charges were preferred against him, including that of the duty of the committee to adjudicate the question of under which section and paragraph of the rules the charges must be heard and determined, and when he joined the church and entered its ministry, having assented to them, and, having thus selected and agreed to the tribunal and its powers and jurisdiction, in so far as it affects him alone and his rights to exercise his office as minister and as a member of the association, the civil courts can not and will not examine the proceedings of the trial committee provided by the discipline, to ascertain whether it has in all things acted in accordance with the rules of the church, or construe the disciplinary laws of the association and take upon them the work of a review or retrial of the case and render in it such verdict or judgment as from the court's construction of the laws of the church, should have been announced." These remarks are very pertinent to the case at bar. It may be Father Harrington's misfortune that under the discipline of the society of which he has voluntarily become a member he was subject, under certain contingencies, to be dismissed upon secret investigation, and for reasons of which the bishop was the sole judge. It may be his misfortune that he has devoted his concededly great abilities to the work of a society in which the supreme authority in each diocese is so largely delegated to one man. But having identified himself with such a denomination, his remedy is either to appeal to the proper ecclesiastical superior of the bishop, or, if so advised, to sever his connection with the organization. It is true, he claims to have appealed. But he produces no evidence thereof, and in fact refuses to state how he appealed, or in what manner proceedings by way of appeal are pending. And, even if he had established an appeal, he has introduced nothing to show that the effect thereof would be to supersede the action of the bishop.

Certain members of the local congregation formed a corporation under the general provisions of the statute with reference to religious societies, and intervened claiming rights in the church property in controversy. No relief was granted by the decree, and we do not think it necessary to direct any decree with reference to the petition of intervention. Where a local church congregation is a member of a general organization, having rules for the government and conduct of all its adherents, congregations and officers, the judgments of the general organization, through its governing authority, so long as they relate exclusively to church affairs and church cases, are binding upon such local organizations, and will not be re-examined by the courts. *Pounder v. Ashe, supra.* In this case the property has been conveyed to the bishop, as representative of the general church organization, and was contributed and was so conveyed for the purposes of religious worship in accordance with the doctrine and discipline of the Roman Catholic Church. Persons claiming under said denomination and not pretending in any way to hold adversely thereto, or have any title of their own, except as members thereof, may be enjoined from using such property contrary to the determination of the governing authority of the church. This proposition likewise is settled in *Pounder v. Ashe.* In that case rival parties of a congregation claimed to represent the true doctrine and discipline of the church, and the one attempted to exclude the other from such property, and to administer it contrary to the determination of the conference. The court granted an injunction, as we think properly, because the question was not one of title or possession, but purely one of the administration of trust property in accordance with the terms of the trust. The bishop has prayed for no injunction against the interveners, and they have obtained no relief against him. If they claim merely as members of the local congregation and in subordination to and under the church, it is obvious that they are bound by his determination, or the determination of his ecclesiastical su-

periors. If they claim by some independent title, or claim adversely to the church, or to the trust represented by the bishop as its governing authority in this jurisdiction, the bishop's remedy would be by forcible entry or ejectment.

In conformity with the rules established by this court in *Pounder v. Ashe,* we recommend that the decree of the district court be reversed and the cause remanded with directions to enter a decree enjoining and restraining the defendant, Harrington, from exercising the powers or faculties of parish priest in or upon the property of said parish of Orleans in contravention of the orders of the bishop, and from exercising therein the functions of which he has been deprived by the bishop, or excluding such person as the bishop shall appoint regularly as priest of said parish from the church property in the petition described, or interfering with him in the exercise of his office. Further than that we do not think an injunction ought to run. Any contests over possession under claim of title, as distinguished from the administration of the church property in accordance with its discipline, laws and canons, must be decided in proper proceedings at law.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded with directions to enter a judgment enjoining and restraining the defendant, Harrington, from exercising the powers or faculties of parish priest in or upon the property of said parish of Orleans, in contravention of the orders of the bishop, exercising therein the functions of which he has been deprived by the bishop, or excluding such person as the bishop shall appoint regularly as priest of said parish from the church property in the petition described, or interfering with him in the exercise of his office.

REVERSED AND REMANDED.

NOTE.—*Civil Courts.—Ecclesiastical Cases.—Church Authorities.*—The only ground upon which civil courts interfere in ecclesiastical cases

being the protection of civil rights, they will not interfere with the exercise of any discretion on the part of the church authorities and will not revise or correct the proceedings of ecclesiastical tribunals. *Walker v. Wainwright*, 16 Barb. [N. Y.], 486.

The jurisdiction of ecclesiastical tribunals being conclusive as to ecclesiastical offenses, as well as upon doubtful and technical questions involving a criticism of the canons of a church, the civil courts will not revise the decision of such tribunals for the purpose of ascertaining or defining this jurisdiction, nor will they revise or question their construction and interpretation of the canons of the church. *Chase v. Cheney*, 58 Ill., 509.

The foregoing authorities are cited by High, Injunctions [3d ed.], secs. 309 and 310. There is an apparent contradiction between the sections. The first would seem to say that a civil court may inquire into the jurisdiction of the ecclesiastical tribunal under the law of the church, and there is a *dictum* to that effect in *Walker v. Wainwright, supra;* but this is clearly not the law, and is not so held to be in either of the cases cited by High. If it is a question of canon law, and the church tribunal even *claims* jurisdiction, it is a question to be determined *intra ecclesiam*, and not in a civil court.—W. F. B.

This note was prepared by the editor at the suggestion of the author of the opinion.

A. E. RICKLEY V. STATE OF NEBRASKA ET AL.

FILED OCTOBER 9, 1902. No. 11,297.

Commissioner's opinion, Department No. 3.

Criminal Code: PROSECUTING WITNESS: GOOD FAITH: TAXATION OF COSTS: UNCONSTITUTIONALITY. Section 322 of the Code of Criminal Procedure, in so far as it authorizes the question of of the good faith of the prosecuting witness in instituting the prosecution to be tried and determined at the same time that the defendant is tried, and the taxation of costs against him in case it is found that in filing the information he acted maliciously or without probable cause, is unconstitutional and void.

ERROR from the district court for Sheridan county. Tried below before WESTOVER, J. *Reversed.*

One Lovekin was prosecuted in the county court for larceny on the information of one Rickley. Lovekin was acquitted, and the jury found the information without

MD. & VA. CHURCHES v. SHARPSBURG CH.

United States Supreme Court

MD. & VA. CHURCHES v. SHARPSBURG CH.(1970)

No. 414

Argued: Decided: January 19, 1970

Since state court's resolution of property dispute between church bodies was made on basis of state law that did not involve inquiry into religious doctrine, the appeal involves no substantial federal question.

254 Md. 162, 254 A. 2d 162, appeal dismissed.

Alfred L. Scanlan, James H. Booser, and Charles O. Fisher for appellants.

Arthur G. Lambert for appellees.

PER CURIAM.

In resolving a church property dispute between appellants, representing the General Eldership, and appellees, two secessionist congregations, the Maryland Court of Appeals relied upon provisions of state statutory law governing the holding of property by religious corporations, 1 upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property. 254 Md. 162, 254 A. 2d 162 (1969). 2 Appellants argue primarily that the statute, as applied, deprived the General Eldership [396 U.S. 367, 368] of property in violation of the First Amendment. Since, however, the Maryland court's resolution of the dispute involved no inquiry into religious doctrine, appellees' motion to dismiss is granted, and the appeal is dismissed for want of a substantial federal question.

It is so ordered.

Footnotes

[Footnote 1] Md. Ann. Code, Art. 23, 256-270 (1966 Repl. Vol.)

[Footnote 2] The Maryland court reached the same decision in May 1968. 249 Md. 650, 241 A. 2d 691. This Court vacated and remanded the case "for further consideration in light of Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church . . . ." 393 U.S. 528 (1969).

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring.

I join the per curiam but add these comments. We held in Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969), that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." It follows that a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.

Thus the States may adopt the approach of Watson v. Jones, 13 Wall. 679 (1872), and enforce the property decisions made within a church of congregational polity "by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government," id., at 724, and within a [396 U.S. 367, 369] church of hierarchical polity by the highest authority that has ruled on the dispute at issue, 1 unless "express terms" in the "instrument by which the property is held" condition the property's use or control in a specified manner. 2 Under Watson civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine. 3 Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be [396 U.S. 367, 370] essential to the resolution of the controversy. In other words, the use of the Watson approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

> "[N]eutral principles of law, developed for use in all property disputes," Presbyterian Church, supra, at 449, provide another means for resolving litigation

over religious property. Under the "formal title" doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws. Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues. For example, provisions in deeds or in a denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could not be civilly enforced. 4

A third possible approach is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine. Such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies. 5 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).
[Footnote 1] Under the Watson definition, supra, at 722-723, congregational polity exists when "a religious congregation . . ., by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." Hierarchical polity, on the other hand, exists when "the religious congregation . . . is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."

[Footnote 2] Id., at 722. Except that "express terms" cannot be enforced if enforcement is constitutionally impermissible under Presbyterian Church. Any language in Watson, supra, at 722-723, that may be read to the contrary must be disapproved. Only express conditions that may be effected without consideration of doctrine are civilly enforceable.

[Footnote 3] Except that civil tribunals may examine church rulings alleged to be the product of "fraud, collusion, or arbitrariness." Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929).

[Footnote 4] Thus a State that normally resolves disputes over religious property by applying general principles of property law would have to use a different method in cases involving such provisions, perhaps that defined in Watson. By the same token, States following the Watson approach would have to find another ground for decision, perhaps the application of general property law, when identification of the relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity.

[Footnote 5] See, e. g., Goodson v. Northside Bible Church, 261 F. Supp. 99 (D.C. S. D. Ala. 1966). aff'd, 387 F.2d 534 (C. A. 5th Cir. 1967). [396 U.S. 367, 371]

UNITED STATES *v.* BALLARD ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 472. Argued March 3, 6, 1944.—Decided April 24, 1944.

Upon an indictment charging use of the mails to defraud, and conspiracy so to do, respondents were convicted in the District Court. The indictment charged a scheme to defraud through representations—involving respondents' religious doctrines or beliefs—which were alleged to be false and known by the respondents to be false. Holding that the District Court had restricted the jury to the issue of respondents' good faith and that this was error, the Circuit Court of Appeals reversed and granted a new trial. *Held:*

1. The only issue submitted to the jury by the District Court was whether respondents believed the representations to be true. P. 84.

2. Respondents did not acquiesce in the withdrawal from the jury of the issue of the truth of their religious doctrines or beliefs, and are not barred by the rule of *Johnson* v. *United States*, 318 U. S. 189, from reasserting here that no part of the indictment should have been submitted to the jury. P. 85.

3. The District Court properly withheld from the jury all questions concerning the truth or falsity of respondents' religious beliefs or doctrines. This course was required by the First Amendment's guarantee of religious freedom. P. 86.

The preferred position given freedom of religion by the First Amendment is not limited to any particular religious group or to any particular type of religion but applies to all. P. 87.

4. Respondents may urge in support of the judgment of the Circuit Court of Appeals points which that court reserved, but since these were not fully presented here either in the briefs or oral argument, they may more appropriately be considered by that court upon remand. P. 88.

138 F. 2d 540, reversed.

CERTIORARI, 320 U. S. 733, to review the reversal of convictions for using the mails to defraud and conspiracy.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss*

Beatrice Rosenberg were on the brief, for the United States.

Messrs. Roland Rich Woolley and *Joseph F. Rank,* with whom *Mr. Ralph C. Curren* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents were indicted and convicted for using, and conspiring to use, the mails to defraud. § 215 Criminal Code, 18 U. S. C. § 338; § 37 Criminal Code, 18 U. S. C. § 88. The indictment was in twelve counts. It charged a scheme to defraud by organizing and promoting the I Am movement through the use of the mails. The charge was that certain designated corporations were formed, literature distributed and sold, funds solicited, and memberships in the I Am movement sought "by means of false and fraudulent representations, pretenses and promises." The false representations charged were eighteen in number. It is sufficient at this point to say that they covered respondents' alleged religious doctrines or beliefs. They were all set forth in the first count. The following are representative:

> that Guy W. Ballard, now deceased, alias Saint Germain, Jesus, George Washington, and Godfre Ray King, had been selected and thereby designated by the alleged "ascertained masters," Saint Germain, as a divine messenger; and that the words of "ascended masters" and the words of the alleged divine entity, Saint Germain, would be transmitted to mankind through the medium of the said Guy W. Ballard;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard, and Donald Ballard, by reason of their alleged high spiritual attainments and righteous conduct, had been selected as divine messengers through which the words of the alleged "ascended masters," in-

> cluding the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the "I Am" movement;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard and Donald Ballard had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did falsely represent to persons intended to be defrauded that the three designated persons had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases; and did further represent that the three designated persons had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments;

Each of the representations enumerated in the indictment was followed by the charge that respondents "well knew" it was false. After enumerating the eighteen misrepresentations the indictment also alleged:

> At the time of making all of the afore-alleged representations by the defendants, and each of them, the defendants, and each of them, well knew that all of said aforementioned representations were false and untrue and were made with the intention on the part of the defendants, and each of them, to cheat, wrong, and defraud persons intended to be defrauded, and to obtain from persons intended to be defrauded by the defendants, money, property, and other things of value and to convert the same to the use and the benefit of the defendants, and each of them;

The indictment contained twelve counts, one of which charged a conspiracy to defraud. The first count set forth all of the eighteen representations, as we have said. Each of the other counts incorporated and realleged all of them and added no additional ones. There was a demurrer and a motion to quash, each of which asserted, among other things, that the indictment attacked the religious beliefs

of respondents and sought to restrict the free exercise of their religion in violation of the Constitution of the United States. These motions were denied by the District Court. Early in the trial, however, objections were raised to the admission of certain evidence concerning respondents' religious beliefs. The court conferred with counsel in absence of the jury and with the acquiescence of counsel for the United States and for respondents confined the issues on this phase of the case to the question of the good faith of respondents. At the request of counsel for both sides the court advised the jury of that action in the following language:

> Now, gentlemen, here is the issue in this case:
>
> First, the defendants in this case made certain representations of belief in a divinity and in a supernatural power. Some of the teachings of the defendants, representations, might seem extremely improbable to a great many people. For instance, the appearance of Jesus to dictate some of the works that we have had introduced in evidence, as testified to here at the opening transcription, or shaking hands with Jesus, to some people that might seem highly improbable. I point that out as one of the many statements.
>
> Whether that is true or not is not the concern of this Court and is not the concern of the jury—and they are going to be told so in their instructions. As far as this Court sees the issue, it is immaterial what these defendants preached or wrote or taught in their classes. They are not going to be permitted to speculate on the actuality of the happening of those incidents. Now, I think I have made that as clear as I can. Therefore, the religious beliefs of these defendants cannot be an issue in this court.
>
> The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that.
>
> If these defendants did not believe those things, they did not believe that Jesus came down and dic-

> tated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty. Therefore, gentlemen, religion cannot come into this case.

The District Court reiterated that admonition in the charge to the jury and made it abundantly clear. The following portion of the charge is typical:

> The question of the defendants' good faith is the cardinal question in this case. You are not to be concerned with the religious belief of the defendants, or any of them. The jury will be called upon to pass on the question of whether or not the defendants honestly and in good faith believed the representations which are set forth in the indictment, and honestly and in good faith believed that the benefits which they represented would flow from their belief to those who embraced and followed their teachings, or whether these representations were mere pretenses without honest belief on the part of the defendants or any of them, and, were the representations made for the purpose of procuring money, and were the mails used for this purpose.

As we have said, counsel for the defense acquiesced in this treatment of the matter, made no objection to it during the trial, and indeed treated it without protest as the law of the case throughout the proceedings prior to the verdict. Respondents did not change their position before the District Court after verdict and contend that the truth or verity of their religious doctrines or beliefs should have been submitted to the jury. In their motion for new trial they did contend, however, that the withdrawal of these issues from the jury was error because it was in effect an amendment of the indictment. That was also one of their specifications of errors on appeal. And other errors urged on appeal included the overruling of the demurrer to the indictment and the motion to quash, and the

disallowance of proof of the truth of respondents' religious doctrines or beliefs.

The Circuit Court of Appeals reversed the judgment of conviction and granted a new trial, one judge dissenting. 138 F. 2d 540. In its view the restriction of the issue in question to that of good faith was error. Its reason was that the scheme to defraud alleged in the indictment was that respondents made the eighteen alleged false representations; and that to prove that defendants devised the scheme described in the indictment "it was necessary to prove that they schemed to make some, at least, of the (eighteen) representations . . . and that some, at least, of the representations which they schemed to make were false." 138 F. 2d 545. One judge thought that the ruling of the District Court was also error because it was "as prejudicial to the issue of honest belief as to the issue of purposeful misrepresentation." *Id.*, p. 546.

The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

The United States contends that the District Court withdrew from the jury's consideration only the truth or falsity of those representations which related to religious concepts or beliefs and that there were representations charged in the indictment which fell within a different category.[1] The argument is that this latter group of

[1] Petitioner has placed three representations in this group: (1) A portion of the scheme as to healing which we have already quoted and which alleged that respondents "had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments"; (2) The portion of the scheme relating to certain religious experiences described in certain books (Unveiled Mysteries and The Magic Presence) and concerning which the indictment alleged "that the defendants represented that Guy W. Ballard, Edna W. Ballard, and Donald Ballard actually encountered the experiences pertaining to each of their said names as related and

representations was submitted to the jury, that they were adequate to constitute an offense under the Act, and that they were supported by the requisite evidence. It is thus sought to bring the case within the rule of *Hall* v. *United States,* 168 U. S. 632, 639–640, which held that where an indictment contained "all the necessary averments to constitute an offense created by the statute," a conviction would not be set aside because a "totally immaterial fact" was averred but not proved. We do not stop to ascertain the relevancy of that rule to this case, for we are of the view that all of the representations charged in the indictment which related at least in part to the religious doctrines or beliefs of respondents were withheld from the jury. The trial judge did not differentiate them. He referred in the charge to the "religious beliefs" and "doctrines taught by the defendants" as matters withheld from the jury. And in stating that the issue of good faith was the "cardinal question" in the case he charged, as already noted, that "The jury will be called upon to pass on the question of whether or not the defendants honestly and in good faith believed the representations which are set forth in the indictment." Nowhere in the charge were any of the separate representations submitted to the jury. A careful reading of the whole charge leads us to agree with the Circuit Court of Appeals on this phase of the case that the only issue submitted to the jury was the question as stated by the District Court, of respondents' "belief in their representations and promises."

The United States contends that respondents acquiesced in the withdrawal from the jury of the truth of their reli-

set forth in said books, whereas in truth and in fact none of said persons did encounter the experiences"; (3) The part of the scheme concerning phonograph records sold by respondents on representations that they would bestow on purchasers "great blessings and rewards in their aim to achieve salvation" whereas respondents "well knew that said . . . records were man-made and had no ability to aid in achieving salvation."

gious doctrines or beliefs and that their consent bars them from insisting on a different course once that one turned out to be unsuccessful. Reliance for that position is sought in *Johnson* v. *United States,* 318 U. S. 189. That case stands for the proposition that, apart from situations involving an unfair trial, an appellate court will not grant a new trial to a defendant on the ground of improper introduction of evidence or improper comment by the prosecutor, where the defendant acquiesced in that course and made no objection to it. In fairness to respondents that principle cannot be applied here. The real objection of respondents is not that the truth of their religious doctrines or beliefs should have been submitted to the jury. Their demurrer and motion to quash made clear their position that that issue should be withheld from the jury on the basis of the First Amendment. Moreover, their position at all times was and still is that the court should have gone the whole way and withheld from the jury both that issue and the issue of their good faith. Their demurrer and motion to quash asked for dismissal of the entire indictment. Their argument that the truth of their religious doctrines or beliefs should have gone to the jury when the question of their good faith was submitted was and is merely an alternative argument. They never forsook their position that the indictment should have been dismissed and that none of it was good. Moreover, respondents' motion for new trial challenged the propriety of the action of the District Court in withdrawing from the jury the issue of the truth of their religious doctrines or beliefs without also withdrawing the question of their good faith. So we conclude that the rule of *Johnson* v. *United States, supra,* does not prevent respondents from reasserting now that no part of the indictment should have been submitted to the jury.

As we have noted, the Circuit Court of Appeals held that the question of the truth of the representations concerning

respondents' religious doctrines or beliefs should have been submitted to the jury. And it remanded the case for a new trial. It may be that the Circuit Court of Appeals took that action because it did not think that the indictment could be properly construed as charging a scheme to defraud by means other than misrepresentations of respondents' religious doctrines or beliefs. Or that court may have concluded that the withdrawal of the issue of the truth of those religious doctrines or beliefs was unwarranted because it resulted in a substantial change in the character of the crime charged. But on whichever basis that court rested its action, we do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones,* 13 Wall. 679, 728. The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion." *Cantwell* v. *Connecticut,* 310 U. S. 296, 303. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Id.,* pp. 303–304. Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette,* 319 U. S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.

Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock* v. *Pennsylvania,* 319 U. S. 105. As stated in *Davis* v. *Beason,* 133 U. S. 333, 342, "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with." See *Prince*

v. *Massachusetts,* 321 U. S. 158. So we conclude that the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents.

Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green,* 282 U. S. 531, 538–539; *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 560, 567–568. But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267–268; *Brown* v. *Fletcher,* 237 U. S. 583. If any questions of importance survive and are presented here, we will then have the benefit of the views of the Circuit Court of Appeals. Until that additional consideration is had, we cannot be sure that it will be necessary to pass on any of the other constitutional issues which respondents claim to have reserved.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

Reversed.

MR. CHIEF JUSTICE STONE, dissenting:

I am not prepared to say that the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences,

more than it renders polygamy or libel immune from criminal prosecution. *Davis* v. *Beason,* 133 U. S. 333; see *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572; cf. *Patterson* v. *Colorado,* 205 U. S. 454, 462; *Near* v. *Minnesota,* 283 U. S. 697, 715. I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences. To go no further, if it were shown that a defendant in this case had asserted as a part of the alleged fraudulent scheme, that he had physically shaken hands with St. Germain in San Francisco on a day named, or that, as the indictment here alleges, by the exertion of his spiritual power he "had in fact cured . . . hundreds of persons afflicted with diseases and ailments," I should not doubt that it would be open to the Government to submit to the jury proof that he had never been in San Francisco and that no such cures had ever been effected. In any event I see no occasion for making any pronouncement on this subject in the present case.

The indictment charges respondents' use of the mails to defraud and a conspiracy to commit that offense by false statements of their religious experiences which had not in fact occurred. But it also charged that the representations were "falsely and fraudulently" made, that respondents "well knew" that these representations were untrue, and that they were made by respondents with the intent to cheat and defraud those to whom they were made. With the assent of the prosecution and the defense the trial judge withdrew from the consideration of the jury the question whether the alleged religious experiences had in fact occurred, but submitted to the jury the single issue whether petitioners honestly believed that they had occurred, with the instruction that if the jury did not so find, then it should return a verdict of guilty. On this

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issue the jury, on ample evidence that respondents were without belief in the statements which they had made to their victims, found a verdict of guilty. The state of one's mind is a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health. See *Seven Cases* v. *United States,* 239 U. S. 510, 517; cf. *Durland* v. *United States,* 161 U. S. 306, 313. There are no exceptions to the charge and no contention that the trial court rejected any relevant evidence which petitioners sought to offer. Since the indictment and the evidence support the conviction, it is irrelevant whether the religious experiences alleged did or did not in fact occur or whether that issue could or could not, for constitutional reasons, have been rightly submitted to the jury. Certainly none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise.

Obviously if the question whether the religious experiences in fact occurred could not constitutionally have been submitted to the jury the court rightly withdrew it. If it could have been submitted I know of no reason why the parties could not, with the advice of counsel, assent to its withdrawal from the jury. And where, as here, the indictment charges two sets of false statements, each independently sufficient to sustain the conviction, I cannot accept respondents' contention that the withdrawal of one set and the submission of the other to the jury amounted to an amendment of the indictment.

An indictment is amended when it is so altered as to charge a different offense from that found by the grand jury. *Ex parte Bain,* 121 U. S. 1. But here there was no alteration of the indictment, *Salinger* v. *United States,* 272 U. S. 542, 549, nor did the court's action, in effect, add anything to it by submitting to the jury matters which

it did not charge. *United States* v. *Norris,* 281 U. S. 619, 622. In *Salinger* v. *United States, supra,* 548–9, we explicitly held that where an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment. See also *Goto* v. *Lane,* 265 U. S. 393, 402–3; *Ford* v. *United States,* 273 U. S. 593, 602. Were the rule otherwise the common practice of withdrawing from the jury's consideration one count of an indictment while submitting others for its verdict, sustained in *Dealy* v. *United States,* 152 U. S. 539, 542, would be a fatal error.

We may assume that under some circumstances the submission to the jury of part only of the matters alleged in the indictment might result in such surprise to the defendant as to amount to the denial of a fair trial. But, as in the analogous case of a variance between pleading and proof, a conviction can be reversed only upon a showing of injury to the "substantial rights" of the accused. *Berger* v. *United States,* 295 U. S. 78, 82. Here no claim of surprise has been or could be made. The indictment plainly charged both falsity of, and lack of good faith belief in the representations made, and it was agreed at the outset of the trial, without objection from the defendants, that only the issue of respondents' good faith belief in the representations of religious experiences would be submitted to the jury. Respondents, who were represented by counsel, at no time in the course of the trial offered any objection to this limitation of the issues, or any contention that it would result in a prohibited amendment of the indictment. So far as appears from the record before us the point was raised for the first time in the specifications of errors in the Circuit Court of Appeals. It is asserted that it was argued to the District Court on

motions for new trial and in arrest of judgment. If so, there was still no surprise by a ruling to which, as we have said, respondents' counsel assented when it was made.

On the issue submitted to the jury in this case it properly rendered a verdict of guilty. As no legally sufficient reason for disturbing it appears, I think the judgment below should be reversed and that of the District Court reinstated.

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER join in this opinion.

MR. JUSTICE JACKSON, dissenting:

I should say the defendants have done just that for which they are indicted. If I might agree to their conviction without creating a precedent, I cheerfully would do so. I can see in their teachings nothing but humbug, untainted by any trace of truth. But that does not dispose of the constitutional question whether misrepresentation of religious experience or belief is prosecutable; it rather emphasizes the danger of such prosecutions.

The Ballard family claimed miraculous communication with the spirit world and supernatural power to heal the sick. They were brought to trial for mail fraud on an indictment which charged that their representations were false and that they "well knew" they were false. The trial judge, obviously troubled, ruled that the court could not try whether the statements were untrue, but could inquire whether the defendants knew them to be untrue; and, if so, they could be convicted.

I find it difficult to reconcile this conclusion with our traditional religious freedoms.

In the first place, as a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his expe-

rience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.

In the second place, any inquiry into intellectual honesty in religion raises profound psychological problems. William James, who wrote on these matters as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. "If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways." [1] If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.

And then I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. James points out that "Faith means belief

[1] William James, Collected Essays and Reviews, pp. 427–8; see generally his Varieties of Religious Experience and The Will to Believe. See also Burton, Heyday of a Wizard.

in something concerning which doubt is still theoretically possible." [2] Belief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce. Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

There appear to be persons—let us hope not many—who find refreshment and courage in the teachings of the "I Am" cult. If the members of the sect get comfort from the celestial guidance of their "Saint Germain," however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The Ballards are not alone in catering to it with a pretty dubious product.

The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. I doubt if the vigilance of the law is equal to making money stick by over-credulous people. But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in

[2] William James, The Will to Believe, p. 90.

their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt.

I would dismiss the indictment and have done with this business of judicially examining other people's faiths.

3-19-2003

Sutton v. Rasheed

PRECEDENTIAL

Filed March 19, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7096

RICHARD X. SUTTON;
ROBERT X. WISE; MICHAEL X. WALKER,
Appellants

v.

IMAM ADEEB RASHEED;
JAMES SMITH, Chaplain; FRANCIS MENEI, Chaplain;
JOHN PALAKOVICH; KENNETH KYLER;
MARTIN F. HORN;

UNITED STATES OF AMERICA
(Intervenor in District Court)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Civil Action No. 94-cv-01865
(Honorable Edwin M. Kosik)

Argued: March 6, 2002

Before: BECKER, *Chief Judge* and SCIRICA, *Circuit Judge*,
and POLLAK, *District Judge**

(Filed March 19, 2003)

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* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

PER CURIAM:

This is an appeal from an order of the District Court granting defendants summary judgment on claims that defendants infringed upon, *inter alia,* plaintiffs' rights protected by the Free Exercise Clause of the First Amendment. Plaintiffs, three members of the Nation of Islam,[1] contend that the Pennsylvania Department of Corrections' former policy of limiting inmates' access to religious material while they were confined in a special unit for high-risk inmates was unconstitutional — both as applied and facially — because defendants used "unlawful prison rules" to "illegally ban" Nation of Islam texts.

1. The Nation of Islam movement is "based on the [Qur'an] as interpreted by Elijah Muhammad and ministers within the Nation." *Cooper v. Tard*, 855 F.2d 125, 126 (3d Cir. 1988).

We hold that there was a constitutional violation, but because we conclude that defendants are protected by qualified immunity, we will affirm.[2]

I.

In response to three days of riots in 1989 by prisoners at the State Correctional Institute at Camp Hill ("SCI-Camp Hill"), the Pennsylvania Department of Corrections designed, and in April 1992 created, a Special Management Unit ("SMU") at SCI-Camp Hill. Prior to the establishment of the SCI-Camp Hill SMU, high-risk inmates of Pennsylvania prisons were placed in restricted housing units ("RHUs"), maximum custody settings still used at a number of correctional institutions other than Camp Hill.[3] A salient aspect of the RHU regime, as it existed at the commencement of this litigation, was its limitation on what reading materials an RHU inmate could keep with him. Department of Corrections Administrative Directive 802 ("DC-ADM 802") provided that inmates in administrative custody were permitted "no books other than legal materials and a personal Bible, Holy Koran[4] or other religious equivalent . . . . ."[5] Department of Corrections Administrative Directive 801 ("DC-ADM 801") similarly provided: "[administrative custody] inmates will be permitted legal material that may be contained in one (1) records center box . . . . A personal Bible, a Holy Koran, or equivalent publication is permitted."

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2. We have jurisdiction under 28 U.S.C. § 1291.

3. According to Department of Corrections Regional Deputy Commissioner Dr. Jeffrey Beard, "[T]he RHUs are used for both disciplinary and administrative custody inmates, to provide secure housing for both inmates who require long-term confinement in maximum housing because of an inability to adjust to prison life in general population as well as for those who need such custody only in the short term to address a misconduct or temporary security need."

4. "Koran" is an alternate spelling of "Qur'an."

5. DC-ADM 802, section V provided authority for a "Program Review Committee" or "Unit Management Team" to add privileges "based on an individual's need, on safety and security, and on behavioral progress of the inmate."

The regulations governing the SCI-Camp Hill SMU were modeled on those governing the RHU.[6] But unlike the Department of Corrections' traditional restricted housing units, the SMU is a structured program that provides for progression through a series of five phases, from Phase V to Phase I, at which point the inmate is returned to the general prison population.[7] Progression from one phase to the next is accomplished by compliance with specified goals and is rewarded by additional privileges. The intent of the program is to provide security for both staff and inmates while at the same time giving inmates with a long history of behavioral problems various incentives to modify their behavior. The program functions to prepare such inmates for reintegration into the general prison population.

Some inmates begin their time in the SMU at Phase IV, but most begin at Phase V. Inmates in Phases III, IV, and V are under restrictive regimes: they are placed under strict security and control practices; they have short exercise periods; and they have limited access to their own personal property. At the outset of this litigation, a Phase V SMU inmate's access to personal property was confined to a newspaper, one package of cigarettes every two weeks, one records center box of legal materials ("with even exchange"),[8] and religious materials consisting of one personal "Bible, Quran or equivalent only."[9] Phase IV increased inmates' privileges slightly, but still allowed them a "Bible, Quran, or equivalent only." At Phase III, an inmate was allowed to have legal materials, a Bible or Qur'an, and "[two] other religious reading materials." At Phase II, an inmate was

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6. The Department of Corrections' summary of those regulations, Appendix III to the SMU Inmate Handbook, is reprinted as an appendix to this opinion.

7. In a June 29, 1992 Department of Corrections policy statement, the SMU is defined as "A special unit within designated Department of Corrections institutions designated to safely and humanely handle inmates whose behavior presents a serious threat to the safety and security of the facility, staff, other inmates, or him or herself."

8. According to the appellees, "[a] records center box has approximate interior dimensions of 15 inches (long) by 12 inches (wide) by 10 inches (deep)."

9. "Quran" is another alternate spelling of "Qur'an."

permitted legal materials, a Bible or Qur'an, and four other religious reading materials. At Phase I, an inmate was returned to the general population, with all privileges "except that [his] movements [would] be controlled and monitored."

Plaintiff Richard X. Sutton was confined in the SMU from October 5, 1993 until July 20, 1995, when he was transferred to SCI-Greene. Plaintiff Robert X. Wise was confined in the SMU from January 3, 1994 until December 27, 1994, when he was transferred to SCI-Graterford; as of August 28, 2000, he was in the general population at SCI-Albion. Plaintiff Michael X. Walker was confined in the SMU from November 17, 1993 until August 28, 1996, when he was transferred to SCI-Rockview. Plaintiff Walker has now been released from prison. All three are adherents of the Nation of Islam.

Several times between October 1993 and May 1994, Sutton asked defendant Imam Adeeb Rasheed,[10] the Muslim Chaplain at SCI-Camp Hill, whether he would be permitted to have access to various texts written by Fard Muhammad, Elijah Muhammad and Louis Farrakhan from his personal property.[11] Believing the texts were not religious, Imam Rasheed determined that Sutton should not be permitted access to them. During the same period, Sutton also asked Officer Olenowski, the SMU Property

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10. The caption of this case spells the Imam's name as "Rashid." In deposition testimony, the Imam stated that the proper spelling of his surname is "R-A-S-H-E-E-D." This opinion will use the latter spelling.

11. Fard Muhammad was the founder of the Nation of Islam, and followers believe him to have been the Messiah. Elijah Muhammad is believed by Nation of Islam faithful to have been a prophet. Louis Farrakhan is a prominent minister in one of the branches of the Nation of Islam. The texts in question are primarily those written by Elijah Muhammad: *Message to the Blackman*, *The Supreme Wisdom*, *How to Eat to Live*, *Our Savior Has Arrived* and *The Fall of America*. In addition, plaintiff Wise attempted to obtain *The Meaning of FOI* by Louis Farrakhan and *The Wake of the Nation of Islam* by Silas Muhammad. In her deposition, plaintiffs' expert, Aminah Beverly McCloud, a professor of Islamic Studies in the Department of Religious Studies at DePaul University, states that the texts in question are "required reading by the faithful." Her report is unrebutted.

Officer, for the books in question. The inmates' personal property, which includes the Nation of Islam texts at issue, appears to have been stored in the SMU Property Room. Olenowski, in turn, asked Imam Rasheed whether the books were religious. Imam Rasheed responded negatively, and Olenowski denied Sutton access to them. By May 27, 1994, Sutton reached Phase III of the program, and, under the regulations, was permitted two religious texts in addition to the Qur'an. He requested two Nation of Islam texts from his personal property. But Acting Property Officer Stone denied the request because "[n]o religious books [were] found that were authorized by the Imam [i.e., Rasheed]."

On May 30, 1994, Sutton filed an Official Grievance directed to defendant John A. Palakovich, the Superintendent's Assistant at SCI-Camp Hill from 1979 until July 1995. Palakovich forwarded the grievance to defendant Reverend James W. Smith, the Facility Chaplaincy Program Director at SCI-Camp Hill. In addition, Sutton sought the assistance of defendant Kenneth D. Kyler, the Superintendent of SCI-Camp Hill. In an attempt to resolve the impasse, the SMU Unit manager, Arthur Auxer, together with Reverend Smith and Imam Rasheed, met with Sutton. That meeting appears to have been contentious. Sutton expressed his belief that *Message to the Blackman*, one of the principal works of Elijah Muhammad, was religious and that Rasheed was "not an Imam" — presumably meaning that he was not a Nation of Islam Imam. Imam Rasheed and Reverend Smith insisted that *Message to the Blackman* was not an Islamic text. The meeting ended without resolution.

On June 9, 1994, Sutton filed a second grievance with Palakovich, the Superintendent's Assistant, stating he did "not believe in the same doctrine as Rasheed." On June 14, Palakovich again denied Sutton's request for the books because "[t]he books in question were received by Chaplain Rasheed and determined not to be religious in nature." The same day, Superintendent Kyler denied the appeal that Sutton had initially filed, writing that "[s]ince the books in question are not considered religious books, you may not receive them at this time." Kyler also wrote, "It should be

pointed out that Chaplain Rasheed as the Muslim Ima[m] is considered the authority when making a determination on this type of book." When Sutton again wrote to Kyler asking for the basis of Imam Rasheed's authority, Kyler responded that "Rev. Rasheed is an Islamic Minister and as such is the recognized institution authority on the Muslim religion."

On July 4, 1994, Sutton wrote to defendant Father Francis T. Menei, Administrator of Religious and Family Services at the Department of Corrections, explaining that Imam Rasheed, as a Sunni Muslim, did not follow the teachings of Elijah Muhammad. He again requested access to his Nation of Islam texts. Father Menei asked Reverend Smith to review the books. In a memorandum to Father Menei, Reverend Smith wrote:

> On July 26, 1994 I reviewed the following books written by Elijah Muhammad:
>
> Our Savior Has Arrived"
> "Message to the Blackman"
> "How to Eat to Live"
>
> The general contents of each of the aforementioned books appears to be of a social/political nature, referencing both racial superiority and political activism. Religious discussion is generally in the context of a social agenda, making "religion" a vehicle for the promotion of the central ideologies in these books, the essence of which smacks of racism and hatred.
>
> Religion, by definition, begins and ends with a search for and discovery of God.
>
> These books are about attaining a political program, "religion" merely attached to their itinerary as a useful component to achieving this end.
>
> It is therefore my opinion that these books are not essentially religious in nature.

Two days later, without reviewing the books in question, Father Menei wrote to Sutton regarding his appeal, stating, "We have determined that these books are *not* essentially religious in nature," and that "these books smack of racism

and hatred, and I know of no God that wants us to worship him in this way."

Plaintiff Robert X. Wise appears to have gone through a similar peregrination. At some point prior to June 6, 1994, Wise attempted to gain access to various Nation of Islam texts kept in the property lock-up. Wise was not allowed to have any of his Nation of Islam books because he was at Phase IV of the SMU program, which only permitted access to a Bible, Qur'an or "equivalent religious text." On June 6, Wise filed a grievance with Palakovich, explaining that he was a member of the Nation of Islam and that he had been denied access to the texts, and questioning the authority of Imam Rasheed to determine whether Nation of Islam texts were religious. Reverend Smith responded to that grievance, noting that Imam Rasheed had determined the material in question was not religious and that an inmate at Phase IV was only permitted access to "his main holy book." Wise appealed to Superintendent Kyler, arguing he did not "worship the same God that Orthodox Imam Rasheed worships." Kyler denied that appeal, writing, "The Muslim Chaplain is the religious authority in determining if the books are religious or not." He concluded, "Since [Rasheed] has determined it not to be religious, you are not permitted to have it while in the SMU." Kyler also wrote, "I would suggest you concentrate on improving your adjustment to be released from the SMU at which time you may have the book in question."

At some point before July 12, 1994, Wise reached Phase III in the SMU system, and again sought access to the Nation of Islam texts. His requests were denied on the ground that Imam Rasheed determined the texts were not religious. On July 15, 1994, Wise filed a grievance with Palakovich, who denied the request for the texts because Reverend Smith determined the books in question were not religious and not permitted in the SMU.

Between November 1993 and the fall of 1995, SMU inmate Michael X. Walker also requested various Nation of Islam tracts by Elijah Muhammad and Louis Farrakhan. His requests were denied.

II.

Plaintiffs Sutton and Wise filed a *pro se* complaint in November of 1994 against defendants Imam Rasheed, Reverend Smith, and Father Menei. After retaining counsel in the summer of 1995, Sutton and Wise, together with plaintiff Walker, filed an amended complaint, adding defendants Kyler and Palakovich and Commissioner of Corrections Martin F. Horn. As the District Court compendiously summarized, the principal claims put forward in the amended complaint were that defendants' "alleged deprivations of [plaintiffs'] religious materials . . . violated [plaintiffs'] rights to: free exercise of religion under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-bb-4 (1993) (the 'RFRA'); freedom from the establishment of religion by the state under the First Amendment; due process and equal protection under the Fourteenth Amendment; and the rights secured by 42 U.S.C. §§ 1981, 1985(3), and 1986."[12] *Sutton v. Rashid*,[13] No. 97-7096, unpub. op. at 2 (M.D. Pa. Sept. 3, 1996). The amended complaint sought "[c]ompensatory and punitive damages, as well as declaratory and injunctive relief and attorneys' fees." *Id.* On September 3, 1996, the District Court granted defendants' motion for summary judgment as to plaintiffs' free exercise claims and denied plaintiffs' motion for partial summary judgment. On January 21, 1997, the District Court granted defendants' supplemental motion for summary judgment on the remaining claims. Plaintiffs filed a timely appeal. In a judgment order dated November 21, 1997, we affirmed the judgment of the District Court. Plaintiff-appellants subsequently filed a petition for panel rehearing, which was granted.

On October 29, 1998, at oral argument before this court, counsel for defendants argued that the policy under attack had been changed, effective August 16, 1995. In making

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12. Plaintiffs' contentions based upon RFRA have been rendered moot by the decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (as applied to the states and hence to state officials, RFRA exceeds congressional power).

13. As noted, this caption misspells Rasheed.

this argument, counsel relied on two administrative directives that allegedly amended DC-ADM 801 and 802 "to allow inmates to maintain religious, as well as legal material, in one (1) records center box"; and the declaration of Dr. Jeffrey Beard, explaining the reasons for those amendments. Counsel further represented that the Nation of Islam texts in question are now "absolutely" permitted. In response to these representations, plaintiffs filed, on December 28, 1998, a "Motion to Supplement the Record on Appeal." Because the proposed additional information was keyed to the question of mootness, we granted plaintiffs' motion and directed defendants to file a memorandum addressing the record as supplemented. *See Clark v. K-Mart Corp.*, 979 F.2d 965, 967 (3d Cir. 1992) (en banc) ("[B]ecause mootness is a jurisdictional issue, we may receive facts relevant to that issue; otherwise there would be no way to find out if an appeal has become moot.").

The enlargements to the record include an affidavit from Sutton and two institutional grievance forms. Together, these documents suggest that Sutton, while assigned to the Houtzdale RHU in December of 1998, requested, from his personal property, the following texts: *The Flag of Islam* (by Elijah Muhammad), *Seven Speeches* (by Louis Farrakhan), *A Torchlight for America* (by Louis Farrakhan), *The Convention of the Oppressed* (by Louis Farrakhan), *How to Teach Math to Black Students* (by Shahid Muhammad), *Light from the Ancient African* (author unknown), *Creating Wealth* (by Robert G. Allen), *Black Economics* (by Jawanza Kunjufu), *My Life's Journey Traveling with the Wise Man* (by Mother Tynnetta Muhammad[14]), *The Corner by Night* (by Mother Tynnetta Muhammad), and *This Is the One* (by Jabril Muhammad). According to his affidavit, Sutton was denied access to these texts on the basis of regulation DC-ADM 801, which limited inmates in the RHU to a Bible, Qur'an, or equivalent religious text, despite Sutton's attempt to convince the officer involved that the cited policy was no longer in effect. In the Department of Corrections' responsive papers, Superintendent John McCullough stated:

14. Mother Tynnetta Muhammad was the wife of Elijah Muhammad.

> I am aware that an inmate currently at my institution, Richard X. Sutton . . . has submitted an affidavit in which he represents that the amendments to [DC-ADM] 801 and 802 effective August 16, 1995 are either not in effect or not being faithfully followed.
>
> That is not correct. To the contrary, the bulletins that were issued and made effective from August 16, 1995 . . . have been in full force and in effect the entire time SCI-Houtzdale has been open to confine inmates.
>
> . . . .
>
> I appreciate that Mr. Sutton's December 3, 1998 grievance . . . would lead the casual reader to the conclusion that Mr. Sutton was denied the additional books because he was limited by the former policy to one Bible, Holy Koran or its religious equivalent. This is simply incorrect. The issue being addressed through Mr. Sutton's grievance (although this is not clear either from his grievance or from the response he ultimately received) was whether the two books written by Mother Tynnetta Muhammad were religious books (which would have been permitted so long as they could be contained with Mr. Sutton's other legal and religious material in a records center box) or were educational books (which the inmate is not permitted to possess in the status that Mr. Sutton was then in).

On April 19, 1999, appellants filed a Second Motion to Supplement the Record on Appeal, containing an affidavit from Wise, stating that the prior policy remained in effect at SCI-Albion, where he was confined. Concluding that the record on appeal had been sufficiently augmented, we denied that motion.

On July 12, 1999, we entered an order directing the parties to "file succinct memoranda reflecting relevant changes in policy, law or additional submissions." In light of these submissions, we remanded the case on September 20, 1999 (while retaining jurisdiction) to the District Court with "instructions to determine whether the claim for injunctive and declaratory relief is moot in view of the putative change in policy." We stated that "[i]n making this determination, the Court may wish . . . . to ascertain how

Corrections officials determine whether a book requested by a prisoner qualifies as religious material under the current policy, and whether the [Nation of Islam books requested] are available to inmates as religious materials . . . ."

Accordingly, the District Court held a hearing on January 27, 2000, on the most recent incarnation of the Department of Corrections policy and its implementation. In a subsequent Order, the District Court found the August 16, 1995 changes to the Department of Corrections policy were poorly enforced. The District Court also found that even after state correctional facility superintendents were informed of policy misinterpretations on April 28, 1999, "distinctions and limitations persisted . . . . Although an administrative procedure was in place where disputes arose, the prison authorities continued to follow previous practices in determining what was religious material. This practice continues." The District Court also referenced a Department of Corrections policy change made in February 2000 and observed that the new policy failed to define religious materials, an issue "which continues to be at the root of continuing misinterpretations."

After the District Court's memorandum, the putative February 2000 SMU policy change became effective April 17, 2000.[15] Because the effects of this latest policy change had not yet been determined, we again remanded on June 16, 2000 to the District Court "with directions to determine whether plaintiffs' claims for injunctive and declaratory relief are moot."

On remand, the District Court entered an order on August 21, 2000, advising that plaintiffs' claims for injunctive and declaratory relief were not moot. But in a Supplemental Memorandum dated October 30, 2000, the District Court stated the injunctive and declaratory relief

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15. The February 2000 policy change (targeted to go into effect on March 15, 2000) provides that "[disciplinary custody] inmates will be permitted to retain religious, as well as legal materials that may be contained in one record center box. Any additional or religious materials will be stored and made available upon request on an even exchange basis. Not more than one subject for every day unless approved by the Department of Corrections."

claims were moot.[16] To resolve this confusion, we remanded again with instructions to "fully comply" with our June 16, 2000 Order.[17] We also granted motions to file supplemental briefs on mootness and granted leave to supplement the record on appeal. On March 21, 2001, we reaffirmed our prior remand requesting the District Court to issue a final order on mootness and to make a determination whether this was an injury capable of repetition yet evading review. We also requested the District Court to make findings of fact and determine whether plaintiffs still pressed damage claims.

After this remand, the District Court held that the claims for injunctive and declaratory relief were moot. The District Court based this holding on submissions from the Department of Corrections about a new SMU directive adopted October 5, 2001[18] that "virtually allow[s] each inmate to determine what is religious material." The District Court observed "because we concluded that the changes to Directives 801 and 802 have force of law, we do not believe that the injury was of a type likely to happen to plaintiff again regardless of declaratory and injunctive relief." The District Court also stated that damages claims remained pending.

The October 5, 2001 amendment of DC-ADM 801 provides:

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16. In the Supplemental Memorandum, the District Court found: (1) the specific books plaintiffs sought have been provided to them; (2) it is undisputed that the policy change of February 2000, which became effective on April 17, 2000, was issued throughout the Pennsylvania Department of Corrections facilities; (3) employees were not provided with a definition of religious material in the policy change; (4) an inmate may have as much combined legal or religious material as will fit inside one records center box; and (5) an inmate aggrieved by a decision on what is "religious material" may file a grievance challenge. The District Court also stated "the broader issue of what is defined as 'religious' material in the present case remains constitutionally questionable."

17. Just prior to this Order, the District Court submitted the Supplemental Memorandum clarifying his previous memorandum.

18. The District Court was advised by the Office of the Attorney General for Pennsylvania that another policy was "formally adopted on October 5, 2001, and is contained in Administrative Directives 801 and 802."

> 5. [Disciplinary Custody] status inmates shall be permitted to maintain in their cells any combination of personal property from the following list that will fit into one standard sized records-center box:
>
> a. Written materials in accordance with DC-ADM 803, "Inmate Mail and Incoming Publications";[19]
>
> b. One newspaper (one-for-one exchanges are permitted for newly received editions);
>
> c. Ten magazines (one-for-one exchanges are permitted for newly received publications).
>
> Additionally, each facility will establish procedures to permit inmates to exchange legal materials from their cells with stored legal materials once every 30 days.[20] The Program Review Committee may authorize more frequent exchanges based upon a demonstrated need that the inmate requires additional exchanges for active litigation. Such legal material exchanges, however, may not exceed one per week.

DC-ADM 801-3, "Disciplinary Custody Status Inmates," amending section IV, M.

The October 5, 2001 amendment to DC-ADM 802 provides:

> 4. [Administrative Custody] status inmates shall be permitted to maintain in their cells any combination of personal property from the following list that will fit into one standard-sized, records-center box:
>
> a. Written materials in accordance with DC-ADM 803, "Inmate Mail and Incoming Publications";
>
> b. One newspaper (one-for one exchanges are permitted for newly received editions)
>
> c. Ten magazines (one-for-one exchanges are permitted for newly received publications).

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19. DC-ADM 803 (effective June 24, 2002) establishes "policy and procedures governing inmate mail privileges and incoming publications."

20. Based on the Department of Corrections' oral representations to this Court and the District Court, we interpret the October 2001 policy to permit inmates to exchange religious or legal materials.

> 5. Inmates will be provided access to the facility law library by requesting legal materials in accordance with local procedures. Leisure reading material may be requested on a weekly basis from the library.
>
> Additionally, each facility will establish procedures to permit inmates to exchange legal materials from their cells with stored legal materials once every 30 days.[21]

DC-ADM 802-10, "Administrative Custody Housing Status," amending section IV, M, subsections 4 and 5.

At oral argument on March 6, 2002, a Department of Corrections representative stated that under the new policy, the contents of inmates' records center boxes were "not examined." The Department of Corrections representative also explained that grievance procedures were available for inmates claiming the new policy was not being properly applied.

III.

Our review of the District Court's grant of summary judgment is plenary. *Johnson v. Horn*, 150 F.3d 276, 281 (3d Cir. 1998). A grant of summary judgment is appropriate if there are no genuine issues of material fact[22] and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A.

As a preliminary matter, we must determine whether the inmates' claims are moot because "a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quotations omitted); *see also Abdul-Akbar v. Watson*, 4 F.3d 195, 206 (3d Cir. 1993). An inmate's transfer from the facility complained of generally moots the

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21. As noted, we interpret the October 2001 policy to permit inmates to exchange religious or legal materials.

22. At oral argument on March 6, 2002, both parties agreed that no issues of material fact remain.

equitable and declaratory claims. *Abdul-Akbar*, 4 F.3d at 197 (former inmate's claim that the prison library's legal resources were constitutionally inadequate was moot because plaintiff was released five months before trial). But these claims are not mooted when a challenged action is (1) too short in duration "to be fully litigated prior to its cessation or expiration"; and (2) "there [is] a reasonable likelihood that the same complaining party would be subjected to the same action again." *Id.* at 206; *see also Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 283, 298 n.10 (1982). When there is a voluntary cessation of a policy, a claim will not be rendered moot if there remains the possibility that plaintiffs will be disadvantaged "in the same fundamental way." *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). Instead, the dismissal of an action on mootness grounds requires the defendant to demonstrate that "there is no reasonable expectation that the wrong will be repeated." *Id.* (quotation omitted); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (discussing several factors, including "bona fides of expressed intent to comply, effectiveness of discontinuance, and, in some cases, character of past violations").

Here, none of the plaintiffs remains confined at SCI-Camp Hill, and class action status has not been sought. Wise and Sutton have been provided with the specific Nation of Islam books requested, and Walker has been released from prison. Since October 5, 2001, a new SMU policy has been in effect allowing inmates access to "any combination of personal property" that can fit into one records center box.[23] We are satisfied this one-box policy will not be rescinded based on the representations of the Department of Corrections made before us on March 6, 2002. Furthermore, there are strong administrative incentives making it unlikely that the new policy will be reversed.[24] We conclude plaintiffs no longer present a justiciable claim for declaratory and injunctive relief.

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23. This policy is similar to one of plaintiffs' prior proposals.

24. Indeed, plaintiffs themselves recognized these incentives, stating "the primary impact . . . eliminating the rules restricting inmate access to religious books would have on guards and prison resources would be to *reduce* the amount of time and resources prison officials spend making decisions on whether books are 'religious' and whether they are particular inmates' 'main holy book.' "

But plaintiffs' damages claims are still extant. As noted, under the now-defunct SMU policy, SMU inmates in Phases IV and V were allowed access to one box of legal materials and a Bible, Qur'an or equivalent only. In Phase III, SMU inmates were allowed legal materials, a Bible, Qur'an or equivalent, as well as "[two] other religious reading materials (total [three])." In Phase II, SMU inmates were allowed legal materials, a Bible or Qur'an, and "[four] other religious materials."[25] But even though the prior SMU policy permitted access to additional "religious materials," plaintiffs were repeatedly denied access to Nation of Islam texts over a period of several years while SMU policy changes were being implemented. As noted, plaintiffs were not allowed access to books by Elijah Muhammad, among others, because prison officials determined they were not religious. Hence, plaintiffs' claims for damages remain despite their transfer out of the SMU and the recent policy changes.

B.

We now turn to defendants' contention that Commissioner Horn and Father Menei were not personally involved in the complained-of actions and are thus entitled to judgment in their favor.[26] Under our cases, "[a] defendant in a civil rights action must have personal involvement in the alleged wrongs" to be liable. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). Here, there is no evidence that Commissioner Horn had any personal involvement in the application to plaintiffs of the challenged policies. Therefore, any damage claims against Commissioner Horn were properly dismissed. We find otherwise with respect to Father Menei. On July 4, 1994, Father Menei received from Sutton a letter, styled "Final Appeal of Grievance #94-0768," complaining that Imam Rasheed and Reverend Smith had denied him access to the Nation of Islam texts, pointing out that Imam Rasheed was a Sunni Muslim and

25. In Phase I, inmates were returned to their "designated institutions" and allowed general population privileges.

26. Defendants do not raise this argument with respect to the other individual defendants.

not an adherent of the Nation of Islam, and requesting access to the Nation of Islam material. Father Menei referred the matter to Reverend Smith, and, on the basis of Reverend Smith's memorandum (quoted *supra*), Father Menei wrote to Sutton denying his appeal because "[w]e have determined the books are *not* essentially religious in nature." He continued on to say "these books smack of racism and hatred, and I know of no God that wants us to worship him in this way." Because Father Menei appears to have played an active role, he was not entitled to summary judgment on the grounds that he was not personally involved.

C.

We now address the merits of plaintiffs' free exercise claim that the Department of Corrections' prior regulations were unconstitutional, both as applied and facially. Plaintiffs, members of the Nation of Islam, allege that "they were unlawfully denied 'access to religious literature contained within [their] personal property while confined in the SMU at Camp Hill,' and, consequently, 'defendants prevented plaintiffs from practicing a central tenet of their faith.' " *Sutton*, No. 97-7906, at 1-2 (citation omitted). Defendants claim no constitutional violation occurred because there was a rational connection between the prison rules and a legitimate governmental interest in rehabilitation and security under *Turner v. Safley*, 482 U.S. 78 (1987).[27]

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27. Defendants also contend that they are protected by qualified immunity from the damages claim. Prior to addressing that contention, however, we must first conclude that plaintiffs have alleged or evinced the violation of a constitutional right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.' ") (quoting *Conn v. Gabbert*, 526 U.S. 286 (1999)); *Jones v. Shields*, 207 F.3d 491 (8th Cir. 2000) (treating the "must" language in *Wilson* as mandatory); *Kitzman-Kelley v. Warner*, 203 F.3d 454, 457 (7th Cir. 2000) (same); *Hartley v. Parnell*, 193 F.3d 1263, 1270-71 (11th Cir. 1999) (same); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1265-66 (9th

Before commencing the requisite *Turner* inquiry, we must first determine whether plaintiffs' request for the Nation of Islam texts stemmed from a constitutionally protected interest. *DeHart v. Horn*, 227 F.3d 47, 52 (3d Cir. 2000) (en banc) (explaining that if a prisoner's request is "not the result of sincerely held religious beliefs, the First Amendment imposes no obligation on the prison to honor that request, and there is no occasion to conduct the *Turner* inquiry"). The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. Only beliefs which are both "sincerely held"[28] and "religious in nature" are protected under the First Amendment. *DeHart*, 227 F.3d at 52. Purely secular views are not protected. *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829, 833 (1989) ("There is no doubt that only beliefs rooted in religion are protected by the Free Exercise Clause . . . .") (quotation and citation omitted).

It is often difficult to determine whether a proffered viewpoint is in fact "religious" or "secular" in nature.[29]

Cir. 1999) (same). Other circuits have treated the "must" language in *Wilson* as describing what the courts ordinarily should do, rather than as a command. *See Kalka v. Hawk*, 215 F.3d 90, 95 (D.C. Cir. 2000) (treating *Conn* and *Wilson* as "not always requiring" federal courts to dispose of the constitutional claim before upholding a qualified immunity defense and assuming that "humanism" was a religion protected under the First Amendment before holding that federal prison officials were shielded by qualified immunity); *Horne v. Coughlin*, 191 F.3d 244, 246-47 (2d Cir. 1999) (discussing the doctrine of judicial restraint and observing that "where there is qualified immunity, a court's assertion that a constitutional right exists would be pure dictum . . . .").

We believe that the Supreme Court directive in *Wilson v. Layne* is mandatory. Accordingly, the District Court can decide the issue of qualified immunity only after it has concluded that a cause of action has been stated. Therefore, we initiate our inquiry by examining whether plaintiffs have alleged a constitutional violation.

28. The District Court found that plaintiffs sincerely believed in the teachings of the Nation of Islam, and defendants do not contest this. *Sutton*, No. 97-7096, at 5-6.

29. For a helpful discussion of the problems associated with defining the term "religion," *see generally* John Garvey & Frederick Schauer, *The First*

Nonetheless, we have tried our hand at defining "religion." *See Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981) (describing three indicia of religion).[30] The Supreme Court has provided some guidance on this question in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (concluding that Santeria, a hybrid African/Catholic faith mandating animal sacrifice, was a "religion" meriting First Amendment protection based partly on the "historical association between animal sacrifice and religious worship"). In *Hialeah*, the Court reasoned:

> The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem

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Amendment: A Reader 595-96 (2d ed. 1996):

> We cannot apply the free exercise clause without understanding the meaning of its terms. The most difficult problems have concerned the meaning of the term "religion." This is an interpretative problem like the meaning of the word "speech" in the free speech clause. The First Amendment singles out some activities for special treatment, and leaves the rest to the weaker protection of the due process clause. It is thus very important to determine exactly what is covered.
>
> The increasing religious diversity of the United States makes this job much harder than it once was. Many free exercise claimants will not belong to well known denominations within the Judeo-Christian tradition . . . . It is difficult to find a common thread running through all these claims. To take only the most obvious example, many (like Buddhists) do not believe in God . . . . The First Amendment should not favor western religions, or traditional religions, over others. But neither can it extend protection to everyone who wants it. That would invite false claims for special treatment. It would also dilute the strength of the free exercise clause.

See also Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

30. These indicia included: (1) an attempt to address "fundamental and ultimate questions" involving "deep and imponderable matters"; (2) a comprehensive belief system; and (3) the presence of formal and external signs like clergy and observance of holidays. *Id.*

> abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981). Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834 n.2, 109 S.Ct. 1514 (1989). Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

Hialeah, 508 U.S. at 530 (citations omitted).

We too "must consider" plaintiffs' First Amendment claim. Nation of Islam Muslims believe in the teachings of the "One God whose proper Name is Allah," as they are contained in the Holy Qur'an, the Scriptures of all the Prophets of God, and the Bible. The Nation of Islam Online, *available at* http://www.noi.org (last visited Aug. 5, 2002). They believe that Allah (God) appeared in the person of Master W. Fard Muhammad in July 1930 and that Fard Muhammad is the long-awaited "Messiah" of the Christians and the "Mahdi" of the Muslims. *Id.* The official Nation of Islam website states that members want to establish a separate territory where black people can live independently and "believe the offer of integration is hypocritical and is made by those who are trying to deceive the black peoples into believing that their 400-year-old open enemies of freedom, justice and equality are, all of a sudden, their 'friends.' " *Id.* The central and foundational tenets of the Nation of Islam meet the definition of religion as set forth in *Hialeah* and *Africa*. Furthermore, we cannot say they are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas*, 450 U.S. at 715. Therefore, we conclude that plaintiffs' sincerely-held views are sufficiently rooted in religion to merit First Amendment protection.

But "the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)); *see also Waterman v. Farmer*, 183 F.3d 208, 213 (3d Cir. 1999) (prisoners' constitutional rights "are necessarily limited"). As we recently observed, "incarceration almost always results in a narrowing, not a broadening, of constitutional protections." *Fraise v. Terhune*, 283 F.3d 506, 515 n.5 (3d Cir. 2002). Although prison walls "do not form a barrier separating prison inmates from the protections of the Constitution," inmates' First Amendment rights "must in some respects be limited in order to accommodate the demands of prison administration and to serve valid penological objectives." *Id.* at 515 (quoting *Turner*, 482 U.S. at 84).

The Supreme Court has established that regulations reasonably related to legitimate penological interests generally pass constitutional muster. *See Turner*, 482 U.S. at 84; *O'Lone v. Shabbaz*, 482 U.S. 342 (1987). Under *Turner*, we must weigh four factors in making this determination:

> first, whether the regulation bears a "valid, rational connection" to a legitimate and neutral governmental objective; second, whether prisoners have alternative ways of exercising the circumscribed right; third, whether accommodating the right would have a deleterious impact on other inmates, guards, and the allocation of prison resources generally; and fourth, whether alternatives exist that "fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests."

Fraise, 283 F.3d at 513-14 (quoting *Turner*, 482 U.S. at 89); *see also Wolf v. Ashcroft*, 297 F.3d 305, 310 (3d Cir. 2002) (discussing *Turner* in the context of a prison policy providing that no movies rated R, X, or NC-17 may be shown to inmates); *Waterman*, 183 F.3d at 212 ("Constitutional challenges to laws, regulations, and policies governing prison management must be examined under the framework of *Turner v. Safley* . . . .").

Under the first *Turner* prong, we accord great deference to the judgments of prison officials "charged with the formidable task of running a prison." *O'Lone*, 482 U.S. at 353; *see also Shaw*, 532 U.S. at 230 ("[U]nder *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management") (quoting *Martinez*, 416 U.S. at 405 (" '[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.' ")). The first factor is "foremost in the sense that a rational connection is a threshold requirement — if the connection is arbitrary or irrational, then 'the regulation fails, irrespective of whether the other factors tilt in its favor' . . . But, as we made clear in *DeHart*, we do not view it as subsuming the rest of the inquiry." *Wolf*, 297 F.3d at 310 (quoting *Shaw*, 532 U.S. at 229-30); *see also DeHart*, 227 F.3d at 52 (examining whether a prison regulation prohibiting a Buddhist inmate from following a vegetarian diet was justified by "legitimate and neutral concerns" under *Turner*).

The first *Turner* factor requires a "multifold" analysis: "we must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Thornburgh v. Abbott*, 490 U.S. 401, 414-15 (1989). Where "prison administrators draw distinctions between publications solely on the basis of their potential for prison security, the regulations are 'neutral' in the technical sense in which [the Supreme Court] meant and used the term in *Turner*." *Id.* at 415-16.

In this case, the prior version of DC-ADM 802 provided that inmates in restrictive status could have "no books other than legal materials and a personal Bible, Holy Koran or other religious equivalent." Similarly, DC-ADM 801 provided: "inmates will be permitted legal material that may be contained in one (1) records center box . . . . A personal Bible, a Holy Koran, or equivalent publication is permitted." As an inmate progressed to Phases III and II, additional religious texts were permitted.

Defendants assert the prior Department of Corrections policy of allowing prisoners in SMU Phases IV and V access to one box of legal materials and one Bible, Qur'an or

"equivalent" religious publication was rationally related to the penological goals of "maintaining a secure environment in the SMU (both concerning searches of cells and fire safety) and as an integral part of a global, behavior-driven program to encourage the most recalcitrant prisoners in the system to engage in more responsible and acceptable behavior." Defendants contend that, to the extent some of those inmates are religious, conditioning increased access to religious material on improved behavior served as an incentive for the desired behavior change because, once returned to the general prison population, the inmates would re-gain access to additional religious books. As the District Court found, "[t]he limit on the number of books in an SMU cell or the number of religious materials in general was just another incentive to improve the behavior of prisoners who behaved badly." *Sutton*, No. 97-7096, at 13.

Plaintiffs contend that defendants' "book ban" was "fundamentally irrational" because under these policies, essential Nation of Islam texts "were completely banned from all levels of the SMU, it did not matter how well plaintiffs behaved." In addition, they contend the ban was clearly "not neutral, and it was made only because of the content of the expression . . . . according to defendants, the books were 'not religious' and plaintiffs could not have them."

As noted, the prior Department of Corrections policy provided only that Phase V and Phase IV inmates could have a: "Bible, Quran, or equivalent." Once an inmate "graduated" from Phase IV to Phase III, he was entitled to "two additional religious texts"; in Phase II, "four additional religious texts"; and in Phase I (general population), no restrictions. Because the prison authorities found Nation of Islam texts "not religious," none were permitted at Phases II through V.

We need not address the facial challenge because in applying the policy, the Department of Corrections interfered with the free exercise of religion. The prison administrators impermissibly denied access to Nation of Islam materials because they improperly found the documents were not religious. On this point, the facts are

not in dispute.[31] It is difficult, therefore, to discern a legitimate penological interest in the denial of Nation of Islam texts to plaintiffs. Notwithstanding defendants' arguments and the deference we accord the judgment of prison officials, on balance, we believe that defendants cannot satisfy the first *Turner* prong.

The second *Turner* prong requires "a court to assess whether inmates retain alternative means of exercising the circumscribed right . . . . When assessing the availability of alternatives, the right in question must be viewed 'sensibly and expansively.' " *Fraise*, 283 F.3d at 518. The second factor is not "intended to require courts to determine whether an inmate's sincerely held religious belief is sufficiently 'orthodox' to deserve recognition." *DeHart*, 227 F.3d at 55. Under this factor, "we must of course focus on the beliefs of the inmate asserting the claim. It is obviously impossible to determine whether a regulation leaves an inmate with alternative ways of practicing the inmate's religion without identifying the religion's practices." *Fraise*, 283 F.3d at 518.

Here, the inmates in question are adherents of various Nation of Islam sects.[32] Nation of Islam members follow teachings contained in the "the Holy Qur'an, the Scriptures of all the Prophets, and in the Holy Bible." The Nation of Islam Online, *available at* http://www.noi.org (last visited

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31. Imam Rasheed, while acknowledging that members of the Nation of Islam view themselves as Muslims, nonetheless concluded that the books were not "Islamic," because they did not comport with what he deemed the orthodox conception of Islam. Reverend Smith, beginning from the view that "[r]eligion, by definition, begins and ends with the search for and discovery of God," concluded "these books are not essentially religious in nature" because they referenced racial superiority and political activism. Father Menei echoed this view when he wrote that "these books smack of racism and hatred, and I know of no God that wants us to worship in this way."

We express no opinion on the restriction of religious materials that might advocate violence.

32. Sutton is a member of a Nation of Islam sect led by Minister Farrakhan, Wise is a member of the Lost-Found Nation of Islam, Inc., and Walker is a member of both.

Aug. 5, 2002). Plaintiffs' expert stated in her uncontradicted deposition testimony that the Nation of Islam books requested and denied were "essential religious texts of the Nation of Islam" and "required reading by the faithful," and that without them, "a person could not function well in the Nation of Islam's religious community." Consequently, plaintiffs contend that, under the prior policy, the "only form of religious expression available to plaintiffs and other members of the Nation of Islam is individual prayer in their cells, without the essential books to teach them how to pray."

This Court has held that in a free exercise case, we must consider whether the inmate has "alternate means of practicing his or her religion generally, not whether [the] inmate has alternative means of engaging in [any] particular practice." *DeHart v. Horn*, 227 F.3d 47, 55 (3d Cir. 2000) (en banc). In *DeHart*, we overruled the analysis in *Johnson v. Horn*, 150 F.3d 276 (3d Cir. 1998), that focused on " 'the centrality of the religious tenet' at issue and distinguished between 'religious commandments' and 'positive expression of belief,' suggesting that 'the importance of alternative means of religious observance is an irrelevant consideration' when the practice in question is a commandment." 227 F.3d at 54. We then said:

> Thus, under Johnson where the religious practice being prohibited by the prison is commanded by the believer's faith, the existence of other opportunities for exercising one's religious faith is wholly irrelevant to the analysis. The "religious commandment"/"positive expression of belief" distinction on which the panel in Johnson relied, however, directly conflicts with the Supreme Court's analysis in O'Lone. The Court there expressly held that, although attendance at Jumu'ah was a requirement of the respondents' religion (i.e., a "religious commandment"), because other means of practicing their religion were available, the second Turner factor weighed in favor of the relevant restriction's reasonableness. Recognition that a particular practice is required by an inmate's religion, thus, does not end this portion of the analysis. Rather, as the Supreme Court made clear in O'Lone and

> Thornburgh, courts must examine whether an inmate has alternative means of practicing his or her religion generally, not whether an inmate has alternative means of engaging in the particular practice in question. . . . In this case, the record shows that, while the prison's regulations have prohibited DeHart from following a diet in conformity with his religious beliefs, he has some alternative means of expressing his Buddhist beliefs.

Id. at 55, 57.

We also said that where "other avenues remain available for the exercise of the inmate's religious faith, courts should be particularly conscious of the measure of judicial deference owed to correction officials. . . ." *Id.* at 59 (quoting *Turner*, 482 U.S. at 90) (internal quotations omitted).

Here, while the plaintiffs had access to the Bible and Qur'an, and could pray in their cells and celebrate Ramadan and other religious holidays, they were deprived of texts which provide critical religious instruction and without which they could not practice their religion generally.[33] In so concluding, we are mindful of *DeHart's*

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33. The crucial religious significance of the writings that plaintiffs were foreclosed from reading is made plain by the expert report and deposition testimony of plaintiffs' expert, Dr. Aminah Beverly McCloud, an Assistant Professor in DePaul University's Department of Religious Studies. Professor McCloud, a specialist in Islamic studies, had this to say in her expert report:

> 8. The Nation of Islam is a religious community founded by Wali Fard Muhammad and developed by Elijah Muhammad. Within the Nation of Islam, Allah is God, Fard Muhammad is the Messiah, and Elijah Muhammad is a prophet. The teachings of Fard Muhammad and Elijah Muhammad are essential components of the religious beliefs and practices of the Nation of Islam.
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> 9. Minister Louis Farrakhan is the religious leader of a prominent branch of the Nation of Islam. Like the teachings of Fard Muhammad and Elijah Muhammad, the teachings of Minister Farrakhan are an essential component of the religious beliefs and practices of this branch of the Nation of Islam.

proscription against drawing distinctions between "religious commandments" and "positive expressions of belief" in determining what religious practices may be curtailed by prison officials, and we do not here treat the reading of

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10. I am familiar with Elijah Muhammad's books entitled *The Supreme Wisdom, Message to the Blackman in America, Our Savior Has Arrived, How to Eat to Live* and *The Fall of America*. It is my considered opinion that all of these publications are "religious" in nature. Indeed, all of Fard Muhammad's and Elijah Muhammad's teachings and writings are essential to the worldview of members of the Nation of Islam, and are undeniably religious to members of that community.

11. I am also familiar with the periodicals entitled *Muhammad Speaks* and *The Final Call*. These publications are also "religious" in nature.

12. Professor C. Eric Lincoln refers to two of the above religious publications on page 129 of the 1994 edition of his authoritative treatise, *The Black Muslims in America*:

> In a book entitled *Message to the Blackman* (first published in 1965), [Elijah] Muhammad spelled out the essential doctrines of Black Islam as taught him by Fard, with his own elaborations. *Message to the Blackman* is required reading by the faithful, and it has found its way into the homes and libraries of non-Muslims. Since proper diet is a key aspect of Muslim commitment, *Message* was logically followed by a volume entitled *How to Eat to Live*, also by [Elijah] Muhammad. Together, these two books refine and extend the doctrines laid down in *The Supreme Wisdom*.

13. I agree with Professor Lincoln's characterization of *The Supreme Wisdom*, *Message to the Blackman* and *How to Eat to Live* as essential religious texts of the Nation of Islam. *Our Savior Has Arrived*, *The Fall of America*, *Muhammad Speaks* and *The Final Call* are also essential religious texts of the Nation of Islam.

14. For followers of Minister Farrakhan within the Nation of Islam, his writings are likewise essential religious texts.

15. Without these materials, a person could not function well in the Nation of Islam's religious community. To borrow Professor Lincoln's phrase, they are "required reading by the faithful."

On deposition the following colloquy was had:

Q. Does the Nation of Islam have what you refer to as inspired text?

these texts as religious commandments, but rather as a necessary element of exercising the right in question viewed "sensibly and expansively": the right to free exercise of the Nation of Islam faith.

We are also mindful of this Court's holding in *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002). There, this court said: "While the STG Policy forbids possession of distinctively Five Percent Nation literature, it is undisputed that the Policy allows inmates to possess, study, and discuss the Bible and the Koran. Accordingly, study of the Five Percent Nation's teachings is only partially restricted." *Id.* at 519. However, although *Fraise* refers to testimony identifying certain texts — *The 120 Degrees, Supreme Mathematics*, and *Supreme Alphabet* — which, like the Bible and the Qur'an, contain Five Percent teachings, *id.* at 511, nothing in *Fraise* purports to identify these or other items of "distinctively Five Percent literature" as having the sacrosanct and fundamental quality which the writings of the prophet, Elijah Muhammad, or the writings of Minister Farrakhan, have for members of one or another sect of the Nation of Islam. Those writings are, as plaintiffs' expert Professor Aminah Beverly McCloud explained, "not just the words of Elijah Muhammad or Louis Farrakhan. They are the words of Elijah Muhammad and Louis Farrakhan as inspired by God."[34]

In *O'Lone*, the Supreme Court held that the proper analysis of the second *Turner* prong required the Court not to determine if the inmates had alternative means to

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A. Yes. I would classify this set of texts as both scriptural and inspired because the members believe that these are not just the words of Elijah Muhammad or Louis Farrakhan. They are the words of Elijah Muhammad and Louis Farrakhan as inspired by God.

Q. Okay. Are Elijah Muhammad's books religious both for Silas Muhammad's group based in Atlanta and Louis Farrakhan's group based in Chicago?

A. Oh, yes.

34. *See* note 33, *supra*.

celebrate Jumu'ah, but rather whether they had alternative means to practice their religion in general. Because they teach adherents the proper way to pray and are viewed as divinely inspired, however, deprivation of the Nation of Islam texts in question here implicates not just the right to read those particular texts, but the prisoners' ability to practice their religion in general. To illustrate this principle, while we believe that a Christian inmate could practice his religion generally even if prevented from attending Christmas or Easter services, we do not believe he could practice his religion if deprived of access to the Bible. The distinction in this example is not between religious commandments and positive expressions of belief, but between the deprivation of a single aspect of religious worship and the removal of any ability to undertake the free exercise of the Christian religion generally.[35]

For example, had the plaintiff-inmates been Mormons, we do not think that prison authorities, in furtherance of a program of behavior modification, could, compatibly with the Constitution, have restricted the inmates' religious reading to the Old and New Testaments, withholding the inmates' own copies of *The Book of Mormon*.[36] There can be no fault line in the Constitution that would place the followers of Jesus Christ and Joseph Smith on the preferred side of the line and the followers of Elijah Muhammad and Louis Farrakhan on the other side. Therefore, because the original SMU policy deprived the plaintiffs of texts without which they could not practice their religion generally, we conclude that the second *Turner* prong favors the plaintiffs.

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35. By the use of this example, we do not mean to imply that the deprivation of texts, as opposed to restrictions on religious practices, is more likely to mean that a prisoner cannot practice his religion generally. For example, we suspect that a complete prohibition on a Catholic's ability to attend Mass would mean a deprivation of his right to practice his religion generally, much as we would draw that conclusion about a regulation barring the inmate's access to the Bible.

36. *The Book of Mormon* is "accepted as holy scripture, in addition to the Bible, in the Church of Jesus Christ of Latter-day Saints and other Mormon churches." 8 New Encyclopaedia Britannica 329.

The final two *Turner* factors also favor plaintiffs. "The third and fourth factors . . . focus on the specific religious practice or expression at issue and the consequences of accommodating the inmate for guards, for other inmates, and for the allocation of prison resources." *DeHart*, 227 F.3d at 57.[37] Here, the consequences of accommodation appear de minimis and would not have a deleterious impact on prison personnel or resources. The Department of Corrections itself obviously did not consider the consequences of accommodation burdensome because they have changed their policy and adopted a policy similar to what plaintiffs sought. Prison resources are more efficiently allocated now because the one-box rule no longer requires prison administrators to make repeated individualized decisions about what are "religious" texts.

In sum, each of the four *Turner* factors — the existence of a legitimate and neutral government objective with regulations rationally related to that objective; whether there are alternative means of exercising the circumscribed right; the specific religious practice at issue; and the consequences of accommodating the inmate — weigh in favor of the plaintiffs' claim. For these reasons, we hold that, as applied to plaintiffs, the prior policy was constitutionally infirm under *Turner*.

D.

But this does not end our analysis. We must also consider whether defendants are protected under the doctrine of qualified immunity.[38] *Wilson*, 536 U.S. at 609. Government officials performing discretionary functions, "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Abdul-Akbar*, 4 F.3d at 201-02 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982)). The right allegedly violated must be defined at the appropriate level of

37. Unlike *Fraise*, defendants concede the books at issue pose no security risks. *Sutton*, No. 97-7096, at 1.

38. Defendants were sued in their official and individual capacities. *Sutton*, No. 97-7096, at 1.

specificity before a court can determine if it was "clearly established." *Wilson*, 536 U.S. at 615; *see also Abdul-Akbar*, 4 F.3d at 202 (quoting *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989) (explaining that the contours of the right must be sufficiently clear for "reasonable officials in the defendant's position at the relevant time [to] believe[ ], in light of what was in the decided case law, that their conduct would be unlawful")).

In this case, we must address defendants' claims of qualified immunity as they relate to damages claims asserted against them on the basis of their actions under the prior SMU policy and predicated upon decisions that Nation of Islam texts were "not religious."

The law in this area is murky. There has not always been a clear consensus whether the Nation of Islam is a religion for purposes of protection under the First Amendment. *See, e.g.*, *Cooper*, 855 F.2d at 127 (applying *O'Lone* and rejecting free exercise claims of Nation of Islam plaintiffs seeking to engage in group prayer); *Long v. Parker*, 390 F.2d 816, 819-20 (3d Cir. 1968) (describing the "Black Muslim" movement as "an alleged sect of the religion of Islam" and observing that it "cannot be classified as purely religious in nature," in part because the "inexorable hatred of white people" is a basic part of the faith) (quotation omitted);[39] *Cooper v. Pate*, 382 F.2d 518, 523 (7th Cir. 1967) ("Viewed as ordinary

39. We do not agree with plaintiffs that *Long* "clearly established" a free exercise right that has been violated in this case, in part because *Long* was decided more than a decade before either *Turner* or *O'Lone*, two Supreme Court cases narrowing the scope of constitutional protection afforded inmates. In *Long*, we considered the claims of "Black Muslim" inmates contending they had been "unconstitutionally denied the right to receive and read authoritative publications of their religious sect, including the weekly newspaper 'Muhammad Speaks.' " *Id.* at 822. Access to this publication was restricted because of its alleged inflammatory nature. *Id.* We assumed without deciding that plaintiffs were entitled to the protections of the First Amendment because defendants did not challenge the legitimacy of treating Black Muslim beliefs as a religion. *Id.* at 819-820. After examining the inmates' claims, we required a hearing on the religious significance of "Muhammad Speaks." *Id.* at 822.

reading matter, with only slight relevance to religion, it would be most difficult to establish that exclusion of any [publications containing articles by Elijah Muhammad] from a prison is unlawful. Considered as religious material, one question would be whether material of the same degree of religious relevance is permitted prisoners of other faiths. And the extent or tone with which the race doctrine of this particular faith is emphasized would, we think, be a legitimate consideration."); *see generally Right to Practice Black Muslim Tenets in State Prisons*, 75 HARV. L. REV. 837, 837 40 (1962).

Nor have the courts always provided clear guidance on the question of what restrictions on prisoners' rights pass constitutional muster. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 523-34 (1984) ("[C]onstraints on inmates, and in some cases the complete withdrawal of certain rights, are justified by the considerations underlying our penal system . . . ."); *Canedy v. Boardman et al*, 91 F.3d 30, 34 (7th Cir. 1996) ("But in 1992, the time of the events in question here, it was not at all clear that [plaintiff's interest in observing Islam's nudity taboos] decisively outweighed [the interests] of the prison."); *Wilson v. Prasse*, 463 F.2d 109, 111 (3d Cir. 1972) ("The question of the distribution of Muslim literature [including the writings of Elijah Muhammad] among prison populations is not free from difficulty."); *Cooper*, 855 F.2d at 129 ("While plaintiffs invoke the highest principles of our law, they are dangerous persons who even among inmates convicted of the most serious offenses were singled out for special security treatment . . . . Clearly, there is a valid, rational reason for not permitting plaintiffs to establish an infrastructure within the [restrictive custody unit] and have it openly function merely because plaintiffs claim a right to engage in their activities on the basis of their religion.") (citing *O'Lone*, 482 U.S. at 342); *Knuckles v. Prasse*, 302 F.Supp. 1036, 1050 (E.D. Pa. 1969) (Higginbotham, J.) ("Since the [Black Muslim] literature could be subject to inferences urging [defiance of whites] . . . I rule that it is not necessary that the prison authorities make available to prisoners the writings"), aff'd 435 F.2d 1255 (3d Cir. 1970).[40]

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40. *Cf. Williams v. Lane*, 851 F.2d 867, 878 (7th Cir. 1988) (examining the rights of inmates in protective custody status, which is made

Accordingly, it is questionable whether the likely invalidity of the application of the Department of Corrections' SMU policy was clearly established so that it should have been apparent to defendants. *Cf. Abdul-Akbar*, 4 F.3d at 205 ("Indeed, if members of the judiciary cannot reach a clear consensus regarding '[t]he contours of the right' . . . can we reasonably expect more from those who are required to implement those rights?") (citation and quotation omitted); *see also Kalka*, 215 F.3d at 99 ("Given the judiciary's exceedingly vague guidance, in the face of a complex and novel question, the actions of the defendants therefore did not violate 'clearly established' law."). Furthermore, the first and second prongs of the *Turner* analysis present close calls on these facts, especially in light of the great deference we accord the judgments of prison officials.

For these reasons, we hold that the defendants are protected by qualified immunity from plaintiffs' damages claims.

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available to inmates who fear for their own safety); *McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir. 1987) (addressing a "ban" of Church Jesus Christ Christian books touting white supremacy from a prison library and holding "literature advocating racial purity, but not advocating violence or illegal activity as a means of achieving this goal, and not so racially inflammatory as to be reasonably likely to cause violence at the prison, cannot be constitutionally banned as rationally related to rehabilitation"); *Murphy v. Mo. Dep't of Corrections*, 814 F.2d 1252, 1256 (8th Cir. 1987) (concluding that a total ban of Aryan Nations materials "is too restrictive a mail censorship policy"); *Rowland v. Jones*, 452 F.2d 1005, 1006 (8th Cir. 1971) ("We reject as an intrusion of a prisoner's First Amendment rights the granting of possession of some [religious medallions] and not others contingent upon their meeting an official standard of religious orthodoxy."); *Walker v. Blackwell*, 411 F.2d 23, 29 (5th Cir. 1969) ("The order is merely to direct that the warden not arbitrarily deny Black Muslims the right to read [the "Muhammad Speaks" newspaper], within the normal framework of prison rules and regulations, administration and security."); *Sostre v. McGinnis*, 334 F.2d 906, 911 (2d Cir. 1964) ("In other words the nub of this situation is not to be found in the existence of theoretical rights, but in the very practical limitations on those rights which are made necessary by the requirements of prison discipline").

IV.

Therefore, we will affirm the District Court's entry of summary judgment. Parties to bear their own costs.

SCIRICA, *Circuit Judge*, concurring:

Although I believe the revised Department of Corrections policy represents the better practice and avoids potential problems in the free exercise of an inmate's religion, I believe the prior policy was facially valid. But the prison administrators impermissibly denied access to Nation of Islam materials because they found, improperly in my view, that the documents did not constitute religious material. For this reason, I agree that the prior policy was unconstitutional as applied.

I.

But it seems to me that under *Turner v. Safley*, 482 U.S. 78 (1987), the prison authorities promulgated a rational and neutral policy, reasonably grounded on behavior modification principles. Arguably, had the corrections officials adopted a broader view of "religion," the Nation of Islam materials, at least, in Phases III and II would have been permitted. And depending on whether the officials considered Nation of Islam materials the equivalent of the Bible or Qur'an, they could have been permitted at Phases V and IV.

Under an expansive interpretation of what constitutes religious materials, therefore, the prior policy arguably could be rational and neutral, and reasonably grounded on acceptable behavior modification principles. Department of Corrections Regional Deputy Commissioner Dr. Beard explained that this incentive-based program was developed to improve upon traditional restrictive housing units which were not programmed to address the needs of inmates with a long-term inability to adjust to general population status. To this end, the SMU "provide[d] structured progression through five phases . . . . The program provide[d] security for staff and inmates alike while giving the inmate an incentive to progress through the phases of the program . . . ." To the extent that some of those inmates were religious, conditioning access to religious materials on

improved behavior might very well have served as a powerful incentive for the desired change in behavior.[1]

Furthermore, the District Court found that "the SMU rules were not created to target [Nation of Islam] members, and the rules applied to each prisoner no matter what his religion." *Sutton*, No. 97-7096, at 12. It bears noting as well that as the prisoner progressed through administrative confinement, he regained other privileges besides access to additional religious materials. For these reasons, defendants have arguably demonstrated a "valid, rational connection" to the "legitimate and neutral governmental objective" of behavior modification. *Cf. Thornburgh v. Abbott*, 490 U.S. 401, 414-15 (1989).

II.

I also believe that the second *Turner* prong favors defendants. As the court notes, in a free exercise case, we must consider whether the inmate has "alternate means of practicing his or her religion generally, not whether [the] inmate has alternative means of engaging in [any] particular practice." *DeHart v. Horn*, 227 F.3d 47, 55 (3d Cir. 2000) (en banc). "When assessing the availability of alternatives, the right in question must be viewed 'sensibly and expansively.' " *Fraise*, 283 F.3d at 518 (quoting *DeHart*, 227 F.3d 53-55). In *DeHart*, we overruled the analysis in *Johnson v. Horn*, 150 F.3d 276 (3d Cir. 1998), that focused on " 'the centrality of the religious tenet' at issue and distinguished between 'religious commandments' and 'positive expression of belief,' suggesting that 'the importance of alternative means of religious observance is an irrelevant consideration' when the practice in question is a commandment." 227 F.3d at 54. We then said:

> Thus, under *Johnson* where the religious practice being prohibited by the prison is commanded by the

1. As the District Court found, the SMU incentive-based program was "very successful" because from "April 1992 to October 1993 of the 45 inmates admitted to the program 19 graduated to general population status and only 3 of those had [to] be returned to the SMU." *Sutton*, No. 97-7096, at 12.

> believer's faith, the existence of other opportunities for exercising one's religious faith is wholly irrelevant to the analysis. The "religious commandment"/"positive expression of belief" distinction on which the panel in *Johnson* relied, however, directly conflicts with the Supreme Court's analysis in *O'Lone*. The Court there expressly held that, although attendance at Jumu'ah was a requirement of the respondents' religion (i.e., a "religious commandment"), because other means of practicing their religion were available, the second *Turner* factor weighed in favor of the relevant restriction's reasonableness. Recognition that a particular practice is required by an inmate's religion, thus, does not end this portion of the analysis. Rather, as the Supreme Court made clear in *O'Lone* and *Thornburgh*, courts must examine whether an inmate has alternative means of practicing his or her religion generally, not whether an inmate has alternative means of engaging in the particular practice in question. . . . In this case, the record shows that, while the prison's regulations have prohibited DeHart from following a diet in conformity with his religious beliefs, he has some alternative means of expressing his Buddhist beliefs."

Id. at 55, 57.

We further said that where "other avenues remain available for the exercise of the inmate's religious faith, courts should be particularly conscious of the measure of judicial deference owed to correction officials. . . ." *DeHart*, 227 F.3d at 59 (quoting *Turner*, 482 U.S. at 90) (internal quotations omitted). The second factor is not "intended to require courts to determine whether an inmate's sincerely held religious belief is sufficiently 'orthodox' to deserve recognition." *DeHart*, 227 F.3d at 55. Under this factor, "we must of course focus on the beliefs of the inmate asserting the claim. It is obviously impossible to determine whether a regulation leaves an inmate with alternative ways of practicing the inmate's religion without identifying the religion's practices." *Fraise*, 283 F.3d at 51.

In *Fraise*, we concluded the second *Turner* prong was

satisfied where inmates' access to Five Percent[2] literature was only "partially restricted." *Id.* at 519. The *Fraise* prison regulations allowed New Jersey correctional officers to designate security threat groups (STGs) and transfer core members to a special unit where their ability to "study the lessons" (a central Five Percent practice) was strictly controlled for fear of gang violence linked with the group. *Id.* Although Five Percenters were not allowed possession of "distinctively Five Percent Nation literature," they were still permitted to "possess, study and discuss" the Bible and the Qur'an. *Id.* We stated, "To be sure, the STG Policy restricts the ability of Five Percenters to achieve [self-knowledge, self-respect, responsible conduct or righteous living] by following what the group may regard as the best avenue, i.e., by studying and discussing doctrines and materials distinctive to the Five Percent Nation. But alternative avenues clearly remain open." *Id.*

As the court notes, the inmates in question here are adherents of various Nation of Islam sects.[3] Plaintiffs' expert opined that the Nation of Islam Books requested were "essential" to the practice of their religion. But alternative means of worship were clearly available to the plaintiffs. Even though plaintiffs were denied access to distinctly Nation of Islam texts, they were still allowed access to the Qur'an or Bible, like the *Fraise* inmates. As the District Court found, Nation of Islam members in the SMU were "permitted to exchange books, e.g., the Bible for the Koran . . . . and [t]hey could celebrate religious holidays such as Ramadan in the company of other prisoners." *Sutton*, No. 97-7096, at 5. Thus, SMU inmates had access to the Bible, Qur'an, or equivalent religious texts, and they could pray

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2. The Five Percenters broke away from the Nation of Islam in the 1960s. They believe in a "Supreme Mathematics." The "Five Percent" includes African Americans who have achieved self-knowledge. *Fraise*, 283 F.3d at 511. Five Percenters "reject[] belief in the transcendent and instead focus[] on human enlightenment and conduct as ends in themselves." *Id.* at 518 (examining evidence of the Five Percenters beliefs and practices as submitted by an editor of a Five Percent newspaper).

3. Sutton is a member of a Nation of Islam sect led by Minister Farrakhan, Wise is a member of the Lost-Found Nation of Islam, Inc., and Walker is a member of both.

by themselves, speak with and be visited by religious advisors, and celebrate religious holidays. *Cf. Fraise v. Terhune*, 283 F.3d 506, 519-20 (upholding a prison policy in an as-applied challenge where inmates in restrictive custody were only "partially restricted" in their ability to practice religion because "the policy allowed inmates to possess, study and discuss the Bible and the Koran" and did not restrict religious inmates from seeking "self-knowledge" or "righteous living"). While the original SMU policy undoubtedly imposed restrictions on the ability of Nation of Islam members to engage in activities related to the group, plaintiffs retained sufficient alternative means of studying and practicing doctrines distinct to their religion.[4] *Cf. Fraise*, 283 F.3d at 520. I see no principled distinction here from the circumstances we faced in *Fraise*, which found that sufficient alternative means of worship were retained. Therefore, I believe the second *Turner* prong favors defendants here.

In all other respects, I join the court's opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

4. As noted, we said in *DeHart*, "[T]he Supreme Court made clear in O'Lone and Thornburgh, courts must examine whether an inmate has alternative means of practicing his or her religion generally, not whether an inmate has alternative means of engaging in the particular practice in question." 227 F.3d at 55.

MANU/SC/1454/2015

Equivalent Citation: AIR2016SC209, (2016)2SCC725

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) Nos. 354, 355, 383 and 384 of 2006 (Under Article 32 of the Constitution of India)

Decided On: 16.12.2015

Appellants: **Adi Saiva Sivachariyargal Nala Sangam and Ors.**
Vs.
Respondent: **The Government of Tamil Nadu and Ors.**

Hon'ble Judges/Coram:
Ranjan Gogoi and N.V. Ramana, JJ.

Counsels:
For Appearing Parties: Subramonium Prasad. AAG, K. Parasaran, P.P. Rao, Colin Gonsalves, Sr. Advs., G. Umapathy, Vineet Pandey, R. Mekhala, Rakesh K. Sharma. A. Mukunda Rao, Arjun Singh, Gaichangpou Gangmei, Sridhar Potaraju, M. Yogesh Kanna, Sree Vignesh, Swarnendu Chatterjee, Sabarish Subramanian, Prabu Ramasubramanian, B. Subrahmanya Prasad, Naresh Kumar, P.R. Kovilan Poongkuntran, Mahalakshmi Pavani, S. Raju, Geetha Kovilan, V.G. Pragasam, S. Ramamani, B. Balaji, Rakesh Sharma and R. Shase, Advs.

Case Category:
RELIGIOUS AND CHARITABLE ENDOWMENTS - MATTERS RELATING TO MANAGEM
ADMINISTRATIVE DISPUTES OF TEMPLES ETC. (PRIEST, PUJARI, MAHANT)

JUDGMENT

Ranjan Gogoi, J.

1. Religion incorporates the particular belief(s) that a group of people subscribe to. Hinduism, as a religion, incorporates all forms of belief without mandating the selection or elimination of any one single belief. It is a religion that has no single founder; no single scripture and no single set of teachings. It has been described as Sanatan Dharma, namely, eternal faith, as it is the collective wisdom and inspiration of the centuries that Hinduism seeks to preach and propagate. It is keeping in mind the above precepts that we will proceed further.

2. Before highlighting the issues that confronts the Court in the present case the relevant Constitutional provisions in Part III of the Constitution may be taken note of. Article 13, in clear and unequivocal terms, lays down that all laws including pre-constitution laws which are inconsistent with or in derogation of the fundamental rights guaranteed by Part III are void. Sub-article (3) brings within the fold of laws, all Rules, Regulations, Notification, custom and usage having the force of law. While the several provisions of Part III would hardly need to be re-emphasized, specific notice must be had of, in the context of the present case, the provisions contained in Articles 25 and 26 of the Constitution. While Article 25 makes the freedom of conscience and the right to profess, practice and propagate the religion to which a person may subscribe, a fundamental right, the exercise of such right has been made subject to public order, morality and health and also to the other provisions of Part III. Article 25(2)(b) makes

it clear that main part of the provisions contained in Article 25 will not come in the way of the operation of any existing law or prevent the State from making any law which provides for social welfare and reform or for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Similarly, Article 26 while conferring the right on every religious denomination to manage its own affairs makes it clear that the right to manage the affairs of any religious denomination is restricted to matters of religion only.

3. The provisions of Part III, as noted above, therefore makes it amply clear that while the right to freedom of religion and to manage the religious affairs of any denomination is undoubtedly a fundamental right, the same is subject to public order, morality and health and further that the inclusion of such rights in Part III of the Constitution will not prevent the State from acting in an appropriate manner, in the larger public interest, as mandated by the main part of both Articles 25 and 26. Besides, the freedom of religion being subject to the other provisions of Part III, undoubtedly, Articles 25 and 26 of the Constitution has to be harmoniously construed with the other provisions contained in Part III.

4. The necessary facts may now be noticed. In order to amend and consolidate the law relating to administration and governance of Hindu religious and charitable institutions in the State of Tamil Nadu, the State Legislature has enacted the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as 'the Tamil Nadu Act'). A passing reference may be made, at this stage, to Section 55 of the Tamil Nadu Act which provided that in case where the office holders or servants of a religious institution are required to be filled up on the principle of hereditary succession the person next in line of succession is entitled to succeed. There were some exceptions to the above rule i.e. where the person next in line is a minor or suffers from some incapacity. The aforesaid provision (Section 55) was amended alongwith other related provisions by the Amendment Act of 1970 which came into force on January 8, 1971. By the aforesaid amendment the principle of next in line of succession was abolished. The amendment came to be challenged before this Court which challenge was considered by a Constitution Bench of the Court. In its judgment in ***Seshammal and Ors. Etc. Etc.*** v. ***State of Tamil Nadu*** MANU/SC/0631/1972 : (1972) 2 SCC 11 the Constitution Bench, while upholding the validity of the amendment, dealt with a further question, namely, though the principle of next in line was validly abolished, whether the appointment of office bearers or servants of the temples are required to be made from a particular denomination/group/sect as mandated by the Agamas i.e. treatises pertaining to matters like construction of temples; installation of idols and conduct of worship of the Deity. The Constitution Bench after an elaborate consideration of the matter, details of which will be noticed subsequently, seems to have answered the aforesaid question in the affirmative.

5 . No controversy surfaced after the Constitution Bench judgment in ***Seshammal*** (supra) until a G.O. No. 118 dated 23.05.2006 was issued by the Government of Tamil Nadu, Department of Tamil Development, Cultural and Endowments to the effect that, ***"Any person who is a Hindu and possessing the requisite qualification and training can be appointed as a Archaka in Hindu temples"***. An Ordinance (No. 5/2006) dated 14.07.2006 followed the aforesaid G.O. seeking to further amend Sub-section (2) of Section 55 of the Tamil Nadu Act. The said provision of the Act i.e. Section 55(2), by virtue of the 1971 amendment referred to above and the 2006 Ordinance, read as follows.

(2) No person shall be entitled to appointment to any vacancy referred

to in Sub-section (1) merely on the ground that he is next in the line of succession to the last holder of office.

[Change brought about by amendment of Section 55(2)]

or on the ground of any custom or usage.

[Change brought about by Ordinance 5/2006)

6. The Explanatory statement to the Ordinance in para 4 indicated the purpose behind further amendment of Section 55(2) in the following terms.

> *Archakas of the Temples are to be appointed without any discrimination of caste and creed. Custom or usage cannot be a hindrance to this. It is considered that the position is clarified in the Act itself and accordingly, it has been decided to amend Section 55 of the said Act suitably.*

7. The Ordinance was replaced by The Tamil Nadu Act No. 15 of 2006 which received the assent of the Governor on 29.08.2006. The Act, however, did not contain the amendment to Section 55 as was made by the Ordinance. In other words, the said amendment brought by the Ordinance was dropped from the Amending Act 15 of 2006.

8. The present writ petitions Under Article 32 of the Constitution have been instituted by an Association of Archakas and individual Archakas of Sri Meenakshi Amman Temple of Madurai. The writ petitions were filed challenging the G.O. No. 118 dated 23.05.2006 and Ordinance No. 5/2006 (at that point of time the Amending Act of 2006 had not come into effect). As the amendment of Section 55(2) made by the Ordinance had not been continued by the Amending Act 15 of 2006 the said part of the challenge (as against the ordinance) made in the writ petitions became redundant leaving the legality and validity of the G.O. 23.05.2006 as the sole issue for consideration in the present writ petitions.

9. Preliminary Objections have been raised to the maintainability of the writ petitions by Shri P.P. Rao and Shri Colin Gonsalves, learned senior Counsels appearing for Respondents. It has been urged that the present writ petitions have not been filed as public interest litigations and in the absence of any specific orders in implementation of the impugned G.O. dated 23.05.2006 the writ petitions are premature. It is further contended that even if the writ petitions are to be considered as PILs the same raise questions with regard to appointment in public office i.e. Archakas in public temples and therefore the writ petitions will also not be maintainable as public interest litigations. It is further urged that as and when the G.O. is given effect to by actual appointment of an Archaka or Archakas, as may be, it will be open for the Petitioners to raise the issue and establish that there is a usage or custom or customary practice governing the temple in question which require the appointment of the Archaka to be made from a particular denomination.

10. It is difficult for us to accept the contentions advanced on behalf of the Respondents with regard to the maintainability of writ petitions on two counts. Firstly, it is difficult to appreciate as to why the Petitioners should be non-suited at the threshold merely because the G.O. dated 23.05.2006 has not been given effect to by actual orders of the State Government. The institution of a writ proceeding need not await actual prejudice and adverse effect and consequence. An apprehension of such harm, if the same is well founded, can furnish a cause of action for moving the Court. The argument that the present writ petition is founded on a cause relating to appointment in a public

office and hence not entertainable as a public interest litigation would be too simplistic a solution to adopt to answer the issues that have been highlighted which concerns the religious faith and practice of a large number of citizens of the country and raises claims of century old traditions and usage having the force of law. The above is the second ground, namely, the gravity of the issues that arise, that impel us to make an attempt to answer the issues raised and arising in the writ petitions for determination on the merits thereof.

11. Shri K. Parasaran, learned senior Counsel appearing for the Petitioners has submitted that the issues arising in the case stand squarely covered by the pronouncement of the Constitution Bench in ***Seshammal*** (supra). In fact, according to the learned senior Counsel, the issues in the present case are res judicata; the same having been decided inter-partes in ***Seshammal*** (supra); the Archakas of the Agamas Temples and the Respondent-State both being parties to the said decision. Specifically, Shri Parasaran, has urged that in ***Seshammal*** (supra) the Constitution Bench has unambiguously held that the appointment of an Archaka has to be as per the Agamas governing the particular temple and any deviation from the said age old custom and usage would be an infringement of the freedom of religion and the rights of the religious denomination to manage its own affairs, as guaranteed, by Article 25 and 26 of the Constitution. The impugned G.O., by its prescription, as noted, therefore, seeks to override the declaration of law made by the Constitution Bench in ***Seshammal*** (supra).

12. Shri Parasaran has further urged that curtailment of the freedoms guaranteed by Articles 25 and 26 of the Constitution can only be made by the legislature and even a legislative exercise in this regard is circumscribed by the limitations contained in both Articles 25 and 26. In the present case the amendment of Section 55 of the Tamil Nadu Act as made by Ordinance No. 6 of 2005 has not been continued by the Amendment Act No. 15 of 2006 (as already noted). The impugned G.O. has, therefore, to necessarily lose its efficacy. Reliance herein is placed on the following passage from the report in ***Sanjeev Coke Manufacturing*** v. ***Bharat Coking Coal Limited and Anr.*** MANU/SC/0040/1982 : (1983) 1 SCC 147.

> ***25.***..... *The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court is the only authentic voice which may echo (interpret) the Parliament.....*

13. It was further contended that the G.O. wrongly relies on the decision in the case of ***N. Adhithyan*** v. ***Travancore Devaswom Board and Ors.*** MANU/SC/0862/2002 : (2002) 8 SCC 106 to justify its promulgation. The reliance placed on ***Adhithyan*** (supra), in the face of the law laid down in ***Seshammal*** (supra), is wholly misplaced. Shri Parasaran has further argued that the impugned GO has to be read on its own terms and the validity thereof cannot be saved by what appears to be a "concession" made by the State in Para 51 of the counter affidavit to the effect that the State would respect the distinction between Saiva and Vaishanava temples and the Archakas in each of such temples shall be appointed from either the Saivas or Vaishanavas, as may be, taking into account the indoctrination of the concerned Archakas in the Agamas. According to Shri Parasaran, neither all Saivas nor all Vaishnavas are *ipso facto* denominational. Only a Saiva who satisfies the eligibility under the Sivagama and a

Vaishnava satisfying the eligibility under the pancharatna or vaikhanasa can be referred to as denominations. A person who is a member of such denomination alone can be appointed as a Archaka of a Saiva or a Vaishnava temple, as the case may be.

14. On the other hand, Shri P.P. Rao and Shri Colin Gonsalves, learned Senior Counsels appearing for the Respondents have contended that the decision of the Constitution Bench in ***Seshammal*** (supra) upholding the Constitution validity of the Amendment Act of 1970 had opened the avenue to all qualified Hindus irrespective of caste, denominations, etc to be appointed as Archakas. It is contended that once the hereditary principle was held to be flexible, the exclusive right of a particular group to appointment necessarily stood negated and it is qualification coupled with merit and eligibility that has to be the crucial test for appointment, consistent with Articles 14 and 16 of the Constitution. Learned Counsels have specifically referred to the Government Order No. 1 of 2007 and in this regard the recommendation of the High Powered Committee appointed for making recommendations for effective implementation of the impugned GO dated 23.5.2006. It is contended, by referring to the report of the High Powered Committee, that the same demonstrates the lack of familiarity of even temple priests with the Agamas and their lack of knowledge of such Agamas and the practices of the Temples as may be prescribed by the Agamas. It is submitted that not only the contents of the Agamas have become uncertain, even assuming otherwise, the same cannot be an authority to confer legitimacy to a practice which is inconsistent with and contrary to the provisions of the Constitution, specially those contained in Part III thereof. It is further submitted that the impugned GO is consistent with and in fact effectuates the Fundamental Right of Equality and equal opportunity and no contrary practice overriding the said provisions of the Constitution would be legally acceptable. Learned Counsels have further submitted that there is no conflict between the judgments in ***Seshammal*** (supra) and ***N. Adithayan*** (supra) and it is possible to read the law declared in both the cases in a manner consistent with the Constitutional requirements and principles.

15. An additional issue has been struck by Shri Gonsalves, learned Senior Counsel, that the impugned GO needs to be upheld on the touchstone of the principle enshrined by Article 17 of the Constitution. The exclusive right of a particular group to enter the sanctum sanctorum of a temple and perform the rituals on the ground that performance of such rituals by any other person would defile the image is a thought and action which is prohibited by Article 17 of the Constitution. Violation and consequently commission of offences under the Protection of Civil Rights Act, 1955 has also been urged.

16. The issues arising and the arguments made centre around the true meaning, purport and effect of the Constitution Bench judgment in ***Seshammal*** (supra) and in the above context the effect of the decision of the numerically smaller Bench in ***N. Adithayan*** (supra). We will therefore proceed to understand the above position at the outset.

17. The contours of the challenge in ***Seshammal*** (supra) has already been noticed. To repeat, it is the validity of the Amendment Act of 1970 which sought to amend, inter alia, Section 55 of the Tamil Nadu Act that was questioned in ***Seshammal*** (supra). The Statement of Objects and Reasons for the amendment Act of 1970 is stated as follows:

> *In the year 1969 the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes has suggested in its report that the hereditary priesthood in the Hindu Society should be abolished, that the system*

can be replaced by an ecclesiastical organisation of men possessing the requisite educational qualifications who may be trained in recognised institutions in priesthood and that the line should be open to all candidates irrespective of caste, creed or race. In Tamil Nadu Archakas, Gurukkals and Poojaries are all Ulthurai servants in Hindu temples. The duties of 'Ulthurai servants' relate mainly to the performance of poojas rituals and other services to the deity, the recitation of mantras, vedas, prabandas, thevarams and similar invocations and the performance of duties connected with such performance and recitations. Sections 55 and 56 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959), provide for appointment of office-holders and servants in the religious institutions by the trustees by applying the rule of hereditary succession also. As a step towards social reform Hindu temples have already been thrown open to all Hindus irrespective of caste....

18. The arguments in support of the challenge were threefold namely,

(a) The freedom of hereditary succession to the office of Archaka is abolished although succession to it is an essential and integral part of the faith of the Saivite and Vaishnavite worshippers.

(b) It is left to the Government in power to prescribe or not to prescribe such qualifications as they may choose to adopt for applicants to this religious office while the Act itself gives no indication whatever of the principles on which the qualifications should be based. The statement of objects and reasons which is adopted in the counter-affidavit on behalf of the State makes it clear that not only the scope but the object of the Amendment Act is to override the exclusive right of the denomination to manage their own affairs in the matter of religion by appointing Archakas belonging to a specific denomination for the purpose of worship.

(c) The Amendment Act gives the right of appointment for the first time to the trustee who is under the control of the Government under the provisions of the principal Act and this is the very negation of freedom of religion and the principle of non-interference by the State as regards the practice of religion and the right of a denomination to manage its own affairs in the matter of religion.

19. In the course of a very lengthy discourse and after considering the works of learned scholars in the field; the law laid down by this Court in respect of Articles 25 and 26 till date and particularly the efficacy of the Agamas the Constitution Bench came to the following conclusion.

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.

20. Thereafter, the Constitution Bench by referring to several earlier pronouncements of this Court specifically mentioned in para 13 of the Report identified the main principles underlying the provisions of Article 25 and 26 of the Constitution in the following manner.

The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and

> *therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.*

21. Applying the aforesaid principles to the facts before it the Constitution Bench identified the main thrust of the arguments made in support of the challenge to the amendment to be with regard to the vesting of powers and authority in the temple trustee to appoint any person as an Archaka so long as he was holding a fitness certificate from one of the institutions referred to in Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964. The Said Rule 12 required that an Archaka should be proficient in Mantras, Vedas, Prabandams etc., namely, that such a person is fit and qualified for performing puja and having knowledge of the rituals and other services. The Constitution Bench was told that the above position admits a situation where the requirement of Rule 12 can very well be dispensed with (by a subsequent amendment of the Rules) thereby resulting in conferment of virtually unguided and unbridled powers to the trustee to appoint any person as a Archaka notwithstanding the fact that worship of the deity by a person other than one belonging to a particular denomination may have the effect of defiling the deity. As the temple trustee is to function under the control of the State Under Section 27 of the Tamil Nadu Act the question highlighted before the Constitution Bench was whether by virtue of the amendment the State had gained a right to step into and control the Sanctum Sanctorum of a temple through the agency of the trustee and the Archaka thereby transgressing the rights granted to a religious denomination by Articles 25 and 26 of the Constitution.

22. The Constitution Bench noticed that to counter the above situation the Advocate General of the State of Tamil Nadu had contended that the power given to the trustee by virtue of the amendment to Section 55 was not a unqualified power but was subject to the provisions of Section 28 of the Act which is in the following terms.

> ***Section 28.****-Subject to the provisions of the Tamil Nadu Temple Entry Authorisation Act, 1947, the trustee of every religious institution is bound to administer its affairs and to apply its funds and properties in accordance with the terms of the trust, the usage of the institution and all lawful directions which a competent authority may issue in respect thereof and as carefully as a man of ordinary prudence would deal with such affairs, funds and properties if they were his own.*

In this regard the Advocate General had virtually admitted that if the usage or practice of the institution required the Archaka of a temple to be of a particular denomination the said usage would be binding on the trustee and he would be bound to make appointment Under Section 55 in accordance with such usage. The usage, practice or custom requiring an Archaka to be of a particular denomination, according to the Advocate General, was founded on religious beliefs and practices whereas the next in line principle, if is to be regarded as a usage, was a merely secular usage on which a legislation would be competent Under Article 25(2)(a) of the Constitution. It was, alternatively, contended that if the hereditary principle is to be understood as a religious practice, alteration thereof can also be made by a legislation Under Article 25(2)(b), such legislation being for the purpose of social welfare and reform.

23. The Constitution Bench in ***Seshammal*** (supra) answered the question by holding

that the hereditary principle which was of long usage was a secular principle and therefore a legislation to alter the said usage, i.e. the Amendment Act of 1970, was competent Under Article 25(2)(a). However, the Constitution Bench was quick to add that it is to the limited extent of the above exception alone, namely, the liberty to make the appointment from persons beyond next in line to the last holder that the trustee is released from the obligation imposed on him by Section 28 of the Tamil Nadu Act which otherwise requires the trustee to administer the affairs of the temple in accordance with the usage governing the temple. Para 22 of the Constitution Bench judgment wherein the aforesaid view finds mention may be noticed verbatim.

> ***22.*** *In view of Sub-section (2) of Section 55, as it now stands amended, the choice of the trustee in the matter of appointment of an Archaka is no longer limited by the operation of the rule of next-in-line of succession in temples where the usage was to appoint the Archaka on the hereditary principle. The trustee is not bound to make the appointment on the sole ground that the candidate, is the next-in-line of succession to the last holder of office. To that extent, and to that extent alone, the trustee is released from the obligation imposed on him by Section 28 of the principal Act to administer the affairs in accordance with that part of the usage of a temple which enjoined hereditary appointments. The legislation in this respect, as we have shown, does not interfere with any religious practice or matter of religion and, therefore, is not invalid.*

24. A reading of the judgment of the Constitution Bench in ***Seshammal*** (supra) shows that the Bench considered the expanse of the Agamas both in Saivite and Vaishnavite temples to hold that the said treatises restricted the appointment of Archakas to a particular religious denomination(s) and further that worship of the deity by persons who do not belong to the particular denomination(s) may have the effect of even defiling the idol requiring purification ceremonies to be performed. The Constitution Bench further held that while the appointment of Archakas on the principle of next in line is a secular act the particular denomination from which Archakas are required to be appointed as per the Agamas embody a long standing belief that has come to be firmly embedded in the practices immediately surrounding the worship of the image and therefore such beliefs/practice constitute an essential part of the religious practice which Under Section 28 of the Act (extracted above) the trustee is bound to follow. The above, which the Petitioners contend to be the true ratio of the law laid down by the Constitution Bench in ***Seshammal*** (supra), has been questioned by the Respondents who argue that ***Seshammal*** (supra) is but the expression of an agreement of the Constitution Bench to what was a concession made before it by the Advocate General of the State. According to the Respondent in ***Seshammal*** (supra) the Constitution Bench had no occasion to deal with the issue arising herein, the challenge before it being confined to the validity of the Amendment Act of 1970.

25. The answers to the above will be dealt with a little later and for the present what has to engage the attention of the Court is the true ratio of the law laid down by the numerically smaller Bench in ***Adithayan*** (supra).

26. The facts confronting the Court in ***Adithayan*** (supra) may now be noticed. The challenge therein was by a Namboodri Brahmin to the appointment of a non-Namboodri Brahmin who was otherwise well qualified to be appointed as a priest in the temple in question. The challenge was sought to be based on the ground that it has been a long standing practice and usage in the temple that its priests are appointed exclusively from Namboodri Brahmins and any departure therefrom is in violation of the rights of

Namboodri Brahmins Under Article 25 and 26 of the Constitution. Upon a consideration of the various earlier decisions of this Court specifically referred to in ***Adithayan*** (supra), details of which need not again be noticed herein (such details are being separately noticed later, though in a different context) including the decision in ***Seshammal*** (supra) it was held that rights claimed solely on the basis of caste cannot enjoy the protection of Article 25 and 26 and no earlier decision of this Court including ***Seshammal*** (supra) would support the contention that even duly qualified persons can be barred from performing Poojas on the sole ground that such a person is not a Brahmin by birth or pedigree. After expounding the law in the above manner, it was held in ***Adithayan*** (supra) that even proof of any such practice since the pre-constitutional days (which in any case was not forthcoming) cannot sustain such a claim as the same would be in derogation of constitutional values and opposed to public policy or social decency. We do not see how the above view of this Court in any way strikes a discordant note with the views expressed in any earlier decision including ***Seshammal*** (supra). The issues in ***Seshammal*** (supra) were entirely different and the discussions therein (para 12) proceeds on the basis that entry to the sanctum sanctorum for a particular denomination is without any reference to caste or social status. The reference to the opinion of Sri R. Parthasarathy Bhattacharya who has been referred to in the above para 12 of the report as an undisputed scholar on the subject was cited to show that apart from the followers of the 4 (four) traditions, so far as Vaishnava temples are concerned *".....none others, however high placed in society as Pontiffs or Acharyas, or even other Brahmins could touch the idols, do Pooja or enter the Garba Girha....."* Exclusion solely on the basis of caste was not an issue in ***Seshammal*** (supra) so as to understand the decision in ***Adithayan*** (supra) to be, in any way, a departure from what has been held in ***Seshammal*** (supra).

27. Before we go on to deliberate on the validity of the impugned G.O. dated 23.05.2006 it will be useful to try to understand what is Hinduism? A broad answer is to be found in the preface to this report but, perhaps, we should delve a little deeper into the issue. The subject has received an in depth consideration of the Country's philosopher President Dr. S. Radhakrishnan in the celebrated work " The Hindu way of Life". The said work has been exhaustively considered in ***Sastri Yagnapurushadji and Ors.*** v. ***Muldas Bhudradas Vaishya and Anr.*** MANU/SC/0040/1966 : 1966(3) SCR 242 in the context of the question as to whether Swaminarayan sect is a religion distinguishable and separate from the Hindu religion and consequently the temples belonging to the said sect fell outside the scope of Section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956. The aforesaid Section 3 of the Act *inter alia* provided that every temple to which the Act applied shall be open to the excluded classes for worship in the same manner and to the same extent as other Hindus in general. While the eventual decision of the Court which answered the question raised is in the negative, namely, that the sect in question was not a distinguishable and different religion, it is the very learned discourse that is to be found in the report with regard to the true tenets of Hinduism that would be of interest so far the present case is concerned. The following passages from the report are truly worthy of reproduction both for the purpose of recapitulation and illumination.

> ....
>
> *When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or*

performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.

....

The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practiced different rites (Kurma Purana). (Ibid p.12.)

....

"It presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary rivers and rivulets, spreading itself over an ever-increasing area of country and finally resolving itself into an intricate Delta of tortuous steams and jungly marshes..... The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds." ("Religious Thought & Life in India" by Monier Williams, P. 57.)

The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets. Truth is one, but wise men describe if differently. The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the interrelation between the individual and the universal soul. "If we can abstract from the variety of opinion", says Dr. Radhakrishnan, "and observe the general spirit of Indian thought, we shall find that it has a disposition to interpret life and nature in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings". (Ibid, p.32.)

Though philosophic concepts and principles evolved by different Hindu thinkers and philosophers varied in many ways and even appeared to conflict with each other in some particulars, they all had reverence for the past and accepted the Vedas as the sole foundation of the Hindu philosophy. Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express.

Do the Hindus worship at their temples the same set or number of gods ? That is another question which can be asked in this connection; and the answer to this question again has to be in the negative. Indeed, there are certain sections of the Hindu community which do not believe in the worship of idols; and as regards those sections of the Hindu community which believe in the worship of idols their idols differ from community to community and it cannot be said that one definite idol or a definite number of idols are worshipped by all the Hindu in general. In the Hindu Pantheon the first goods that were worshipped in Vedic

times were mainly Indra, Varuna, Vayu and Agni. Later, Brahma, Vishnu and Mahesh came to be worshipped. In course of time, Rama and Krishna secured a place of pride in the Hindu Pantheon, and gradually as different philosophic concepts held sway in different sects and in different sections of the Hindu community, a large number of gods were added, with the result that today, the Hindu Pantheon presents the spectacle of a very large number of gods who are worshipped by different sections of the Hindus.

The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to the formation of different sects. Buddha stated Buddhism; Mahavir founded Jainism; Basava became the founder of Lingayat religion, Dnyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.

Tilak faced this complex and difficult problem of defining or at least describing adequately Hindu religion and he evolved a working formula which may be regarded as fairly adequate and satisfactory. Said Tilak: "Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion. This definition brings out succinctly the broad distinctive features of Hindu religion. It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: "When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions an ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary.

28. The fact that reference to Hindus in the Constitution includes persons professing the Sikh, Jain and Buddhist religions and the statutory enactments like Hindu Marriage Act, Hindu Succession Act etc. also embraces Sikhs, Jains and Buddhists within the ambit of the said enactments is another significant fact that was highlighted and needs to be specially taken note of.

29. What is sought to be emphasized is that all the above would show the wide expanse of beliefs, thoughts and forms of worship that Hinduism encompasses without any divergence or friction within itself or amongst its adherents. It is in the backdrop of the above response to the question posed earlier "what is Hinduism"? that we have to proceed further in the matter.

30. Image worship is a predominant feature of Hindu religion. The origins of image worship is interesting and a learned discourse on the subject is available in a century

old judgment of the Madras High Court in ***Gopala Mooppanar and Ors.*** v. ***Subramania Iyer and Ors.*** AIR 1915 Madras 363. In the said report the learned Judge (Sadasiva Aiyar, J.) on the basis of accepted texts and a study thereof had found that in the "first stage" of existence of mankind God was worshiped as immanent in the heart of everything and worship consisted solely in service to ones fellow creatures. In the second age, the spirit of universal brotherhood has lost its initial efficacy and notions of inferiority and superiority amongst men surfaced leading to a situation where the inferior man was asked to worship the superior man who was considered as a manifestation of God. Disputes arose about the relative superiority and inferiority which was resolved by the wise sages by introducing image worship to enable all men to worship God without squabbles about their relative superiorities. With passage of time there emerged Rules regulating worship in temples which came to be laid down in the treatises known as Agamas and the Thantras. Specifically in ***Gopala Moopanar*** (supra), it was noticed that the Agamas prescribed rules as regards "what caused pollution to a temple and as regards the ceremonies for removing pollution when caused." In the said judgment it is further mentioned that, *"There are, it is well known Thanthries in Malabar who are specialists in these matters of pollution. As the temple priests have got the special saivite initiation or dheeksha which entitles them to touch the inner most image, and as the touch of the persons who have got no such initiation, even though they be Brahmins, was supposed to pollute the image, even Brahmins other than the temple priest were in many temples not allowed to go into the garbhagraham.* The Agamas also contain other prescriptions including who is entitled to worship from which portion of the temple. *In one of the Agamas it is said (as freely translated) thus: "Saivite Brahmin priests are entitled to worship in the anthrala portion. Brahmins learned in the Vedas are entitled to worship in the arthamantapa, other Brahmins in the front Mantapa, Kings and Vaisyas in the dwaramantapa, initiated Sudras in the Bahir Mantapa" and so on."* The legal effect of the above prescriptions need not detain us and it is the portion underlined which is of particular importance as the discussions that follow would reveal.

3 1 . The Ecclesiastical jurisprudence in India, sans any specific Ecclesiastical jurisdiction, revolves around the exposition of the constitutional guarantees Under Articles 25 and 26 as made from time to time. The development of this branch of jurisprudence primarily arises out of claimed rights of religious groups and denominations to complete autonomy and the prerogative of exclusive determination of essential religious practices and principles on the bedrock of the constitutional guarantees Under Articles 25 and 26 of the Constitution and the judicial understanding of the inter-play between Article 25(2)(b) and 26(b) of the Constitution in the context of such claims. In ***The Commissioner, Hindu Religious Endowments, Madras*** v. ***Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*** MANU/SC/0136/1954 : 1954 SCR 1005 (Shirur Mutt) while dealing with the issue of autonomy of a religious denomination to determine what rights and ceremonies are essential according to the tenets of its religion it has been stated that-

> *Under Article 26(b), therefore a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.- (Page 1028)*

32. Besides the above, recognition of the aforesaid principle is also to be found in the fact that in ***Shirur Mutt*** (supra), though the eventual conclusion of the Court upholds the validity of the Act (Madras Hindu Religious and Charitable Endowments Act, 1951) certain specific provisions i.e. Section 21 which empowered the Commissioner and his

subordinates to enter the premises of any religious institution at any time for performance of duties enjoined under the Act has been struck down indicating consistency with the principle extracted above. The relevant of the report (page 1030/31) will require a specific notice and therefore is extracted below.

> *We agree, however, with the High Court in the view taken by it about Section 21. This section empowers the Commissioner and his subordinate officers and also persons authorised by them to enter the premises of any religious institution or place of worship for the purpose of exercising any power conferred or any duty imposed by or under the Act. It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed. Section 21, it is to be noted, does not confine the right of entry to the outer portion of the premises; it does not even exclude the inner sanctuary "the Holy of Holies" as it is said, the sanctity of which is zealously preserved. It does not say that the entry may be made after due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution. We think that as the section stands, it interferes with the fundamental rights of the Mathadhipati and the denomination of which he is head guaranteed Under Articles 25 and 26 of the Constitution. Our attention has been drawn in this connection to Section 91 of the Act which, it is said, provides a sufficient safeguard against any abuse of power Under Section 21. We cannot agree with this contention. Clause (a) of Section 91 excepts from the saving clause all express provisions of the Act within which the provision of Section 21 would have to be included. Clause (b) again does not say anything about custom or usage obtaining in an institution and it does not indicate by whom and in what manner the question of interference with the religious and spiritual functions of the Math would be decided in case of any dispute arising regarding it. In our opinion, Section 21 has been rightly held to be invalid.-(Page 1030/31)*

33. The decision of this Court in ***Sri Venkataramana Devaru and Ors.*** v. ***State of Mysore and Ors.*** MANU/SC/0026/1957 : AIR 1958 SC 255 may now be considered. Ir the said case this Court was called upon to answer as to whether Section 3 of the Madras Temple Entry Authorization Act violated the guarantee Under Article 26(b) insofar as Gaura Saraswati Brahmins are concerned by making provisions to the effect that Shri Venkataramana Temple at Moolky was to be open to all excluded classes of Hindus. It was the contention of the aforesaid sect that the temple in question was founded for the exclusive use and benefit of Gaura Saraswati Brahmins. This Court in its report elaborately discussed the practice of idol/image worship; Regulation thereof by the Agamas and the efficacy and enforceability of such Agamas. Paras 17 and 18 of the Report which deals with the above aspect may be usefully extracted below.

> ***17.*** *The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation. These injunctions have had such a powerful hold over the minds of the people that daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu. It was during this period that temples were constructed all over the country dedicated to Vishnu, Rudra, Devi, Skanda,*

Ganesha and so forth, and worship in the temple can be said to have become the practical religion of all sections of the Hindus ever since. With the growth in importance of temples and of worship therein, more and more attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of worship of the deity, and numerous are the treatises that came to be written for its exposition. These are known as Agamas, and there are as many as 28 of them relating to the Saiva temples, the most important of them being the Kamikagama, the Karanagama and the Suprabedagama, while the Vikhanasa and the Pancharatra are the chief Agamas of the Vaishnavas. These 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. The following passage from the judgment of Sadasiva Aiyar J. in Gopala Muppanar v. Subramania Aiyar: MANU/TN/0114/1914 : (1914) 27 MLJ 253, gives a summary of the prescription contained in one of the Agamas:

> *In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbargriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram.*
>
> *The other Agamas also contain similar rules.*

18. *According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as Samprokshana) have to be performed for restoring the sanctity of the shrine. Vide judgment of Sadasiva Aiyar J. in Gopala Muppanar v. Subramania Aiyar (supra). In Sankaralinga Nadan v. Raja Rajeswara Dorai, it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion.* ***The conclusion is also implicit in Article 25 which after declaring that all persons are entitled freely to profess, practice and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism. We must accordingly hold that if the rights of the Appellants have to be determined solely with reference to Article 26(b), then Section 3, of Act V. of 1947, should be held to be bad as infringing it.***

Eventually, this Court went on to hold that the provisions of Article 26(b) are also subject to those contained in Article 25(2)(b) and accordingly dismissed the plea set up by the Gaura Saraswati Brahmins in the suit out of which the proceedings arose.

34. The explicit reiteration of the Court's power to decide on what constitutes an essential religious practice in ***Sri Venkataramana Devaru*** (supra) again found manifestation in ***Durgah Committee, Ajmer and Anr.*** v. ***Syed Hussain Ali and Ors.*** MANU/SC/0063/1961 : AIR 1961 SC 1402. Gajendragadkar, J. (as His Lordship then was) was of the view,

> *..... that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection Under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.*

35. Almost half a century later, we find a reiteration of the same view in the majority judgment rendered in ***Commissioner of Police and Ors.*** v. ***Acharya Jagadishwarananda Avadhuta and Anr.*** MANU/SC/0218/2004 : (2004) 12 SCC 770 though the minority view in the said case preferred to take a contrary opinion relying, inter alia, on ***Shirur Mutt*** (supra) and ***Jesse Cantwell*** v. ***State of Connecticut*** 84 L Ed 1213 : 310 US 296 (1939) and ***United States*** v. ***Ballard*** 88 L Ed 1148 : 322 US 78 (1943). Para 57 of the minority opinion containing the discordant note would be worthy of reproduction.

> ***57.*** *The exercise of the freedom to act and practise in pursuance of religious beliefs is as much important as the freedom of believing in a religion. In fact to persons believing in religious faith, there are some forms of practising the religion by outward actions which are as much part of religion as the faith itself. The freedom to act and practise can be subject to Regulations. In our Constitution, subject to public order, health and morality and to other provisions in Part III of the Constitution. However, in every case the power of Regulation must be so exercised with the consciousness that the subject of Regulation is the fundamental right of religion, and as not to unduly infringe the protection given by the Constitution. Further, in the exercise of the power to regulate, the authorities cannot sit in judgment over the professed views of the adherents of the religion and to determine whether the practice is warranted by the religion or not. That is not their function. (See Jesse Cantwell v. State of Connecticut, L Ed at pp. 1213-1218, United States v. Ballard, L Ed at pp. 1153, 1154.)*

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).

39. The preceding discussion indicates the gravity of the issues arising and the perceptible magnitude of the impact thereof on Hindu Society. It would be, therefore, incorrect, if not self defeating, to take too pedantic an approach at resolution either by holding the principle of *res judicata* or locus to bar an adjudication on merits or to strike down the impugned G.O. as an executive fiat that does not have legislative approval, made explicit by the fact that though what has been brought by the G.O. dated 23.05.2006 was also sought to be incorporated in the statute by the Ordinance, eventually, the amending Bill presented before the legislature specifically omitted the aforesaid inclusion. The significance of the aforesaid fact, however, cannot be underestimated. What is sought to be emphasized is that the same, by itself, cannot be determinative of the invalidity of the G.O. which will have to be tested on certain other premises and foundation treating the same to be an instance of exercise of executive power in an area not covered by any specific law.

40. The issue of untouchability raised on the anvil of Article 17 of the Constitution stands at the extreme opposite end of the pendulum. Article 17 of the Constitution strikes at caste based practices built on superstitions and beliefs that have no rationale or logic. The exposition of the Agamas made a Century back by the Madras High Court in ***Gopala Moopnar*** (supra) that exclusion from the *sanctum sanctorum* and duties of performance of poojas extends even to Brahmins is significant. The prescription with regard to the exclusion of even Brahmins in ***Gopala Moopnar*** (supra) has been echoed in the opinion of Sri Parthasarthy Bhattacharya as noted by the Constitution Bench in ***Seshammal*** (supra). Such exclusion is not on the basis of caste, birth or pedigree. The provisions of Article 17 and the Protection of Civil Rights Act, 1955, therefore, would not be of much significance for the present case. Similarly, the 'offer' of the state in its affidavit to appoint Shaivite as Archakas in Shiva temples and Vaishnavas in Vaishanvite Temples is too naive an understanding of a denomination which is, to say the least, a far more sharply indentified subgroup both in case of shaivite and vaishanvite followers. However, what cannot be ignored is the 'admission' inbuilt in the said offer resulting in some flexibility in the impugned G.O. that the state itself has acknowledged.

41. ***Sheshammal*** (supra) is not an authority for any proposition as to what an Agama or a set of Agamas governing a particular or group of temples lay down with regard to the question that confronts the court, namely, whether any particular denomination of worshippers or believers have an exclusive right to be appointed as Archakas to perform the poojas. Much less, has the judgment taken note of the particular class or caste to which the Archakas of a temple must belong as prescribed by the Agamas. All that it does and says is that some of the Agamas do incorporate a fundamental religious belief of the necessity of performance of the Poojas by Archakas belonging to a particular and distinct sect/group/denomination, failing which, there will be defilement of deity requiring purification ceremonies. Surely, if the Agamas in question do not proscribe any group of citizens from being appointed as Archakas on the basis of caste or class the sanctity of Article 17 or any other provision of Part III of the Constitution or even the Protection of Civil Rights Act, 1955 will not be violated. What has been said in ***Sheshammal*** (supra) is that if any prescription with regard to appointment of Archakas is made by the Agamas, Section 28 of the Tamil Nadu Act mandates the Trustee to conduct the temple affairs in accordance with such custom or usage. The requirement of Constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. The constitutional legitimacy, naturally, must supersede all religious beliefs or practices.

42. The difficulty lies not in understanding or restating the constitutional values. There is not an iota of doubt on what they are. But to determine whether a claim of state action in furtherance thereof overrides the constitutional guarantees Under Article 25 and 26 may often involve what has already been referred to as a delicate and unenviable task of identifying essential religious beliefs and practices, sans which the religion itself does not survive. It is in the performance of this task that the absence of any exclusive ecclesiastical jurisdiction of this Court, if not other shortcomings and adequacies, that can be felt. Moreover, there is some amount of uncertainty with regard to the prescription contained in the Agamas. Coupled with the above is the lack of easy availability of established works and the declining numbers of acknowledged and undisputed scholars on the subject. In such a situation one is reminded of the observations, if not the caution note struck by Mukherjea, J. in ***Shirur Mutt*** (supra) with regard to complete autonomy of a denomination to decide as to what constitutes an essential religious practice, a view that has also been subsequently echoed by this Court though as a "minority view". But we must hasten to clarify that no such view of

the Court can be understood to an indication of any bar to judicial determination of the issue as and when it arises. Any contrary opinion would go rise to large scale conflicts of claims and usages as to what is an essential religious practice with no acceptable or adequate forum for resolution. That apart the "complete autonomy" contemplated in ***Shirur Mutt*** (supra) and the meaning of "outside authority" must not be torn out of the context in which the views, already extracted, came to be recorded (page 1028). The exclusion of all "outside authorities" from deciding what is an essential religion practice must be viewed in the context of the limited role of the State in matters relating to religious freedom as envisaged by Articles 25 and 26 itself and not of the Courts as the arbiter of Constitutional rights and principles.

43. What then is the eventual result? The answer defies a straight forward resolution and it is the considered view of the court that the validity or otherwise of the impugned G.O. would depend on the facts of each case of appointment. What is found and held to be prescribed by one particular or a set of Agamas for a solitary or a group of temples, as may be, would be determinative of the issue. In this regard it will be necessary to re-emphasise what has been already stated with regard to the purport and effect of Article 16(5) of the Constitution, namely, that the exclusion of some and inclusion of a particular segment or denomination for appointment as Archakas would not violate Article 14 so long such inclusion/exclusion is not based on the criteria of caste, birth or any other constitutionally unacceptable parameter. So long as the prescription(s) under a particular Agama or Agamas is not contrary to any constitutional mandate as discussed above, the impugned G.O. dated 23.05.2006 by its blanket fiat to the effect that, *"Any person who is a Hindu and possessing the requisite qualification and training can be appointed as a Archaka in Hindu temples"* has the potential of falling foul of the dictum laid down in ***Seshammal*** (supra). A determination of the contours of a claimed custom or usage would be imperative and it is in that light that the validity of the impugned G.O. dated 23.05.2006 will have to be decided in each case of appointment of Archakas whenever and wherever the issue is raised. The necessity of seeking specific judicial verdicts in the future is inevitable and unavoidable; the contours of the present case and the issues arising being what has been discussed.

44. Consequently and in the light of the aforesaid discussion, we dispose of all the writ petitions in terms of our findings, observations and directions above reiterating that as held in ***Seshammal*** (supra) appointments of Archakas will have to be made in accordance with the Agamas, subject to their due identification as well as their conformity with the Constitutional mandates and principles as discussed above.

MANU/SC/0631/1972

Equivalent Citation: AIR1972SC1586, (1972)2SCC11, [1972]3SCR815

IN THE SUPREME COURT OF INDIA

Writ Petition Nos. 13, 14, 70, 83, 437, 438, 439, 440, 441, 442, 443 and 444 of 1971

Decided On: 14.03.1972

Appellants:**Seshammal and Ors.**
Vs.
Respondent:**State of Tamil Nadu**

Hon'ble Judges/Coram:
S.M. Sikri, C.J., A.N. Ray, D.G. Palekar, M. Hameedullah Beg and A.N. Grover, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: R. Gopalakrishnan, Adv. in W.Ps. Nos. 13 and 14 of 1971, K. Parasaran and K. Jayaram, Advs. in W.P. No. 70 of 1971, M. Natesan and M.S. Narasimhan

For Respondents/Defendant: S. Govind Swaminathan, Adv. Gen., S. Mohan and A.V. Rangam, Advs.

JUDGMENT

D.G. Palekar, J.

1. In these 12 petitions under Article 32 of the Constitution filed by the hereditary Archakas and Mathadhipatis of some ancient Hindu Public temples in Tamil Nadu the validity of the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act 1970 (hereinafter referred to as the Amendment Act, 1970) is called in question, principally, on the ground that it violates their freedom of religion secured to them under Articles 25 and 26 of the Constitution. The validity of the Amendment Act had been also impugned on the ground that if interfered with certain other fundamental rights of the petitioners but that case was not pressed at the time of the hearing.

2. The temples With which we are concerned are Saivite and Vaishnavite temples in Tamil Nadu. Writ Petitions 70, 83, 437, 438, 439, 440, 441, 442, 443 and 444/71 art filed by the Archakas and Writ Petitions 13 tad 14/1971 are filed by the Mathadhipatis to whose Math some temples are attached. As, Common questions were involved it all these petitions, arguments were addressed principally in Writ petitions 13/1971 and 442/1971, and we are assured by Counsel for both sides that they cover the points involved in all the other petitions.

3. The State Legislature of Tamil Nadu enacted The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1950 being (Tamil Nadu Act XXII of 1959) hereinafter referred to as the Principal Act. It cam info force on December 2, 1050. It was an Act to amend and consolidate the law relating to the 5 administration and governance of Hindu Religious and Charitable Institutions add Endowments in the State of Tamil Nadu. It applied to all Hindu religious public institutions and endowments in the State of Tamil Nadu and repealed several Acts which had previously governed the administration of

Hindu Public Religious Institutions. It is sufficient to Bay here that the provisions of the Principal Act applied to the temples in the present petitions and the petitioners have no complaint against any of its provisions.

4. Section 55 of that Act provided for the appointment of officeholders and servants in such temples and Section 56 provided for the punishment of office-holders and servants. Section 55, broadly speaking, gave the trustee of the temple the power to appoint the office-holders or servants of the temple and also provided that Where the office or service is hereditary the person next in the line of succession shall be entitled to succeed In only exceptional cases the trustee was entitled to depart from the principles of next-in-the-line of succession, but even so, the trustee was under an obligation to appoint a fit person to perform the functions of the office or perform the service after having due regard to the claims of the members of the family.

5. Power to make rules was given to Government by Section 116(2)(xxiii) and it was open to the Government to make rules providing for the qualifications to be possessed by the Officers and servants for appointment to non-hereditary offices in religious institutions, the qualifications to be possessed by hereditary servants for succession to office and the conditions of service of all such officers and servants. Under this rule making power the State Government made the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964. Under these rules an Archak or Pujari of the deity came under the definition of 'Ulthurai servant'. 'Ulthurai servant' is defined as a servant whose duties relate mainly to the performance of rendering assistance in the performance of pujari, rituals and other services to the deity, the recitation of mantras, vedas, prabandas, thevarams and similar invocations and the performance of duties connected with such performance of recitation. Rule 12 provided that every 'ulthurai servant', whether hereditary of non-hereditary whose duty it is to perform pujari and recite mantras, vedas, prabandams, thevarams and other invocations shall, before succeeding, or appointment to an office, obtain a certificate of fitness for performing his office, from the head of an institution, imparting instructions in Agamas and ritualistic matters and recognised by the Commissioner, by general or special order or from the head of a math recognised by the Commissioner, by general of special order, Of such other person as may be designated by the Commissioner, from time to tone, for the purpose. By this rule the proper worship in the temple was secured whether the Archaka or Pujari was a hereditary Archaka or Pujari or not. Section 107 of the Act emphasized that nothing contained in the Act Shan, save as otherwise provided in Section 106 and in Clause 2 of Article 25 of the Constitution, be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by Article 26 of the Constitution. Section 106 deals with the removal of discrimination in the matter of distribution of prasadam of theertham to the Hindu worshippers. That was a reform in the right direction and there is no challenge to it. The Act as a whole, it is conceded, did not interfere with the religious usages and practices of the temples.

6. The Principal Act of 1950 was amended in certain respects by the Amendment Act of 1970 which came into force on January 8, 1971. Amendments were made to Sections 55, 56 and 116 of the Principal Act and some consequential provisions were made in view of those amendments. The Amendment Act was enacted as a step towards social reform on the recommendation of the Committee on Untouchability, Economic and Educational-Development of the Scheduled Castes. The Statement of Objects and Reasons which are reiterated in the counter-affidavit filed on behalf of the State of Tamil Nadu is as follows:

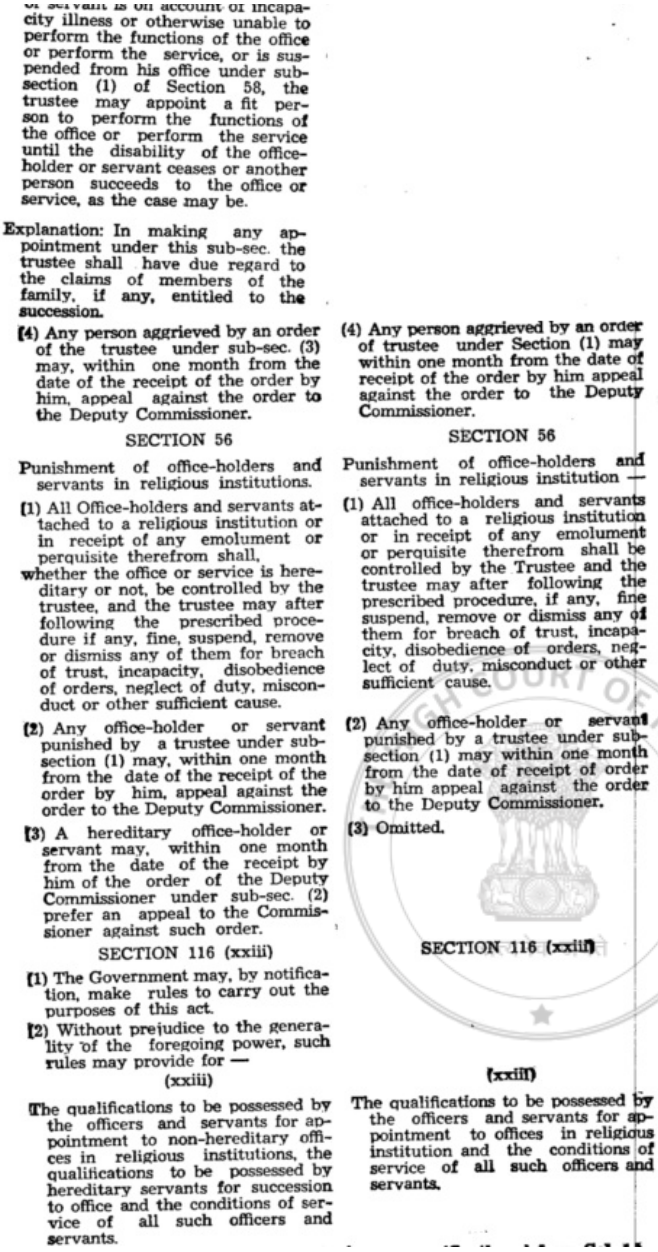
> In the year 1969 the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes has suggested in its report that the hereditary priesthood in the Hindu Society should be abolished, that the system can be replaced by an ecclesiastical organisation of men possessing the requisite educational qualifications who may be trained in recognised institutions in priesthood and that the line should be open to all candidates irrespective of caste, creed or race. In Tamil Nadu Archakas, Gurukkals and Poojaries are all Ulthurai servants in Hindu temples. The duties of Ulthurai servants relate mainly to the performance of poojas, rituals and other services to the deity, the recitation of mantras, vedas, prabandas, thevarams and similar invocations and the performance of duties connected with such performance and recitations. Sections 55 and 56 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959) provide for appointment of office holders and servants in the religious institutions by the trustees by applying the rule of hereditary succession also. As a step towards social reform Hindu temples have already been thrown open to all Hindus irrespective of caste....

In the light of the recommendations of the Committee and in view of the decision of this Court in Gazula Dasaratha Rama Rao v. State of Andhra Pradesh and Ors. MANU/SC/0040/1960 : [1961]2SCR931 and also as a further step towards social reform the Government considered that the hereditary principle of appointment of all office holders in the Hindu temples should be abolished and accordingly it proposed to amend Sections 55, 56 and 116 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act xxii of l959).

7. It is the complaint of the petitioners that by purporting to introduce social reform in the matter of appointment of Archakas and Pujaris, the State has really interfered with the religious practices of Saivite and Vaishnavite temples, and instead of introducing social reform, taken measures which would inevitably lead to defilement and desecration of the temples.

8. To appreciate the effect of the Amendment Act, it would be more convenient to set out the original Sections 55, 56 and 116 of the Principal Act and the same Sections as they stand after the amendment.

Unamended Section	Amended Section
Sec. 55 Appointment of office-holders and servants in religious institutions. —	Sec. 55: Appointment of office-holders and servants in religious institutions.
(1) Vacancies, whether permanent or temporary, among the office-holders or servants of a religious institution shall be filled up by the trustee in cases where the office or service is not hereditary.	(1) Vacancies, whether permanent or temporary among the office-holders or servants of a religious institution shall be filled up by the trustee in all cases:
	Explanation: The expression 'office-holders or servants shall include archakas and poojaris'.
(2) In cases where the office or service is hereditary, the person next in the line of succession shall be entitled to succeed.	(2) No person shall be entitled to appointment to any vacancy referred to in sub-section (1) merely on the ground that he is next in the line of succession to the last holder of office.'
(3) Where, however, there is a dispute respecting the right of succession, or where such vacancy cannot be filled up immediately, or where the person entitled to succeed is a minor without a guardian fit and willing to act as such or there is a dispute respecting the person who is entitled to act as guardian, or —	(3) Omitted.
Where the hereditary office-holder or servant is on account of insane	



of servant is on account of incapacity illness or otherwise unable to perform the functions of the office or perform the service, or is suspended from his office under sub-section (1) of Section 58, the trustee may appoint a fit person to perform the functions of the office or perform the service until the disability of the office-holder or servant ceases or another person succeeds to the office or service, as the case may be.

Explanation: In making any appointment under this sub-sec. the trustee shall have due regard to the claims of members of the family, if any, entitled to the succession.

(4) Any person aggrieved by an order of the trustee under sub-sec. (3) may, within one month from the date of the receipt of the order by him, appeal against the order to the Deputy Commissioner.

SECTION 56

Punishment of office-holders and servants in religious institutions.

(1) All Office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall, whether the office or service is hereditary or not, be controlled by the trustee, and the trustee may after following the prescribed procedure if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause.

(2) Any office-holder or servant punished by a trustee under sub-section (1) may, within one month from the date of the receipt of the order by him, appeal against the order to the Deputy Commissioner.

(3) A hereditary office-holder or servant may, within one month from the date of the receipt by him of the order of the Deputy Commissioner under sub-sec. (2) prefer an appeal to the Commissioner against such order.

SECTION 116 (xxiii)

(1) The Government may, by notification, make rules to carry out the purposes of this act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for —

(xxiii)

The qualifications to be possessed by the officers and servants for appointment to non-hereditary offices in religious institutions, the qualifications to be possessed by hereditary servants for succession to office and the conditions of service of all such officers and servants.

(4) Any person aggrieved by an order of trustee under Section (1) may within one month from the date of receipt of the order by him appeal against the order to the Deputy Commissioner.

SECTION 56

Punishment of office-holders and servants in religious institution —

(1) All office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall be controlled by the Trustee and the trustee may after following the prescribed procedure, if any, fine suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause.

(2) Any office-holder or servant punished by a trustee under sub-section (1) may within one month from the date of receipt of order by him appeal against the order to the Deputy Commissioner.

(3) Omitted.

SECTION 116 (xxiii)

(xxiii)

The qualifications to be possessed by the officers and servants for appointment to offices in religious institution and the conditions of service of all such officers and servants.

9. It is clear from a perusal of the above provisions that the Amendment Act does away with the hereditary tight of succession to the Office of Archaka even if the Archaka was qualified under Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964. It is claimed on behalf of the petitioners that as a result of the Amendment Act, their fundamental rights under Article 25(1) and Article 26(b) are violated since the effect of the amendment is as follows:

(a) The freedom of hereditary succession to the office of Archaka is abolished although succession to it is an essential and integral part of the faith of the Saivite and Vaishnavite worshippers.

(b) It is left to the Government in power to prescribe or not to prescribe such

qualifications us they may choose to adopt for applicants to this religious office while the Act itself gives no indication whatever of the principles on which the qualifications should be based. The statement of Objects, and Reasons which is adopted in the counter-affidavit on behalf of the State makes it clear that not only the scope but the object of the Amendment Act is to override the exclusive right of the denomination, to manage their own affairs in the matter of religion by appointing Archakas belonging to a specific denomination for the purpose of worship.

(c) The Amendment Act gives the right of appointment for the first time to the trustee who is under the control of the Government under the provisions of the Principal Act and this is the very negation of freedom of religion and the principle of non-interference by the State as regards the practice of religion and the right of a denomination to manage its own affairs in the matter of religion.

10. 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 Devaruv. The State of Mysore MANU/SC/0026/1957 : [1958]1SCR895 . 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 Agamas relating to the Saiva temples, the important of them being the Kaimi kagama 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 MANU/SC/0026/1957 : [1958]1SCR895 . 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 Venkatacharlu and Ors. 73 IND APP 156 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 Garbhangriha 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.

11. 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 temples of a different denomination. Dr. Kane has quoted the Brahmapurana on the topic of Punahpratistha (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 deities 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 an 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.

12. This Court in Sardar Syadna Taker Saifuddin Saheb v. The State of Bombay MANU/SC/0072/1962 : [1962] 2 S.C.R. 496 has summarised the position in law as follows (pages 531 and 532).

> The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt MANU/SC/0136/1954 : [1954]1SCR1005 . Mahant Jagannath Ramanuj Das v. The State of Orissa MANU/SC/0137/1954 : [1954]1SCR1046 ; Sri Venkatamona Devaru v. The State of Mysore MANU/SC/0026/1957 : [1958]1SCR895 ; Durgah Committee, Ajmer v. Syed Hussain Ali MANU/SC/0063/1961 : [1962]1SCR383 and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

13. Bearing these principles in mind, we have to approach the controversy in the present case.

14. Section 55 of the Principal Act as it originally stood and Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964 ensured, so far as temples with hereditary Archakas were concerned, that there would be no defilement of the image. By providing in Sub-section 2 of Section 55 that "in cases, where the office or service is hereditary, the person next in the line of succession shall be entitled to succeed", it ensured the personal qualification of the Archaka that he should belong to a particular sect or denomination as laid down in the Agamas. By Rule 12 it also ensured that the Archaka would be proficient in the mantras, vedas, prabandams, thevarams etc. and thus be fit for the performance of the puja, in other words, that he would be a person sufficiently qualified for performing the rituals and ceremonies. As already shown an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and this risk is avoided by insisting that the Archaka

should be an expert in the rituals and the ceremonies. By the Amendment Act the principle of next-in-the-line of succession is abolished. Indeed it was the claim made in the statement of Objects and Reasons that the hereditary principle of appointment of office-holders in the temples should be abolished and that the office of an Archaka should be thrown open to all candidates trained in recognised institutions in priesthood irrespective of caste, creed or race. The trustee, so far as the amended Section 55 went, was authorized to appoint any body as an Archaka in any temple whether Saivite or Vaishnavite as long as he possessed a fitness certificate from one of the institutions referred to in Rule 12. Rule 12 was a rule made by the Government under the Principal Act. That rule is always capable of being varied or changed. It was also open to the Government to make no rule at all or to prescribe a fitness certificate issued by an institution which did not teach the Agamas or traditional ritual s. The result would, therefore, be that any person, whether he is a Saivite or Vaishnavite or not, or whether he is proficient in the rituals appropriate to the temple or not, would be eligible for appointment as an Archaka and the trustee's discretion in appointing the Archaka without reference to personal and other qualifications of the Arehaka would be unbridled. The trustee is to function under the control of the State, because under Section 87 of the Principal Act the trustee was bound to obey all lawful orders issued under the provisions of the Act by the Government, the Commissioner, the Deputy Commissioner or the Assistant Commissioner. It was submitted that the innocent looking amendment brought the State right into the sanctum sanctorum through the agency of the trustee and the Archaka.

15. It has been recognised for a long time that where the ritual in a temple cannot be performed except by a person belonging to a denomination, the purpose of worship will be, defeated : See Mohan Lalji v. Gordhan Lalji Maharaji 35 All 283. In that case the claimants to the temple and its worship were Brahmins and the daughter's sons of the founder and his nearest heirs under the Hindu law. But their claim was rejected on the ground that the temple was dedicated to the sect following the principles of Vallabh Acharya in whose temples only the Gossains of that sect could perform the rituals and ceremonies and, therefore, the claimants had no right either to the temple or to perform the worship. In view of the Amendment Act and its avowed object there was nothing, in the petitioners' submission, to prevent the Government from prescribing a standardized ritual in all temples ignoring the Agamic requirements, and Archakas being forced on temples from denominations unauthorised by the Agamas. Since such a departure, as already shown, would inevitably lead to the defilement of the image, the powers thus taken by the Government under the Amendment Act would lead to interference with religious freedom guaranteed under Articles 25 and 26 of the Constitution.

16. The force of the above submissions made on behalf of the petitioners was not lost on the learned Advocate General of Tamil Nadu who appeared on behalf of the State. He, however, side tracked the issue by submitting that if we were to consider in isolation only the changes introduced in Section 55 by the Amendment Act the situation as described on behalf of the; petitioners could conceivably arise. He did not also admit that he was bound by either the statement of Objects and Reasons or the reiteration of the same in the counter-affidavit filed on behalf of the State. His submission was that we have to take the Principal Act as it now stands after the amendment and see what is the true effect of the same. He contended that the power given to the trustee under the amended Section 55 was not an unqualified power because, in his submission, that power had to be read in the context of Section 28 which controlled it. Section 28(1) provides as follows:

Subject to the provisions of the Tamil Nadu Temple Entry Authorization Act,

> 1947, the trustee of every religious institution is bound to administer its affairs and to apply its funds and properties in accordance with the terms of the trust, the usage of the institution and all lawful directions which a competent authority may issue in respect thereof and as carefully as a man of ordinary prudence would deal with such affairs, funds and properties if they were his own.

The learned Advocate General argued that the trustee was bound under this provision to administer the affairs of the temple in accordance with the terms of the trust and the usage of the institution. If the usage of the institution is that the Archaka or Pujari of the temple must be of a particular denomination then the usage would be binding upon him and he would be bound to make the appointment under Section 55 in accordance with the usage of appointing one from the particular denomination. There was nothing in Section 55, in his submission, which released him from his liability to make the appointment in accordance with the said usage. It was true that the principle of the next-in-line of succession was not binding on him when making the appointment of a new Archaka, but in his submission, that principle is no part of the usage, the real usage being to appoint one from the denomination. Moreover the amended section, according to him, does not require the trustee to exclude in every case the hereditary principle if a qualified successor is available and there was no reason why the trustee should not make the appointment of the next heir, if found competent. He, however, agreed, that there was no such legal obligation on the trustee under that section. He further contended that if the next in-line-of-succession principle is regarded as a usage of any particular temple it would be merely a secular usage on which legislation was competent under Article 25(2)(a) of the Constitution. Going further, he contended that if the hereditary principle was regarded as a religious practice that would be also amenable to legislation under Article 25(2)(b) which permits legislation for the purpose of social welfare and reform. He invited attention to the report of the Hindu Religious Endowments Commission (1960-1962) headed by Dr. C.P. Ramaswami Aiyar and submitted that there was a crying need for reform in this direction since the hereditary principle of appointment of Archakas had led to grave malpractices practically destroying the sanctity of worship in various religious institutions.

17. We have found no difficulty in agreeing with the learned Advocate General that Section 28(1) of the Principal Act which directs the trustee to administer the affairs of the temple in accordance with terms of the trust or the usage of the institution, would control the appointment of the Archaka to be made by him under the amended Section 55 of the Act. In a Saivite or a Vaishnavite temple the appointment of the Archaka will have to be made from a specified denomination, sect or group in accordance with the directions of the Agamas governing those temples. Failure to do so would not only be contrary to Section 28(1) but would also interfere with a religious practice the inevitable result of which would be to defile the image. The question, however, remains whether the trustee, while making appointment from the specified denomination, sect or group in accordance with the Agamas, will be bound to follow the hereditary principle as a usage peculiar to the temple. The learned Advocate-General contends that there is no such invariable usage. It may be that, as a matter of convenience, an Archaka's son being readily available to perform the worship may have been selected for appointment as an Archaka from times immemorial. But that, in his submission, was not a usage. The principle of next-in-line of succession has failed when the successor was a female or had refused to accept the appointment or was under some disability. In all such cases the Archaka was appointed from the particular denomination, sect or group and the worship was carried on with the help of such a substitute. It, however, appears to us that it is now too late in the day to contend that the hereditary principle in

appointment was not a usage. For whatever reasons, whether of convenience or otherwise, this hereditary principle might have been adopted, there can be no doubt that the principle had been accepted from antiquity and had also beep fully recognised in the unamended Section 55 of the Principal Act. Sub-section 2 of Section 55 provided that where the office or service is, hereditary, the person next in the line of succession shall be entitled to succeed, and only a limited right was given under Sub-section 3 to the trustee to appoint a substitute. Even in such cases the explanation to Sub-section 3 provided that in making the appointment of the substitute the trustee should have due regard to the claims of the members of the family, if any, entitled to the succession. Therefore, it cannot be denied as a fact that there are several temples in Tamil Nadu where the appointment of an Archaka is governed by the usage of hereditary succession. The real question, therefore, is whether such a usage should be regarded either as a secular usage or a religious usage. If it is a secular usage, it is obvious, legislation would be permissible under Article 25(1)(a) and if it is a religious usage it would be permissible if it falls squarely under Sub-section 25(1)(b).

18. Mr. Palkhivala on behalf of the petitioners insisted that the appointment of a person to a religious office in accordance with the hereditary principle is itself a religious usage and amounted to a viral religious practice and hence falls within Articles 25 and 26. In his submission, priests, who are to perform religious ceremonies may be chosen by a temple on such basis as the temple chooses to adopt. It may be election, selection, competition, nomination or hereditary succession. He, therefore, contended that any law which interferes with the aforesaid basis of appointment would violate religious freedom guaranteed by Articles 25 and 26 of the Constitution. In his submission the right to select a priest has an immediate bearing on religious practice and the right of a denomination to manage its own affairs in matters of religion. The priest is more important than the ritual and nothing could be more vital than choosing the priest. Under the pretext of social reform, he contended, the State cannot reform a religion out of existence and if any denomination has accepted the hereditary principle for choosing its priest that would be a religious practice vital to the religious faith and cannot be changed on the ground that it leads to social reform. Mere substitution of one method of appointment of the priest by another was, in his submission, no social reform.

19. It is true that a priest or an Archaka when appointed has to perform some religious functions but the question is whether the appointment of a priest is by itself a secular function or a religious practice. Mr. Palkhivala gave the illustration of the spiritual head of a math belonging to a denomination of a Hindu sect like the Shankaracharaya and expressed horror at the idea that such, a spiritual head could be chosen by a method recommended by the State though in conflict with the usage and the traditions of the particular institution. Where, for example, a successor, of a Mathadhipati is chosen by the Mathadhipati by giving him mantra-deeksha or where the Mathadhipati is chosen by his immediate disciples, it would be, he contended, extra-ordinary for the State to interfere and direct that some other mode of appointment should be followed on the ground of social reform. Indeed this may strike one as an intrusion in the matter of religion. But we are afraid such an illustration is inapt when we are considering the appointment of an Archaka of a temple. The Archaka has never been regarded as a spiritual head of any institution. He may be an accomplished person, well versed in the Agamas and rituals necessary to be performed in a temple but he does not have the status of a spiritual head. Then again the assumption made that the Archaka may be chosen in a variety of ways is not correct. The Dharamkarta or the Shebait makes the appointment and the Archaka is a servant of the temple. It has been held in K. Seshadri Aiyangar v. Ranga Bhattar I.L.R. 35 Mad 631 that even the position of the hereditary Archaka of a temple is that of a servant subject to the disciplinary power of the trustee.

The trustee can enquire into the conduct of such a servant and dismiss him for misconduct. As a servant he is subject to the discipline and control of the trustee as recognised by the unamended Section 56 of the Principal Act which provides all office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite there from shall, whether the office or service is hereditary or not be controlled by the trustee, and the trustee may, after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders neglect of duty, misconduct or other sufficient cause. That being the position of an Archaka, the act of his appointment by the trustee is essentially secular. He owes his appointment to a secular authority. Any lay founder of a temple may appoint the Archaka. The Shebaits and Managers of temples exercise essentially a secular function in choosing and appointing the Archaka. That the son of ah Archaka or the son's son has been continued in the office from generation to generation does not make any difference to the principle of appointment and no such hereditary Archaka can claim any right to the office. See: Kali Krishna Ray v. Makhan Lal Mookerjee I.L.R. Cal. 233; Nanabhai Narotamdas v. Trimbak Balwant Bhandare (1878-80) Vot. 4 Unreported printed judgments of the Bombay High Court page 169 and Maharanee Indurjeet Keoer v. Chundemun Misser 16 W R 99. Thus the appointment of an Archaka is a secular act and the fact that in some temples the hereditary principle was followed in making the appointment would not make the successive appointments anything but secular. It would only mean that in making the appointment the trustee is limited in respect of the sources of recruitment. Instead of casting his net wide for selecting a proper candidate, he appoints the next heir of the last holder of the office. That after his appointment the Archaka performs worship is no ground for holding that the appointment is either a religious practice or a matter of religion.

20. In view of Sub-section 2 of Section 55, as it now stands amended, the choice of the trustee in the matter of appointment of an Archaka is no longer limited by the operation of the rule of next-in-line of succession in temples where the usage was to appoint the Archaka on the hereditary principle. The trustee is not bound to make the appointment on the sole ground that the candidate is the next-in-line of succession to the last holder of Office. To that extent, and to that extent alone, the trustee is released from the obligation imposed on him by Section 28 of the Principal Act to administer the affairs in accordance with that part of the usage of a temple which enjoined hereditary appointments. The legislation in this respect, as we have shown, does not interfere with any religious practice or matter of religion and, therefore, is not invalid.

21. We shall now take separately the several amendments which were challenged as invalid. Section 2 of the Amendment Act amended Section 55 of the Principal Act and the important change which was impugned on behalf of the petitioners related to the abolition of the hereditary principle in the appointment of the Archaka. We have shown for reasons already mentioned that the change effected by the Amendment is not invalid. The other changes effected in the other provisions of the Principal Act appear to us to be merely consequential. Since the hereditary principle was done away with the words "whether the office or service is hereditary or not" found in Section 56 of the Principal Act have been omitted by Section 3 of the Amendment Act. By Section 4 of the latter Act Clause (XXIII) of Sub-section (2) in Section116 is suitably amended with a view to deleting the reference to the qualifications of hereditary and non-hereditary offices which was there in Clause (XXIII) of the Principal Act. The change is only consequential on the amendment of Section 55 of the Principal Act Sections 5 and 6 of the Amendment Act are also consequential on the amendment of Sections 55 and 56. These are all the sections in the Amendment Act and in our view the Amendment Act as a whole must be regarded as valid.

22. It was, however, submitted before us that the State had taken power under Section 116(2) Clause (XXIII) to prescribe qualifications to be possessed by the Archakas and, in view of the avowed object of the State Government to create a class of Archakas irrespective of caste, creed or race, it would be open to the Government to prescribe qualifications for the office of an Archaka which were in conflict with Agamas. Under Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964 proper provision has been made for qualifications of the Archakas and the petitioners have no objection to that rule. The rule still continues to be in force. But the petitioners apprehend that it is open to the Government to substitute any other rule for Rule 12 and prescribe qualifications which were in conflict with Agamic injunctions. For example at present the Ulthurai servant whose duty it is to perform pujas and recite vedic mantras etc. has to obtain the fitness certificate for his Office from the head of institutions which impart instructions in Agamas and ritualistic matters. The Government, however, it is submitted, may hereafter change its mind and prescribe qualifications which take no note of Agamas and Agamic rituals and direct that the Archaka candidate should produce a fitness certificate from an institution which does not specialize in teaching Agamas and rituals. It is submitted that the Act does not provide guidelines to the Government in the matter of prescribing qualifications with regard to the fitness of an Archaka for performing the rituals and ceremonies in these temples and it will be open to the Government to prescribe a simple standardized curriculum for pujas in the several temples ignoring the traditional pujas and rituals followed in those temples. In our opinion the apprehensions of the petitioners are unfounded. Rule 12 referred to above still holds the field and there is no good reason to think that the State Government wants to revolutionise temple worship by introducing methods of worship not current in the several temples. The rule making power conferred on the Government by Section 116 is only intended with a view to carry out the purposes of the Act which are essentially secular. The Act no where gives the indication that one of the purposes of the Act is to effect a change in the rituals and ceremonies followed in the temples. On the other hand, Section 107 of the Principal Act emphasizes that nothing contained in the Act would be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by Article 26 of the Constitution. Similarly Section 105 provides that nothing contained in the Act shall (a) save as otherwise expressly provided in the Act or the Rules made there under, affect any honour, emolument Or perquisite to which any person is entitled by custom or otherwise in any religious institution, or its established usage in regard to any other matter. Moreover, if any rule is framed by the Government which purports to interfere with the rituals and ceremonies of the temples the same will be liable to be challenged by those who are interested in the temple worship. In our opinion, therefore, the apprehensions now expressed by the petitioners are groundless and premature.

23. In the result these petitions fail but to the circumstances of the case there shall be no order as to costs.

MANU/SC/0026/1957

Equivalent Citation: AIR1958SC255, [1958]1SCR895

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 403 of 1956

Decided On: 08.11.1957

Appellants:**Venkataramana Devaru and Ors.**
Vs.
Respondent:**The State of Mysore and Ors.**

Hon'ble Judges/Coram:
Sudhi Ranjan Das, C.J., A.K. Sarkar, T.L. Venkatarama Aiyyar, Syed Jaffer Imam and Vivian Bose, JJ.

JUDGMENT

T.L. Venkatarama Aiyyar, J.

1. The substantial question of law, which arises for decision in this appeal, is whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Art. 26(b), is subject to, and can be controlled by, a law protected by Art. 25(2)(b), throwing open a Hindu public temple to all classes and sections of Hindus.

2. In the District of South Kanara which formed until recently part of the State of Madras and is now comprised in the State of Mysore, there is a group of three villages, Mannampady, Bappanad and Karnad collectively known as Moolky Petah; and in the village of Mannampady, there is an ancient temple dedicated to Sri Venkataramana, renowned for its sanctity. It is this institution and its trustees, who are the appellants before us. The trustees are all of them members of a sect known as Gowda Saraswath Brahmins. It is said that the home of this community in the distant past was Kashmir, that the members thereof migrated thence to Mithila and Bihar, and finally moved southwards and settled in the region around Goa in sixty villages. They continued to retain their individuality in their new surroundings, spoke a language of their own called Konkani, married only amongst themselves, and worshipped idols which they had brought with them. Subsequently, owing to persecution by the Portuguese, they migrated further south, some of them settling at Bhatkal and others in Cochin. Later on, a chieftain who was ruling over the Moolky area brought five of these families from Bhatkal, settled them at Mannampady, erected a temple for their benefit and installed their idol therein, which came to be known as Tirumalaivaru or Venkataramana, and endowed lands therefore. In course of time, other families of Gowda Saraswath Brahmins would appear to have settled in the three villages constituting Moolky, and the temple came to be managed by members of this community residing in those villages.

3. In 1915, a suit, O.S. No. 26 of 1915, was instituted in the Court of the Subordinate Judge of South Kanara under s. 92 of the Code of Civil Procedure for framing a scheme for this temple. Exhibit A-6 is the decree passed in that suit. It begins by declaring that "Shri Venkataramana temple of Moolky situated in the village of Mannampadi, Nadisal Mangane, Mangalore taluk is an ancient institution belonging to the Gowda Saraswath Brahmin community, i.e., the community to which the parties to the suit belong residing

in the Moolky Petah, i.e., the villages of Bappanad, Karnad and Mannampadi according to the existing survey demarcation". Clause 2 of the decree vests the general control and management of the affairs of the temple, both secular and religious, in the members of that community. Clause 3 provides for the actual management being carried on by a Board of Trustees to be elected by the members of the community aforesaid from among themselves. Then follow elaborate provisions relating to preparation of register of electors, convening of meetings of the general body and holding of elections of trustees. This decree was passed on March 9, 1921, and it is common ground that the temple has ever since been managed in accordance with the provisions of the scheme contained therein.

4. This was the position when the Madras Temple Entry Authorisation Act (Madras V of 1947), hereinafter referred to as the Act, was passed by the Legislature of the Province of Madras. It will be useful at this stage to set out the relevant provisions of the Act, as it is the validity of s. 3 thereof that is the main point for determination in this appeal. The preamble to the Act recites that the policy of the Provincial Government was "to remove the disabilities imposed by custom or usage on certain classes of Hindus against entry into Hindu temples in the Province which are open to the general Hindu public". Section 2(2) defines 'temple' as "a place by whatever name known, which is dedicated to or for the benefit of or used as of right by the Hindu community in general as a place of public religious worship". Section 3(1) enacts that,

> "Notwithstanding any law, custom or usage to the contrary, persons belonging to the excluded classes shall be entitled to enter any Hindu temple and offer worship therein in the same manner and to the same extent as Hindus in general; and no member of any excluded class shall, by reason only of such entry or worship, whether before or after the commencement of this Act, be deemed to have committed any actionable wrong or offence or be sued or prosecuted therefore."

5. Section 6 of the Act provides that,

> "If any question arises as to whether a place is or is not a temple as defined in this Act, the question should be referred to the Provincial Government and their decision shall be final, subject however to any decree passed by a competent civil court in a suit filed before it within six months from the date of the decision of the Provincial Government". It is the contention of the appellants - and that, in our opinion, is well-founded - that the true intent of this enactment as manifest in the above provisions was to remove the disability imposed on Harijans from entering into temples, which were dedicated to the Hindu public generally.

6 . Apprehending that action might be taken to put the provisions of this Act in operation with reference to the suit temple, the trustees thereof sent a memorial to the Government of Madras claiming that it was a private temple belonging exclusively to the Gowda Saraswath Brahmins, and that it therefore did not fall within the purview of the Act. On this, the Government passed an order on June 25, 1948, Exhibit B-13, that the temple was one which was open to all Hindus generally, and that the Act would be applicable to it. Thereupon, the trustees filed the suit, out of which the present appeal arises, for a declaration that the Sri Venkataramana temple at Moolky was not a temple as defined in s. 2(2) of the Act. It was alleged in the plaint that the temple was founded for the benefit of the Gowda Saraswath Brahmins in Moolky Petah, that it had been at all times under their management, that they were the followers of the Kashi Mutt, and

that it was the head of the Mutt that performed various religious ceremonies in the temple, and that the other communities had no rights to worship therein. The plaint was filed on February 8, 1949. On July 25, 1949, the Province of Madras filed a written statement contesting the claim. Between these two dates, the Madras Legislature had enacted the Madras Temple Entry Authorisation (Amendment) Act (Madras XIII of 1949), amending the definition of 'temple' in s. 2(2) of Act V of 1947, and making consequential amendments in the preamble and in the other provisions of the Act. According to the amended definition, a temple is "a place which is dedicated to or for the benefit of the Hindu community or any section thereof as a place of public religious worship". This Amendment Act came into force on June 28, 1949. In the written statement filed on July 25, 1949, the Government denied that the temple was founded exclusively for the benefit of the Gowda Saraswath Brahmins, and contended that the Hindu public generally had a right to worship therein, and that, therefore, it fell within the definition of temple as originally enacted. It further pleaded that, at any rate, it was a temple within the definition as amended by Act XIII of 1949, even if it was dedicated for the benefit of the Gowda Saraswath Brahmins, inasmuch as they were a section of Hindu community, and that, in consequence, the suit was liable to be dismissed.

7. On January 26, 1950, the Constitution came into force, and thereafter, on February 11, 1950, the plaintiffs raised the further contention by way of amendment of the plaint that, in any event, as the temple was a denominational one, they were entitled to the protection of Art. 26, that it was a matter of religion as to who were entitled to take part in worship in a temple, and that s. 3 of the Act, in so far as it provided for the institution being thrown open to communities other than Gowda Saraswath Brahmins, was repugnant to Art. 26(b) of the Constitution and was, in consequence, void.

8 . On these pleadings, the parties went to trial. The Subordinate Judge of South Kanara, who tried the suit, held that though the temple had been originally founded for the benefit of certain immigrant families of Gowda Saraswath Brahmins, in course of time it came to be resorted to by all classes of Hindus for worship, and that accordingly it must be held to be a temple even according to the definition of 'temple' in s. 2(2) of the Act, as it originally stood. Dealing with the contention that the plaintiffs had the right under Art. 26(b) to exclude all persons other than Gowda Saraswath Brahmins from worshipping in the temple, he held that "matters of religion" in that Article had reference to religious beliefs and doctrines, and did not include rituals and ceremonies, and that, in any event, Arts. 17 and 25(2) which had been enacted on grounds of high policy must prevail. He accordingly dismissed the suit with costs. Against this decision, the plaintiffs preferred an appeal to the High Court of Madras, A.S. No. 145 of 1952.

9. It is now necessary to refer to another litigation inter partes, the result of which has a material bearing on the issues which arise for determination before us. In 1951, the Madras Legislature enacted the Madras Hindu Religious and Charitable Endowments Act, (Madras XIX of 1951) vesting in the State the power of superintendence and control of temples and Mutts. The Act created a hierarchy of officials to be appointed by the State, and conferred on them enormous powers of control and even management of institutions. Consequent on this legislation, a number of writ applications were filed in the High Court of Madras challenging the validity of the provisions therein as repugnant to Arts. 19, 25 and 26 of the Constitution, and one of them was Writ Petition No. 668 of 1951 by the trustees of Sri Venkataramana Temple at Moolky. They claimed that the institution being a denominational one, it had a right under Art. 26(b) to manage its own affairs in matters of religion, without interference from any outside authority, and that the provisions of the Act were bad as violative of that right. By its judgment dated December 13, 1951, the High Court held that the Gowda Saraswath Brahmin community

was a section of the Hindu public, that the Venkataramana Temple at Moolky was a denominational temple founded for its benefit, and that many of the provisions of the Act infringed the right granted by Art. 26(b) and were void. Vide Devaraja Shenoy v. State of Madras MANU/TN/0086/1953 : (1952)ILLJ364Mad . Against this judgment, the State of Madras preferred an appeal to this Court, Civil Appeal No. 15 of 1953, but ultimately, it was withdrawn and dismissed on September 30, 1954. It is the contention of the appellants that by reason of the decision given in the above proceedings, which were inter partes, the issue as to whether the temple is a denominational one must be held to have been concluded in their favour.

10. To resume the history of the present litigation : Subsequent to the dismissal of Civil Appeal No. 15 of 1953 by this Court, the appeal of the plaintiffs, A.S. No. 145 of 1952, was taken up for hearing, and on the application of the appellants, the proceedings in the writ petition were admitted as additional evidence. On a review of the entire materials on record, including those relating to the proceedings in Writ Petition No. 668 of 1951, the learned Judges held it established that the Sri Venkataramana Temple was founded for the benefit of the Gowda Saraswath Brahmin community, and that it was therefore a denominational one. Then, dealing with the contention that s. 3 of the Act was in contravention of Art. 26(b), they held that as a denominational institution would also be a public institution, Art. 25(2)(b) applied, and that, there under, all classes of Hindus were entitled to enter into the temple for worship. But they also held that the evidence established that there were certain religious ceremonies and occasions during which the Gowda Saraswath Brahmins along were entitled to participate, and that that right was protected by Art. 26(b). They accordingly reserved the rights of the appellants to exclude all members of the public during those ceremonies and on those occasions, and these were specified in the decree. Subject to this modification, they dismissed the appeal. Against this judgment the plaintiffs have preferred Civil Appeal No. 403 of 1956 on a certificate granted by the High Court.

11. There is also before us Petition No. 327 of 1957 for leave to appeal under Art. 136. That was reference to the modifications introduced by the decree of the High Court in favour of the appellants. It must be mentioned that while the appeal was pending, there was a reorganisation of the States, and the District of South Kanara in which the temple is situated, was included in the State of Mysore. The State of Mysore has accordingly come on record in the place of the State of Madras, and is contesting this appeal, and it is that State that has now applied for leave to appeal against the modifications. The application is very much out of time, and Mr. M. K. Nambiar for the appellants vehemently opposes its being entertained at this stage. It is pointed out that not merely had the State of Madras not filed any application for leave to appeal to this Court against the decision of the Madras High Court but that it accepted it as correct and actually opposed the grant of leave to the appellants on the ground that the points involved were pure questions of fact, that no substantial question of law was involved, and that the judgment of the High Court had recognised the rights of all sections of the Hindu public. It is argued that when a party acquiesces in a judgment and deliberately allows the time for filing an appeal to lapse, it would not be a sufficient ground to condone the delay that he has subsequently changed his mind and desires to prefer an appeal. The contention is clearly sound, and we should have given effect to it, were it not that the result of this litigation would affect the rights of members of the public, and we consider it just that the matter should be decided on the merits, so that the controversies involved might be finally settled. We have accordingly condoned the delay, and have heard counsel on this application. In view of this, it is unnecessary to consider the questions discussed at the Bar as to the scope of Art. 132, who are entitled to appeal on the strength of a certificate granted under that Article, and the forum in

which the appeal should be lodged. It is sufficient to say that in this case no appeal, was, in fact, filed by the respondent.

12. On the arguments addressed before us, the following questions fall to be decided :

(1) Is the Sri Venkataramana Temple at Moolky, a temple as defined in s. 2(2) of Madras Act V of 1947 ?

(2) If it is, is it a denominational temple ?

(3) If it is a denominational temple, are the plaintiffs entitled to exclude all Hindus other than Gowda Saraswath Brahmins from entering into it for worship, on the ground that it is a matter of religion within the protection of Art. 26(b) of the Constitution ?

(4) If so, is s. 3 of the Act valid on the ground that it is a law protected by Art. 25(2)(b), and that such a law prevails against the right conferred by Art. 26(b); and

(5) If s. 3 of the Act is valid, are the modifications in favour of the appellants made by the High Court legal and proper ?

13. On the first question, the contention of Mr. M. K. Nambiar for the appellants is that the temple in question is a private one, and therefore falls outside the purview of the Act. This plea, however, was not taken anywhere in the pleadings. The plaint merely alleges that the temple was founded for the benefit of the Gowda Saraswath Brahmins residing in Moolky Petah. There is no averment that it is a private temple. It is true that at the time when the suit was instituted, the definition of 'temple' as it then stood, took in only institutions which were dedicated to or for the benefit of the Hindu public in general, and it was therefore sufficient for the plaintiffs to aver that the suit temple was not one of that character, and that it would have made no difference in the legal position whether the temple was a private one, or whether it was intended for the benefit of a section of the public. But then, the Legislature amended the definition of 'temple' by Act XIII of 1949, and brought within it even institutions dedicated to or for the benefit of a section of the public; and that would have comprehended a temple founded for the benefit of the Gowda Saraswath Brahmins but not a private temple. In the written statement which was filed by the Government, the amended definition of 'temple' was in terms relied on in answer to the claim of the plaintiffs. In that situation, it was necessary for the plaintiffs to have raised the plea that the temple was a private one, if they intended to rely on it. Far from putting forward such a plea, they accepted the stand taken by the Government in their written statement, and simply contended that as the temple was a denominational one, they were entitled to the protection of Art. 26(b). Indeed, the Subordinate Judge states in para. 19 of the judgment that it was admitted by the plaintiffs that the temple came within the purview of the definition as amended by Act XIII of 1949.

14. Mr. M. K. Nambiar invited our attention to Exhibit A-2, which is a copy of an award dated November 28, 1847, wherein it is recited that the temple was originally founded for the benefit of five families of Gowda Saraswath Brahmins. He also referred us to Exhibit A-6, the decree in the scheme suit, O.S. No. 26 of 1915, wherein it was declared that the institution belonged to that community. He contended on the basis of these documents and of other evidence in the case that whether the temple was a private or public institution was purely a matter of legal inference to be drawn from the above materials, and that, notwithstanding that the point was not taken in the pleadings, it

could be allowed to be raised as a pure question of law. We are unable to agree with this submission. The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding. We have accordingly declined to entertain this contention. We hold, agreeing with the Courts below, that the Sri Venkataramana Temple at Moolky is a public temple, and that it is within the operation of Act V of 1947.

(2) The next question is whether the suit temple is a denominational institution. Both the Courts below have concurrently held that at the inception the temple was founded for the benefit of Gowda Saraswath Brahmins; but the Subordinate Judge held that as in course of time public endowments came to be made to the temple and all classes of Hindus were taking part freely in worship therein, it might be presumed that they did so as a matter of right, and that, therefore, the temple must be held to have become dedicated to the Hindu public generally. The learned Judges of the High Court, however, came to a different conclusion. They followed the decision in Devaraja Shenoy v. State of Madras (supra), and held that the temple was a denominational one. The learned Solicitor-General attacks the correctness of this finding on two grounds. He firstly contends that even though the temple might have been dedicated to the Gowda Saraswath Brahmins, that would make it only a communal and not a denominational institution, unless it was established that there were religious tenets and practices special to the community, and that that had not been done. Now, the facts found are that the members of this community migrated from Gowda Desa first to the Goa region and then to the south, that they carried with them their idols, and that when they were first settled in Moolky, a temple was founded and these idols were installed therein. We are therefore concerned with the Gowda Saraswath Brahmins not as a section of a community but as a sect associated with the foundation and maintenance of the Sri Venkataramana Temple, in other words, not as a mere denomination, but as a religious denomination. From the evidence of P.W. 1, it appears that the Gowda Saraswath Brahmins have three Gurus, that those in Moolky Petah are followers of the head of the Kashi Mutt, and that it is he that performs some of the important ceremonies in the temple. Exhibit A is a document of the year 1826-27. That shows that the head of the Kashi Mutt settled the disputes among the Archakas, and that they agreed to do the puja under his orders. The uncontradicted evidence of P.W. 1 also shows that during certain religious ceremonies, persons other than Gowda Saraswath Brahmins have been wholly excluded. This evidence leads irresistibly to the conclusion that the temple is a denominational one, as contended for by the appellants.

The second ground urged on behalf of the respondent is that the evidence discloses that all communities had been freely admitted into the temple, and that though P.W. 1 stated that persons other than Gowda Saraswath Brahmins could enter only with the permission of the trustees, there was no instance in which such permission was refused. It was contended that the inference to be drawn from this was that the Hindu public generally had a right to worship in the temple. The law on the subject is well settled. When there is a question as to the nature and extent of a dedication of a temple, that has to be determined on the terms of the deed of endowment if that is available, and where it is not, on other materials legally admissible; and proof of long and uninterrupted user

would be cogent evidence of the terms thereof. Where, therefore, the original deed to endowment is not available and it is found that all persons are freely worshipping in the temple without let or hindrance, it would be a proper inference to make that they do so as a matter of right, and that the original foundation was for their benefit as well. But where it is proved by production of the deed of endowment or otherwise that the original dedication was for the benefit of a particular community, the fact that members of other communities were allowed freely to worship cannot lead to the inference that the dedication was for their benefit as well. For, as observed in Babu Bhawan Din v. Gir Bar Saroop [MANU/PR/0056/1939], "it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away". On the findings of the Court below that the foundation was originally for the benefit of the Gowda Saraswath Brahmin community, the fact that other classes of Hindus were admitted freely into the temple would not have the effect of enlarging the scope of the dedication into one for the public generally. On a consideration of the evidence, we see no grounds for differing from the finding given by the learned Judges in the court below that the suit temple is a denominational temple founded for the benefit of the Gowda Saraswath Brahmins, supported as it is by the conclusion reached by another Bench of learned Judges in Devaraja Shenoy v. State of Madras (supra). In this view, there is no need to discuss whether this issue is res judicata by reason of the decision in Writ Petition No. 668 of 1951.

(3) On the finding that the Sri Venkataramana Temple at Moolky is a denominational institution founded for the benefit of the Gowda Saraswath Brahmins, the question arises whether the appellants are entitled to exclude other communities from entering into it for worship on the ground that it is a matter of religion within the protection of Art. 26(b). It is argued by the learned Solicitor-General that exclusion of persons from entering into a temple cannot ipso facto be regarded as a matter of religion, that whether it is so must depend on the tenets of the particular religion which the institution in question represents, and that there was no such proof in the present case. Now, the precise connotation of the expression "matters of religion" came up for consideration by this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [MANU/SC/0136/1954 : [1954]1SCR1005], and it was held therein that it embraced not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not merely its Gnana but also its Bakti and Karma Kandas. The following observations of Mukherjea J., (as he then was) are particularly apposite to the present discussion :

> "In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are

> religious practices and should be regarded as matters of religion within the meaning of article 26(b)."

15. It being thus settled that matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion, we have now to consider whether exclusion of a person from entering into a temple for worship is a matter of religion according to Hindu Ceremonial Law. There has been difference of opinion among the writers as to whether image worship had a place in the religion of the Hindus, as revealed in the Vedas. On the one hand, we have hymns in praise of Gods, and on the other, we have highly philosophical passages in the Upanishads describing the Supreme Being as omnipotent, omniscient and omnipresent and transcending all names and forms. When we come to the Puranas, we find a marked change. The conception had become established of Trinity of Gods, Brahma, Vishnu and Siva as manifestations of the three aspects of creation, preservation and destruction attributed to the Supreme Being in the Upanishads, as, for example, in the following passage in the Taittiriya Upanishad, Brigu Valli, First Anuvaka :

> "That from which all beings are born, by which they live and into which they enter and merge."

16. The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation. These injunctions have had such a powerful hold over the minds of the people that daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu. It was during this period that temples were constructed all over the country dedicated to Vishnu, Rudra, Devi, Skanda, Ganesha and so forth, and worship in the temple can be said to have become the practical religion of all sections of the Hindus ever since. With the growth in importance of temples and of worship therein, more and more attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of worship of the deity, and numerous are the treatises that came to be written for its exposition. These are known as Agamas, and there are as many as 28 of them relating to the Saiva temples, the most important of them being the Kamikagama, the Karanagama and the Suprabedagama, while the Vikhanasa and the Pancharatra are the chief Agamas of the Vaishnavas. These 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. The following passage from the judgment of Sadasiva Aiyar J. in Gopala Muppanar v. Subramania Aiyar MANU/TN/0114/1914 : (1914)27MLJ253 , gives a summary of the prescription contained in one of the Agamas :

> "In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbagriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram."

17. The other Agamas also contain similar rules.

18. According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as Samprokshana) have to be performed for restoring the sanctity of the shrine. Vide judgment of Sadasiva Aiyar J. in Gopala Muppanar v. Subramania Aiyar (supra). In

Sankaralinga Nadan v. Raja Rajeswara Dorai [MANU/PR/0019/1908], it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. The conclusion is also implicit in Art. 25 which after declaring that all persons are entitled freely to profess, practice and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenants of Hinduism. We must accordingly hold that if the rights of the appellants have to be determined solely with reference to Art. 26(b), then s. 3, of Act V of 1947, should be held to be bad as infringing it.

(4) That brings us on to the main question for determination in this appeal, whether the right guaranteed under Art. 26(b) is subject to a law protected by Art. 25(2)(b) throwing the suit temple open to all classes and sections of Hindus. We must now examine closely the terms of the two articles. Art. 25, omitting what is not material, is as follows :

> "(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.
>
> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -
>
> . . .

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus". Article 26 runs as follows :

> "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -
>
> (a) to establish and maintain institutions for religious and charitable purposes;
>
> (b) to manage its own affairs in matters of religion;
>
> (c) to own and acquire movable and immovable property; and
>
> (d) to administer such property in accordance with law."

19. We have held that matters of religion in Art. 26(b) include the right to exclude persons who are not entitled to participate in the worship according to the tenets of the institution. Under this Article, therefore, the appellants would be entitled to exclude all persons other than Gowda Saraswath Brahmins from entering into the temple for worship. Article 25(2)(b) enacts that a law throwing open public temples to all classes of Hindus is valid. The word 'public' includes, in its ordinary acceptation, any section of

the public, and the suit temple would be a public institution within Art. 25(2)(b), and s. 3 of the Act would therefore be within its protection. Thus, the two Articles appear to be apparently in conflict. Mr. M. K. Nambiar contends that this conflict could be avoided if the expression "religious institutions of a public character" is understood as meaning institutions dedicated to the Hindu community in general, though some sections thereof might be excluded by custom from entering into them, and that, in that view, denominational institutions founded for the benefit of a section of Hindus would fall outside the purview of Art. 25(2)(b) as not being dedicated for the Hindu community in general. He sought support for this contention in the law relating to the entry of excluded classes into Hindu temples and in the history of legislation with reference thereto, in Madras.

20. According to the Agamas, a public temple enures, where it is not proved to have been founded for the benefit of any particular community, for the benefit of all Hindus including the excluded classes. But the extent to which a person might participate in the worship therein would vary with the community in which he was born. In Venkatachalapathi v. Subbarayadu [(1890) I.L.R. 13 Mad. 293], the following statement of the law was quoted by the learned Judges with a apparent approval:

> "Temple, of course, is intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. Sudras and Baniyas can go into the hall of the temple. Brahmins can go into the holy of the holies."

21. In Gopala Muppanar v. Subramania Aiyar (supra), Sadasiva Aiyar J. observed as follows at p. 258 :

> "It is clear from the above that temples were intended for the worship of people belonging to all the four castes without exception. Even outcastes were not wholly left out of the benefits of temple worship, their mode of worship being however made subject to severe restrictions as they could not pass beyond the Dwajastambam (and some times not beyond the temple outer gate) and they could not have a sight of the images other than the procession images brought out at the times of festivals."

22. The true position, therefore, is that the excluded classes were all entitled to the benefit of the dedication, though their actual participation in the worship was insignificant. It was to remove this anomaly that legislation in Madras was directed for near a decade. First came the Malabar Temple Entry Act (Madras XX of 1938). Its object was stated to be "to remove the disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into, and offering worship in, Hindu temples". Section 2(4) defined 'temple' as "a place which is used as a place of public worship by the Hindu community generally except excluded classes.....". Sections 4 and 5 of the Act authorised the trustees to throw such temples open to persons belonging to the excluded classes under certain conditions. This Act extended only to the District of Malabar. Next came the Madras Temple Entry Authorisation and Indemnity Act (Madras Act XXII of 1939). The preamble to the Act states that "there has been a growing volume of public opinion demanding the removal of disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into and offering worship in Hindu temples", and that "it is just and desirable to authorize the trustees in charge of such temples to throw them open to.....the said classes". Section 3 of the Act authorised the trustees to throw open the temples to them. This Act extended to the whole of the Province of Madras. Then we come to the Act, which has given rise to this litigation, Act V of 1947. It has been already mentioned that, as originally passed, its

object was to lift the ban on the entry into temples of communities which are excluded by custom from entering into them, and 'temple' was also defined as a place dedicated to the Hindus generally.

23. Now, the contention of Mr. Nambiar is that Art. 25(2)(b) must be interpreted in the background of the law as laid down in Gopala Muppanar v. Subramania Aiyar (supra) and the definition of 'temple' given in the statutes mentioned above, and that the expression "religious institutions of a public character" must be interpreted as meaning institutions which are dedicated for worship to the Hindu community in general, though certain sections thereof were prohibited by custom from entering into them, and that, in that view, denominational temples will fall outside Art. 25(2)(b). There is considerable force in this argument. One of the problems which had been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchables. A custom which denied to large sections of Hindus the right to use public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic principle, and efforts were being made to secure its abolition by legislation. This culminated in the enactment of Art. 17, which is as follows :

> "'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

24. Construing Art. 25(2)(b) in the light of Art. 17, it is arguable that its object was only to permit entry of the excluded classes into temples which were open to all other classes of Hindus, and that that would exclude its application to denominational temples. Now, denominational temples are founded, ex hypothesi, for the benefit of particular sections of Hindus, and so long as the law recognizes them as valid - and Art. 26 clearly does that - what reason can there be for permitting entry into them of persons other than those for whose benefit they were founded ? If a trustee diverts trust funds for the benefit of persons who are not beneficiaries under the endowment, he would be committing a breach of trust, and though a provision of the Constitution is not open to attack on the ground that it authorises such an act, is it to be lightly inferred that Art. 25(2)(b) validates what would, but for it, be a breach of trust and for no obvious reasons of policy, as in the case of Art. 17 ? There is, it should be noted, a fundamental distinction between excluding persons from temples open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation. The former will be hit by Art. 17 and the latter protected by Art. 26, and it is the contention of the appellants that Art. 25(2)(b) should not be interpreted as applicable to both these categories and that it should be limited to the former. The argument was also advanced as further supporting this view, that while Art. 26 protects denominational institutions of not merely Hindus but of all communities such as Muslims and Christians, Art. 25(2)(b) is limited in its operation to Hindu temples, and that it could not have been intended that there should be imported into Art. 26(b) a limitation which would apply to institutions of one community and not of others. Article 26, it was contended, should therefore be construed as falling wholly outside Art. 25(2)(b), which should be limited to institutions other than denominational ones.

25. The answer to this contention is that it is impossible to read any such limitation into the language of Art. 25(2)(b). It applies in terms to all religious institutions of a

public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a priori reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in a Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Art. 25(2)(b).

26. It is then said that if the expression "religious institutions of a public character" in Art. 25(2)(b) is to be interpreted as including denominational institutions, it would clearly be in conflict with Art. 26(b), and it is argued that in that situation, Art. 26(b) must, on its true construction, be held to override Art. 25(2)(b). Three grounds were urged in support of this contention, and they must now be examined. It was firstly argued that while Art. 25 was stated to be "subject to the other provisions of this Part" (Part III), there was no such limitation on the operation of Art. 26, and that, therefore, Art. 26(b) must be held to prevail over Art. 25(2)(b). But it has to be noticed that the limitation "subject to the other provisions of this Part" occurs only in clause (1) of Art. 25 and not in clause (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practise and propagate religion. It is this right that is subject to the other provisions in the Fundamental Rights Chapter. One of the provisions to which the right declared in Art. 25(1) is subject is Art. 25(2). A law, therefore, which falls within Art. 25(2)(b) will control the right conferred by Art. 25(1), and the limitation in Art. 25(1) does not apply to that law.

27. It is next contended that while the right conferred under Art. 26(d) is subject to any law which may be passed with reference thereto, there is no such restriction on the right conferred by Art. 26(b). It is accordingly argued that any law which infringes the right under Art. 26(b) is invalid, and that s. 3 of Act V of 1947 must accordingly be held to have become void. Reliance is placed on the observations of this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (supra) at page 1023, in support of this position. It is undoubtedly true that the right conferred under Art. 26(b) cannot be abridged by any legislation, but the validity of s. 3 of Act V of 1947 does not depend on its own force but on Art. 25(2)(b) of the Constitution. The very Constitution which is claimed to have rendered s. 3 of the Madras Act void as being repugnant to Art. 26(b) has, in Art. 25(2)(b), invested it with validity, and, therefore, the appellants can succeed only by establishing that Art. 25(2)(b) itself is inoperative as against Art. 26(b).

28. And lastly, it is argued that whereas Art. 25 deals with the rights of individuals, Art. 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to that denomination, that would remain unaffected by Art. 25(2)(b). This contention ignores the true nature of the right conferred by Art. 25(2)(b). That is a right conferred on "all classes and sections of Hindus" to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Art. 25(1) or against a denomination under Art. 26(b). The fact is that though Art. 25(1) deals with rights of individuals, Art. 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Art. 25(1) and Art. 26(b).

29. The result then is that there are two provisions of equal authority, neither of them

being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction.

Applying this rule, if the contention of the appellants is to be accepted, then Art. 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Art. 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Art. 25(2)(b) will prevail. While, in the former case, Art. 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Art. 26(b). We must accordingly hold that Art. 26(b) must be read subject to Art. 25(2)(b).

> (5) It remains to deal with the question whether the modifications made in the decree of the High Court in favour of the appellants are valid. Those modifications refer to various ceremonies relating to the worship of the deity at specified times each day and on specified occasions. The evidence of P.W. 1 establishes that on those occasions, all persons other than Gowda Saraswath Brahmins were excluded from participation thereof. That evidence remains uncontradicted, and has been accepted by the learned Judges, and the correctness of their finding on this point has not been challenged before us. It is not in dispute that the modifications aforesaid relate, according to the view taken by this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (supra), to matters of religion, being intimately connected with the worship of the deity. On the finding that the suit temple is a denominational one, the modifications made in the High Court decree would be within the protection of Art. 26(b).

30. The learned Solicitor-General for the respondents assails this portion of the decree on two grounds. He firstly contends that the right to enter into a temple which is protected by Art. 25(2)(b) is a right to enter into it for purposes of worship, that that right should be liberally construed, and that the modifications in question constitute a serious invasion of that right, and should be set aside as unconstitutional. We agree that the right protected by Art. 25(2)(b) is a right to enter into a temple for purposes of worship, and that further it should be construed liberally in favour of the public. But it does not follow from this that that right is absolute and unlimited in character. No member of the Hindu public could, for example, claim as part of the rights protected by Art. 25(2)(b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services, which the Archakas alone could perform. It is again a well-known practice of religious institutions of all denominations to limit some of its services to persons who have been specially initiated, though at other times, the public in general are free to participate in the worship. Thus, the right recognised by Art. 25(2)(b) must necessarily be subject to some limitations or regulations, and one such limitation or regulation must arise in the process of harmonising the right conferred by Art. 25(2)(b) with that protected by Art. 26(b).

31. We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26(b), must yield to the overriding right declared by Art. 25(2)(b) in favour of the public to enter into a

temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Art. 25(2)(b) overrides that right so as to extinguish it, but whether it is possible - so to regulate the rights of the persons protected by Art. 25(2)(b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2)(b) as to give effect to Art. 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected.

32. The question then is one of fact as to whether the rights claimed by the appellants are strictly denominational in character, and whether after giving effect to them, what is left to the public of the right of worship is substantial. That the rights allowed by the High Court in favour of the appellants are purely denominational clearly appears from the evidence on record. P.W. 1 put forward two distinct rights on behalf of the Gowda Saraswath Brahmins. He firstly claimed that no one except members of his community had at any time the right to worship in the temple except with their permission; but he admitted that the members of the public were, in fact, worshipping and that permission had never been refused. This right will be hit by Art. 25(2)(b), and cannot be recognised. P.W. 1 put forward another and distinct right, namely, that during certain ceremonies and on special occasions, it was only members of the Gowda Saraswath Brahmin community that had the right to take part therein, and that on those occasions, all other persons would be excluded. This would clearly be a denominational right. Then, the question is whether if this right is recognised, what is left to the public of their right under Art. 25(2)(b) is substantial. The learned Solicitor-General himself conceded that even apart from the special occasions reserved for the Gowda Saraswath Brahmins, the other occasions of worship were sufficiently numerous and substantial, and we are in agreement with him. On the facts, therefore, it is possible to protect the rights of the appellants on those special occasions, without affecting the substance of the right declared by Art. 25(2)(b); and, in our judgment, the decree passed by the High Court strikes a just balance between the rights of the Hindu public under Art. 25(2)(b) and those of the denomination of the appellants under Art. 26(b) and is not open to objection.

33. Then, it is said that the members of the public are not parties to the litigation, and that they may not be bound by the result of it, and that, therefore, the matter should be set at large. Even if the members of the public are necessary parties to this litigation, that cannot stand in the way of the rights of the appellants being declared as against the parties to the action. Moreover, the suit was one to challenge the order of the Government holding that all classes of Hindus are entitled to worship in the suit temple. While the action was pending, the Constitution came into force, and as against the right claimed by the plaintiffs under Art. 26(b), the Government put forward the rights of the Hindu public under Art. 25(2)(b). There has been a full trial of the issues involved, and a decision has been given, declaring the rights of the appellants and of the public. When the appellants applied for leave to appeal to this Court, that application was resisted by the Government inter alia on the ground that the decree of the High Court was a proper decree recognising the rights of all sections of the public. In view of this,

there is no force in the objection that the public are not, as such, parties to the suit. It is their rights that have been agitated by the Government and not any of its rights.

34. In the result, both the appeal and the application for special leave to appeal must be dismissed.

35. The parties will bear their own costs throughout. The appellants will take their costs out of the temple funds.

36. Appeals Dismissed.

MANU/SC/0138/1954

Equivalent Citation: AIR1954SC388, [1954]1SCR1055

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 1 of 1954 and Civil Appeal No. 7 of 1954

Decided On: 18.03.1954

Appellants:**Ratilal Panachand Gandhi**
Vs.
Respondent:**The State of Bombay and Ors.**

Hon'ble Judges/Coram:
M.C. Mahajan, C.J., B.K. Mukherjea, Ghulam Hasan, Sudhi Ranjan Das and Vivian Bose, JJ.

JUDGMENT

B.K. Mukherjea, J.

1. These two connected appeals are directed against a common judgment of a Division Bench of the Bombay High Court, dated the 12th of September, 1952, by which the learned judges dismissed two petitions under article 226 of the Constitution presented respectively by the appellants in the two appeals.

2. The petitioners in both the cases assailed the constitutional validity of the Act, known as the Bombay Public Trusts Act, 1950, (Act XXIX of 1950), which was passed by the Bombay Legislature with a view to regulate and make better provisions for the administration of the public and religious trusts in the State of Bombay. By a notification, dated the 30th of January, 1951, the Act was brought into force on an from the 1st of March, 1951, and its provisions were made applicable to temples, maths and all other trusts, express or constructive, for either a public, religious or charitable purpose or both. The State of Bombay figures as the first respondent in both the appeals and the second respondent is the Charity Commissioner, appointed by the first respondent under section 3 of the impugned Act to carry out the provisions of the Act throughout the State of Bombay. In one of the appeals, namely, Appeal No. 1 of 1954, the Assistant Charity Commissioner for the region of Baroda has been impleaded as the third respondent.

3. The appellant in Appeal No. 1 of 1954 is a Swetamber Murtipujak Jain and a resident of Vejalpar in the district of Punchmahals within the State of Bombay. He is a Vahivatdar or manager of a Jain public temple or Derasar situated in the same village and the endowed properties appertaining to the temples are said to be of the value of Rs. 5 lakhs. The petition, out of which this appeal arises, was filed by the appellant on the 29th of May, 1952, before the High Court of Bombay, in its Appellate Side, against the three respondents mentioned above, praying for the issue of a writ in the nature of mandamus or direction ordering and directing the respondents to forbear from enforcing or taking any steps for the enforcement of the Bombay Public Trusts Act, 1950, or of any of its provisions and particularly the provisions relating to registration of public and religious trusts managed by the appellant and payment of contributions levied in respect of the same. The grounds urged in support of the petition were that a number of provisions of Act conflicted with the fundamental rights of the petitioner guaranteed

under articles 25 an 26 of the Constitution and that the contribution levied on the trust was a tax which it was beyond the competence of the State Legislature to impose.

4. A similar application under article 226 of the Constitution and praying for almost the identical relief was filed by the appellants in the other appeal, namely, Appeal No. 7 of 1954 before the High Court in its Original Side on the 4th of August, 1952. The petitioners in this case purport to be the present trustees of the Parsi Panchayat Funds and Properties in Bombay registered under the Parsi Public Trusts Registration Act of 1936. These properties constitute one consolidated fund and they are administered by the trustees for the benefit of the entire Parsi community and the income is spent for specified religious and charitable purposes of a public character as indicated by the various donors. The petitioners challenged the validity of the Bombay Public Trusts Act, 1950, substantially on the grounds that they interfered with the freedom of conscience of the petitioners and with their right freely to profess, practice and propagate religion and also with their right to manage their own affairs in matters of religion and thereby contravened the provisions of articles 25 and 26 of the Constitution. The levy of contribution under section 58 of the Act was also alleged in substance and effect to be a tax on public, religious and charitable trusts, a legislation upon which it was beyond the competency of the State Legislature to enact.

5. As practically the same questions were involved in both the petitions, the learned Chief Justice of Bombay directed the transfer of the later petition from the Original Side to the Appellate Side of the High Court and both of them were heard together by a Division Bench consisting of the Chief Justice himself and Shah J. Both the petitions were disposed of by one and the same judgment delivered on the 12th of September, 1952, and the learned Judges rejected all contentions put forward on behalf of the respective applicants and dismissed the petitions. The petitioners in both the cases have now come before us in appeal on the strength of certificates granted by the High Court under article 132(1) of the Constitution.

6. To appreciate the points that have been canvassed before us by the parties to these appeals, it may be convenient to refer briefly to the scheme and salient features of the impugned Act.

7. The object of the Act, as stated in the preamble, is to regulate and make better provisions for the administration of public, religious and charitable trusts within the State of Bombay. It includes, within its scope, all public trusts created not merely for religious but for purely charitable purposes as well and extends to people of all classes and denominations in the State. The power of superintendence and administration of public trusts is vested, under the Act, in the Charity Commissioner, who is to be appointed by the State Government in the manner laid down in Chapter II. The State Government may also appoint such number of Deputy and Assistant Charity Commissioners as it thinks fit and these officers would be placed in charge of particular regions or particular trusts or classes of trusts as may be considered necessary. Section 9, with which Chapter III of the Act begins, defines what 'charitable purposes' are, and section 10 and 11 lay down that a public trust shall not be void on the ground of uncertainty, nor shall it fail so far as a religious and charitable purpose is concerned, even if a non-charitable or non-religious purpose, which is included in it, cannot be given effect to. Chapter IV provides for registration of public trusts. Section 18 makes it obligatory upon the trustee of every public trust to which the Act applies, to make an application for the registration of the trust, of which he is the trustee. In case of omission on the part of a trustee to company with this provision, he is debarred under section 31 of the Act from instituting a suit to enforce any right on behalf of such trust

in a court of law. Chapter V deals with accounts and audit. Section 32 imposes a duty upon every trustee of a public trust, which has been registered under the Act, to keep regular accounts. Under section 33, these accounts are to be audited annually in such manner as may be prescribed. Section 34 prescribes it to be the duty of the auditor to prepare balance-sheets and to report all irregularities in the accounts. Section 35 lays down how trust money has to be invested, and section 36 prohibits alienation of immovable trust property except by way of leases for specified periods, without the previous sanction of the Charity Commissioner. Section 37 authorizes the Charity Commissioner and his subordinate officers to enter on and inspect or cause to be entered on and inspected any property belonging to a public trust. A proviso is added to the section laying down that in entering upon any such property, the officers making the entry shall give reasonable notice to the trustee and shall have due regard to the religious practices and usages of the trust. Among other powers and functions of the Charity Commissioner, which are detailed in Chapter VII, section 44 enables a Charity Commissioner to be appointed to act as a trustee of a public trust by a court of competent jurisdiction or by the author of the trust. Section 47 deals with the powers of the court to appoint new trustee or trustees and under clause (3) of this section, the court, after making enquiry, may appoint the Charity Commissioner or any other person as a trustee to fill up the vacancy. Section 48 provides for the levy of administrative charges in case where the Charity Commissioner is appointed a trustee. Section 50 appears to be a substitute for section 92 of the Civil Procedure Code and contains provisions of almost the same character in respect to suits regarding public trusts. One of the reliefs that can be claimed in such a suit is a declaration as to what proportion of the trust property or interest therein shall be allocated to any particular object of the trust. Section 55 purports to lay down the rule of cy pres in relation to the administration of religious and charitable trusts; but it extends that doctrine much further than is warranted by the principles laid down by the Chancery Courts in England or recognised by judicial pronouncements in this country. Section 56 deals with the powers of the courts in relation to the application of the cypress doctrine. Section 57 provides for the establishment of a fund to be called "The Public Trust Administration Fund' which shall vest in the Charity Commissioner and clause (2) lays down what sums shall be credited to this fund. Section 58 makes it obligatory on every public trust to pay to this fund a contribution at such time and in such manner as may be prescribed. Under the rules prescribed by the Government on this subject, the contribution has been fixed at the rate of 2 per cent. per annum upon the gross annual income of every public trust. Failure to pay this contribution will make the trustee liable to the penalties provided for in section 66 of the Act. Section 60 provides that the Public Trusts Administration Fund shall, subject to the provisions of the Act and subject to the general and special orders of the State Government, be applicable to the payment of charges for expenses incidental to the regulation of public trusts and generally for carrying out the provisions of the Act. Sections 62 and 66 which are comprised in Chapter IX of the Act, deal with the appointment and qualifications of assessors. The function of the assessors is to assist and advise the Charity Commissioner or his subordinate officers in the matter of making enquiries which may be necessary under the provisions of the Act. Chapter X prescribes the penalties that will be inflicted on trustees in case of their violating any of the provisions of the Act. Chapter XI deals with procedural matters in connection with jurisdiction of courts and rights of appeal, and the twelfth or the last chapter deals with certain miscellaneous matters. These, in brief, are the provisions of the Act which are material for our present purpose.

8. The contentions that have been raised by the learned counsel, who appeared in support of the appeals, may be considered under two heads. In the first place, a number of provisions of the Act have been challenged as invalid on the ground that they

conflict with freedom of religion and the right of the religious denominations or sects, represented by the appellants in each case, to manage their own affairs in matter of religion guaranteed under articles 25 and 26 of the Constitution. The sections of the Act, the validity of which has been challenged on this ground are sections 18, 31, to 37, 44, 47, 48, 50, clauses (e) and (g), 55, 58 and 66. The second head of the appellants' argument relates to the levy of contribution as laid down in sections 57 and 58 of the Act and the argument is that this being in substance the levy of a tax, it was beyond the competence of the State Legislature to enact such a provision.

9. As regards the first branch of the contention, a good deal of argument has been advanced before us relating to the measure and extent of the fundamental rights guaranteed under articles 25 and 26 of the Constitution. It will be necessary to address ourselves to this question at the outset, because without a clear appreciation of the scope and ambit of the fundamental rights embodied in the two articles of the Constitution, it would not be possible to decide whether there has been a transgression of these rights by any of the provisions of the Act. This identical question came up for consideration before this court in Civil Appeal No. 38 of 1953 (The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar MANU/SC/0136/1954 : 1954 S.C.R. 1005 and it was discussed at some length in our judgment in that case. It will be sufficient for our present purpose to refer succinctly to the main principles that this court enunciated in that judgment.

10. Article 25 of the Constitution guarantees to every person and not merely to the citizens of India the freedom of conscience and the right freely to profess, practice and propagate religion. This is subject, in every case, to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the article. Sub-clause (a) of clause (2) saves the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-clause (b) reserves the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices. Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sectioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people. What sub-clause (a) of clause (2) of article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.

11. So far as article 26 is concerned, it deals with a particular aspect of the subject of religious freedom. Under this article, any religious denomination or a section of it has the guaranteed right to establishing maintain institutions for religious and charitable purposes and manage in its own way all affairs in matters of religion. Rights are also given to such denomination or a section of it to acquire and own movable and immovable properties and to administer such properties in accordance with law. The language of the two clauses (b) and (d) of article 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no

legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here again it should be remembered that under article 26(d), it is the religious denomination itself which has been given the right to administer it's property in accordance with any law which the State may validly impose. Any law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by article 26(d) of the Constitution.

12. The moot point for consideration, therefore, is where is the line to be drawn between what are matters of religion and what are not ? Our Constitution-makers have made no attempt to define what 'religion' is and it is certainly not possible to frame an exhaustive definition of the word 'religion' which would be applicable to all classes of persons. As has been indicated in the Madras case referred to above, the definition of the 'religion' given by Fields J. in the American case of Davis v. Beason 133 U.S. 333, does not seem to us adequate or precise.

> "The term 'religion'", thus to observed the learned Judge in the case mentioned above, "has reference to one's views of his relations to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His Will. It is often confounded with cults or form of worship of a particular sect, but is distinguishable from the latter".

It may be noted that 'religion is not necessarily theistic and in fact there are well known religions in India like Buddhism and Jainism which do not believe in the existence of God or of any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been suggested by one of the learned Judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine for belief. It has its outward expression in acts as well.

We may quote in this connection the observations of Latham C.J. of the High Court of Australia in the case of Adelaide Company v. The Commonwealth 67 C.L.R. 116, 124.), where the extent of protection given to religious freedom by section 116 of the Australian Constitution came up for consideration.

> "It is sometimes suggested in discussion on the subject of freedom of religion that, though the civil Government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."

13. In our opinion, as we have already said in the Madras case, these observations apply fully to the provision regarding religious freedom that is embodied in our

Constitution.

14. Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines.

Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed as certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities.
No outside authorities has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.
Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on' these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar J. in the case of Jamshedji v. Soonabai 33 Bom. 122, and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad baj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think, are quite appropriate for our present purpose.

> "If this the belief of the community"

thus observed the learned Judge, "and it is proved undoubtedly to be the belief of the Zoroastrian community, - a secular Judge is bound to accept that belief - it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by article 26(b) of our Constitution.

15. The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in cases of doubt, as Chief Justice Latham pointed out in the case (Vide Adelaide Company v. The Commonwealth, 67 C.L.R. 116, 129.) referred to above, the court should take a common sense view and be actuated by considerations of practical necessity. It is in the light of these principles that we will proceed to examine the different provisions of the Bombay Public Trusts Act, the validity of which has been challenged on behalf of the appellants.

16. We will first turn to the provisions of the Act which relate to registration of trusts. Under Section 18, it is incumbent on the trustee of every public, religious or charitable trust to get the same registered. Section 66 of the Act makes it an offence for a trustee not to comply with this provision and prescribes punishment for such offence. Section 31 provides for further compulsion by laying down that no suit shall lie on behalf of a public trust to enforce its right in any court of law unless the trust is registered. A compulsory payment of a fee of Rs. 25 has also been prescribed by the rules framed by the Government for registration of a trust. The provisions of registration undoubtedly have been made with a view to ensure due supervision of the trust properties and the

exercise of proper control over them. These are matters relating to administration of trust property as contemplated by article 26(d) of the Constitution and cannot, by any stretch of imagination, be held to be an attempt at interference with the rights of religious institutions to manage their religious affairs. The fees leviable under section 18 are credited to the Public Trust Administration Fund constituted under section 57 and are to be spent for meeting the charges incurred in the regulation of public trusts and for carrying into effect the provisions of the Act. The penalties provided are mere consequential provisions and involve no infraction of any fundamental right. It has been argued by the learned counsel for the appellants that according to the tenets of the Jain religion the property of the temple and its income exist for one purpose only, viz., the religious purpose, and a direction to spend money for purposes other than those which are considered sacred in the Jain scriptures would constitute interference with the freedom of religion. This contention does not appear to us to be sound. These expenses are incidental to proper management and administration of the trust estate like payment of municipal rates and taxes, etc., and cannot amount to diversion of trust property for purposes other than those which are prescribed by any religion.

17. The next group of sections to which objections have been taken comprises sections 32 to 37. Section 32 compels a trustee of a public trust to keep accounts in such form as may be prescribed by the Charity Commissioner. Section 33 provides for the auditing of such accounts and section 34 makes it the duty of the auditor to prepare balance sheets and to report irregularities, if any, that are found in the accounts. These are certainly not matters of religion and the objection raised with regard to the validity of these provisions seem to be altogether baseless. Section 35 relates to investment of money belonging to trusts. It is a well settled principle of law that trustees in charge of trust properties should not keep cash money in their hands which are not necessary for immediate expenses, and a list of approved securities upon which trust money could be invested is invariably laid down in every legislation on the subject of trust. There is nothing wrong in section 36 of the Act. Immovable trust properties are inalienable by their very nature and a provision that they could be alienated only with the previous sanction of the Charity Commissioner seems to us to be a perfectly salutary provision.

18. Section 37 has been objected to on the ground that an unrestricted right of entry in any religious premises might offend the sentiments of the followers of that religion; but the section has expressly provided that the officers making the entry shall give reasonable notice of their intended entry to the trustees and shall have due regard to the religious practice and usages of the trust. Objection has next been taken to section 44 and 47 of the Act. Section 44 lays down that the Charity Commissioner can be appointed to act as trustee of a public trust by a court of competent jurisdiction or by the author of the trust. If the author of the trust choose to appoint the Charity Commissioner a trustee, no objection can possibly be taken to such action; but if the court is authorised to make such appointment, the provisions of this section in the general form as it stands appear to us to be open to serious objection. If we take for example the case of a religious institution like a Math at the head of which stands the Mathadhipati or spiritual superior. The Mathadhipati is a trustee according to the provisions of the Act and if the court is competent to appoint the Charity Commissioner as a superior of a Math, the result would be disastrous and it would amount to a flagrant violation of the constitutional guarantee which religions institutions have under the Constitution in regard to the management of its religious affairs. This is not a secular affair at all relating to the administration of the trust property. The very object of a Math is to maintain a competent line of religious teachers for propagating and strengthening the religious doctrines of a particular order or sect and as there could be no Math without a Mathadhipati as its spiritual head, the substitution of the Charity

Commissioner for the superior would mean a destruction of the institution altogether. The evil is further aggravated by the provision of clause (4) of the section which says that the Charity Commissioner shall be the sole trustee and it shall not be lawful to appoint him as a trustee along with other persons. In our opinion, the provision of section 44 relating to the appointment of the Charity Commissioner as a trustee of any public trust by the court without any reservation in regard to religious institutions like temples and Maths is unconstitutional and must be held to be void. The very same objections will apply to the provisions of clauses (3) to (6) of section 47. The court can certainly be empowered to appoint a trustee to fill up a vacancy caused by any of the reasons mentioned in section 47(1), and it is quite a salutary principle that in making the appointment the court should have regard to matter specified in clause (4) of section 47; but the provision of clause (3) to the extent that it authorises the court to appoint the Charity Commissioner as the trustee - and who according to the provisions of clause (5) is to be the sole trustee - cannot be regarded as valid in regard to religious institutions of the type we have just indicated. To allow the Charity Commissioner to function as the Shebait of a temple or the superior of a Math would certainly amount to interference with the religious affairs of this institution. We hold accordingly that the provisions of clauses (3) to (6) of section 47 to the extent that they relate to the appointment of the Charity Commissioner as a trustee of a religious trust like temple and Math are invalid. If these provisions of section 47 are eliminated, no objection can be taken to the provision of section 48 as it stands. This section will in that event be confined only to cases where the Charity Commissioner has been appointed a trustee by the author of the trust himself and the administrative charges provided by this section can certainly be levied on the trust.

19. We now come to section 50 and exception has been taken to clauses (e) and (g) of that section. It is difficult to see how these provisions can at all be objected to. Section 50, as has been said above, is really a substitute for section 92 of the Civil Procedure Code and relates to suits in connection with public trusts. Clause (e) of section 50 is an exact reproduction of clause (e) of section 92 of the Civil Procedure Code and clause (g) also reproduces substantially the provision of clause (g) of section 92 of the Civil Procedure Code. There is no question of infraction of any fundamental right by reason of these provisions.

20. A more serious objection has been taken by the learned counsel for the appellants to the provisions of section 55 and 56 of the impugned Act and it appears to us that the objections are to a great extent well founded. These sections purport to lay down how the doctrine of cy pres is to be applied in regard to the administration of public trust of a religious or charitable character. The doctrine of cy pres as developed by the Equity Courts in England, has been adopted by our Indian courts since a long time past. The provisions of section 55 and 56, however, have extended the doctrine much beyond its recognised limits and have further introduced certain principles which run counter to well established rules of law regarding the administration of charitable trusts. When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settler, the court would not, when there is a general charitable intention expressed by the settler, allow the trust to fail but would execute it cy pres, that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give a suitable directions regarding the objects upon which the trust money can be spent. It is well established, however, that where the donors' intention can be given effect to, the court has no authority to sanction any deviation from the intentions expressed by the settler on the grounds of

expediency and the court cannot exercise the power of applying the trust property or its income to other purposes simply because it considers them to be more expedient or more beneficial than what the settler had directed (Vide Halsbury, 2nd Edn., Vol. IV, p. 228.). But this is exactly what has been done by the provision of section 55(c) read with section 56 of the Act. These provisions allow a diversion of property belonging to a public trust or the income thereof to objects other than those intended by the donors if the Charity Commissioner is of opinion, and the court confirms its opinion and decides, that carrying out wholly or partially the original intentions of the author of the trust or the object for which the trust was created is not wholly or partially expedient, practicable, desirable or necessary; and that the property or income of the public trust or any portion thereof should be applied to any other charitable or religious object. Whether a provision like this is reasonable or not is not pertinent to our enquiry and we may assume that the legislature, which is competent to legislate on the subject of charitable and religious trust, is at liberty to make any provision which may not be in consonance with the existing law; but the question before us is, whether such provision invades any fundamental right guaranteed by our Constitution, and we have no hesitation in holding that it does so in the case of religious trusts. A religious sect or denomination has the undoubted right guaranteed by the Constitution to manage its own affairs in matters of religion and this includes the right to spend the trust property or its income for the religious purposes and objects indicated by the founder of the trust or established by usage obtaining in a particular institution. To divert the trust property or funds for purposes which the Charity Commissioner or the court considers expedient or proper, although the original objects of the founder can still be carried out, is to our minds an unwarrantable encroachment on the freedom of religious institution in regard to the management of their religious affairs. It is perfectly true, as has been stated by the learned counsel for the appellants, that it is an established maxim of the Jain religion that Divadravya or religious property cannot be diverted to purposes other than those which are considered sacred in the Jain scriptures. But apart from the tenets of the Jain religion, we consider it to be a violation of the freedom of religion and of the right which a religious denomination has under our Constitution to manage its own affairs in matters of religion, to allow any secular authority to divert the trust money for purposes other than those for which the trust was created. The State can step in only when the trust fails or is incapable of being carried out either in whole or in part. We hold, therefore, that clause (3) of section 55, which contains the offending provision and the corresponding provision relating to the powers of the court occurring in the latter part of section 56(1), must be held to be void.

21. The only other section of the Act to which objection has been taken is section 58 and it deals with the levy of contribution upon each public trust, at certain rates to be fixed by the rules, in proportion to the gross annual income of such trust. This together with the other sums specified in clause (2) section 57 makes up the Public Trusts Administration Fund, which is to be applied for payment of charges incidental to the regulation of public trusts and for carrying into effect the provisions of this Act. As this contribution is levied purely for purposes of due administration of the trust property and for defraying the expenses incurred in connection with the same, no objection could be taken to the provision of the section on the ground of its infringing any fundamental rights of the appellants. The substantial contention that has been raised in regard to the validity of this provision comes, however, under the second head of the appellants' arguments indicated above. The contention is that the contribution which is made payable under this section is in substance a tax and the Bombay State Legislature was not competent to enact such provision within the limits of the authority exercisable by it under the Constitution. This raises a point of some importance which requires to be examined carefully.

22. It is not disputed before us that if the contribution that is levied under section 58 is a tax, a legislation regarding it would be beyond the competence of the State Legislature. Entries 46 to 62 of List II in Schedule VII of the Constitution specify the different kinds of taxes and duties in regard to which the State Legislature is empowered to legislate; and a tax of the particular type that we have here is not covered by any one of them. It does not come also under any specific entry in List III or even of List I. The position, therefore, is that if the imposition is held to be a tax, it could come either under entry 97 of List I, which includes taxes not mentioned in Lists II and III or under article 248(1) of the Constitution and in either case it is Parliament alone that has the competency to legislate upon the subject. If, on the other hand, the imposition could be regarded as "fees", it can be brought under entry 47 of the Concurrent List, the Act itself being a legislation under entries 10 and 28 of that List. The whole controversy thus centers round a point as to whether the contribution leviable under section 50 is a fee or tax and what in fact are the indicia and characteristics of a fee which distinguish it from a tax. This identical question came up for consideration before this court in Civil Appeal No. 38 of 1953 referred to above, in connection with the provision of section 76 of the Madras Religious and Charitable Endowments Act, and the view which we have taken in that case regarding the proper criterion for determining whether an imposition is a fee or tax is in substantial agreement with the view taken by the Bombay High Court in the present case. As the matter has been discussed at some length in the Madras case, it will not be necessary to repeat the same discussions over again. It will be enough if we indicate the salient principles that were enunciated by this court in its judgment in the Madras case mentioned above.

23. We may start by saying that although there is no generic difference between a tax and a fee and in fact they are only different forms in which the taxing power of a State manifests itself, our Constitution has, in fact, made a distinction between a tax and a fee for legislative purposes. While there are various entries in the three legislative lists with regard to various forms of taxation, there is an entry at the end of each one of these lists as regards 'fees' which could be levied in respect of every one of the matters that are included therein. This distinction is further evidenced by the provisions of the Constitution relating to Money bills which are embodied in articles 110 and 199. Both these articles provide that a bill should not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or for the demand or payment of fees for licences or fees for services rendered, whereas a bill relating to imposition, abolition or regulation of a tax would always be reckoned as a Money Bill. There is no doubt that a fee resembles a tax in many respects and the question which presents difficulty is, what is the proper test by which the one could be distinguished from the other ? A tax is undoubtedly in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the other and equally important characteristic of a tax is, that the imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax. It follows, therefore, that although a tax may be levied upon particular classes of persons or particular kinds of property, it is imposed not to confer any special benefit upon individual persons and the collections are all merged in the general revenue of the State to be applied for general public purposes. Tax is a common burden and the only return which the taxpayer gets is participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of quid pro quo which is absent in a tax. It may not be possible to prove in every case that the fees that are collected by the Government approximate to

the expenses that are incurred by it in rendering any particular kind of services or in performing any particular work for the benefit of certain individuals. But in order that the collections made by the Government can rank as fees, there must be co-relation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. This can be proved by showing that on the face of the legislative provision itself, the collections are not merged in the general revenue but are set apart and appropriated for rendering these services. Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly and in the second place, the amount collected must be ear-marked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purposes. As has been pointed out in the Madras case mentioned above, too much stress should not be laid on the presence or absence of what has been called the 'coercive' element. It is not correct to say that as distinguished from taxation which is compulsory payment, the payment of fees is always voluntary, it being a matter of choice with individuals either to accept the service or not for which fees are to be paid. We may cite for example the case of a licence fee for a motor car. It is argued that this would be a fee and not a tax, as it is optional with a person either to own a motor car or not and in the case he does not choose to have a motor car, he need not pay any fees at all. But the same argument can be applied in the case of a house tax or land tax. Such taxes are levied only on those people who own lands or houses and it could be said with equal propriety that a man need not own any house or land and in that event he could avoid the payment of these taxes. In the second place, even if the payment of a motor licence fee is a voluntary payment, it can still be regarded as a tax if the fees that are realised on motor licences have no relation to the expenses that the Government incurs in keeping an office or bureau for the granting of licence and the collections are not appropriated for that purpose but go to the general revenue. Judging by this test, it appears to us that the High Court was perfectly right in holding that the contributions imposed under section 58 of the Bombay Public Trusts Act are really fees and not taxes. In the first place, the contributions, which are collected under section 58, are to be credited to the Public Trusts Administration Fund as constituted under section 57. This is a special fund which is to be applied exclusively for payment of charges for expenses incidental to the regulation of public trusts and for carrying into effect the provisions of the Act. It vests in the Charity Commissioner and the custody and investments of the money belonging to the fund and the disbursement and payment therefrom are to be effected not in the manner in which general revenues are disbursed, but in the way prescribed by the rules made under the Act. The collections, therefore, are not merged in the general revenue, but they are ear-marked and set apart for this particular purpose. It is true that under section 6A of the Act, the officers and servants appointed under the Act are to draw their pay and allowances from the Consolidated Fund of the State but we agree with what has been said by Mr. Justice Shah of the Bombay High Court that this provision is made only for the purpose facilitating the administration and not with a view to mix up the fund with the general revenue collected for Government purpose. This would be clear from the provision of section 6B which provides that out of the Public Trust Administration Fund all the costs, which the State Government may determine on account of pay, pension, leave and other allowances of all the officers appointed under this Act, shall be paid. It is the Public Trusts Administration Fund, therefore, which meets all the expenses of the administration of trust property within the scheme of the Act, and it is to meet the expenses of this administration that these collections are levied. As has been said by the learned Judges of the High Court, according to the concept of a modern State, it is not necessary that services should be rendered only at

the request of particular people, it is enough that payments are demanded for rendering services which the State considers beneficial in the public interests and which the people have to accept whether they are willing or not. Our conclusion, therefore, is that section 58 is not ultra vires of the State Legislature by reason of the fact that it is not a tax but a fee which comes within the purview of entry 47 of List III in Schedule VII of the Constitution.

24. The result, therefore, is that in our opinion the appeals are allowed only in part and a mandamus will issue in each of these cases restraining the State Government and the Charity Commissioner from enforcing against the appellants the following provisions of the Act to wit :-

(i) Section 44 of the Act to the extent that it relates to the appointment of the Charity Commissioner as a trustee of religious public trust by the court,

(ii) the provisions of clauses (3) to (6) of section 47, and

(iii) clause (c) of section 55 and the part of clause (1) of section 56 corresponding thereto.

25. The other prayers of the appellants stand dismissed. Each party will bear his own costs in both the appeal.

MANU/SC/0407/1995

Equivalent Citation: AIR1995SC2001, 1995Supp(4)SCC286, [1995]Supp1SCR542

IN THE SUPREME COURT OF INDIA

Civil Appeals Nos. 4958-60 of 1990, etc. etc.

Decided On: 20.06.1995

Appellants: **Most. Rev. P.M.A. Metropolitan and Ors.**
Vs.
Respondent: **Moran Mar Marthoma and Ors.**

Hon'ble Judges/Coram:
R.M. Sahai, B.P. Jeevan Reddy and S.C. Sen, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: K. Parasaran, C.S. Vaidyanathan, T.L. Vishwanatha Iyer, Fali Sam Nariman, Advs. and R.F. Nariman, Sr. Advs

ORDER

R.M. Sahai, J.

1. When Lord Jesus Christ was asked by a youngman who was possessed of property what was the road to heaven, the Holy Bible records it in Chapter 19 of the New Testament - the Gospel According to St. Mathew thus,

> **16.** And, behold, one came and said unto him, Good Master, what good thing shall I do, that I may have eternal life?
>
> **17.** And he said unto him, Why cellist thou me good? there is none good but one, that is, God: but if thou wilt enter into life, keep the commandments.
>
> **18.** He saith unto him, Which? Jesus said, Thou shalt do no murder, Thou shalt not commit adultery, Thou shalt not steel, Thou shalt not bear false witness,
>
> **19.** Honour the father and thy mother: and, Thou shalt love thy neighbour as thyself.
>
> **20.** The young man saith unto him. All these things have I kept from my youth up: what lack I yet?
>
> **21.** Jesus said unto him, if thou wilt be perfect, go and sell that thou hast, and give to the poor, and thou shalt have treasure in heaven; and come and follow me.
>
> **22.** But when the young man heard that saying, he went away sorrowful: for he had great possessions.

Turning 'away sorrowful', is the long and short of this litigation between two rival groups of Jacobite Christian Community of Malabar which has been going on for more than hundred years apparently for religious and spiritual supremacy over the Church but really for administrative control and temporal powers over vast assets which have accumulated out of 3000 star pagodas created in Trust in 1808 for charitable purposes

by one Moran Mar Marthoma VI popularly called 'Dionysius the Great'. This is the third round between the parties in this Court, the two earlier being in 1954 and 1959. While deciding the appeal in 1959 this Court had observed that the dispute had been going on for a considerable length of time which has brought in its train protracted litigation involving ruinous costs. The effect of the decision was that for sometime both the parties resolved their differences by mutual adjustment, but 'those who hoped - fondly, as events have proved, that the decision of the Supreme Court in Moran Mar Basselios Catholicos v. Thukalan Paulo Avira and Ors. and the reported reconciliation following upon that decision would give the quietus to the litigation, prolific, prolonged and ruinous, arising out of the faction in the Malankara Jacobite Syrian Church between what is known as the Patriarch's Party on the one hand and what is known as the Catholicos' Party on the other, counted without the resourcefulness of those entrenched in and of those covetous of positions of power, and we dare say, of profit, and of those who, for one reason or another, have a vested interest in the continuance of the dispute.' [Raman Nayar, J. in Appeal Suit No. 269 of 1960 decided on 3rd April 1964]

2. How the much negotiated peace and quiet arrived at by written adjustments worked out by issuing letters from both the groups was shaken even before expiry of 15 years since the judgment was delivered by this Court in September, 1958 and what led to filing of numerous suits eight of which were consolidated by the Additional District Judge but were heard and decided by a learned Single judge of the High Court, as they were transferred under orders of this Court, and were ultimately decided in appeal and cross objections by the Division Bench giving rise to these appeals and various legal issues including whether the suit under Section 9 of the CPC was maintainable, effect of Places of Worship (Special Provisions) Act, 1991 and whether the decision in earlier suit filed by the appellants operated as res judicata can be, better, appreciated if the history how the Malankara Church came to be established, what is its nature and how the two groups Patriarch of Antioch and Catholicos came to be formed leading to internecine struggle and litigation may be noticed in brief. The adversarial duel between the two rival groups has assumed so much of publicity that it has found place even in the Encyclopedia of Religion. It may be prefaced with brief observations about the Christian religion and the Church.

3. Religion is founded on faith and belief. Faith emanates from conscience and belief is result of teaching and learning. Christianity is 'a religion that traces its origins to Jesus of Nazareth, whom it affirms to be the chosen one (Christ) of God' Encyclopedia Britannica, Volume 5, Page 693. 'It is embodied both in its principles and precepts in the Scriptures of the Old and New Testaments, which all denominations of Christians believe to be a Divine revelation, and the only rule of faith and obedience' [Faiths of the World by James Gardner, Volume 1, p 516]. It is 'a historical religion. It locates within the events of human history both the redemption it promises, and the revelation to which it lays claim' [The Encyclopedia of Religion, Volume 3, p. 348]. 'In its origin Christianity is Eastern rather than Western. Jesus was a Palestinian Jew, and during the early, formative centuries of the church's life the Greek and Syriac East was both numerically stronger and intellectually more creative than the Latin West. Christianity came to India many centuries before it reached Europe as it is believed that St. Thomas, one of the original apostles of Jesus Christ, visited India in 56 A.D. and found the first Christian settlement in the South' [Religion in India by Dr. Karan Singh], In A.D. 37 Apostolic See at Antioch was established by St. Peter to whom the stewardship of Church was entrusted by Lord Jesus Christ. It took root in Kerala within 20 years of the epoch making events in Jerusalem, the crucifixion, resurrection and ascension of the Lord Jesus Christ. St. Thomas, one of the 12 apostles of Jesus Christ visited India in A.D. 51/52 and established 7 Churches in the Malayalam speaking parts of South India.

They are known as Malankara Jacobite (or orthodox) Syrian Church, "Malankara" means "Malayalam speaking" The two Syrian Orthodox Churches in Syria and India, along with the Egyptian (Coptic), Ethiopian, and Armenian Churches, belong to the group of Ancient, or Oriental Orthodox, Churches, wrongly called "monophysite". Their Christology is essentially the same as that of the Eastern Orthodox related to the patriarchate of Constantinople. They affirm the perfect humanity as well as the perfect divinity of Christ, inseparably and unconfused united in the divine-human nature of the person of Christ' [Encyclopedia of Religion, Volume 14, page 227].

4. Jacobite Church is, 'a name which the Syrian Church assumes to itself. When the Syrian Churches are interrogated as to the reason of this name they usually allege that they are the descendants of Jacob' [Faiths of the World by James Gardner, Volume II). 'Known to the West as Jacobites (after Jacob Baradeus, c. 500-578, the reorganiser of the West Syrians and Egyptians in the sixty century), the Syrian Orthodox Church is found mainly in Syria, Lebanon, Jordan, Turkey, India, the United States, the Federal Republic of Germany, and Sweden. In 1985 the total number of Jacobites, including 1.8 million Indians, was abut 2 million, in two separate jurisdiction-one with Patriarch Ignatius Zakka as head in Damascus, Syria and the other with Catholicos Mar Thoma Mathews I as head, in Kottayam, Kerala, India' [Encyclopedia of Religion. Volume 14 p.227]. The word 'church' refers both to the Christian religious community and to the building used for Christian worship' [Encyclopedia Britannica, Volume 5 page 739]. The Christian religion is one, but, 'Christians differ greatly in their beliefs about the nature of the church' [Encyclopedia Britannica, Volume 5, page 739] which was, 'originally applied in the classical period to an official assembly of citizens.... In the Septuagint translation of the Old Testament (3rd-2nd centuries B.C.) the term ecclesia is used for the general assembly of the Jewish people especially when gathered for a religious purpose such as hearing the Law (Deut. ix, 10, xviii, 16; etc.) In the New Testament it is used of the whole body of believing Christians throughout the world (e.g., Matt, xvi, 18), of the believers in a particular area (e.g. Acts v, 11) and also of the congregation meeting in a particular house-the "house-church")' [Encyclopedia Britannica, Volume 5 page 739]. 'The four marks or characteristics by which the church is said to be distinguished are recited in the creed - holy, catholic and apostolic'.

5. Coming to the history of Jacobite Syrian Church it is, both, fascinating and eventful. The long period stretching from A.D. 51-52 can be conveniently divided in three one, the religious and the formative period which saw the foundation of the church and the vicissitudes through which it passed. The second can be said to be the golden period, a period of affluence and prosperity, in which the church not only acquired assets and became financially rich but is also marked for administrative efficiency imparted by different metropolitans who were consecrated from time to time. But wealth breeds dissension, disharmony and discontent. And that is the unfortunate story of the last period beginning form 1879. More than 100 years have rolled by since then when the storm of strife for supremacy over the Church was taken to courts but the dust has not settled down till now. The first two periods have been described by the Royal Court of Appeal as, 'Grand Periods', the first commencing from the foundation of the church and ending with the overthrow of the Portuguese power in India sometime in 1663, and the second period commencing from that year or 1665 and extending to the period when the famous Mulunthuruthy Synod was held in 1876 which was remarkable for more than one reason, including the one which led to struggle for spiritual supremacy and administrative control over temporal matters of the Church through the courts. The events till 1876 have been discussed in great detail in the judgment of the Royal Court of Appeal. The period thereafter commencing from the last quarter of 19th century and beginning of 20th century is remarkable for creation of Catholicate of East in this

country and framing of Constitution by the Malankara Association. All this is discussed in Moron Mar Basselios (supra).

6. Religious spirit was dominant in the first period. Every move was religion oriented. The keen desire to delve more and more in spiritual than temporal matters was exhibited from tune to time. Three important events took place during this long period. Although each was distance in time from the other but everyone was significant in its own way in shaping the future of the Church. The first, of course, was establishing of the Church by St. Thomas who exercised great influence and ordained two men as Arch-Deacons, one from each of the two respectable families, that is, Sankarapuri and Pakalomattiom. In A.D. 200 the devotees had written to Demetrius the Bishop of Alexandria, requesting him to send a teacher, to instruct them in the doctrines elating to the beliefs in Christ. The second in the sequence was significant not for the Syrian Church only, but for the entire Christian community. It was an epoch making event. The first ecumenical council was held in 325 A.D. at Nicea. Priests and prelates from all parts of Christendom were invited. Representatives of all dioceses in the Christian world attended the Synod. Christians of India were represented by their bishop or metropolitan known as Johannes, metropolitan of Persia and India. The council among other matters was concerned with matters relating to the revival and establishment of Christianity, revision of the scriptures and framing a Code of faith and rituals. But the most important decision, of far reaching consequence was that the ecclesiastical jurisdiction of the Christandom was settled under four ecclesiastical heads and four Patriarchs were appointed over four sees - Rome, Constantinople, Alexandria and Antioch. India was placed under the Patriarch of Antioch. The other decision taken was that the great metropolitan of the East was proclaimed as the Catholicos of the East. It was laid down that the Catholics appointed at Tigris (Baghdad) shall manage the affairs of the Eastern churches subject to that Patriarch of Antioch was common and could exercise all the functions of Patriarchs. These decisions were enforced and the Patriarch of Antiouch started taking action upon it. Till about A.D. 1599 Bishops (who were called 'episcopas' or Metropolitans) were deputed to Malabar from time to time by the Catholicate of the East in Persia and by the Patriarchs of other Eastern Churches for discharging spiritual functions like ordination of priests in the Malankara Church. But all other functions were carried on by the Indian born ecclesiastical dignitary known as the 'Arch-Deacon' who was not possessed of the full spiritual grace of a Bishop.

7. The next or the third important event during this period was the famous Koonan Cross Oath at Muttancherry sometime in 1664. It was final break away from the Roman Catholic influence which was being forcibly imposed on the followers of Syrian Church. Between 1599 to 1654 A.D. due to influence of the Portuguese political power in the East Coast of India, the Malankara Church was compelled to accept Roman Catholic supremacy i.e., the supremacy of the Pope of Rome. The tough resistance from the Syrian Christians resulted in adopting repressive measures by the Portuguese. The climax was reached in 1599 in the so-called Synod of Diamper. Books of the Syrians Christians were burnt and destroyed. All traces of Apostolic succession in their church were obliterated. The Portuguese arrested Mar Ignatius the Patriarch, at Mylapore, brought him in fetters to Cochin on way to Rome and ultimately he mysteriously disappeared believed to have been killed either by drowning or burning. This enraged the Syrians. They met at Muttancherry, took the famous oath at Koonan Cross and resolved that they shall never again unite themselves with the Portuguese who had without any scruple or fear of God murdered their holy Patriarch. This was in 1664. This event marks an epoch in the history of the Syrian church. It split the followers in two Punthenkoor and Palayakoor. The former became Jacobite Syrians following the creed of Patriarch of Antioch and the latter Roman Syrians following the Roman creed of the

Pope of Rome. The Puthenkoor people after meeting at Muttancherry came to Alengad Church and, in obedience to the Station of Mar Ignatius consecrated Arch-Deacon Thoma with the title of Mar Thoma Metran.

8. With this commenced the second period. It, too, like the first was marked by few important events, which again have played vital role in the destiny of the Syrian Church. The first was the ordination in 1654 of Mar Thoma Mitra as Marthoma I. Its significance lay as he was ordained as Metropolitan of Malankara by the Patriarch of Antioch through his delegate. From 1665 onwards, therefore, the ordination of the Malankara Metropolitan was carried on by the delegate of Patriarch of Antioch. The second important event took place in A.D. 1808 when a trust for charitable purposes was created by the then Malankara Metropolitan Mar Thoma VI (Dionysius the Great) by investing in perpetuity 3000 Star Pagodas (equivalent to Rs. 10,500) in the British Treasury on interest @8% per annum. During this period the Church Mission Society, a missionary society of Protestant with headquarters in London, had come to Malabar and collaborated with the Malankara Church and had jointly acquired some properties, disputes arose between this Society and the Malankara Church with regard to those properties and also to the beneficial interest arising out of the charitable deposit of 3000 Star Pagodas which were referred to arbitration and were settled by what is known as the 'Cochin Award of 1840', which was the third important event of this period. This Award divided the properties between the two bodies allotting among other items 3000 Star Pagodas to the Malankara Church. The properties so allotted to the Malankara Church were as per the Award to be administered by the trustees i.e., (1) the Malankara Metropolitan, (2) a priest-trustee and (3) a lay-trustee. The effect of the Cochin Award was that the dispute between the Mission Society and the Syrian Church came to an end. But it appears between 1808 and 1840 vast assets had been acquired with the trust created by Dionysius VI. These were controlled and administered by the person who was the head of the Church. Therefore, even though one Cheppat Dionysius, a locally ordained Metropolitan was in office, one Mathew Athanasius went to Syria in 1840 and got himself ordained as Metropolitan by the Patriarch of Antioch. Thus the seeds of strife were sown.

9. If 1654 is significant for commencement of local ordination by the delegate of Patriarch of Antioch then 1840 marked the beginning of emergence of struggle for supremacy over the Church between locally ordained Metropolitan and the one ordained by the Patriarch of Antioch. Disputes arose between M. Athanasius and C. Dionysius. To settle it the Patriarch of Antioch sent one Mar Yayakim Koorilos as his delegate. But Koorilose adopted a novel way of settling the dispute by excommunicating Mathew and appointing himself as the Malankara Metropolitan. Cheppat Dionysius withdrew in favour of Mar Koorilos, but Mathew Athanasius persisted in his claim. When these disputes came to the knowledge of the Travancore Government it appointed in 1848 a Tribunal known as the 'Quilon Committee' to settle the dispute. The committee held in favour of M. Athanasius and he took over charge as the Malankara Metropolitan. It appears the Committee preferred Patriarch ordained Metropolitan over the local ordained as spiritual spirit was flowing, still, form Antioch. Even though the Quilon Committee decided in favour of Athanasius and he took . over charge of the property but the local people were not satisfied, therefore, they appear to have persuaded one Joseph Dionysius to go to Syria and get himself ordained as Malankara Metropolitan. In 1865 Joseph Dionysius was ordained as the popular feeling was that M. Athanasius was leaning towards protestainism. M. Athanasius however refused to lay down the office. He continued as metropolitan and towards the end of his life he ordained his nephew or brother one Thomas Athanasius who on death of his brother assumed the office.

10. This bitter strife between the two forced the Patriarch to come to Malabar, as the conduct of Athanasius amounted to denial of his authority, and call a meeting of accredited representatives of all the Churches at Mulunthuruthy in 1876. It is popularly known as 'Mulunthuruthy Synod'. This is the most important event not only of this period, but in the entire history of Syrian Church. Many resolutions taking important decisions were adopted. At the Synod the Syrian Christian Association popularly called the 'Malankara Association' was formed to manage the affairs of the Churches and the community. It constituted the Malankara metropolitan as the ex-officio President and three representatives from each Church. A Managing Committee of 24 was to be Standing Working Committee of the said Association. The Synod affirmed the orthodox faith. Joseph Dionysius who had earlier been ordained by the Patriarch was accepted as the Malankara Metropolitan. Whether it was re-assertion of supremacy of Patriarch or not cannot be said as the election of Joseph Dionysius was preceded by two factors, one, that he had been persuaded by the local people, earlier, and he got himself ordained by the Patriarch and second that Thomas Athanasius was a nominee of his brother and he had not been elected by the people. But it, undoubtedly, shows that the spiritual domination was still predominant. However, Thomas Athanasius challenged the ordination by Patriarch and claimed equal status. This could not have been agreed to by anyone as the spiritual faith in the Patriarch prevented the people in Malabar to acknowledge a person as Metropolitan who was not ordained either by the Patriarch or his nominee. However, Thomas Athanasius refused to hand over the property and Joseph Dionysius was left with no option except to approach the court.

11. Thus commenced the third period. If the first two periods were great for the growth and development of the Church then the third described as the, 'turbulent period' is unique not for any development of religion, but for providing stability to the Church by creating a Catholicate of the East for India, Burma and Ceylon at Malankara and adopting a Constitution for the administration of the Church. The period unfortunately witnessed division amongst followers of the Church who came to be known as the 'Patriarch' and the 'Catholico', mainly because there was disturbance in Antioch itself and two of the Patriarch claimed to exercise the prerogative of being Patriarch of Antioch at the same time. Within a span of fifty years, five suits were filed, the first knows as, 'Seminary Suit', in 1879, the second as 'Arthat case' in 1899, the third in 1913 which became famous as 'Vattipanam case', the fourth in 1938 known as 'Samudayam Suit' and fifth and last in 1974 giving rise to these appeals. The first was filed by a Patriarch ordained and duly elected Metropolitan at Mulunthuruthy Synod for recovery of property against nominated Metropolitan, whereas the second was filed for enforcement of the order passed in earlier suit as some of the parishes were denying the authority of the Metropolitan to exercise spiritual and temporal control over them. The third was an interpleader suit by Secretary of State for India due to formation of two groups laying rival claims against the assets. All the three suits were decided in favour of Catholico group. Therefore, the fourth suit was filed by the Patriarch group against Catholicos claiming that they had become heretics and had separated from the Church. This too was decided in favour of Catholicos. But the fifth and the last suits were filed by the Catholicos for reasons which shall be explained later. In the Encyclopedia of Religion, Vol. 14, p. 226, the history from creation of Patriarch of Antioch till 1970 is traced thus, The church in Antioch became practically the mother church of Christendom.... The leadership of the Syrian church was decimated by the Diocletian persecution that broke out around 304. The persecution also led to the development of Syrian monasticism through the Christians who fled into the wilderness. The spirit of Syrian Christianity was shaped more by worship, martyrdom, and monasticism then by theology....In the twelfth century the Syrian church was at the peak of its glory, with 20 metropolitan sees, 103 bishops, and millions of believers in

Syria and Mesopotamia.... The turbulent thirteenth century, wracked by invasions of Latin Crusaders from the West as well as of Mamluk Turks and Mongols from the East, produced such great leaders as Gregory Bar Hebraeus (1226-1286), a Jewish convert to Syrian Christianity, a chronicler and philosopher, and primate of the East....The nineteenth and twentieth centuries have been turbulent tunes for the Syrian Orthodox in the Middle East.... The Syrian church in India numbers 1.8 million and is divided into two jurisdictions. The smaller of the two jurisdictional groups (with five hundred thousand members and a dozen bishops) decided in the 1970s to revolt against the Indian catholicos and his synod, forming a wing of the church directly administered by the Syrian Patriarch in Damascus and with its own maphrian see. The larger group, numbering about 1.3 million is an autocephalous church in India under Moran Mar Basselius Mar Thoma Mathews I, Catholicos of the East. This group has a flourishing theological seminary and a number of ashrams and monasteries, as well as hospitals, orphanages, schools, and other institutions. Its members have established a diocese in North America with about thirty congregations and a bishop residing in Buffalo, New York' [The Encyclopedia of Religion, Volume 14 p.228].

12. The 'Seminary Suit' was filed in 1879 by Joseph Dionysius against Mar Thomas Athanasius for recovery of the property over which he had obtained possession in lieu of the Quilon Committee report. It was contested by Thomas Athanasius who denied the supremacy of the Patriarch. He claimed that Patriarch could not claim as a matter of right to have any control over the Jacobite Syrian Church in Malabar either in temporal or spiritual matters although as a high dignitary in the churches in the country where their saviour was born and crucified the Malabar Syrian Christian community did venerate the Patriarch. The final judgment in the suit was given on 20th July 1889 by the Royal Court of Final Appeal (Travancore). The decision went in favour of Joseph Dionysius who was held entitled to recover the properties of Malankara Church as he was the Malankara Metropolitan accepted by the community. The judgment explained the extent of the spiritual supremacy of the Patriarch over the Malankara Church. It was held that Patriarch right consisted in ordaining either directly or by duly authorised delegates metropolitans from time to time, to manage the spiritual matters of the local church, sending Morone (holy oil) to be used in the churches for baptismal and other purposes and in general supervision over the spiritual government of the Malankara Church. But he was held to have no authority over temporal matters. It was held:

> the Patriarch's supremacy over the Church in Malabar has extended only to spiritual matters. The Patriarch or his Delegates when they sojourned in this country, attended only to spiritual affairs of the Church leaving the management of the temporal affairs to the local Metropolitan and the trustees. The former never interfered with temporal affairs; and where in two or three instances they (the Delegates) tried to have some control over, or interference with, the temporal affairs, the Metropolitan and the community resisted them successfully.
>
> On a review of the whole History and evidence, *we arrive at the conclusion that the Patriarch of Antioch has been recognized by the Syrian Christian community all through as the Ecclesiastical Head of their Church in Malabar; that consecration by him or by his Delegates duly authorised in that behalf was and has been felt absolutely necessary to entitle a man to become a Metropolitan of the Church in this county in matters spiritual, that the man so consecrated should be a native Syrian Christian of Malabar acceptable to the community; that the Patriarch's power in spiritual affairs of the Church has been supreme; and that the Patriarch or his foreign Delegates have had no interference with the*

internal administration of the temporalities of the Church in Travancore which, in this respect has been an independent Church.

[Emphasis supplied]

13. The conclusion and finding of the court that the Patriarch had no temporal and administrative control over the churches was not accepted either by the Patriarch or the Parishes. Some of the Parishes, therefore, denied the authority of Dionysius which led to filing of suit in 1899 by the Metropolitan against Parishes which, as stated, became famous as 'Arthat Case. The suit was decreed in 1905 and the judgment of Rajah (Cochin) Court of Appeal reiterated that the Patriarch of Antioch was the spiritual head of Malankara See which included the church for which suit had been filed and the churches and the properties were bound by a Trust in favour of those who worship God according to faith, doctrine, disciple of Jacobite Syrian Church in the communion of His Holiness the Patriarch of Antioch. The Court held that the churches and properties were, therefore, subject to spiritual, temporal and ecclesiastical jurisdiction of the 'Dionysius the Malankara Metropolitan'.

14. The effect of the two judgments of the Royal Court of Final Appeal and Rajah of Cochin on one hand was to recognise Dionysius as the validly elected Malankara Metropolitan, which of course was in keeping with what the Patriarch had decided when the meeting was held at Mulunthuruthy and with this there was no grievance, and on the other that Patriarch had no temporal power over the Church which was not acceptable to him. He, therefore, decided to come down to Malabar to influence the course of events and get an assurance from different churches accepting his superiority in temporal matters as well. However, in 1905 dispute started between two persons one, Abdul Messiah and other Abdulla-II over the right to be Patriarch. Both of them were appointed by Firman of the Sultan of Turkey. But the one issued in favour of Abdul Messiah had been withdrawn. In 1909 Joseph Dionysius died. In his place one M.G. Dionysius was elected who had got himself ordained by the Patriarch Abdulla-II in 1907. When Abdulla-II came to Malabar with the object of claiming his temporal authority over the Malankara Jacobite Syrian Church and he convened a meeting at the old Seminary of Kottayam and demanded acknowledgment of his temporal authority the majority declined to do so. He, therefore, approached the Parish Churches individually and succeeded in getting submission deeds (Udampadis) from some including one Mar Paulose Athanasius. In token of it, he ordained him as a Metropolitan. This led to dispute between M.G. Dionysius and M.P. Athanasius the one ordained earlier at Syria and the other ordained in Malabar over the administrative and temporal control of the churches. In 1911 Abdulla-II the Patriarch ordained one Mar Coorilos as the Malankara Metropolitan so as to make him automatically the ex- officio President of the Malankara Association and one of the trustees of the trust property. The two of the other trustees also acknowledged the new nominee as the Malankara Metropolitan but Mar Gheevarghese Dionysius did not give us and in retaliation convened a meeting of the Malankara Association which declared his ex-communication invalid and removed from trusteeship the two trustees who had gone over to the side of the Patriarch. The Committee further decided to suspend payment of Ressissa to the Patriarch so long it was not ascertained as to who was the Patriarch, Abdul Messiah or Abdulla-II. Abdulla-II left Malabar in October 1911 and in 1912 issued a Kalpana branding Abdul Messiah and M.G. Dionysius as "wolves" from whom the faithful should entirely keep aloof.

15. Little did anyone, then visualise that the very next year which was to synchronise with visit of Abdul Messiah, yet another Patriarch who had been disentitled by the Sultan of Turkey, would so significantly change the history of Malankara Church.

Whether he was justified and more than that entitled to declare the ex- communication of Dionysius invalid and whether he could on his own issue a Kalpana creating a Catholicate of East is now a matter of history as its validity is beyond challenge since both the actions have been upheld judicially and have achieved finality in *Moran Mar Basselios* (supra). Abdul Messiah issued a Kalpana beseeching everyone, that it was their duty, 'to respect Mar Gheevarghese, and love him properly and suitably because he was their head, shepherd and spiritual father'. It was stated that 'who respects him (respects us), he who receives him, receives us. Those who do not accept his right words and those who stand against his opinions which are in accordance with the cannon of the Church, defy him and quarrel with him will become guilty. Keep aloof from quarrel and breach of law. Grace and blessing from the Lord will come and abide on them who obey'. Another Kalpana was issued bestowing his blessings second time and expressing deep grief at the dissension shown by Effendi. It further said 'we, by the grace of God, in response to your request, ordained a Maphrian, that is, Catholicos by name; Poulose Basselios and three new Metropolitans the first being Gheevarghese Gregorius, the second, Joachim Evanios and the third, Gheevarghese Philexinos....We commend you into the hands of Jesus Christ, our Lord, the Great Shepherd of the flock. May He keep you! We rest confident that the Catholicos and Metropolitans - your shepherds - will fulfill all your wants. *The Catholicos, aided by the Metropolitans, will ordain melpattakkars, in accordance with the Canons of Our Holy Fathers and consecrate Holy Morone. In your Metropolitans is vested the sanction and authority to install a catholicos, when a catholicos dies. No one can resist you in exercise of this right and, do all things properly, and in conformity with precedents with the advice of the committee, presided over by Dionysius, Metropolitan of Malankara'*.

(emphasis supplied)

16. The declaration of Abdul Messiah that ex-communication of Dionysius was invalid led to serious dispute between rival groups claiming their authority over the temporal affairs of the Church. Two rival groups were formed one led by Mar Gheevarghese Dionysius and the other by Mar Coorilos. Consequently, the Secretary of State for India filed the interpleader suit in 1913, in the District Court of Trivandrum, impleading both the sets of rival claimants as defendants and seeking a declaration from the court as to which of the two rival sets of trustees were entitled to draw the interest on the amount standing in the credit of the Malankara Jacobite Syrian Christian community in the British treasury. The suit was decided in favour of M.G. Dionysius. The decree was reversed by a Full Bench of the Travancore High Court in 1923. The judgment was reviewed at the instance of M.G. Dionysius and the net result was that M.G. Dionysius and his two co-trustees became finally entitled to withdraw the money deposited in the Court as the lawful trustees of the Church properties.

17. On 16th August 1928 the Managing Committee of the Malankara Association was authorised to draw up a Constitution of the Church. There was sharp reaction to it. The delegate of Patriarch issued an order to the Catholic Metropolitan to execute Udampad within tow days. When nothing came out of it, 18 persons belonging to Patriarch group filed suit against Mar Philexinos, a person who later joined the Patriarch after 1958 and was largely responsible for the disturbance of peace in 1965. The suit was dismissed in default and the order remained unchanged as the revision in the High Court was dismissed for non-prosecution. The Catholico in the meantime went ahead and in a meeting held on 26th December, 1934 at Kottayam adopted the draft Constitution unanimously and elected the Malankara Metropolitan. The Constitution while recognising that Malankara Church was a division or orthodox church and primacy of Patriarch of Antioch provided that the primacy of the East was in Catholicos. Detailed provisions

dealing with powers of Metropolitan, bishop, Parishes, Etc. were made. Probably as a counter to 1934 meeting of Catholico the Patriarch group held meeting in August, 1935, elected one M. Paulose Althanasius as Malankara Metropolitan and armed with this they filed Suit No. 111 of 1139, that is 10th March, 1938 in the District Court of Kottayam claiming that the Catholico had become heretics and separated from the Orthodox Syrian Church. The suit was dismissed in January, 1943. In 1946, appeal was allowed and the suit was decreed. The defendants again applied for review which was dismissed against which they preferred appeal under Article 136 of the Constitution and in Moron Mar Basselios Catholicos and Anr. v. Most Rev. Mar Poulose Athanasius and Ors. AIR (1954) SC 526 the appeal was allowed. The judgment of the High Court was set aside and the High Court was directed to admit the review petition and re-hear the same. In December 1956 the judges heard the appeal, delivered the unanimous judgment allowing the appeal and decreeing the suit. Against the decree the Catholico group preferred an appeal which was decided in 1959 by this Court. Some of the Catholicos also filed a writ petition under Article 32 of the Constitution which was also decided along with the appeal. The Court after elaborate discussion and noticing the earlier course of litigation held that the claim of the other group that the Catholicos had become heretics or aliens or had gone out of the Church by establishing a new church because of the specific acts and conduct was not correct. The Constitution framed in 1934 and the Kalpanas issued by Abdul Messiah were considered by this Court in 1959. The claim of the Patriarch, that the supremacy of the Patriarch had been taken away by the mere adoption of the new Constitution was not permitted to be raised as it was not raised in the pleadings. The Court further did not permit them to raise the question about the privilege of the Patriarch, alone, to ordain metropolitans and to consecrate Morone. It was also held that Ressissa which was a voluntary and not a compulsory contribution made by the parishes collected by the committee of the Malankara Association and sent to Patriarch was not forbidden and its non-payment did not amount to heresy on the party of the Catholicos. The declaration sought by the Patriarch that they were trustees of the property and the Catholicos were neither trustees nor in possession of the trust property, based on their election at a meeting held on August 22, 1935 was not accepted. The Court held that the meeting was, admittedly, held without any notice to the members of the Catholico party as they were erroneously regarded as having gone out of the Church. The Court did not find any merit in the Kalpana which was Ex.Z in the suit commanding the faithful not to have anything to do with the heretics. The Court held that the Catholicos and their partisans had not become, 'ipso facto' heretics in the eye of the Civil Court or aliens and had not gone out of the Church. The Court held that the election of the plaintiffs was not valid and their suit, in so far as it was in the nature of a suit for ejectment was liable to fail for want of their title as trustees. The Court further held that since the interpleader suit was converted into a representative suit on behalf of Jacobite Syrian Christian population of Malabar, therefore, the decision in that suit was binding on all members of the Malankara Syrian Christian Community. Thereafter, it proceeded to examine as to what were the material issues which were decided in that case and which operated as res judicata. The four issues which were framed in that suit and which were considered by the Court for purposes of deciding the question on res judicata read as under :

> **14.** Do all or any of the following acts of the 1st defendant (catholico) and his partisans amount to open defiance of the authority of the Patriarch? Are they against the tenants of the Jacobite Syrian Church and do they amount to heresy and render them ipso facto heretics and aliens to the faith?
>
> (i) Claim that the 1st defendant is a Catholicos? (ii) Claim that he is the Malankara Metropolitan?

(iii) Claim that the 1st defendant has authority to consecrate Morone and the fact that he is so consecrating?

(iv) Collection of Ressissa by the 1st defendant?

15. (a) Have the 1st defendant and his partisans voluntarily given up their allegiance to and seceded from the Ancient Jacobite Syrian Church?

(b) Have they established a new Church styled the Malankara Orthodox Syrian Church?

(c) Have they framed a Constitution for the new church conferring authority in the Catholicos to consecrate Morone to ordain the higher orders of the ecclesiastical hierarchy, to issue Stations allocating Dioceses to the Metropolitans and, to collect Ressissa?

(d) Do these functions and rights appertain solely to the Patriarch and does the assertion and claim of the 1st defendant to exercise these rights amount to a rejection of the Patriarch?

(e) Have they instituted the Catholicate for the first time in Malankara? Do the above acts, if proved, amount to heresy?

16. (a) Have the defendants ceased to be members of the Ancient Jacobite Syrian Church?

(b) Have they forfeited their right to be trustees or to hold any other office in the Church?

(c) Have they forfeited their right to be beneficiaries in respect of the trust properties belonging to the Malankara Jacobite Syrian community?

19. (a) Have the plaintiffs and their partisans formed themselves into a separate Church in opposition to Mar Geevarghese Dionysius and the Malankara Jacobite Syrian Church?

(b) Have they separated themselves from the main body of the beneficiaries of the trust from 1085?

The Court held that the same objection was raised by the Patriarch in the suit filed in paragraphs 19 to 26 and, therefore, the finding recorded on the aforesaid issues having been raised and decided in the interpleader suit and having been decided by the Travancore High Court on review in favour of M.G. Dionysius and his co-trustees (Catholico group) it operated as res judicata. It was on this reasoning that the Court held:

> that the contentions put forward in paragraphs 19 to 26 of the plaint in the present suit on which issues Nos. 14, 15, 16 and 19 have been raised were directly and substantially in issue in the interpleader suit (O.S. 94 of 1088) and had been decided by the Travancore High Court on review in favour of Mar Geevarghese Dionysius and his two co-trustees (defendants 1 to 3) and against defendants 4 to 6. In short the question whether Mar Geevarghese Dionysius and his two co-trustees (defendants 1 to 3) had become heretics or aliens or had gone out of the Church and, therefore, were not qualified for acting trustees was in issue in the interpleader suit (O.S. No. 94 of 1088) and it was

> absolutely necessary to decide such issue. That judgment decided that neither (a) the repudiation of Abdulla-II, nor (b) acceptance of Abdul Messiah who had ceased to be a Patriarch, nor (c) acceptance of the Catholicate with powers as hereinbefore mentioned, nor (d) the reduction of the power of the Patriarch to a vanishing point, 'ipso facto' constituted a heresy or amounted to voluntary separation by setting up a new Church and that being the position those contentions cannot be re-agitated in the present suit.

Thereafter the Court after discussing the matter in great details held as under:

> the case with which the plaintiffs have come to court in the present suit is that the defendants had become heretics or aliens or had gone out of the Church by establishing a new church because of the specific acts and conduct imputed to the defendants in the present suit and that the charges founded on those specific acts and conduct are concluded by the final judgment (Ex. 256) of the High Court of Travancore in the interpleader suit (O.S. No. 94 of 1088) which operates as 'res judicata'. The charge founded on the fact of non-payment of Ressissa, if it is not concluded as constructive 'res judicata' by the previous judgment must, on merits, and for reasons already stated, be found against the plaintiff-respondent. We are definitely of the opinion that the charges now sought to be relied upon as a fresh cause of action are not covered by the pleadings or the issues on which the parties went to trial, that some of them are pure after-thoughts and should not now be permitted to be raised and that at any rate most of them could and should have been put forward in the earlier suit (O.S. No. 94 of 1088) and that not having been done the same are barred by 'res judicata' or principles analogous thereto. *We accordingly hold, in agreement with the trial court, that it is no longer open to the plaintiff-respondent to re-agitate the question that the defendant-appellant had 'ipso facto' become heretic or alien or had gone out of the church and has in consequence lost his status as a member of the Church or his office as a trustee*.
>
> [Emphasis supplied]

The Court also examined whether the election of the Catholico group in the meeting held on December 26, 1934 was in accordance with rules or not and it answered the question in their favour. The Court, therefore, set aside the judgment of the Kerala High Court and dismissed the suit filed by the Patriarch group.

18. The one good effect of judgment delivered by this Court in 1959 after nearly 50 years of litigation was that good sense appears to have dawned on both the groups and on 9th December 1958 Patriach Yakub-III issued a letter marked as Ex.A-19 the relevant portions of which are extracted below:

> It is not secret that the disputes and dissensions that arose in the Malankara church prevailing for a period of 50 years have in several ways weakened and deteriorated it. Although right from the beginning several persons who love the church and devout of God desired peace and unity putting an end to the dissention, they departed in sorrow without seeing the fulfillment of their desire. We also were longing for peace in the Malankara church and the unity of the organs of the one body of the church. We have expressed this desire of our very clearly in the apostolic proclamation we issued to you soon after our ascension on the Throne. This desire of ours gained strength with all vigour day by day without in any way slackened and the lord God has been pleased to end

> the dissention through us. Glory be to Him. *To bring forth peace in the Malankara church we hereby accept with pleasure Mar Baselious Gheevarghese as Catholicose*. Therefore we send our hearty greetings intensified by the fervour of peace in this month of rejoycing. We also beseech, let the lord shower on you His abundant blessings. Let the lord make you a people beautified by virtuous acts towards the right and delight you with the comfort and plenteous-ness flowing from the care pleased to his Holy will to the envy of others. Let it be with the grace and mercy of Him, His father and His Holy spirit.
>
> Our father which art in the heaven etc. etc. On the 9th December 1958, the 2nd year of our ascension as patriarch.
>
> From the Aramana at Holms.
>
> [Emphasis supplied]

The other letter was issued on 16th December 1958 marked as Ex.A-20 by the Catholico group to the following effect :

> Glory to God united in the Trinity, the self existing, perfect in essence and without beginning or end. From the meek Baselious Catholicose named as Gheevarghese II seated on the Throne of The East of Abostle St. Thomas.
>
> Seal
>
> Let divine grace and Apostolic Benediction be always in abundance with all the Melpattakkars (High Priests). Priests, Deacons and all the faithful under our jurisdiction.
>
> We have always been in grief on account of the failure of the efforts made by late Mar Gheevarghese Dionisius and us to bring forth peace in our church and end quarrels and discord which were existing in our church for long. We are how very much delighted and do glorify God in that there is an end to the discord showing the willingness to unite.
>
> We, for the sake of peace in the church, are pleased to accept Moran Mar Ignatius Yakub III as patriarch of Antioch subject to the Constitution passed by the Malankara Syrian Christian Association and now in force.
>
> We have also pleasure to accept the Metropolitans under him (patriarch) in Malankara subject to the provisions of the said constitution.
>
> Let the abundant grace and blessings of God Almighty be with you always.
>
> Let it be through the prayers of St. Mary the mother of God, Mar Thoma Sleeba, the Patron saint of India and all the saints. Amen.
>
> Our father that art in the heavens etc. etc.

After the exchange of these letters, Ex.A-19 and Ex.A-20 dispute started between the Patriarch and the Catholico over the use of the word 'Holiness'. 'Throne of St. Thomas', and 'Church of the East' and 'Catholicos of the east' etc. as the expressions according to the Patriarch could be used by the supreme head, that is, Patriarch of Antioch and not by Catholico to which the reply was that this was not new and it was provided for in the Constitution of 1934. It is not necessary to extract the various points of difference

raised in the letters issued by the two. In a letter sent in August 1960 marked as Ex.A-26 after reiterating the stand which was taken in earlier letters it concluded with these words:

> To conclude, I wish to state that the prestige and influence of the throne of Antioch here depend very largely upon the wish cooperation of Your Holiness. The Malankara Church with its catholicate and synod of bishops and the association has certainly to adhere to the provisions of the Constitution and has to abide by the Supreme Court decision. But that does not mean any kind of disrespect or hostility towards Antioch. There are enough provisions in the Constitution to keep our connection meaningful and alive.

The relations thereafter appear to have become cordial so much so that in 1961 Ex.A-30 was written by Patriarch yakub-III in which it was mentioned.

> I am placing your Beatitude's photo properly in our palace so that all people who are in and out should see it and understand the intimate unity and real re-conciliation and the essential relationship between the Apostolic Throne and our church in Malankara....We are eager to see perfect peace in our church in Malankara. We hope that all the disputes will be over and the church go ahead powerfully in the path of light, prosperity and progress during your Beatitude's old age itself.
>
> Please convey our Apostolic Blessings to all our spiritual children both priests and faithfuls who are under your authority.

But from letter dated 18th January 1962 sent by Baselius Geevarghese II, Catholicos of the East, it appears some local dispute had surfaced again. Allegations were made against one Mar Philixenos and the same person about whom reference has been made earlier and who in fact was responsible for dissension once again and it was stated, 'they profess outwardly to be pro-Antioch, but really they are anti Patriarchal as well as anti-Catholicate. Now since at this time I am in my declining age I think it appropriate to invite your Holiness be pleased to visit us at your earliest con (sic) and bless us by your presence as well as prayers'. It appears Mar Baselius Geevarghese died in January 1964 and he members of the Holy Episcopal Synod installed one Ougen Mar Themotheus, Metropolitan as his successor as his election by the Malankara Association on 17th May 1962 was approved by the Holy Synod on 21st March 1963. The letter was sent requesting the patriarch Yakub-III for the installation ceremony. He did come in 1964 and installed Mar Ougen I. Then there are letters and other memoranda Ex.A-36 and A-37 submitted to the Catholicos regarding prevailing discontentment amongst some sections. The exchange of these letters and their contents indicate a simmering discontent which surfaced in June, 1970 when the Patriarch once again dug up the closed issue of use of expression 'Holiness' and, Throne of St. Thomas' by the Catholico. The initial anxiety of reconciliation and peace got set back with vengeance as the Catholico openly challenged the authority of Patriarch. Events moved swiftly, thereafter, when the Patriarch ordained Metropolitan who in his turn ordained Bishops started interfering resulting in filing of suits by Catholico against Patriarch ordained Bishop, obtaining of injunction sharply reacted by the Patriarch by issuing show-cause notice, starting disciplinary proceedings, summoning the Synod at Damascus and Ex-communicating the Catholico. The breakaway was complete. There was vertical split. The two groups once again were up in arms. Two hundred suits were filed. Eight of which covering entire issues were consolidated and tried together.

19. This completes the factual narration and the background in which the suits out of which these appeals have arisen came to be filed. Although both the parties have furnished in great detail the events which took place after the judgment was delivered in 1959, but it appears unnecessary to mention each of them, except to observe that a mere look on these dates indicates that initially there was an anxiety for peace and reconciliation by both groups which was shaken by pinpricks here and there and was finally thrown to winds between 1970-75. Religious cover was again put forward to gain control over temporal affairs resulting in setting in motion the same old tortuous process of litigation. In the first part beginning from December, 1958 a meeting of the Malankara Association was held in which almost all the Churches participated, irrespective of the faction. The meeting was attended even by the elected priest-trustee and the lay trustee and the delegate of the Patriarch as a special invitee. In January, 1959 the Patriarch Group submitted a memorandum to the Catholicos seeking among other things reconstitution of the Managing Committee of the Malankara Association which was considered in a Synod held on 21st February, 1959 and pursuant to the decision taken therein, dioceses were re-allocated. From the year 1959 to 1964 number of meetings were held in which both the groups participated and attempted to function as one unit. Form 1960 to 1962 there are various letters, for instance Exhts. A-28, A-29, A-30, A-31 and A-39 which indicate cordial relationship between the Patriarch and Catholico. Even in 1964 when Mar Ougen I was installed by the Malankara Episcopal Synod, the Patriarch himself presided in the ceremony. In a meeting held in December, 1965 Malankara Association elected five candidates for ordination as Bishops and elected members to the Managing Committee which included members of the Patriarch group as well. In 1967 the Constitution was amended in consequence of meeting in which both the groups deliberated.

20. From June 1970 started the second part which was in contrast of the earlier. In June 1970 the dispute about use of expression 'Holiness' and The Throne of St. thomas' was again questioned followed by sending a delegate in 1972 which was objected to leading to ordination by the Patriarch of one of the appellants who was impleaded as defendant no. 1 in Suit no. 4/79. Thereafter as stated there was no end. When the Catholico succeeded in obtaining injunction from Civil Court in 1973 restraining the appellant from interfering, the Patriarch issued chargesheet in June 1974 which was not only objected but asserted to be without jurisdiction. Various ordinations followed. Each was challenged in courts. And when on 5th January 1975 the Catholico in their Synod declared that Malankara Association was autocephalous then the Patriarch in a Synod held at Damascus from 16th to 20th June 1975 decided that the only apostolic see of the Syrian Orthodox Church in the world was the See of Antioch founded by St. Peter, that the Malankara Church was an indivisible part of the Syrian Orthodox Church dependent on the Patriarch in all spiritual matters, that acknowledgment of Patriarch's and position by those ordained was essential, and the Catholicos having rebelled against the Patriarch stood disqualified from their ecclesiastical grade and also guilty of violation of fundamental faith. It was followed by letter dated 23rd June 1975 asking the Catholicos if he was willing to submit to the decision of the alleged universal Synod. On 21st August 1975 the Patriarch by Kalpana Ex.B-72 excommunicated Catholicos and on 7th September 1979 installed at Damascus Mar Paulose Philexinos (who had earlier been deposed by the Malankara Episcopal synod for proved ecclesiastical indiscipline) as a Catholicos in the name of Baselius Paulose II.

21. Out of these suits eight covering all the issues were transferred to the High Court. The Single Judge even while accepting the Constitution as valid held that it was not binding on the Churches and Parishioners unless there was express surrender. The Court held that they had no concern with those Churches which continued with Patriarch

of Antioch. The learned Single Judge held that the Malankara Church was Episcopal to a limit in spiritual affairs. In matters of temporalities, the Church was congregational. It was further held that the Parish Churches were independent autonomous units as far as governance and administration of temporalities were concerned. The suits were dismissed. In appeal, the Bench framed as many as 31 questions to cover the wide range of controversy raised before it, reversed the decision of the learned Single Judge and decreed the suit, except in relation to Churches known as 'Simhasana Churches' and the Churches establishes by the Evangelistic Association. Relevant findings on the questions framed by it are extracted below. The first three questions related to the validity of the Cannon. They read as under :

> (1) Whether Ext. A90 or Ext. B161 is the correct version of Hudaya Canons accepted by the Malankara Jacobite Syrian Community as valid and binding?
>
> (2) Are the plaintiffs barred by res judicata from contending that the binding version of Hudaya canons is Ext. A90 by reason of the judgment in XLT T.L.R. 1, order in the Review Petition and the judgment in 45 T.L.R. 116?
>
> (3) Are the defendants barred by res judicata from contending that the binding version of Hudaya Canons is not Ext. B161 by reason of the decision in the Samudayam suit?.

The answer given by it was that the decision in 41 TLR 1, Exhibit 18 therein, and (Ext. BP in the Samudayam suit and Exht. B-161 in these cases) is the version of the Hudaya Canons accepted as binding on the Malankara Church has not become concluded and does not operate as res judicata between the parties. The Bench further held that there was no independent evidence on the basis of which it could be held that either of the versions was binding on the Malankara Orthodox Syrian Christian Community and since findings in the previous litigations were not res judicata neither version of the Canon was proved to be binding on the community. In respect of Question Nos. 4-6, which read as under,

> (4). Whether the Catholicate established under Ext. A14 by Patriarch Abdul Messiah with powers as provided for in Ext. A14 is valid and binding on the entire Malankara church?
>
> (5). Whether by such establishment of the Catholicate the Patriarch was deprived of his powers to ordain Metropolitans, consecrate/send morone or to exercise any other spiritual power over the Malankara church thereby reducing his powers to a vanishing point?
>
> (6). Whether contentions in points 4 and 5 are barred by res judicata against parties in Patriarch's group by reason of the decision of the Travancore High Court in Interpleader suit 45 TLR 116 and by in reason of the decision of the Supreme Court in Samudayam suit AIR (1959) SC 31?

It was held that the Catholicate established under Exht. A14 with powers as provided therein was valid and binding on the Malankara Church, that by such establishment Patriarch has not been deprived of his powers to ordain Metropolitans or consecrate Morone or to exercise any other recognised spiritual power, though the power to ordain Metropolitans is subject to acceptance of the Malankara community represented by the Association and that by the establishment of the Catholicate spiritual power of the Patriarch has not been reduced to a vanishing point, though the Patriarch could not be regarded as having active spiritual supremacy.

22. The Question Nos. 7 to 15 related to the Constitution of 1934 and status of Parish Churches. They were answered as follows:-

> (a) 1934 Constitution is valid and binding on the Malankara Association, Community, Dioceses as well as parish churches and parishioners.
>
> (b) Parish churches are not congregational or independent, but are constituent units of Malankara church; they have fair degree of autonomy subject to the supervisory powers vesting in the Managing Committee of the Malankara Association, Catholicos and the Malankara Metropolitan as the case may be. Administration of the day-to-day affairs of parish churches vests in parish assembly and elected committees of the parishes.
>
> (c) Malankara church is not purely episcopal but has only some episcopal characteristics .
>
> (d) Malankara Association is a representative body which has right to bind the Malankara church, the community, parishes and parishioners by its deliberations and actions.

The most sensitive issue which has been subject of great debate in this Court was posed as Question No. 18,

> Has the Malankara Church become an autocephalous church?

and it was answered against the respondent by recording the finding: -

> We, therefore, hold that the Malankara Church is not an autocephalous church but is a part or division of the world Orthodox Syrian Church and set aside the finding of learned single judge that the Catholicos group has now established an autocephalous church. We hold that while Patriarch of Antioch is the head of the World Orthodox Syrian church Catholicos of the East who is subject to the Constitution is head of the Malankara Church and the relationship between Patriarchate and the Malankara Church is governed by the provisions of the Constitution.

This was the finding recorded in Moran Mar Basselios (supra) as well. It has not been challenged, therefore, it has become final.

23. Some of the churches claiming to be socially and culturally different, for instance, Knanaya Church or the Kanandra Church established in pursuance of Royal Charter issued by the Queen or registered under Societies Registration Act or having their own bye-laws claimed to be independent and autonomous. Their claim was under Question Nos. 23, 24 and 25 and the answer given was that except Simhasana Churches and Evangelistic Association Churches the others were constituents of Malankara Sabha. The appellants are the members of Patriarch Group. Separate appeals have been filed by those churches which claim to be independent. The Catholic Group is aggrieved by the decision in respect of Churches of Evangelistic Association and Simhasana Churches.

24. Factual canvas having been spread out the stage is now set for grappling with intricate issues of jurisdiction and law which have been canvassed neatly, by, both the learned senior counsel, Mr. K. Parasaran for the appellant and Mr. F. Nariman for the respondents, without expression of any emotion, admirable understanding and respect for each other, with utmost congenial coolness and exemplary precision and clarity. To

support their respective claims, the learned Counsel for both the parties advanced extensive arguments covering wide range of various aspects ranging from maintainability of the suit, jurisdiction of the civil courts to entertain religious disputes, misjoinder and non-joinder of the parties, intricate questions of res judicata, religious nature of the Trust and even religious matters, such as whether the Catholicate of the East is entitled to be addressed as 'Holiness' sitting on the Throne of St. Thomas'. It is proposed to deal with the preliminary objections both to the maintainability of the suit under Section 9 of the Civil Procedure Code and the non-maintainability due to enactment of the Places of Worship (Special provisions) Act, 1991 as if any of these is accepted then no further controversy would arise. Thereafter, what shall be examined is whether the claim of the appellant that they had ex-communicated the respondent in accordance with Hudaya Canon governing the Church is wall founded as if even this plea is accepted, then no other issue shall survive. If the answer is in favour of the respondents, then it shall have to be decided, how far the dispute between parties has been settled by earlier decisions and what was the scope of Samudayam Suit and the finality arising out of it. Ancillary to this would be the question whether Catholicate of the East was established in Malankara in the year 1912 and whether it has been validly established, if so, what is its binding effect.

25. To begin with the objection to the maintainability of the suit under Section 9 of the Civil Procedure Code was probably not raised in 1954 and 1959 and if raised was not pressed. But that by itself may not preclude defendant-appellant from raising it, even in this Court as the bar or lack of jurisdiction can be entertained, at any stage, since an order or decree passed without jurisdiction is non est in law. What then is the scope of the Section ? Does it comprehend suits for declaration that the Syrian Churches are episcopal? Could the respondent-Plaintiff claim declaration that Malankara Association had become autocephalous and no priest could refuse to recognise the authority of the Catholico? Could the plaintiff seek injunction, restricting the priests or Deacon from performing any other sacramental services and prohibit the defendants from interfering with the Malankara Church? How would the bar of jurisdiction operate if only part of relief is cognisable? To appreciate these aspects it is necessary to set out the Section itself and examine its scope and then advert to facts:

> **9.** Courts to try all civil suits unless barred.
>
> The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> Explanation I - A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
>
> Explanation II - For the purposes of this Section , it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

One of the basic principles of law is that every right has a remedy. Ubi jus ibi remedied is the well known maxim. Every civil suit is cognisable unless it is barred, 'there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue' Smt. Ganga Bai v. Vijay Kumar and Ors. MANU/SC/0020/1974 . The expansive nature of the

Section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added I 1976 bring out clearly the legislative intention of extending operation of the Section to such religious matters where right to property or office is involved irrespective of whether any fees is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the Section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the Section by use of the word 'shall' and the expression, all suits of a civil nature' unless 'expressly or impliedly barred'.

26. Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of right. The word 'shall' makes it mandatory. No court can refuse to entertain a suit if it is of description mentioned in the Section . That is amplified by use of expression, 'all suits of civil nature'. The word 'civil' according to dictionary means, 'relating to the citizen as an individual; civil rights'. In Black's Legal Dictionary it is defined as, 'relating to provide rights and remedies sought by civil actions as contrasted with criminal proceedings'. In law it is understood as an antonym of criminal. Historically the two broad classifications were civil and criminal. Revenue, tax and company etc. were added to it later. But they top pertain to the larger family of 'civil'. There is thus no doubt about the width of the word 'civil'. Its width has been stretched further by using the word 'nature along with it. That is even those suits are cognisable which are not only civil but are even of civil nature. In Article 133 of the Constitution an appeal lies to this Court against any judgment, decree or order in a 'civil proceeding'. This expression came up for construction in S.A.L. Narayan Row and Anr. Etc. Etc. v. Ishwarlal Bhagwandas and Anr. Etc. Etc. MANU/SC/0160/1965 : [1965]57ITR149(SC) The Constitution Bench held 'a proceedings for relief against infringement of civil right of a person is a civil proceedings'. In Arbind Kumar Singh v. Nand Kishore Prasad and Anr. MANU/SC/0129/1968 , it was held 'to extend to all proceedings which directly affect civil rights'. The dictionary meaning of the word 'proceedings' Is 'the institution of a legal action, 'any step taken in a legal action.' In Black's Law Dictionary it is explained as, 'In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like'. The word 'nature' has been defined as, 'the fundamental qualities of a person or thing; identity or essential character; sort; kind; character'. It is thus wider in content. The word 'civil nature' is wider than the word 'civil proceeding'. The Section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature.

27. Are religious rights, for instance right to worship in a religious place, entry in a temple, administration of religious shrines for instance a temple, mosque or a church are rights of civil nature? is the suit filed by the respondent bad as the declaration, injunction and prohibition sought are in respect of matters which are not civil in nature? The answer is given by Explanation I. The Civil Procedure Code was enacted during British period. The legislature enacting the law was aware that there were no ecclesiastical courts either in ancient or Medieval India as in England. 'The term "ecclesiastical law" may be used both in a general and in a technical sense. In its general sense it means the law relating to any matter concerning the Church of England administered and enforced in any court; in its technical sense it means the law

administered by ecclesiastical courts and persons' [Halsbury's Laws of England Vol. 14 para 137]. The ecclesiastical law of England is as much the law of the land as any other part of the law' [Halsbury's Laws of England Vol. 14 para 139]. There was no such law in our country. The ecclesiastical courts are peculiar to England. The Parliament was aware of it. That is why it added Explanation I to Section 9 of the Civil Procedure Code. It obviates any ambiguity by making it clear that where even right to an office is contested then it would be a suit of a civil nature even though that right may entirely depend on the decision of a question as to religious rites or ceremonies. Explanation II widens it further to even those offices to which no fees are attached. Therefore, it was visualised from the inception that a suit in which the right to property or religious office was involved it would be a suit of civil nature. Reason for this is both historical and legal. In England ecclesiastical law was accepted as a part of the common law binding on all. But, 'the introduction of English Law into a colony does not carry with it English ecclesiastical law'. (Halsbury Laws of England Vol. 14 para 315). In ancient or medieval India the courts were established by King which heard all disputes. No religious institution was so strong and powerful as church in England. The Indian outlook was always secular. Therefore, no parallel can be drawn between the administration of the churches by ecclesiastical courts in England. Religion in India has always been ritualistic. The Muslim rulers were by and large tolerant and understanding. They made India their home. They invaded, ruled and became Indian. But Britishers made it a colony. However they did not interfere with religion. Disputes pertaining to religious office including performance of rituals were always decided by the courts established by law. As far back as 1885 Justice Mehmood in Queen Empress v. Ramzan and Ors. MANU/UP/0046/1885 : ilr (1885) All 461 repelled the argument that the courts were precluded from considering Muslim Ecclesiastical Law and observed at page 468 as under :-

> I am unable to accept this view, because, if it is conceded that the decision of this case depends (as I shall presently endeavour to show it does depend) upon the interpretation of the Muhammadan Ecclesiastical Law, it is to my mind the duty of this Court, and of all Courts subordinate to it, to take judicial notice of such law.

There are numerous authorities where dispute about entry in the temple, right to worship, performing certain rituals have been taken cognizance of and decided by civil courts. In Narasimma Chariar and Ors. v. Sri Krishna Tata Chariar, 6 Mad. H.C. Report 449 it was claimed by the plaintiff that they had the exclusive rights to Adhyapaka Mirass of reciting certain texts or chants in a temple. In that suit it was held :

> The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns.
>
> There can exist no doubt that the right to such benefits is a question which the Courts are pound to entertain, and cannot cease to be such a question, because claimed on account of some service connected with religion.
>
> If, to determine the right to such pecuniary benefit, it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point.

It was approved by the Privy Council in Krishnama and Ors. v. Ktishnasamy and Ors. [1879] ILR 2 Mad. 62 and the passage extracted above was approved by observing that

it was "perfectly correct". This was a decision when Explanation II was not there. The dispute had two rounds of litigation. In the second round after remand the High Court observed,

> It is certainly not the duty of the Civil Court to pronounce on the truth of religious tenants nor to regulate religious ceremony; but, in protecting persons in the enjoyment of a certain status or property, it may incidentally become the duty of the Civil Court to determine what are the accepted tenants of the followers of a creed and what is the usage they have accepted as established for the regulation of their rights inter se.

The Law Commission in its 27th Report in Civil Procedure Code, December 1964 at page 91 while considering the addition of Explanation II to Section 9 observed as under:

> It may be added, that the decision of the Privy Council to the effect that a suit for pecuniary benefits is a civil suit, even if it becomes necessary to determine a right to perform religious services, does not imply that other suits relating to religious offices cannot be entertained.

In Srinivasalu Naidu v. Kavalmari Munnuswami Naidu MANU/TN/0200/1967 : AIR1967Mad451 it was observed,

> The explanation certainly does not confine the limits of the nature of suits contemplated by the main Section . What the Explanation states is only that though religious rites and ceremonies may form the basis of a right that is claimed, such right being a right to property or to office, a suit to establish such right would be a suit of a civil nature. The Section takes within its broad sweep all questions where one person claims any privilege in himself as against others. There is no doubt that such a question would be one of a civil nature.

On the plain phraseology of the Section , therefore, it is clear that a suit filed after coming into force of the Constitution for vindication of rights related to worship of status, office or property is maintainable in civil court and it would be duty of the court to decide even purely religious questions if they have a material bearing on the right alleged in the plaint regarding worship, status or office or property. In Nagar Chandra Chatterjee and Anr. v. Kailash Chandra Mondal and Ors. MANU/WB/0390/1921 : AIR (1921) Cal 328 it was held :

> Where there were no Ecclesiastical Courts, there was nothing to prevent civil courts from holding that Pujari has been removed from his office on valid grounds.

Sir Ashutosh Mookerjee quoted thus:

> There is manifestly nothing wrong in principle that the holder of a spiritual office should be subject to discipline and should be liable to deprivation for what may be called misconduct from an ecclesiastical point of view or for flagrant and continued neglect of duty.... It is plain that although so far as Hindus are concerned, there is now no State Church and no ecclesiastical court, there is nothing to prevent civil courts from determining questions such as those raised in the present litigation and from holding that the Pujari has been removed from his office on valid grounds.

In U.W. Baya v. U. Zaw Ta. AIR (1914) L B 178where a question arose as to which was

the forum where an action for violation of religious rights could be brought, it was held,

> there are, therefore, no ecclesiastical authorities in Lower Burma. Section 9, Civil P.C. enacts that the courts shall subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which the cognizance is either expressly or impliedly barred. This is a suit of a civil nature. It is a claim of certain lands and manuscripts.
>
> The civil courts, in our opinion, clearly have jurisdiction to decide the suit and should do so.

In Sri Sinna Ramanuja Jeer and Ors. v. Sri Ranga Ramanuja Jeer and Anr. MANU/SC/0350/1961 : [1962]2SCR509 this Court observed:

> prima facie suits raising questions of religious rites and ceremonies only are not maintainable in a civil court, for they do not deal with legal rights of parties. But the explanation to the Section accepting the said undoubted position says that a suit in which the right to property or to an office is contested is a suit of civil nature notwithstanding that such right may depend entirely on the decision of a question as to religious rites or ceremonies. It implies two things, namely, (i) a suit for an office is a suit of a civil nature; and (ii) it does not cease to be one even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies'.

In Ugamsingh & Mishrimal v. Kesrimal and Ors. MANU/SC/0537/1970 : [1971]2SCR836 , it was held that right to worship is a civil right which can be subject matter of a civil suit. The Court observed :

> It is clear therefore that a right to worship is a civil right, interference with which raises a dispute of a civil nature.

That the right to conduct worship is also a civil right has been recognised by the courts in T-A. Aiyangar Swamigal and Ors. v. L.S. Aiyangar and Ors. 31 Madras Law Journal 758. In Devendra Narain Sarkar and Ors. v. Satya Charon Mukerji and Ors. MANU/WB/0202/1926 : AIR1927Cal783 it was held that a suit by a person claiming to be entitled to a religious office against an usurper, for a declaration of his right to the office is a suit of a civil nature. Similarly in S.Ramnuja Jeer (supra) this Court observed as under :

> From the aforesaid passage it is clear that so long as the holder of a purely religious office is under a legal obligation to discharge duties attached to the said office for the non-observance of which he may be visited with penalties, a civil court could grant a declaration as to who would be or could be the holder or such office.

28. It was vehemently urged that declaration of the character of a church, viz., whether it was autocephalous was solely dependent upon the canonical laws and it necessarily involved an adjudication of what was the application canon, what was its interpretation and what are the religious beliefs, practices, customs and usage in the church which pertained to the ecclesiastical jurisdiction and the civil courts could not embark on such an enquiry. This is the farthest or the highest stand that could be taken by the appellant. The answer is two fold, one Section 9 of the Civil Procedure Code and other Article 25 of the Constitution. The latter guarantees constitutionally freedom of conscience and the right freely to profess, practice and propagate religion to every

person. Its reach has been explained in various decisions. In His Holiness Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami Etc. v. The State of Tamil Nadu MANU/SC/0631/1972 : [1972]3SCR815 it was held that this Article guarantees freedom to practice rituals and ceremonies which are integral parts of a religion. In Rev. Stainislaus v. State of Madhya Pradesh and Ors. MANU/SC/0056/1977 : 1977CriLJ551 it was held that right to practice and propagate not only matters of faith or belief but all those rituals and practices which are regarded as integral parts of a religion by the followers of a doctrine. In S.P. Mittal v. Union of India and Ors. : [1983]1SCR729 , it was held that freedom or right involving the conscience must naturally receive a wide interpretation. The suit filed was thus maintainable. The injunction and prohibition sought from interfering in administration of Church are certainly matters which pertain to the religious office. Even the declaration that the Church is episcopal is covered in the expansive expression of religion as explained in Mittal's case (supra). The word 'episcopal, means 'of or pertaining to bishops, Having a govt. vested in bishop'. A suit for declaration of such a right would be maintainable under Section 9. Not only because it is claim to an office but also because there is no other forum where such dispute can be resolved. If a dispute arises whether a particular religious shrine has ceased to be so due to its anti-religion activities then the followers of that religion or belief and faith cannot be denied the right to approach the court. Explanation I is not restrictive of the right or matters pertaining to religion. It only removes the doubt to enable the courts to entertain suits where dispute about religious office in involved. The right to religion having become fundamental right, it would include the right to seek declaration that the Church was Episcopal. But the court may refrain from adjudicating upon purely religious matters as it may be handicapped to enter into the hazardous, hemisphere of religion. Maintainability of the suit should not be confused with exercise of jurisdiction. Nor is there any merit in the submission that Explanation I could not have suits where the right to property or to an office was not contested or where the said right depended on decisions of questions as to religious faith, belief, doctrine or creed. The emphasis on the expression 'is contested' used in Explanation I is not of any consequence. It widens the ambit of the Explanation and include in its fold any right which is contested to be a right of civil nature even though such right may depend on decisions of questions relating to religious rights or ceremonies. But from that it cannot be inferred that where the right to office or property is not contested it would cease to be a suit cognisable under Section 9. The argument is not available on facts but that shall be adverted later. Suffice it to mention that in Ugamsingh (supra) the plaintiffs claim was that they were entitled to worship without interference of the idol of Adeshwarji in the temple named after him at Paroli according to tenants observed by the Digambri Sect on the Jain religion. It was held that from the pleadings and the controversy between the parties it was clear that the issue was not one which was confined merely to rites and rituals but one which effected the rights of worship. If the Digambaries have a right to worship at the temple, the attempt of the Swetamberies to put Chakshus or to place Dhwandand or Kalash in accordance with their tenets and to claim that the idol is a Swatamberi idol was to preclude the Digambaries from exercising their right to worship at the temple, with respect to which a civil suit is maintainable under Section 9 of the Civil Procedure Code. The scope of the Section was thus expanded to include even right to worship.

29. 'Religion is the belief which binds spiritual nature of men to super-natural being'. It includes worship, belief, faith, devotion etc. and extends to rituals. Religious right is the right of a person believing in a particular faith to practice it, preach it and profess it. It is civil in nature. The dispute about the religious office is a civil dispute as it involves disputes relating to rights which may be religious in nature but are civil in consequence. Civil wrong is explained by Salmond as a private wrong. He has extracted Blackstone who has described private wrongs as, 'infringement or privation of the private or civil

rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries'. Any infringement with a right as a member of any religious order is violative of civil wrong. This is the letter and spirit of Explanation I to Section 9. In American Jurisprudence volume 66, paragraph 45, the law is explained thus:

> The civil courts have steadily asserted their want of jurisdiction to hear and determine any controversy relating thereto. On the other hand, the civil courts have without hesitation exercised their jurisdiction to protect the temporalities of such bodies, for whenever rights of property are invaded, the law must interpose equally in those instances where the dispute is as to church property and in those where it is not'.

In Long v. Bishop of Capetown (1863) 1 Moo PC 411, where the Bishop held an ecclesiastical court for proceeding against the appellant who was authorised to perform ecclesiastical duties in a Parish was held as coram non judice as he had no authority to hold an ecclesiastical court. The court held that where no Church was established by law it was in the same situation as any religious body, therefore, if any tribunal was constituted by such body which was not court then its decision would be binding only if it was exercised within the scope of the authority. La Dame Henriette Brown v. Les Cure Et Marguilliers De L'Oeuvre Et Fabrique De Notre Dame De Motreal,1874 6 PC 157, the Privy Council while following the decision in Long (supra) held that where a Church was merely a private and voluntary religious society resting only upon a consensual basis courts of justice were still bound when due complaint was made that a member of the society was injured in any manner of a mixed spiritual and temporal character to inquire into the laws and rules of the tribunal or authority which inflicted the alleged injury and ascertain whether the act complained of was law and discipline of the Church and whether the sentence was justifiably pronounced by a competent authority. The decision in Long (supra) has been followed in this country in Anadrav Bhikaji Phadke and Ors. v. Shankar Daji Charya and Ors. ILR 7 Bom 323 were certain persons brought a suit that their right of worship in the sanctuary for a temple was being infringed, it was held that the right of exclusive worship of an idol at particular place set up by a caste was civil right.

30. The law being such it may be seen whether the suit filed by the respondent is covered within the fore corners of Section 9. Whether the relief sought by the respondent was regarding the status or office of the Metropolitan? In Original Suit No. 4 of 1979 it is claimed that various persons said to be ordained as metropolitans have no right to act as such and priest ordained in turn by them would equally have no right to act as such, all these being usurpers. Further the office of metropolitan in the Malankara Church has, with it, attached legal obligations for the non-performance of which sanctions or penalties are provided is clear both from the canonical law as well as the Constitution. Apart from this four suits, namely, Original Suit Nos. 2/79, 5/79, 6/79 and 8/79 concern themselves solely with the interference in the administration of Church properties being scheduled specifically in the respective plaints. Similarly the claim founded on allegations against wrong persons exercising the functions by those who have been wrongly designated as metropolitans and are interfering with the right to worship in Churches appears to be squarely covered in Section 9. The prayers in Original Suit No. 4/79 were 'A' to 'H'. Even if the prayer 'A' which seeks a declaration that Malankara Church is episcopal in character ignored the suit for reliefs 'E', 'F', 'G' and 'H' which read as under cannot be held to be touching only religious rites and therefore, are not cognisable by Civil Court:

> E. To declare that any Priest who refuses to recognize the authority of the

Catholicos and Malankara Metropolitan, the 2nd plaintiff and other Metropolitans under him is not entitled to minister in any of the churches or its institutions in Malankara.

F. To prohibit defendants 1 to 3 by an order or permanent injunction from ordaining Priests or deacons or performing any other sacraments, services, Etc. for the Malankara church or its institutions.

G. To prohibit defendants 4 onwards from performing any religious services a sacraments whatsoever in or about any of the church of Malankara and for the Malankara church or its constituent churches or institutions.

H. To prohibit the defendants from interfering in any manner with the administration of the Malankara church.

The appellant placed reliance on various averments in different I.As, written arguments and affidavits to demonstrate that the nature of relief sought was beyond the pale of Section 9. In fact this dispute was not seriously raised before the courts below. The dispute is going on since long and this is as stated the third round in this Court. But it appears that in , earlier litigations in the Royal Court of Final Appeal and the Supreme Court no such objection was taken that the suit was not maintainable. The submission that the locus standi of the respondent was suspect as they having been ex-communicated by the Synod of the orthodox church with Patriarch as its head, did not have any substance as in Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay MANU/SC/0072/1962 : [1962] Supp. 2 SCR 496 a Constitution Bench of this Court hel that the exercise of the power of ex-communication by the religious head on religious ground form part of the management of its affairs in matters of religion and since Articles 25 and 26 of the Constitution protect not merely religious, doctrine and beliefs but also acts done in pursuance of religion and themselves carrying the rituals and observations, ceremonies and right of worship which are integral part of religion it is difficult to agree that there was no forum for vindication of such right.

31. Even the argument that the declaration that the Church was autocephalous or Episcopal is cognisable only in the ecclesiastical jurisdiction and the civil courts could not embark on such an enquiry does not appear to be well founded. A civil court may be precluded from deciding what rites are necessary to impart religious character. For instance, whether kaivapu, that is placing of the hand by the spiritual head for ordination is necessary or Morone, that is, the oil of see must be there may be a matter for the Synod. But who has a right to perform it or whether it has been performed as provided in the religious book and whether a Church has become autocephalous due to adoption of Constitution by a Synod are matters which can surely and certainly be decided by the courts. The learned Counsel submitted that question whether the Malankara Church was governed in its administration by the Constitution of Malankara Church with reference to the Constitution passed in M.D. Seminary meeting in 1934, which dealt with religious and ecclesiastical aspects of the Church, could not be adjudicated upon by the civil courts. According to learned Counsel the Constitution expressly adopted the Catholico version of the canon and made provisions in regard to ordination of prices, bishops, Catholicos and the discipline to which they were subjected, these were mere matters of religious rites and ceremonies and involved an adjudication of the question of religious faith, creed and doctrine which would be wholly outside the scope of the civil courts. The learned Counsel submitted that the single most important question on which the fate of these appeals and suits would turn was as to which was the correct version of the canon applicable to Malankara Church

and this was a matter which entirely depended on questions relating to the religious faith, doctrine and belief. It was also emphasised that the various decisions given by this Court, namely, Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay MANU/SC/0072/1962 : [1962] Supp. 2 SCR 496; Ugamsingh & Mishramal v. Kesrimal and Ors. MANU/SC/0537/1970 : [1971]2SCR836 ;Thiruvenkata Ramanuja Pedda Jivyangarlu Valu v. Prathivathi Bhayankaram Venkatacharlu and Ors. MANU/PR/0026/1946; M Appadorai Ayyangar and Ors. v. P.B. Annangarachariar and Ors. AIR (1939) Mad. 102; Kattalai Michael Pillai and Ors. v. J.M. Barthe and Ors. AIR (1917) Mad. 431;E. C. Kent v. E.E.L. Kent AIR (1926) Madras 59 and Sri Sinna Ramanuja Jeer and Ors. v. Sri Ranga Ramanuja Jeer and Anr. MANU/SC/0350/1961 : [1962]2SCR509 would indicate that Explanation 1 to Section 9 saved only those suits where the right to property or to an office was contested. But where no contest was raised the suit would not be covered within the fore corners of the Section . Reference was made to paragraphs 301 to 304, 313 to 315, 318, 321, 332 to 339, 343 to 346, 352, 354 and 356 of vol. 14 of Halsbury's Laws of England and it was urged that these paragraphs would show that the position of the crown in England in respect of Church was entirely different. The learned Counsel submitted that passages which have been relied to deal with the Anglican Church relate to colonies where the supremacy of the Crown in ecclesiastical affairs still exists. He urged that those passages have no relevance to a sovereign secular country like India. The learned Counsel pointed out that the decisions in Long (supra) and Dame (supra) arose in different colonies which accepted the supremacy of the Crown in ecclesiastical matters and apart from the regular hierarchical set up in the Anglican Churches or the Churches in the colonies the civil courts also exercised jurisdiction. These decisions arising from jurisdictions where Church was part of the State could not apply in a country like India where religious neutrality was mandated by the secular constitution. In the end the learned Counsel submitted that the judiciary should keep its hands off in respect of such religious matters.

32. The submissions do not appear to stand the test in light of what has been stated earlier. The relevant passage from Halsbury's Laws of England have already been extracted to demonstrate that the ecclesiastical law of England does not apply to colonies. There is no statute framed even during British regime which had adopted the statutory or common law to the Churches in India. The mere fact that the Churches in England are governed by ecclesiastical law could by no stretch of imagination furnish foundation for the submission that the Churches in India would also be governed by ecclesiastical law. The jurisdiction of courts depends either on statute or on common law. The jurisdiction is always local and in absence of any statutory provision the cognizance of such dispute has to be taken either by a hierarchy of ecclesiastical courts established in the country where the religious institutions are situated or by a statutory law framed by the Parliament. Admittedly no law in respect of Christian Churches has been framed, therefore, there is no statutory law. Consequently any dispute in respect of religious office in respect of Christians is also cognisable by the civil court. The submission that the Christians stand on a different footing than Hindus and Buddhists, need not be discussed or elaborated. Suffice it to say that religion of Christians, Hindus, Muslims, Sikhs, Budhs, Jains or Parsee may be different but they are all citizens of one country which provides one and only one forum that is the civil court for adjudication of their rights, civil or of civil nature.

33. In reading Section 9 widely and construing it expansively the jurisdiction to entertain a suit for declaration whether the Church was episcopal or congregational and whether the appellants could have been ordained by the Patriarch when it was contrary to the earlier decision given by this Court that the ordination was required to be approved by Synod, the court is not being asked to adjudicate on faith but whether the

exercise of right in respect of faith was valid. The Grace no doubt comes from Patriarch and on that there is no dispute but whether the Grace came in accordance with the Canon or the Constitution is certainly a matter which would fall within Section 9 C.P.C. Status and office are no doubt different but what was challenged is not the status or faith in Patriarch but the exercise of right by Patriarch which interfered with the Office of Catholico held validly. Apart from it, as stated earlier, after coming into force of the Constitution Article 25 guarantees a fundamental right to every citizen of his conscience, faith and belief, irrespective of cast, creed and sex, the infringement of which is enforceable in a court of law and such court can be none else except the civil courts. It would be travesty of justice to say that the fundamental right guaranteed by the Constitution is incapable of enforcement as there is no court which can take cognisance of it. There is yet another aspect of the matters that Section 9 debars only those suits which are expressly or impliedly barred. No such statutory bar could be pointed out. Therefore, the objection that the suit under Section 9 C.P.C. was not maintainable cannot be accepted.

34. The other objection to the maintainability of the suit was based on the Places of Worship (Special Provisions) Act, 1991 ('Act' for short). This Act was enacted to prohibit conversion of any place of worship and to provide for the maintenance of its religious character as it existed on the 15th day of August, 1947 and for matters connected therewith or incidental thereto. Section 2(c) defines 'worship' to mean 'a temple, mosque, gurudara, church, monastery or any other place of public religious worship of any religious denomination or any Section thereof, by whatever name called'. Section 3 bars any person from converting any place of worship or any religious denomination into a place of worship of a different Section of the same religious denomination or of a different religious denomination or any Section thereof. Section 4 declares that the religious character of a place of worship existing on 15th day of August, 1947 shall continue to be same as it existed on that date. Therefore, it was urged that the suit having been filed for declaration that the Syrian Churches were apostolic and autocephalous, it amounted to seeking a declaration as to religious character of the places of worship and consequently it was barred and the court cannot assume jurisdiction to grant such declaration. The learned Counsel urged that each Parish Church is a place of worship within the meaning of Section 2(c) of the Act and the religious denomination is the Jacobite Syrian Orthodox church in Malabar. According to learned Counsel, it having been held in successive decisions that there were two sections of the said religious denomination, one, the Patriarch Group and the other, Catholicos and these two denominations existed on 15th day of August, 1947, factually and legally, the suit filed by the respondents for a declaration that the Jacobite Church was autocephalous was not maintainable and liable to be dismissed on this ground alone. The learned Counsel submitted that the Parish Churches believed in uninterrupted apostolic succession of St. Peter through the Patriarch and that the spiritual grace emanates through such Patriarchs and, therefore, the declaration sought by the respondents could result in destroying the basic character of the religious denomination. It is not necessary to deal with these submissions at length as Sub-section (3) of Section 4 is a complete answer to it. It reads as under:-

> Nothing contained in Sub-section (1) and Sub-section (2) shall apply to, -
>
> > (a) any place of worship referred to in the said Sub-sections which is an ancient and historical monument or an archaeological site or remains covered by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) or any other law for the time being in force;

> (b) any suit, appeal or other proceeding, with respect to any matter referred to in Sub-section (2), finally decided, settled or disposed of by a court, tribunal or other authority before the commencement of this Act.
>
> (c) any dispute with regard to any such matter settled by the parties amongst themselves before such commencement;
>
> (d) any conversion of any such place effected before such commencement by acquiescence;
>
> (e) any conversion of any such place effected before such commencement which is not liable to be challenged in any court, tribunal or other authority being barred by limitation under any law for the time being in force.

The Syrian Jacobite Church is an ancient and historical monument which was established sometime in 51-52 century A.D. the respondents did not seek a declaration for conversion of the church or place of worship. The matter of the religious denomination was settled as far back as 1876 in the Mulunthuruthy Synod. Even the declaration sought that the Church is autocephalous is founded on the Kalpana issued in 1912 and the Constitution framed in 1934. No declaration is sought for change of the place as it existed in 1947. Further, whether the declaration sought for can be granted or not is a different matter than claiming that the declaration if granted would result in converting the place of worship or the religious denomination. This objection, too, therefore, is not available on facts of this case.

35. Reverting to merits the principal issue that calls for adjudication is about the scope of ex-communication in ecclesiastical matters and the extent to which the Court can examine it and lastly whether the ex-communication of the Catholico by the Synod held at Damascus under the Presidentship of the Patriarch of Antioch was valid either canonically or conventionally? The principal defence in the suit from which these appeals have arisen, was that the Catholic-plaintiffs were ex-communicated, therefore, the suits were liable to be dismissed. Two questions arise, one, the jurisdiction of the civil court to examine ex-communication and second, whether the ex-communication was in accordance with law. Taking up the first question as to whether the civil courts are competent to decide on the validity of the ex-communication, the answer, in this connection, has been given while deciding the objection of maintainability of the suit under Section 9 CPC. Yet it would not be inappropriate to mention how far the protection of a civil court extends regarding the ecclesiastical matters. The law has been explained in paragraphs 315, 332 and 337 of Halsbury's Laws of England, Vol. 14. A church is formed by the voluntary association of individuals. And the churches in the commonwealth are voluntary body organised on a consensual basis - their rights apart from statutes will be protected by the courts and their discipline enforced exactly as in the case of any other voluntary body whose existence is legally recognised. Therefore, all religious bodies are regarded by courts of law in the same position in respect of the protection of their rights and the sanction given to their respective organisations. It is further settled that discipline of a church cannot affect any person except by express sanction of the civil power or by the voluntary submission of the particular person. But for purposes of enforcing discipline within a church religious body may constitute a tribunal to determine whether its rule have been violated by any other members or not and what will be the consequence of that violation. In such case the tribunals so constituted are not in any sense courts, they derive no authority from the statutes and

they have no power of their own to enforce their sentence. Their decisions are given effect to by the courts as decision of the arbitrators whose jurisdiction rests entirely on the agreement of the parties. Consequently if any member of such body has been injured as to his rights in any matter of mixed spiritual and temporal character the courts of law will, on due complaint being made, inquire into the laws and rules of the tribunal or authority which has inflicted the injury and will ascertain whether any sentence pronounced was regularly pronounced by competent authority, and will give such redress as justice demands. See Long (supra), Dame (supra) and Anadrav (supra). In Hasanall and Ors. v. Nansoorali and Ors. AIR 35 (1948) PC 66, it was held that a court of law cannot recognise a purported ex-communication as valid if principles of substantial justice have not been complied with.

36. Ex-communication in religious order and that top of a spiritual head entails serious consequences both religious and civil. 'Ex-communication' is defined in Black's Law Dictionary as 'a sentence of censure pronounced by one of the spiritual courts for offences falling under the ecclesiastical cognizance. It is described as two-fold: (1) The lesser excommunication, which is an ecclesiastical censure, excluding the party from the sacraments; (2) the greater, which excludes him from the company of all Christians. Formerly, too, an excommunicated man was under various civil disabilities. He could not serve upon juries, or be a witness in any court; neither could he bring an action to recover lands or money due to him. These penalties were abolished in England by St. 53 Geo. III, c.127. Excommunication is still a censure under Canon Law". In Faiths of the World by James Gardner, it is discussed under 'Anathema' and 'Censure'. The Anathema was usually administered to offenders. 'It is well known that a solemn curse or anathema "with bell, book, and candle" against all heretics, is annually pronounced by the Pope at Rome, and by other ecclesiastics in other places on the Thursday of Passion week, the day before Good Friday, the anniversary of the Saviour's crucifixion". The substance of the "Anathema" is in these words :

> Excommunicated and accursed may they be, and given body and soul to the devil. Cursed be they in cities, in towns, in fields, in ways, in paths, in houses, out of houses, and all other places, standing, lying, or rising, walking running, waking, sleeping, eating, drinking, and whatsoever things they do besides. We separate them from the threshold, and from all prayers of the church.
>
> 'Censures (Ecclesiastical)" is 'the various punishments inflicted by the Christian church upon delinquent members of her communion, in virtue of that authority which has been committed to her by Christ, the great King and Head of the church'.

37. One of the effects of such action is that the person concerned is deprived of the right of worship. Under our Constitution it is a fundamental right. Any interference with it or its deprivation can be challenged in a court of law. Even in England the Courts extend protection regarding ecclesiastical matters if they affect the right as is clear from paragraph 337 of Halsbury's Laws of England, Fourth Edition, Volume 14.

38. In the light of the law thus stated it may be examined if the excommunication of Catholico by the Patriarch was valid as if the power of ex-communication was validly exercised then the suit filed by them was not maintainable. The specific case in this regard of the appellants was that, 'canonical', and, 'traditionally' the Patriarch of Antioch is the supreme head of the Holy Universal Syrian Orthodox Church and the Catholicos, is subordinate to the Patriarch of Antioch'. Therefore, the Catholico was validly ex-communicated in accordance with the canon filed as Ex.18, which is the foundation of

the power and jurisdiction of Patriarch. How far is this correct? In Moran Mar Basselios (supra) it was held that the Catholicos had not committed any act of heresy. Could they be held to have committed act of hereby when, then used the word 'Holiness' and on the 'Throne of St. Thomas'. From The new Testament - The Gospel according to St. Mathew, Chapter 19 it appears there was throne for each apostle :-

> Then answered Peter and said unto him, Behold, we have forsaken all, and followed thee; what shall we have therefore?
>
> And Jesus said unto them, Verily I say unto you, That ye which have followed me, in the regeneration when the Son of, man shall sit in the throne of his glory, ye also shall sit upon twelve thrones, judging the twelve tribes of Israel.

St. Thomas was, 'one of the original apostles of Jesus Christ' [Religions of India by Dr. Karan Singh, p.15]. In a book written by E.M. Philip, one of the authors on Syrian Church, the effect of the judgment by Royal Court of Appeal is described thus, 'of course, the majority judgment prevailed and Mar Dionysius was established on the Throne of St. thomas'. The expression 'Melapattakaran of the throne in Malayalam' has been used by Royal Court of Cochin in its judgment thus,

> He upheld the contention of Mar Thomas Athanasius, and found that the Syrian Church was independent of the Patriarch of Antioch. Of course, the majority judgment prevailed, and Mar Dionysius v. was established on the throne of St. Thomas.

In Exht. A-4 (Notice for M.D. Seminary Meeting of 1934) issued to Vicars, Priests, Kykars and Parishioners, it was mentioned :-

> From the meek Baselius Catholicos under the Gheevarghese II seated on the Throne of Apostle St. thomas in the East.

In the letter dated 8th June, 1959, Ex. A-24, the Catholic in his reply to the Patriarch wrote as under:-

> **3.** His Holiness: The propriety of using the title 'His Holiness' along with my name is questioned. Now I must bring to your notice that fact that customarily the same epithets have been attached to the Patriarch and the Catholicos in our church as evinced by our Holy writs and other books. For example, in the diptych (first intercession of the Church, during the Holy Qurbans, the people are asked to pray for our Patriarchs Aboon Mar Ignatius and Aboon Mar Baselios. The very same titles are here seen applied to the Patriarch and the Catholicos, alike, the later himself being called a Patriarch. The inference is that the titles proper to the Patriarch of Antioch are proper also to be Catholicos of the East. We also see that such epithets as Moran, Aboon, Etc. are applied to both the prelates in common. Further this title has been in use here for long time.
>
> **4.** The Throne of St. Thomas : Your Holiness says 'It is never heard that St. Thomas established a throne of the Catholicos or the Mapriano, either in India or in my other place'. I must, without presumption, ask your Holiness, whether for that matter, any apostle has established a throne anywhere. Is it not that such honours have been connected, with them in latter times. There is also no special thronal ascension for any dignitary of our church except the installation ceremony (...) done at the time of the consecration of Bishops and other

prelates and at their acceptance by their respective dioceses. Besides, we see that this term 'throne' is added to the Patriarchs, Metropolitans and Bishops alike in the Hudaya Canon and other books (Canon Chap. VII, Section I) and the ceremony of enthronement is done over for Bishops.

Your Holiness knows that the very eminent Syrian Historical writer Gregories Bar Hebraous regards St. Thomas, the apostle, as the first bishop of the East. Let me also bring to your notice that the Malankara Church Historian, E.M. Philip who had been a staunch partisan of the Patriarch, refers to the throne of St. Thomas, in his history of the Malankara Syrian Church (2nd Edition page 253). That being the case, can we say that St. Thomas, one among the twelve eminent apostles, had no throne at all.

Your Holiness says 'Also we could not find such a throne in the document given by Abdul Messiah II. I am indeed happy that your Holiness respects and depends upon the Kalpana given by Abdul Messiah II. But it must caution your Holiness that the Kalpana you refer to may be the General Kalpana that he issued just before he left Malankara (1913). The earlier Kalpana issued by him from Niranam Church on the day he installed Mar Ivanios of Murimattom as Catholicos, had to be necessarily referred to. To make things clear, I shall quote a sentence from it. "According as you requested we have consecrated our spiritual and beloved Ivanious as Mapriano under the name Baselios of the East; on the throne of the Diocese of St. Thomas in India and other places". (1912). This is very definite and no one could say that a throne like this was a now find or one found without the knowledge of the throne of Antioch.

39. This letter explained the justification for use of the expression, Throne of St. Thomas' and 'Holiness'. Whatever may be its religious significance but in view of what has been stated above coupled with the conduct of the Patriarch in not only condoning and accepting its use but even presiding in the installation ceremony, it is difficult to treat it as an act of heresy deserving ex-communication.

Apart from it, the four charges levied in the show-cause notice were as under :-

(i) That the Catholicos claimed to be seated on the Throne of St. Thomas.

(ii) That he declared that he was equal in status to the Patriarch which was uneconomical as he was a subordinate.

(iii) That he did not accept the Patriarch delegate in India (sent in 1972) and resorted by all means "to send him off .

(iv) That at the time of ordination of three Metropolitans in 1966 by the Catholicos, the Catholicos did not take an oath of subordination to the Patriarch.

None of them individually or collectively could attract the punishment of excommunication even if found to be true. The nature and the power to be exercised for excommunication have been indicated earlier. They are not lightly exercised as they deprive a person of his right of worship. The accusation that the Catholico was subordinate to Patriarch was not an accurate description. The Patriarch of Antioch was and is undoubtedly the highest ecclesiastical functionary. But the second highest dignitary was and is the Catholicate of the East. The concept of subordinate amongst such spiritual heads is out of place. They function in their own sphere according to

religious canon. When Patriarch of Antioch was established in Synod of Nicea the Catholico of the East was established at Tigris. The two authorities in the hierarchy existed from 4th century. Therefore, the creation of Catholico in 1912 in Malankara conferring jurisdiction over India, Ceylon and Burma was neither against scriptures nor against faith. The exercise of power by the Catholico in pursuance of such creation and under the Constitution which was framed in 1934 could not entail ex- communication. The action of Patriarch in ex-communicating the Catholico deprived him of the religious right guaranteed to him under the Constitution, therefore, it had to be in accordance with law. Even the meeting summoned at Damascus being in violation of the Constitution of 1934 was invalid. Therefore, the ex-communication of Catholicos was not in accordance with law.

40. Was the ex-communication canonical? If the religion is a bond uniting man to God then canon is a rule or decree, a body of principles and standards the practice and observance of which identifies the man with the religion. 'The identity of the religious community described as church consist in the identity of its doctrine, creeds, formularies, rituals etc.'. [Hidayatullah, J. in Ninal Daniel v. Most Rev. Ubanon Marthoma, Metropolitan of Mar Thoma Church, and Ors. Civil Appeal No. 947 of 1964 decided on 7th January, 1965.]

Canon is explained in Black's Law Dictionary as under :

> A law, rule or ordinance in general, and of the church in particular. An ecclesiastical law or statute. A rule of doctrine or discipline. A criterion or standard of judgment. A body of principles, standards, rules, or norms.

41. Canon means both a norm and attribute of the scripture. The term 'canon law' is explained in The Encyclopedia of Religion Vol. 3 as under :

> The term canon is based on the Greek word Kanon. Originally signifying a straight rod or bar, especially one used to keep something else straight, canon came to mean something that is fixed, a rule or norm. The term has several applications in church usage: the canon of scripture, or that fixed list of books that are determined to belong to sacred scripture; the canon of the Mass, the fixed portion of the eucharistic prayer; the process of declaring a deceased person to be among the fixed list of saints in heaven, or canonization. From the third century, directives for church living and norms for church structures and procedures have been issued as canons.
>
> Canon law refers to the law internal to the church. In the early centuries of Christianity, canon was used for internal church norms, to distinguish them from the imperial norms (leges in Latin) or laws. Church norms have also been known as sacred or divine, to distinguish them from civil or human laws. At times they are referred to as the "sacred canons" or the "canonical order". The term ecclesiastical law is used synonymously with canon law, although at times ecclesiastical law also refers to the civil law adopted in various nations to regulate church affairs. The term canon law is used in the Roman Catholic, Anglican, and Orthodox communions.
>
> Canon law is drawn from sources in scripture, custom, and various decisions of church bodies and individual church authorities. Over the centuries these have been gathered in a variety of collections that serve as the law books for various churches.

42. Canons are thus the principal scriptural bases for the religious practices observed in a Church. Syrian Orthodox Church is very old. But its canon appears to have come in existence sometime in 13th Century collected and written by Bar Hebrew who was the Catholico of Tigris. In the appeal arising out of interpleader suit this Court after examining the evidence in detail particularly of C.Philip, P.W.5, who was the Professor of the Sriram College, Calcutta and was examined, as expert on canon law held that there was no authorised edition of these canons even though one of the resolutions at the Mulunthuruthy Synod ran thus:

> It will be very good if a book containing the Canons and procedure necessary for the firmness in the Orthodox faith is printed in Syriac or Malayalam as per orders (of the Holy father) and a copy with his seal given to each church and decided that future conduct shall not be except in accordance with that.

The absence of any canon in such an old Church existing since 51-52 Century A.D. with such extensive and widespread following not only in this country but even others is a tribute to the honest, firm and sincere belief in the Syrian Church. Even without any written Code or rule their never was any controversy over faith, practice, belief, rituals etc. But what is surprising is that till the advent of late 19th and the beginning of 20th Century there was no authentic publication of it. Consequently when the battle in courts of law started between the two groups there appeared two divergent versions differing on vital aspects. To add to this the courts have not been consistent in accepting one or the other version. More so because of the accusation of interpolation and tampering. Even though the first occasion to examine the canons arose in the appellate judgment of the Royal Court, the scope was limited as to whether the Patriarch alone had the power to consecrate Morone. The authority to ex-communicate etc. in which the interpolation is alleged was never examined. The decision, therefore, cannot be taken to be as putting its seal of approval on the authority of the canon produced on behalf of Patriarch of Antioch. And when the power and jurisdiction to ex-communicate in accordance with canon law was raised in the interpleader suit (Vattipanam suit) both the sides came with different versions, the one filed by Catholico was accepted by the trial court whereas the High Court found the version placed by the Patriarch as authentic. Both the judgments abound in thorough and careful analysis of difficult subject. The discussion is extensive and learned. But all this labour was lost when the appeal in the High Court was dismissed in consequence of the review judgment. It is true that the Bench while admitting the review petition had confined its scope but one it found that the excommunication was invalid for violation of principles of natural justice and question having been raised that the ordination of defendant no. 1 (that is catholico) as Malankara Metropolitan was invalid he was the Malankara trustee. Justice Chatfield with whom Justice Pillay agreed that, 'he (that is catholicos) did not forfeit these positions afterwards by any heresy or schism. The meeting of the Malankara Association which removed the 5th & 6th defendants (that is Patriarch) was presided over by the Malankara Metropolitan and the reason given in the original judgment of this court for holding that their removal was illegal cannot therefore stand'. On these findings it was held :

> In the result therefore by reason of the decision on the contentions as to natural justice and apostasy the appeal must fail quite apart from the decision of the other questions in dispute in this suit. It would not be necessary to consider these other questions even if it were open to this court to do so in view of the orders already referred to.

43. The effect in law of this order, on review, was that the finding recorded by the High

Court on the authenticity of the canon etc. in its original order ceased to be operative. But the learned Counsel for the appellant vehemently urged that since the Bench which admitted the review petition had restricted its scope and made it subject to the findings recorded on the authenticity of the canon and the power of the Patriarch to ex-communicate without any intervention by the Synod, the findings recorded on these aspects were not destroyed in consequence of the order passed on the review petition. The submission does not appear to be correct either legally or factually. When a review petition is entertained and notice is issued by a court it is open to it to restrict the scope of hearing but once the petition is heard and the court is satisfied that the order under review was erroneous at the fact of it then it is not precluded from allowing the petition and setting aside the findings which were earlier not permitted to be re-opened. After the review petition was admitted and the Catholicos were restricted from re-opening other points, an application was filed on their behalf which was rejected but while rejecting the application it was observed, 'if it is found that any of these questions is so legally connected with the questions relating to natural justice that the latter questions cannot be properly dealt with without considering such excluded questions then for this purpose and for this purpose alone the excluded questions may be considered'. This observation of Chatfield, J. was concurred by other judges also. And when the review petition was heard on merits the court was of the opinion, 'these (These) orders did not prevent the defendants (that is Patriarch) from relying on contentions not expressly found in their favour in the original judgment and they have in fact relied on the contentions previously set up by them that the defendants 1 to 3 have become aliens to the faith of Syrian Jacobite Church and for this reason alone are capable of acting as trustees. The plaintiffs on the other hand have failed to show that any of the questions which have been declared to be excluded from consideration at the re-hearing are inseparably connected with these questions and thereupon in disposing of this appeal the excluded questions will not be referred to'. It is thus clear that the Bench heard the appeal not only on the questions on which the review was entertained but even on other questions as the questions of natural justice and apostasy were closely connected with and could not be separated from the issues which had earlier been closed. It was after these observations that Justice Chat-field made the observations which have been extracted earlier. To argue, therefore, that the finding recorded in the earlier judgment by the High Court the Ex.18 filed by the Patriarch group and relied as authentic canon survived, does not appear to be correct.

44. Even assuming, although there appears no doubt, that the finding recorded by the High Court in its earlier judgment on the authenticity of the canon survived, there is yet another reason to disregard it. If the ex-communication of Dionysius was invalid for violation of principles of natural justice, as was found by the Bench reviewing the order, then the findings on other issues were rendered unnecessary and it is fairly settled that the finding on an issue in the earlier suit to operate as res judicata should not have been only directly and substantially in issue but it should have been necessary to be decided as well. For instance, when a decision is taken in appeal the rule is that it is the appellate decision and not the decision of the Trial Court that operates as res judicata. Consequently where a suit is decided both on merits and on technical grounds by the Trial Court, and the appellate court maintains in on technical ground of limitation or suit being not properly constituted then the decision rendered on merits by the Trial Court ceases to have finality. In Abdullah Ashgar Ali Khan v. Ganesh Das AIR (1917) PC 201 the Court while considering the expression, 'heard and finally decided' in Section 10 of the British Baluchistan Regulation IX of 1896 held that where the suit was dismissed by two courts on merits but the decree was maintained in second appeal because the suit was not properly constituted then the finality on merits stood destroyed. In Sheosagar Singh and Ors. v. Sitaram Singh ILR (1897) Cal. 24 where parentage of defendant was

decided in his favour by the Trial Court but the High Court maintained the order as the suit was defective the claim of the defendant in the latter suit that the finding on parentage operated as res judicata was repelled and it was held, that the question of percentage had not been heard and finally decided in the suit of 1885. The appeal in that suit had put an end to any finality in the decision of the first Court, and had not led to a decision on the merits.

45. The rationale of these decisions is founded on the principle that if the suit was disposed of in appeal not on merits but for want of jurisdiction or for being barred by time or for being defectively constituted then the finality of the findings recorded by the Trial Court on merits stands destroyed as the suit having been found to be bad for technical reasons it becomes operative from the date the decision was given by the trial court thus rendering any adjudication on merits impliedly unnecessary. On the same rationale, once the Royal Court of Appeal allowed the Review Petition and dismissed the appeal as the ex-communication of Dionysius was contrary to principles of natural justice and he had not become heretic then the finding on authenticity of the canon etc. rendered in the original order was rendered unnecessary. Therefore, the finding recorded on the authenticity of the canon and power of the Patriarch etc. recorded in the earlier order could not operate as res judicata in subsequent proceedings.

46. Last but not the least reason to hold that the finding in the Vattipanam Suit recorded by the High Court in its original judgment on canon etc. could not operate as res judicata is where a decree is one of dismissal in favour of the defendants, but there is an adverse finding against him, a plea of res judicata cannot be founded upon that decision because the defendant having succeeded on the other plea had no occasion to go further in appeal against the adverse finding recorded against him [see Midnapur Zamindari Company Ltd. v. Naresh Narayan Roy MANU/PR/0009/1920 : AIR (1922) PC 241. Mr. Parasaran, the learned senior counsel for the appellant, urged that this is not an absolute rule as there is mutuality in res judicata and even the succeeding party is bound by the question decided against him. Reliance was placed on Mt. Munni Bibi and Anr. v. Tirloki Nath and Ors. MANU/PR/0031/1931;V.P.R.V. Chockallagam Chetty v. Seethai Ache and Ors. AIR (1927) PC 202; Sham Nath Madan v. Mohammed Abdullah and Ors. AIR (1967) J&K 85 and Arjun Singh and Ors. v. Tarn Das Ghosh and Ors. MANU/BH/0001/1974 : AIR1974Pat1 . The two Privy Council decisions do not appear to be of any assistance as the first one, Mt. Munni Bibi (supra), is the leading decision on the principle of res judicata amongst co- defendants. True the Patriarch and Catholico were co-defendants and there was lis too but in view of the finding on natural justice and apostasy the finding on other issues was rendered unnecessary. The rule of res judicata amongst co-defendants is also governed by those rules which apply to normal rule of res judicata. The decision in Chockalingam Chetty (supra) is an authority for the principle that where an appeal is filed without impleading a defendant through whom other defendants derived title then the decision in his favour operates as res judicata between plaintiff and other defendants as well. Similarly, in the decision of the Patna High Court in Arjun Singh (supra) the primary question was whether a party against whom a finding is recorded has got a right of appeal even though the ultimate decision was in his favour and it was held that there was no bar, but what was necessary was that the finding so recorded should operate as res judicata. On facts it was found that the Appellate Court while maintaining the order of dismissal of the suit on preliminary issue recorded findings on other issues which were against the plaintiff, yet the plaintiff was not entitled to file an appeal as the findings on merits which were adverse to him could not operate as res judicata. In Sham Nath's case (supra) the learned Single Judge rejected the plea of res judicata raised on behalf of the plaintiff, but while considering the alternative argument, observed that an adverse finding recorded against a defendant

in a suit dismissed could not operate as res judicata unless the adverse finding formed a fundamental part of the decree itself. None of the decisions, therefore, are of any help to the appellant. In any case the findings on cannon or power of Patriarch which were the findings adverse to the Catholico could not form fundamental part of the decree itself, therefore, it could not operate as re judicata. Truly speaking, the findings on the authenticity of the canon and the power of Patriarch etc. recorded in the earlier judgment and the finding on apostasy and breach of natural justice recorded in the review judgment could not go together. Otherwise in Moran Mar Besselios (supra) it would not have been possible for this Court to come to a finding that the findings recorded on Issue Nos. 14 15, 16 and 19 in the Vettipanam Suit operated as res judicata in the Samudayam Suit. The finding recorded by the learned Single Judge and the Division Bench, therefore, that, 'the decision in XLI T.L.R. that Ext.18 there in (Ext.BP in the Samudayam case and Ext. B161 in these cases) is the version of Hudaya canons accepted as binding on the Malankara Church has not become concluded and does not operate as res judicata between the parties', its well founded.

47. Could the finding on the authenticity of the canon be relied as a precedent? For that it must fall either under Section 42 or Section 43 of the Indian Evidence Act. Section 42 which makes any judgment relating to public nature admissible itself provides but 'such judgments are not conclusive proof of that which they state'. Section 43 makes a judgment admissible if existence of such a judgment is in issue. In Kumar Gopika Roman Roy v. Atal Singh and Ors. MANU/PR/0105/1929, it was held that 'the Indian Evidence Act does not make finding of fact arrived at on the ' evidence before the court in one case evidence of that fact in another case'. In Benode Lal v. Secretary of State AIR (1931) Calcutta 239 where the law was clearly explained, it was observed, 'when an appeal is taken against a decree, the decree of the lower gets merged in the decree of the Appellate Court and so the judgment of the trial court is not final adjudication on the point in issue between the parties in the suit'. The Court further observed that even assuming that, 'the existing judgment may be relevant, but the truth of it, by which it is understood, the decision of the Judge and the opinion expressed by him, is not relevant'. Applying these principles once the appellate judgment was set aside, the appeal was dismissed and the order of the trial curt was maintained, the findings recorded on canon etc. in the appeal could not be relied.

48. That is why when he suit was file din 1938, that is the Samudayam Suit, the parties joined issue, once again, on the authenticity of the canon and the Court framed the issue as to which was the correct and genuine version. No issue about res judicata was raised by the Patriarch. Coincidentally same story was repeated, the Trial Court accepting the version filed by the Patriarch. But when the matter came to this Court in 1959 it while considering the objection of Patriarch that by inserting Clause 5 in the Constitution the Catholicos were guilty of heresy as it was contrary to the authentic version produced by them did observe that for deciding this aspect it was necessary to decide the issue which related to authenticity of the version. Since this Court had not recorded any finding itself on the authenticity of the canon the dispute again arose, when these suits were filed, about the authenticity of the canon and the findings and conclusions recorded in earlier suits that is the Vattipanam Suit and the Samudayam Suit and whether any one of them operated as res judicata. It has already been explained why the findings recorded in Vattipanam Suit could not operate as res judicata. or the finding could be treated as binding precedent.

49. Can the same be said about the finding in the Samudayam Suit? It is not disputed that the Trial Court not only framed Issue No. 13 but even recorded specific finding that the canon produced by the Patriarch group was not the authentic version. But its

binding effect was rendered nugatory both according to the Division Bench and the learned Counsel for the appellant because when this Court restored only the decree of the Trial Court and not judgment then the findings recorded by the Trial Court could not be taken to be binding or final. Two legal questions, therefore, arise one, whether the authenticity of the canon was directly and substantially in issue and second the effect of restoration of the decree of the Trial Court. The first was answered by this Court itself while adjudicating upon the plea advanced on behalf of the Patriarch group to support the judgment of the High Court. To appreciate it, it is appropriate to extract Issue No. 13 which reads as under :

> 13. Which is the correct and genuine version of the Hoodaya Canons compiled by Mar Habraeus? Whether it is the book marked as Ext.A or the book Marked as Ext.XVIII in O.S.91 of 1088.

Issues Nos. 19 and 20 related to as to whether the defendants, that is, the Catholicos formed themselves into a separate Church and whether the acts mentioned under the Issues constituted separation. This Could did not permit the appellants, that is, Patriarchs to support the order of the High Court on the ground that insertion of clause 5 in the Constitution of 1934 was contrary to canons, as it was not raised in the pleadings. Nor did the Court find any merit in the submission that Issues Nos. 13 and 16 which related to loss of status as members of the Church was wide enough to include it. But it held that reference to pleadings would indicate why Issue No. 13 was raised. It further found that to decide Issues Nos. 16, 17, 19 and 20 it was, 'absolutely necessary to determine which is the correct book of canons, for the plaintiff (that is the Patriarch Group) founded their charges on Ex.B.P. - Ex. 18 in O.S. No. 94 of 1088 and the defendants took their stand on Ex.26 - Ex. A in O.S. No. 94 of 1088. Issue No. 13 was directed to determine that question'. The issue whether the Hudaya canon filed by the Patriarch Group as Ex.18 in the earlier suit and as Ex. BP in the present was authentic was not only directly and substantially in issue but as held by this Court was necessary to be decided for the principal and the main dispute which arose in that case. In the circumstances it is difficult to agree with the Division Bench, that, 'this does not mean that findings were really relevant or necessary for the ultimate decision in the litigation by the Supreme Court. Issue Nos. 14 to 17 and 19 and 20 were raised by the plaintiffs and had to be decided'. The Trial court no doubt observed that it was not necessary to decide the issue in the broad and general sense but it held that the discussion and conclusions in the earlier suit that in Vattipanam Suit on the question of canon did not operate as res judicata. It did make some observations which furnished occasion to the appellants to urge that once the Court found that it was not necessary to decide the larger issue it should not have discussed the smaller one only because additional evidence had been led and the counsel had argued the matter. But this submission cannot be accepted as in view of the observation made by this Court that the finding on Issue No. 13 was necessary the observations lose importance. And the finding if recorded by the Trial Court would have to be accepted and any observation to the contrary ignored. The finding of the Trial Court on Issue No. 13 was that no Hudaya canon book approved as authentic and genuine by the Patriarch was ever supplied to the Malankara Sabha and the manuscript were of questionable origin and it could not be shown that,

> either in Malankara or in Syria or Turkey or other places under the Patriarch or any where in the Jacobite church outside Malankara, *there is or has been in existence and in use any version of the Hudaya canon corresponding to Ext. BP or that such a version has been approved and accepted by the Jacobite church as a correct version*.

[Emphasis supplied]

In appeal (The Most. Rev. Mar Poulose Athanasius and Ors. v. Moron Mar Basselios Catholicos and Ors. (1957) KLT 63 the findings recorded by the Trial Court were not set aside, on merits but the canon filed by Patriarch was accepted as authentic since, 'in the final judgment after review the question of natural justice alone was considered and decided and this means that the earlier finding on the question of canons, which was a matter directly and substantially in issue in this suit, was accepted as correct even for the purpose of the final decision on the question of natural justice. Thus by implication the finding on the question of the canons forms an integral part of the final decision in 45 T.L.R. 116 because, without maintaining the finding, the question of natural justice could not have arisen at all'. But that judgment did not and could not operate as res judicator for reasons explained earlier. The judgment of the High Court in The Most. Rev. Mar Poulose Athanasius and Ors. v. Moron Mar Bassaelios Catholicos and Ors. (1957) KLT 63. was reversed by this Court. It was held that Catholico had not become heretic or separated from the Church. But for recording this finding the decision on Issue No. 13 was as observed by this Court necessary. Therefore, the appellate judgment of this Court precluded the Patriarch from claiming that the Hudaya Canon filed by them was authentic as the earlier judgment operated as bar to this plea as once this Court recorded the finding that the Catholico had not separated the finding on Issue No. 13 stood affirmed even though it was not referred since the finding on the Catholic having become heretic or separated from the Church depended as observed by this Court itself, on finding on Issue No. 13. If the finding of the trial court on Issue No. 13 was necessary for deciding whether the Catholico had become heretic and that finding was affirmed in the review judgment then the finding of the High Court in its earlier judgment on the authenticity of the canon cannot stand. It could neither be res judicata nor a precedent.

50. The next aspect is the legal effect of restoration of decree of the Trial Court. Did it result in revival of the findings on authenticity of the canons as well. The Division Bench held that, 'once an appeal is disposed of it is the appellate judgment which should be considered for the purpose of deciding the question of res judicata. Appellate judgment supersedes the judgment of the trial court, and it is no longer open to look into the judgment of the trial court except to the extent it might have been specifically confirmed by the appellate court. See Benodial Chakravarthy v. Secretary of State for India MANU/WB/0211/1930 : AIR1931Cal239 and Venkiteswarulu v. Venkitanarasimham and Ors. AIR (1967) A.P. 557. The reasoning that once an appeal is taken to higher court then it is the appellate decree which is final and binding cannot be faulted with. But the other observation that the findings of the Trial Court cannot be locked into except to the extent it might have been specifically confirmed is not wholly correct. None of the decisions referred in the order support it. The Calcutta decision has already been referred to. In Venkateswarlu v. Venkata Narasimham and Ors. MANU/AP/0210/1956 : AIR (1957) A P 557, the High Court observed, 'Now the appellate court rested its conclusion not on the ground that Ex.A-1 was unsupported by consideration but on the ground that the transaction was such as not to bind the joint family. Though the trial court found that the consideration for the sale Ex.A-1 was wholly fictitious, the appellate court did not give a finding upon that question but confirmed the decree of the trial court on the ground that the sale was for a consideration not binding on the joint family'. But what the Division Bench ignored was that the High Court did not look into the earlier judgment as the order was upheld on a different ground, therefore, it could not be held that it was express or implied approval of the decision of the Trial Court. In Narayanan Chetty v. Kannammai Achi and Ors. ILR Madras (1905) 28 which is more in point it was held :

> An appellate judgment operates by way of estoppel as regards all findings of the lower Court, which though not referred to in it, are necessary to make the appellate decree possible only on such findings.

This Court having held that Issue Nos. 14 to 20 could not have been decided without a decision on Issue No. 13 and set aside the order of the High Court and restored the decree of the Trial Court the finding recorded by the Trial Court on Issue No. 13 has to be read as part of appellate judgment rendered by this Court.

51. Even otherwise there is no power in canon produced by the Patriarch for excommunicating a Catholico. In fact it could not be. All this controversy was raised, with respect, without having regard to it that the canon framed in 13th Century could not have provided for ex-communication of Catholico of East who was himself visualised as high spiritual authority no doubt lower in hierarchy to Patriarch of Antioch but otherwise not subordinate to him. In absence of any such express provision in the canon, the Patriarch of Antioch could not exercise this power as even if it was there it did not mention Catholicos. Who could exercise this power is not necessary to be gone into. Suffice it to say that where scriptures are silent the courts cannot substitute their own opinion but when the excommunication of high spiritual authority is involved which, as seen earlier, has serious repercussion not only on the individual status of the man but also of religious society, then such an action by a general body of ecclesiastics like a properly requisitioned Synod of all the groups may have that sanctity which may compel the courts to stay its hands. But the Synod summoned at Damascus was certainly not empowered to excommunicate.

52. There is one additional feature in this case that Clause 5 of the Constitution framed in 1934 read as under :

> 5. The Canon accepted by this church is the Hudaya canon of Bar-Hebreaus (This is the Canon that has been printed in Paris in 1890).

53. This Constitution has been upheld by this Court in Moran Mar Basselius (supra). It is now binding on the Syrian Christians. Any action taken against the respondent contrary to it could not have been upheld. Religious persons in all religions have been men of great learning and character. Spiritual superiority emanates from purity of character. Any person elected or nominated to such high spiritual office as Catholicate of East could not be subjected to ex-communication. That is why the Canons did not contain any provision. The entire proceedings of ex-communication, therefore, were unsustainable. If the spiritual heads of such high stature start ex-communicating each other, it may not be conducive for the religious order. That is why even though the Sultan of Turkey withdrew the Firman issued in favour of Abdul Messiah, the court in absence of any material to show that such withdrawal resulted in deprivation of his spiritual superiority refused to act upon it. Apart from it, once a Constitution for Malankara Association was framed, accepted and upheld by the Court, the ex-communication, if any, could be in exercise of that power only. The power to ex-communicate can be exercised by a spiritual head either when the scriptures specifically permit it or it is in respect of the authorities which function under him and are subordinate to it. Normally in religious matters such decisions depend either on the text and if there is no text on the Constitution of the trust or on convention developed in course of time. From the history of Orthodox Syrian Church, it appears such important decisions are taken by the synod that is a general body of bishops, vicars, clergies etc. and, therefore, before ex-communication can be held to be valid two things were required to be proved, one, that such power existed either in the spiritual head or in the

general body and the power was exercised in respect of a person or holder of an office for whom it could be exercised. It has already been indicated that in consequence of Ex. A-14 the Kalpana issued by Abdul Messiah the entire power, spiritual or temporal, which was exercised by the Patriarch of Antioch was conferred on the Catholico of the East. The only relation which was to be observed in future was the communion of the two. In fact if the history is traced from the Mulunthuruthy Synod held in 1876 to 1912 then it is apparent that Catholicate of the East was not treated as subordinate to the Patriarch of Antioch. He exercised same spiritual and temporal powers as Patriarch but with respectful communion. The ex-communication thus cannot be upheld canonically, traditionally or constitutionally. It was violative of the norms which are mandatorily required to be observed conventionally.

54. Having dealt with ex-communication, the controversy about spiritual and temporal powers of the Patriarch and Catholicos, their inter-relationship and the extent to which they have become final by earlier decisions, particularly Moron Mar Basselios (supra) and operate as res judicata, may be examined. The pleadings of the parties giving rise to various issues and the questions framed by the Division Bench and answered by it have been extracted in extenso. The crucial issue that had been argued was whether the direction of this Court in Moran Mar Masselios (supra) 'that the judgment of the Kerala High Court is set aside, the decree of the trial court dismissing the suit must be restored', resulted in restoring the decree and not the judgment, therefore, any finding recorded in that suit could not operate as res judicata. In Satyadhyan Ghosal and Ors. v. 5m. Deorajin Debi and Anr. MANU/SC/0295/1960 : [1960]3SCR590 this Court insisted on finality in the strict sense of the term and observed as under :

> The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term.

This was affirmed by a Constitution Bench in The Mysore State Electricity Board v. Bangalore Woollen, Cotton and Silk Mills Ltd. and Ors. MANU/SC/0007/1962 : [1963] Supp. 2 SCR 127 and it was observed :

> It is well settled that in order to decide whether a decision in an earlier litigation operates as res judicata, the court must look at the nature of the litigation, what were the issues raised therein and what was actually decided in it... it is indeed true that what becomes res judicata is the "matter" which is actually decided and not the reason which leads the court to decide the 'matter'.

These observations are well settled and reiterate established principle laid down by the courts for the same, sound and general purpose for which the rule of res judicata has been accepted, acted, adhered and applied, dictated by wisdom of giving finality even at the cost of absolute justice. In a recent English decision - Ampthill Peerage Case, [1976] 2 All ELR.411, finality at cost of fallibility has been graphically described at pages 423 and 424 thus:-

> Our forensic system, with its machinery of cross-examination of witnesses and forced disclosure of documents, it characterised by a ruthless investigation of truth. Nevertheless, the law recognises that the process cannot go on indefinitely. There is a fundamental principle of English law (going back to Coke's Commentary on Littleton) generally expressed by a Latin maxim which can be translated: 'It is in the interest of society that there should be some end

to litigation'. This fundamental principle finds expression in many forms. Parliament has passed Acts (the latest only last year) limiting the same within which actions at law must be brought. Truth may be thus shut out, but society considers that truth may be bought at too high a price, that truth bought at such expense is the negation of justice. The great American Judge, Story, J. delivering the judgment of the Supreme Court of the United States in Bell v. Morrison, called the first of these Acts of limitation 'a statute of repose'; and in England Best CJ called it 'an act of peace'*(A' Court v. Cross)*. The courts of equity, originally set up to make good deficiencies in the common law, worked out for themselves a parallel doctrine. It went by the technical name of laches. Courts of equity would only give relief to those who pursued their remedies with promptitude. Then, people who have long enjoyed possession, even if they cannot demonstrate a legal title, can rarely be dispossessed. Scottish law goes even further than English: delay in vindicating a claim will not only bar the remedy but actually extinguish the right. But the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law-by every system of law-of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such

exceptional cases conclude the matter. That, indeed, is one of society's purposes in substituting the law suit for the vendetta....And once the final appellate court has pronounced its judgment, the parties and those who claim through them are concluded, and, if the judgment is as to the status of a person, it is called a judgment in rem and everyone must accept it. A line can thus be drawn closing the account between the contestants. Important though the issues may be, how extensive so ever the evidence, whatever the eagerness for further fray, society says: 'We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. *Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough'. And the law echoes: 'res judicata, the matter is adjudged'*. The judgment creates an estoppel - which merely means that what has been decided must be taken to be established as a fact, that the decided issue cannot be reopened by those who are bound by the judgment, that the clamouring voices must be stilled, that the bitter waters of civil contention (even though channeled into litigation must be allowed to subside.

[emphasis supplied]

Such is the principle of finality. True that the questions must have been adjudicated stricto sense as observed by this Court. Conclusiveness according to the learned Counsel applied to decree and not the judgment. For reasons given while discussing the authenticity of canons, it is difficult to agree that once decree of the trial court was restored it did not result in making the findings operative which were basis of the decree, except to the extent it was expressly or impliedly set aside by this Court.

55. Therefore, the judgment of this Court in Moran Mar Basselios (supra) would preclude the parties from agitating those issues which have been concluded. Effect of the judgment delivered by this Court in 1958 on the rights of Catholicos was twofold,

one their status was defined and two, their relationship with Patriarch of Antioch was explained. What stands out clearly from the decision after decision rendered right from 1899 to 1959 is that the Patriarch of Antioch is the spiritual head of the Syrian Orthodox Church. It was held so clearly in the appellate judgment of the Royal Court of Appeal. It was reiterated in Court of Appeal judgment delivered in 1905. In the Interpleader Suit filed by the Secretary of State the claim of Catholicos was upheld. The findings recorded therein were held to operate as res judicata in Moran Mar Basselious (supra) which arose out of a suit filed by the Patriarch Group as far back as 1938. The claim of the Patriarch that the Catholicos had becomes heretics and ceased to be members of the Syron Orthodox Church, was repelled. The Court held that the reduction of power of the Patriarch of Antioch to 'vanishing point', ipso facto did not constitute heresy nor it amounted to voluntary separation of setting up a new Church. But the most vital finding was that the creation of Catholicate of the East of Abdul Messiah, the disentitled Patriarch of Antioch, by Kalpana, Exhibit A-14 (latter order) issued in 1912 was not invalid. The result of creation of Catholicate of East with power to ordain metropolitan and perform all those functions which could be performed by Patriarch Antioch was that even the spiritual power which was held to be vesting in him in earlier judgments stood reduced to 'vanishing point'. What is meant by this expression shall be explained later. The verdict was accepted by the Patriarch himself when he issued Kalpana-Exhibit A-19 after the Supreme Court decision to bring peace. The specific objection on behalf of the Patriarch that "the re-establishment of the Institution of the Catholicos in the East in Malabar having jurisdiction over India, Burma and Ceylon" was "different from the Catholicate that was the subject-matter of Interpleader Suit" was repelled by this Court in Moran Mar Basselios (supra) and it was observed at page 48 as under:-

> We do not think there is any substance whatever in this contention. A reference to paragraphs 30 and 31 of the written statement clearly indicates that the institution of Catholicate, which is relied upon by the defendants, is no other than the Catholicate established in Malabar in 1088 by Patriarch Abdul Messiah.

Relevant clauses of 1934 Constitution declaring the status of Patriarch and Catholicate in the Malankara church are extracted below :-

> **1.** The Malankara Church is a division of the Orthodox Syrian Church and the Primate of he Orthodox Syrian Church is the Patriarch.
>
> **2.** The Malankara Church was founded by St. Thomas the Apostle and is included in the Orthodox Syrian Church of the East and the Primate of the Orthodox Syrian Church of the East is the Catholicos.

The basis for it was the Kalpana issued in 1913, the relevant portion of which is reproduced :

> We commend you into the hands of Jesus Christ, our Lord, the Great Sherpherd of the flock. May He keep you! We rest confident that the Catholicos and Metropolitans - your shepherds - will fulfil all your wants. The Catholicos, aided by the Metropolitans, will ordain melpattakkars, in accordance with the Canons of Our Holy Fathers and consecrate Holy Morone. In your Metropolitans is vested the sanction and authority to install a catholicos, when a catholicos dies. No one can resist you in exercise of this right and, do all things properly, and in conformity with precedents with the advice of this committee, presided over by Dionysius, Metropolitan of Malankara. We beseech our Lord Jesus that Ye faint not in your true faith of Saint Peter, on which is built, the holy Catholic

> and Apostolic Church. What we enjoin your true love is that the unlawful conduct of a usurper, may not induce you to sever that communion which is the bond of love connecting you with the Apostolic Throne of Antioch.

Relevant portion of Exhibit A-19 issued by Patriarch after the decision of the Court read as under :-

> To bring forth peace in the Malankara church we hereby accept with pleasure Mar Baselious Gheevarghese as Catholicose.

The combined reading of these documents along with the findings recorded by this Court in Moran Mar Basselios (supra), thus, leaves no doubt that Catholicate of East whether due to disuse of the Catholicate which, un-disputedly, existed at Tigris or because of creation of a new one by the Kalpana of 1912 or for any other reason did come into existence. The power and jurisdiction to be exercised by such Catholicate is spelt out from the Kalpana A-12 and A-13 and the Constitution of 1934. In fact, going by the history it was nothing new or unusual as it has already been narrated that even in the first ecumenical Council when Patriarch of Antioch was created, the Catholicate of the East was also created and he was entrusted with the power and prerogative to manage the affairs or Eastern Churches subject to that Patriarch of Antioch was common and could exercise all the functions. Then from 1654 to 1800 the ordination of Bishops in Malabar used to take place by the delegates of the Patriarch. Even though after 1810, i.e. the Cochin Award, the individual persons went to Antioch and got themselves ordained which was accepted as well, but due to its disuse and in any case after issuance of Kalpanas in 1912 and framing of the Constitution the controversy arose whether the supremacy in spiritual matters also was not reduced to 'vanishing point'. It was negatived by the Court as it was held that it was not so and nor any separate Church came into existence. The documents which have been referred earlier if properly construed and the course of activity, thereafter, is studied in correct perspective, then the Syrian Church in Malabar and the Patriarch of Antioch, the two authorities with nearly same spiritual powers, one local and the other at Syria entered into relationship of happy communion between the two. This communion meant that each was supreme, but if both of them were present then it was the Patriarch of Antioch who was higher in the hierarchy. In religious orders the two supreme authorities one highest and the other higher without the latter being subordinate is not unknown. This was the change in the power and prerogative of Patriarch as compared from 325 A.D. where he had the supreme power. But this change has been recognised, accepted and acted upon. Further, now the relationship is governed by a Constitution which has been held to be valid.

56. This was fairly observed. Between 1912 to 1970 four Catholicos were appointed, the first B. Paulose I by Abdul Messiah in 1912, second Basselius Gheevarghese I in 1924, third in 1929 after the Vattipanam Suit, fourth Mar Ougen I in 1964. What is significant is that second and third were not installed by or with the consent of Patriarch. And the fourth was installed after the judgment of this Court in Moron Mar basselios (supra) by the Malankara Synod presided over by the Patriarch Yakub III. But what led to filing of suits by members of the Catholico group and the Catholico himself and successors-elect was the wrongful consecration by the Patriarch of Paulose Athanasius on 3.9.1973 (the first ordination by the Patriarch after 15 years). Original Suit no. 274 of 1973 filed in the District Court was numbered as O.S. No. 2/79 in the High Court. The suit was filed as Paulose Athanasius had never been elected by the Malankara Association and, therefore, was not entitled to function as Metropolitan in the Malankara Church. In view of the findings recorded by the Travancore Royal Court of

Final Appeal pronounced on July 12, 1889 that a Metropolitan of the Jacobite Syrian Church could be a native of Malabar consecrated by the Patriarch or the delegates and accepted by the people to be entitled to be spiritual and temporal head of the local Church, which finding was endorsed by the Court in 1958, the suit was filed to prevent Athanasius from interfering with administration of the Malankara Church and any of its constituent diocese including the Kottayam Diocese, as he was neither qualified nor entitled to be appointed. Since the Patriarch ordination created the apprehension and the defendants threatened to act on strength of his ordination from the Patriarch of Antioch the Court granted an injunction in October 1973 restraining him from interfering in the administration of the Malankara Church. As a sequel to this injunction a show cause notice was issued on 30th January, 1974 by the Patriarch against the first plaintiff leveling various charges and describing the action of the plaintiff as uneconomical and a challenge to the authority of the Patriarch. The matters thereafter grew worse and when the Patriarch ordained two more bishops the Catholico Mar Ougen I and Catholico-elect Mathew Athanasius filed Suit No. 142/74 which was re-numbered in the High Court as O.S. No. 4/79 once again protesting against the direct ordination by the Patriarch of Bishops not accepted by the Malankara Association. In this manner nearly 8 suits came to be filed by the Catholico Mar Ougen 1 along with his successor-elect Mathew Athanasius. The main defence in the suits apart from others was that the plaintiff had been ex-communicated. Both the learned Single Judge and the Division Bench did not find any merit in the claim that after the death of first plaintiff the third plaintiff who was successor-elect was not entitled to continue the suit. It was held that they were not apostate and aliens to the Jacobite faith and the decision of the Universal Episcopal Synod and the Syrian Orthodox Church held from 16.6.1975 was not in accordance with the rule of the Church. The judgment thus in Moran Mar Bassilios (supra) and the findings recorded by the trial court to the extent it was not set aside by this Court, operative as res judicata.

57. Two more issues remain, one the nature of Parish churches whether they are congregational, episcopal, voluntary association or autonomous bodies, public charities or private charities and their relation with the Malankara Association; second, legal status of the Patriarch of Antioch whether he is a corporation sole as argued by Ms. Lily Thomas the learned Counsel for the intervener, and if to, his rights, privileges and prerogative. Taking up the issues on Parish Churches and whether they are autonomous units, the Constitution and the status of he Parishes may be discussed first.

58. A Parish Church is a, 'district committed to the charge of one incumbent having the cure of souls in it'. [*Halsbury's Law of England*, Vol. 14 para 534]. 'The ancient parishes appear to have been gradually formed between the 7th and 12th or 13th Centuries. Their boundaries seem to have been originally identical with or determined by those of manors, as a manor very serfdom extends over more than one of these parishes, although in many cases one parish contains two or more manors. Besides being ecclesiastical units, ancient parishes have been at different periods, and in many cases still are, administrative areas for various civil purposes, although the boundaries for parishes for civil purposes have in many cases been altered under statutory authority'. [*Halsbury's Laws of England* Vol. 14 para 535]. 'The word 'Parish' was in use as early as the third century, but it was at that time equivalent to the term Diocese (which see). In primitive time the diocese of a bishop was neither more nor less than what is now called a Parish; and even when the jurisdiction of bishops had become extensive, the diocese long continued to be called the parish. Afterwards the word was limited to the district attached to a single church over which a presbyter presided, who was hence called parochus....During this formation of the parochial system, the ... measures were adopted to retain these churches in a state of dependence on the mother or cathedral

church. The diocesans, however, were often obliged to allow the parish churches a greater degree of independence than they were of their own accord willing to concede to them.... For sometime after the first introduction of the parochial system, the revenues of a diocese continued to be regarded as a whole the distribution of which was subjected to the bishop; that is to say, *whatever oblations or the like were made in parish churches were paid into the treasury of the cathedral church, as the one heart of the body and thence distributed among the clergy after the claims of the parish had been satisfied* [emphasis supplied]. This arrangement remained generally in force until the end of 5th century, many parish Churches having in the meantime greatly increased in wealth by means of bequests and donations and having come into the receipt of considerable oblations.... But in the course of the sixth century the revenues of the parochial clergy came to be considered simply as their own, the bishops being obliged to relay their hold of them' Faiths of the World, by James Gardner p.617.

59. A Parish Church, thus, is an ecclesiastical authority operating in a specific area. But they are of a religious order. Their autonomy, their financial powers, their administrative control have been thus different in different ages depending on the terms of creation of the trust, the purpose and objective of its establishment, the personality of the person occupying it, the financial strength of it etc. The Syrian Churches, as the history narrated earlier indicates, were established for religious worship and public charity and every church, small or big, claimed that its spiritual head was the Patriarch of Antioch. DW- 28 - Gheevarghese Moran Mar Basselios II who was ordained as Metropolitan by Abdul Messiah and examined in O.S. No. 111/1113 and on whose testimony reliance was placed by the appellant, stated that the Churches are established after obtaining sanction of the Metropolitan and the Government.

60. When the Malankara Association was formed in the Mulunthuruthy Synod a resolution was passed constituting 8 of the priests assembled there and 16 of the laymen of the first class with the ruling Metropolitan as President entrusted with the complete responsibility of management for every matter connected with the common religious and communal affairs of the entire Syrian community. The other resolution passed was that the 'committee shall have liberty to collect other amounts as well in addition to the amounts above mentioned to cause its' increase, to make sub-committees and to do everything beneficial'. In respect of administration of property it was resolved that 'for altering the existing rules relating to the administration of the property belonging to, the church and to the Syrian community, and for enacting new laws for the same, for examining and approving the accounts of the various churches, for confirming the Episcopes (Stuarts of the Church) of the respective churches decided by the Yogam, for printing the books useful and necessary for the community, for repairing the churches which have fallen into disrepair, for building new churches and for erecting schools, the above said committee shall have full responsibility'. The Committee was further entrusted with responsibility to collect and send the "Ressissa" due to His Holiness the Patriarch, to collect the 'Kaimuthu and other income due to the metropolitans from the churches and in case it was not sufficient to find other ways for the same and also for maintenance of the Dayaras (Monasteries), to effect payment of salaries to the vicars according to the capacity of the parish and pay the salary of the Secretary and others. Thereafter when the Constitution of 1934 was made a full chapter was devoted to the Parish church. The detailed procedure was given about the membership, maintenance of register, the payment of subscription, the convening of the Parish Assembly meeting, the duration at which the Assembly should meet in a year and the manner in which the fund was to be spent. It was also provided that the Vicar shall report to the diocesan Metropolitan about the election of the Parish Committee which shall not have any authority to take any decision in matters relating to religion which

shall be referred to the Diocesan Metropolitan. Right of appeal was also provided to Metropolitan. Clause 37 provided that when the Diocesan Metropolitan came to the Church on his Parish visit he shall sign the register maintained in every Parish of moveable and Immovable properties. All this indicates that the Parish Churches were under the control and supervision of the Metropolitan. This Constitution was amended in 1967 with participation of Patriarch group and apart from reiterating what was said in 1934 it was provided in Clause 120 that Vicar of every Parish Church shall collect 'Ressissa' at the rate of 2 annas every year from every male member who has passed the age of 21 years and shall send the same to the Catholico. The Constitution further contemplates entire hierarchy in which the Catholico and metropolitan were placed at the highest. From the scheme unfolded by the Resolution passed in the Mulunthuruthy Synod read with the Constitution it appears every syrian Parish Church even though established independently has necessarily to have relation with the Malankara Association. The relationship between the two that is, the Parishes and the Malankara Association has been subject matter of consideration in every decision which came up before the courts. Even in the suit out of which this appeal has arisen the issues framed were whether Parish Churches were independent and autonomous units and whether the administration and conduct of their affairs and their assets were to be under the immediate control, direction and supervision of the Diocesan Metropolitan as provided for in the Constitution and whether vicars, priests and office bearers in Parish Churches had to be approved and appointed by him or the Metropolitan had only spiritual supervision and no temporal control. Both these issues were decided by the learned Single Judge in favour of the Parish Churches. But the Division Bench after elaborate discussion of law and fact held, 'Parish Churches' were 'not congregational or independent' and the Constitution is valid and binding on the Malankara Association, community diocese as well as Parish Churches and Parishes.

61. Whether the finding is well founded or not and whether the Division Bench was justified in further recording the finding that the Malankara Church was episcopal to a limited extent, only, shall be adverted presently, but before doing so it is necessary to deal with one submission of Mr. Parasaran on this aspect at the outset, which was more preliminary in nature, as to whether the relief sought by the plaintiffs that the Malankara Church was episcopal in character was to a Union or Federation of Autonomous Church Units and was governed in its administration by the Constitution of the Malankara Church could not be granted in absence of impleadment of each Parish Church. Prima facie the submission appeared attractive but a closer scrutiny of the pleading demonstrates that the nature of Parish Churches was very much in issue of which parties were aware and the suits were tried on the footing whether Parish Churches were autonomous or not. In any event, it is worthwhile referring to the pleading.

62. In paragraph 11 onwards of the Plaint (in Original Suit No. 142/74 re-numbered as Original Suit No. 4/79 in the High Court) it was averred that the Malankara Church consisted of an aggregate of about 15 lakhs of worshippers worshiping in more than 1000 Parish Churches. A list of churches was appended to the Plaint. It was claimed that each Church founded became a constituent of the Malankara Church a well established religious community administered under the authority of the Malankara Metropolitan. It was claimed that the Parishioners of each Church were entitled to the benefits from the Church and its properties. The Malankara Church was neither a Union with a Federation of Congregational Units but a Church with a unique solidarity derived form apostolic succession and authority of Malankara Metropolitan and the doctrines and creed followed by the Church. It was alleged that the Constitution of 1934 was binding on every Church and the temporal, ecclesiastical and spiritual powers of the administration vested in the Malankara metropolitan who invariably in a native of Malankara or elected

by a group by the community. In paragraph 19 it was averred that defendants were impleaded. in their individual capacity and as representatives of Malankara Jacobite Syrian Christian Association. Permission to sue in representative capacity under Order 1 Rule 8 was also sought.

63. In the written statement filed by different defendants the entire claim of the Catholicos was denied. The averments went to the extent of denying establishment or revival of Catholicate in Malabar. The basic claim was that the Catholicate of East was deputy to the Patriarch of Antioch. It was alleged that Syrian Christian Association formed at the Mulunthuruthy Synod was given the power to take decisions on common matters of the community but it was not vested with any power over the individual Parish Churches or their administration. It was alleged that no Parish Church has surrendered their powers of administration to the said Association. It was claimed that Parish Churches and their properties belonged to the respective Parishioners and the plaintiffs or the hierarchy in the Malankara Church had no manner of right, title, possession or management over these Churches. It was denied that the Parish Churches and other Churches mentioned in the list were constituents of the Malankara Church and that the Malankara Metropolitan had the authority to administer all those Churches. Written statements were filed. The defendants raised all possible defence even contrary to earlier decision. Different written statements were filed by different defendants including the two, that is, Knanaya Association and Evangelistic Association which were impleaded on their own instance. These averments would indicate that the parties were very much at issue on the question whether Parish Churches were constituents of Malankara Church or not. That is why when applications were filed on behalf of the Parish Churches for being impleaded as party it was rejected and the dispute became final after the High Court held that it was not necessary to implead every Parish Church individually.

64. It is too late, therefore, to urge that no declaration on the status of Parish Churches be granted. No such objection was taken either before the learned Single Judge or the Division Bench. May be that the 1000 Parish Churches were not impleaded. But it was a representative suit. Then the suit was for a declaration that the Malankara Church was episcopal in character and not a Union of Federation of Autonomous Churches. It was not necessary to implead every Parish church as a party. The question whether Malankara Church is episcopal or not had to be decided on the pleading of the plaintiff. The defence raised by the defendants, who were ordained by the Patriarch of Antioch, was that they were the metropolitans and, therefore, entitled to protect the interest of Parish Churches. Moreover the declaration sought is as a matter of law. No factual dispute arises. The suit was filed for enforcement of this right. Once it was found by this Court in 1958 that the Constitution was validly framed the Catholicos could not be denied this declaration. In paragraph 94 of the 1954 Constitution it was provided that, 'the Prime jurisdiction regarding the temporal ecclesiastical and spiritual administration of the Malankara Church is vested in the Malankara Metropolitan subject to the provisions of this constitution'. Whether a particular Parish Church is a member of the Malankara Association is not relevant. Therefore, the submission that the non-impleadment of individual Parishes precluded the court from granting any declaration about the nature and status of Parish Churches, does not appear to be correct.

65. 'Congregationalims' is defined in New English Dictionary of Historical Principles (By Sir John Murray, Vol. III, Part I, page 245) as under :

> A system of ecclesiastical polity which regards all legislative disciplinary and judicial functions as vested in the individual church or local congregation of

believers.

'Congregationalism' is defined in Chambers Encyclopedia, Vol.IV. page 13 as under :

> Congregationalism is the doctrine held by churches which put emphasis on the autonomy of the individual congregations. Congregationalism has for its sign manual the words of Jessus:
>
> > 'Where 2 or 3 are gathered together in my name, there am I in the midst of them'.

In Black's Law Dictionary 'Congregation' is explained thus:

> An assembly or gathering, specifically, an assembly or society of persons who together constitute the principal supporters of a particular Parish, or habitually meet at the same church for religious exercises.

The word is explained in the Faiths of the World Vol. 1 at page 589 thus:

> This word, like the term Church (which see) is sometimes used in a more extended and at other times in a more restricted sense. In its widest acceptation, it includes the whole body of the Christian people. It is thus employed by the Psalmist when he says, "Let the congregation of saints praise Him." But the word more frequently implies an association of professing Christians, who regularly assemble for divine worship in one place under a stated pastor. In order to constitute a congregation in this latter sense of the term, among the Jews at least ten men are required, who have passed the thirteenth year of their age. In every place in which this number of Jews can be statedly assembled, they procure a synagogue. Among Christians, on the other hand, no such precise regulation is found, our Lord himself having declared, "Wherever two or three are met together in my name, there am I in the midst of them." Guided by such intimations of the will of Christ, Christian sects of all kinds are in the habit of organising congregations though the number composing them may be much smaller than that fixed by the Jewish Rabbies.

66. 'Episcopal' is defined in Webster Comprehensive Dictionary to mean, 'of or pertaining to bishops. Having a government vested in bishops; characterised by episcopacy'. Whereas 'Episcopacy' is defined as under:-

> Government of a church by bishops.

New English Dictionary of Historical Principles by Sir John Murray, Volume III, explains it to mean:

> Theory of Church Polity which places the supreme authority in the hands of episcopal or pastoral orders.

'Episcopacy' is explained in the Faiths of the World by James Gardner, Volume I, at page 836 as under:-

> that form of church government which recognises a distinction of ranks among the minister of religion, having as its fundamental article that a bishop is superior to a presbyter.

'Bishop' in the same book is defined as under :-

> one who in episcopalian churches has the oversight of the clergy of a diocese or district.

'Metropolitan' is defined in the same book at page 445 as under :-

> the bishop who presides over the other bishops of a province. In the Latin church it is used as synonymous with an archbishop. In England, the archbishops of Canterbury and York are both Metropolitans....The title was not in use before the council of Nice in the fourth century....The rise of the authority of Metropolitans seems to have taken place without any distinct interference on the part of the church. The council of nice was the first to give an express deliverance on the subject, particular with reference to the Alexandrian Church. The sixth canon of that council ran in these terms : 'Let the ancient custom which has prevailed in Egypt, Libya, and Pentapolis, that the bishop of Alexandria should have authority over all these places, be still maintained, since this is the customs also with the Roman bishop. In like manner, at Antioch, and in the other provinces, the churches shall retain their ancient prerogatives'.

67. These definitions of 'Congregationalism' and 'episcopal' have been extracted to give an idea how the expressions are understood as the entire submission of autonomy of the Churches is based on whether the Parishes are congregational or episcopal. The basic or essential characteristic as appears from the above definitions and explanation of 'Congregationalism' and 'episcopal' is that in the former the authority vests in the congregation whereas in the latter it is controlled by the bishop as he is deemed to be successor of the apostle. That the Syrian Orthodox Church of Malankara accept and acknowledge the theory of apostle succession is beyond doubt. In Faiths of the World, the word 'Eiscopalians' is explained and it is stated that it is a name given to those who hold that peculiar form of Church government which is called 'Episcopacy'. The Church of Rome is Episcopalian in its constitution, and acknowledges the Pope as Universal Bishop, to whom all the various orders of clergy, cardinals, primates, and patriarchs, archbishops and bishops are subordinate.... The Armenian church is similar in government to the Greek church, their Catholicos being equivalent in rank and authority to the Greek patriarch.... All the ancient Eastern churches, including the Copts, Abyssinians, and others, are Episcopalian. The church of England is strictly Episcopalian in its ecclesiastical constitution'. The claim, therefore, that they are congregational cannot be accepted.

68. Even factually it was not open to the Patriarch to take up this defence. The Canon on which reliance was placed by them and filed as Ex. B-161 dealing with properties and income of the Churches provided. 'If the valuable souls of the believing can be entrusted to the (Episcops Bishop) it is quite apt that he bears authority over the property of the church. Everything should be administered by his order and be given to the Priests, Deacons and those who are in needs'. The resolution in the Mulunthuruthy Synod also accepted this. In the Vattipanam Suit Justice Chatfield in paragraph 15 of the judgment has noticed, 'it may be stated that both sides admit that the administration of the temporalities of the Syrian Jacobite church in Malankara is with the local Metropolitan and the other Metropolitans'. That is why in the Arthat case it was held that the plaintiff churches, that is the Parish Churches of Arthat were subject to spiritual, temporal and ecclesiastical jurisdiction of the Metropolitan of Malankara. Paragraph 95 of 1934 Constitution itself provides that, 'there will be an Episcopal Synod in Malankara'.

69. Whether a public institution or a public Church unlike private religious places is autonomous or not depends on its trust deed, the intention of the members who found it, the purpose for which it was established. The establishment of a Church is normally understood as an institution established for public charities. Its objective is religious and spiritual. Whenever a charity is created it is either public or private. The latter is for individual, may be for fixed period or for determinate person. But public charities are of permanent character, the membership of which keeps on fluctuating. Lewin on Trust explained a 'charitable trust' thus, 'a public or charitable trust, on the other hand, has for its object the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement upon a private trust. These trusts may be said to have as their object some purpose recognised by the law rather than human beneficiaries'. Tudor on Charities at page 131 of 6th Edn. has stated thus, 'when a charity has been founded and trusts have been declared, the founder has no power to revoke, vary or add to the trusts. This is so irrespective of whether the trusts have been declared by an individual, or by a body of subscribers or by trustees'. That the Parish Churches were established for promoting ideals of Syrian Orthodox or Jacobite Church has been the consistent claim of both the Patriarch and the Catholicos. Its nature cannot be changed by the persons who are entrusted to manage it. They were episcopal in character when they were found, they continue to be so at present and shall remain so in future. The character of public charities from Episcopal to congregational cannot be changed as it would be against basic purpose for which these Churches were established. In Attorney General v. Pearson and Ors. 1814 All E L R 60 it was observed as under :

> But if, on the other hand, it turns out that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members; 'We have changed our opinions, and you, who assemble in this place for the purpose of hearing the doctrines and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions'.

Therefore, once these public charities were found whether before the establishment of catholicate or after it their nature could not change. On the material on record the courts have found them to be so. Therefore, the submission that they are autonomous does not appear to be well founded. autonomy for what, religious worship or temporal matters. Former cannot be pleaded as once a Church was found for religious worship it continued to be so. The autonomy in temporal matters as claimed appears to be two-fold, one, freedom to disassociate from Malankara Association and second to control and supervise its internal affairs. The first cannot arise. In law it is not open to members of public or public trust to appropriate trust properly for themselves. Under Hill on the Law of Trusts and Trustees has explained in thus, 'However, the crucial difference surely is that no absolutely entitled members exist if the gift is on trust for future and existing members, always being for the members of the association for the time being. The members for the time being cannot under the association rules appropriate trust property for themselves for there would then be no property held on trust as intended by the testator for those persons who some years later happened to be the members of the association for the time being'. Non of the Parish Churches claim autonomy in the sense that they have changed their faith and belief. Each of them claims that their spiritual head is Patriarch of Antioch. That is they are the believers and

followers of Syrian Church. So are the members of Malankara Association and Catholicate of East. Therefore, the existence or exercise of autonomy for Parishes has no meaning. Similarly the independence or autonomy in temporal matters is not of any consequence. The Parishes are bound by the Constitution framed in 1934.

70. Mr. Parasaran submitted that the Malankara Church was from very ancient times episcopal to a limited extent in spiritual and ecclesiastical matters but has been congregational/autonomous in temporal matters. It was urged that if Jacobite Syrian Orthodox Church has been or was episcopal as claimed by the respondents then the Patriarch would have had control over temporal matters also. The learned Counsel submitted that Malankara Church being essentially congregational it was to be presumed that every Parish Church was an independent Church. The learned Counsel criticised the Constitution of 1934 as the deliberate departure from the established norms and practice of the Church and the attempt by it to invest it with episcopal character in temporal matters. The learned Counsel submitted that the custom which was prevalent in the Malankara church throughout has been that the Parish Churches and its properties were administered by the congregation that is Parishioners and in that sense the Malankara church has been congregational in temporal matters and this well established custom must prevail even over the provisions of the canon. It was urged that this was already recognised in the Samudayam suit by the Trial Judge and the admission of the Catholicos before the District Judge. The learned Counsel submitted that the status of the Parish Churches even before Malankara Synod was independent and if indeed the Church was episcopal in temporal matters there was no necessity for the creation of an Association in the meeting of 1876 for the purpose of raising funds since the Patriarch directly or through the Malankara Metropolitan could have raised the necessary finance from the Parish Churches and above all if the Parish Churches were episcopal then where was the question of entering into an Udampadi with every individual Parish Church. The learned council submitted that the entire claim of the respondents that the entire body of Churches, institutions and common properties formed one organic unit to be administered by the provisions of the impugned Constitution was based on a misrepresentation of the words 'Church' and 'Sabha' and is contrary to the history, customs and proceedings and the Malankara Church. Reliance was placed on the evidence of P.W. 4 and P.W. 8 and it was urged that if they were read along with Ex.A-19 and A-80 then they would indicate that it did not result into bringing into effect any voluntary association. The learned Counsel submitted that if the exchange of Kalpanas are sought to be treated as legally binding on individual Parish Churches amounting to unification and acceptance of the Constitution on the basis that the Patriarch will bind the Parish Churches then necessarily Patriarch will have to be accepted as the supreme ecclesiastical and temporal superior. It was urged that it was so because the Constitution framed in 1934 deals with all the three aspects and can be imposed on the Parish Churches only on the basis that they did not have autonomy in respect of any one of the three and the Patriarch will have the power to impose such a Constitution on the individual Parish Churches without obtaining their individual consent. According to learned Counsel if Patriarch had such a spiritual, ecclesiastical and temporal supremacy such supremacy could not only be in regard to Parish Churches in the Patriarch Section but also in regard to the Churches of the Catholico Section . And otherwise the religious beliefs, practice etc. would be different in Parish Churches in the two sections and there cannot be any unification. It was urged that Ex.A-19 could not be construed as a surrender of the authority which existed in the Patriarch in favour of the Catholico as if the Kalpana is construed as such then it would amount to a change of faith so far the Parish Churches in the Patriarch Section were concerned and on the principle of religious trust the properties and the Churches could not go to Catholicos Section . Minutes of the meetings held by the Association in 1959, 1962, 1965 and 1970

including the presence of the Patriarch in the installation ceremony of Mar Ougen as Catholico was placed. It was urged that if these are construed as claimed by the respondents then it would inevitably result in applying the law relating to religious trusts. But that would not be in consonance with law. According to learned Counsel on the principle of voluntary association even if it is assumed that they decided to be under Catholico there was nothing to prevent them in law from opting out of it. Attention was draw to various suits filed during this period and the failure of the Catholico to impose their constitution. In respect of presence of the Patriarch at the installation ceremony of the Catholico the learned Counsel urged that it only strengthened their claim that Patriarch was the supreme head as a person as delegation of power can be made only by a person who is superior then the person whom he ordains. In any case if the Patriarch was authorised to delegate and participate in the installation ceremony as the head of the Syrian Orthodox Church then there was nothing in law to prevent him from withdrawing it. The submission was placed on yet another aspect that the Catholicos had never claimed supremacy to the exclusion of the Patriarch. But on the other hand by their conduct and action they accepted the spiritual and ecclesiastical supremacy as was clear from various documents where the Catholico requested the consent of Patriarch for relaxing the rigour of canonical penaces. The learned Counsel submitted that the respondents were claiming that the Malankara Association had become autocephalous. Therefore, applying the principle of religious trusts if the Parish Churches and properties which were originally founded for the benefit of the Parishioners who believed in uninterrupted apostolic succession from St. Peter through the Patriarch then the use of such Parish Churches and their properties by those who claimed to be Malankara Church would be contrary to original faith and character of the Sabha (Sabha means the Church as a whole) attached to the Parish which are established for worship according to the faith, custom and practice of the Sabha. Attention was drawn to Ex.B-269 and Ex.A-120 and it was claimed that the Constitution of these Parishes would indicate that they were part of the Malankara Church subject to superior authority of the Diocesan Metropolitan of the Malankara Metropolitan. The learned Counsel submitted that according to the Orthodox teachings the Church or Sabha is a body with Christ as its head and together they from an integral whole and by consecration a Parish Church becomes the abode of God and becomes a part of the Sabha. Reliance was placed on the evidence of P.W. 8 and admissions of D.W.2. It was urged that Church being a public trust of a religious nature the beneficiaries of which at a time have no right to deal with it as is clear from what has been stated by Lewin on Trusts.

71. The nature of public charities has already been explained. Non of the submissions appear to have substance. A Church is either Episcopal or congregational. It cannot be episcopal in spiritual matters and congregational in temporal matters. That would be against the basic characteristic of such a Church. It would be against specific provisions in the Constitution. The temporal matters or administration of Churches flows from its establishment for religious purposes, namely, 'the cure of souls'. Where a building is consecrated as a Church, 'it continues to exist in the eye of law as a church and the body corporate which had been endowed in respect of it remains in possession of the endowment even though the material building is destroyed'. Every Parish Church of Malankara acknowledges the Patriarch of Antioch as the spiritual head. They have been paying ressissa to Patriarch. The ordination, consecration and every spiritual or temporal power has always been exercised by the Patriarch of Antioch so long it was not decided on basis of the Synod held at Mulunthuruthy that the Patriarch was only the spiritual head and the temporal powers vested in the Metropolitan. This division of power could not destroy the basic characteristic of episcopacy. The Church in England is also an episcopal Church. In Halsbury's Laws of England Vol. 14 para 562 the right of Parishioners has been described, 'to enter the church remain there for purpose of

participating in divine worship to have a seat and to obey the reasonable directions of the church to ordain', the property vests in the endowment. That is the fundamental different in congregational and episcopal. In the former it vests in the Parishioner. But in the latter in endowment. Once it is conceded that the Syrian Churches are episcopal in character then the distinction between spiritual and temporal is of no consequence. Therefore, the property of the Church vests in the endowment and not the Parishioners. The right to manage such property vests in the trustees under the bye-law subject to the control by the Catholicos and Metropolitan in accordance with the Constitution. The fact that every Church has its own bye law does not militate against its nature of being episcopal as Clause 122 of the Constitution of 1934 itself provides that, 'byelaws which are not inconsistent with the principles contained in this Constitution may be passed from time to time by the Parish Assembly, the Diocesan Assembly or the Diocesan Council and may be brought into force with the approval of the Rule Committee'. The Parish Churches are thus governed in their administration by the Constitution of the Malankara Church. The nature of relationship between the two bodies can be gathered either from the circumstances or from the documents if they are on record. The Resolution of the Mulunthuruthy Synod, the Constitution of 1934 and its amendment in 1967 unmistakenly demonstrate a close link between the Malankara Association and each Parish Church. A Church is established by followers of a religious faith. The mere establishment is not sufficient unless it assures the realisation of the ultimate goal that is salvation and that could come only when such a body has a link with the higher spiritual body which religiously is considered to be the one which could help in permitting a man to achieve the end. It is not the case of the appellants that the Parish Churches are independent in the sense that they have no link with any higher spiritual power. It is their specific case that they claim . their spiritual link from the Patriarch of Antioch. The ordination of the Metropolitan-consecrate of Bishop even according to them has to be from Antioch. When D.W. 28 was asked whether after creation of Catholicate the Patriarch ceased to have any power, he stated 'ordaining a Metropolitan is not a power. It is a bond and duty'. The witness denied that Patriarch of Antioch was only the head of the Jacobite Church and he had no power over or concerning the Malankara Church. Therefore, they are not independent and autonomous in the sense in which it was claimed by the learned Counsel. If it be so and if what has been stated earlier that the Patriarch of Antioch himself created a Catholico of the East in 1912 with all the spiritual powers then it is difficult to visualise that how the Parish Churches can claim that they are independent and separate from the Malankara Association. In Moran Mar Basselios (supra) it has been decided that the Constitution was framed after notices were sent to every Parish Church. Therefore, whether they attended or not is not material and in any case once the Constitution was framed and its validity has been upheld then under the provisions of the Constitution the Metropolitan appointed by the Malankara Association has control over the Parish Churches. It is not necessary to refer to various observations made in the earlier judgments by the courts which undoubtedly indicate that the Malankara Association which was a creation of Malankara Synod and is the representative body that has the right to bind the holy community and all the Churches by its deliberations and actions. The Full Bench of the Royal Court of Cochin in 1905 held that the Churches and its properties were subject to spiritual, temporal and ecclesiastical jurisdiction of the Metropolitan of Malankara. Even in the very first judgment of 1889 it was held that, 'once Metropolitan of the Syrian Jacobite Church was accepted by the people it would, 'entitle him to spiritual and temporal governance of the local churches'. In the Samudayam suit this Court had observed that the whole of the Malankara Church was represented by the Malankara Association. The District Judge whose decree had been restored by this Court, and in appeal this Court had not said anything contrary to what was observed by him, observed, 'It cannot therefore be

denied that this Jacobite 'Syrian Association' which was a creation of the Mulunthurn Synod was and is the representative body that has the right to bind the whole community and all the churches by its deliberations and action.' The claim, therefore, that the Patriarch Churches are autonomous and independent in temporal matters cannot be accepted. That would be contrary to the Mulunthuruthy Synod, the decision in the Royal Court of Appeal, the Arthat Case and the Constitution of 1934. A power which vested in Malankara Association could not be denuded merely because the spiritual power of the Patriarch descended on the Catholico, who could be Metropolitan as well, on the analogy that if Patriarch did not have temporal power then it could not be deemed to vest in Catholico. Temporal power always vested in Metropolitan. It could not be divested because even the spiritual power came to be vested in him. The extent of power also remains the same, namely, not to interfere in day to day administration of a member which is governed by its own bye-laws.

72. Apart from the Syrian Orthodox Church there are various other churches such as the Evangelistic Association, the Simhasana churches the five churches established between 1951 to 1956 and Malankara Suriyani Knanaya Samudayan who claimed that though they are followers of Orthodox Syrian Christian tenets and beliefs but they have been established separately either under the Societies Registration Act or by their own rules and their churches were established with explicit declaration that they were under the spiritual supremacy of Patriarch of Antioch from whom the grace emanates. It was claimed by them that the suits against them were misconceived and in any case some of them, for instance, the churches established between 1951 and 1956 having come into existence after the Constitution of 1934 was framed by the Malankara Association they could not be held to be under the spiritual or administrative control of the Catholicate of the East. Each of them were subject matter of separate suit. The issues were framed separately and the evidence was also led. Both the learned Single Judge and the Division Bench after consideration of the material on record and examining the finding recorded in the earlier decisions rendered by the Travancore Cochin High Court and this Court in Moran Mar Basselios (supra) had held that except churches of the Evangelistic Association and the Simhasana churches and St. Anthony church the others were under the Catholico of the East. The findings recorded in the case of Knanaya Samudayam is subject-matter of Appeal No. 4953 whereas Appeal No. 4954 to 4956 has been filed by Kundara Church and Appeal No. 4989 has been filed by five churches established during 1951-56. The Catholicos have challenged the findings of the Division Bench in respect of Evangelistic Association and Simhasana Churches which is the subject-matter of SLP No. 14783-86 of 1991.

73. The Malankara Suriyani Knanya Samudayam referred to as 'Knanaya Samudayam' traces its origin from one Mar Thomas of Cona and one Bishop Joseph who migrated along with 400 persons comprising of 72 families from a place called Cona in 345 A.D. They claim that they are different racially, culturally and socially from the Syrian Christians and the membership in the community is only by virtue of birth. It is claimed that the community all along kept its status separate and functioned under the guidance and supervision of spiritual leadership of the Patriarch of Antioch. It claimed that Patriarch ordained Mar Sevoten as the Metropolitan in 1910 and Mar Clemis in 1951 who is still continuing. Attention was also drawn to the Constitution framed in 1912 and amended in 1918,1932,1939, 1951 and 1959 wherein the supremacy of Patriarch of Antioch was always offered. Various other provisions were pointed out and it was urged that it was clear that it was an autonomous church. The followers of Kundara church claimed that it was established by followers of Mar Cyrial who had come to India as prelate of the Patriarch of Antioch who resolved the differences between Mar Athanasius and M. Dionysius, but failed in his attempt due to the Roya Proclamation which was in

operation. It is claimed that it was at the instance of the Patriarch that the Queen of England issued a second proclamation permitting the followers to establish a new church. Therefore, their fore-fathers were associated with Kundara Old Church now called 'Valiapaly'. According to them, this church was established as Athanasius denied spiritual supremacy of Antioch. However, it is not denied that once ex-communication of Gheevarghese was cancelled in 1912 and when I. Ibrahim Kathanan, the priest of the Church died his son Fr. J. Abrahim was ordained as priest by Gheevarghese Dionysius, the Metropolitan of Malankara. The claim of Kothamangalam Church was that it was only an Archdiocese of the Syrain Orthodox Church under the Patriarch of Antioch which is administered by its Parishioners according to congregational principles of governance and its administration is carried on in accordance with its Constitution which provided for Edavaka Yogam, a managing committee, a working committee and Thonnanda Kaikors. In the appeal filed by the five churches established during 1951-56 it was claimed that when Catholicos were declared as aliens to the church by the Travancore High Court, they established the church under the Patriarch of Antioch. They claimed that they have their own Constitution and mode of administration. They are registered under the Societies Registration Act to whom the Constitution of Sabha was never made applicable. According to them, they having been established exclusively by the Patriarch Group, there can presumably be no doubt as to the object of its foundation and its basic faith. In the SLP filed by the Catholicos against the Evangelistic Association referred as 'Samajam' and 'Simhasana Churches', it is claimed that the object of the Evangelistic Association indicates that it is composed of the members of the Malankara Church and it provided that any person holding the faith of the Jacobite Syrian Church and acknowledging the authority of that church can be a member of that Association. It was claimed that even though Samajam is registered under the Societies Registration Act, but it being established in the territorial jurisdiction of the Catholicos and having acknowledged the spiritual headship of the Patriarch of Antioch as a supreme patron of the Samajam, they too should be treated as a part of the Malankara Church. It was pointed out that in 1966 the Samajam amended Clauses 7 and 9 of its Regulations and Rules and incorporated in clause 7 (a) and (b), but their claim was rejected by the Division Bench as this amendment was subsequently withdrawn. In respect of the Simhasana Churches, it was claimed that they were established with the object of seeking grace from Patriarch of Antioch and, therefore, they too should be deemed to be part of Malankara Church.

74. Since the basic controversy is the same and both the learned Single Judge and the Division Bench have recorded the finding for or against the catholicos in respect of different churches after considering the material on record in each case and with full understanding and correct appreciation of law it is not necessary to deal with them in any detail except to hold that they do not call for any interference. Suffice it to say that the parishes are the churches which cannot claim to be separate or autonomous bodies only because their racial and cultural origin was different. Once they were established whether they came from outside or they were local persons it did not make any difference as after the establishment of the church with the permission of the Government and the Metropolitan and acknowledging the spiritual headship of Patriarch of Antioch which follows the apostolic succession, the nature of these churches was episcopal and, therefore, it was not open to them to claim that they should be treated as autonomous bodies merely because they have their separate bye-laws. As stated earlier, the framing of the bye-laws in each church is necessary for purposes of governance and administration. But once a church is established then the property vests in the endowment and it becomes a public charity, the administration and control of which has to be governed in accordance with the objective of the endowment. Since the objective is to follow Syrian Orthodox Church of which Patriarch of Antioch is the head,

they cannot claim to be independent, especially after the Constitution of 1934 was framed.

75. What remains to be dealt with is the argument advanced by Ms Lily Thomas, the learned Counsel for intervener that the Patriarch of Antioch being corporation sole his powers, spiritual or temporal were not partible nor the integrality can be split up. Reliance was placed on paragraph 1206 of Halsbury's Laws of England Vol. 9 and General Assembly of Free Church of Scotland and Ors. Etc. v. Lord Overtoun and Ors. Etc. (1904) A C 515. The characteristics of a corporation sole which was, 'originally ecclesiastical for the most part' is, 'that its identity is continuous, that is that the original member or members and his or their successors are one' [Halsbury's Laws of England Vol. 9 paras 1207-1208]. But does it help? The personality of the Patriarch is not being split. His integrality is not being destroyed. He remains the spiritual head. The difference is degree of exercise of spirituality does not detract his status from being corporation sole. The mere fact that it has been reduced to 'vanishing point' does not mean that he has ceased to be so, in fact much sensitivity has been generated for nothing. The Patriarch of Antioch and Catholicate always existed in the hierarchy as the two dignitraties. 'This dignitary Patriarch) usually resides in a monastery near Mardin. The second dignitary, the primate of Tagrit, resides near Mosul, and is termed Maphrida or fruit-bearer' [Faiths of the World Vol. II p.195]. In General Assembly of Free Church (supra) what was held that nature of public trust cannot be changed. Has it been changed by the Catholicate? The answer has to be in the negative. Even the first clause of the Constitution framed in 1934 acknowledges the supremacy of the Patriarch.

The conclusions thus reached are,

1 (a). The civil courts have jurisdiction to entertain the suits for violation of fundamental rights guaranteed under Articles 25 and 26 of the Constitution of India and suits.

(b). The expression 'civil nature' used in Section 9 of the Civil Procedure Code is wider than even civil proceedings, and thus extends to such religious matters which have civil consequence.

(c). Section 9 is very wide. In absence of any ecclesiastical courts any religious dispute is cognizable, except in very rare cases where the declaration sought may be what constitutes religious rite.

2. Places of Worship (Special Provisions) Act, 1991 does not debar those cases where declaration is sought for a period prior to the Act came into force or for enforcement of right which was recognised before coming into force of the Act.

3. The following findings in Moron Mar Basselios (supra) have become final and operate as res judicata:-

(a) The Catholicate of the East was created in Malankara in 1912.

(b) The Constitution framed in 1934 by Malankara Association is valid.

(c) The Catholicos were not heretics nor they had established separate church.

(d) The meeting held by Patriarch Group in 1935 was invalid.

4 (a). The effect of the two judgments rendered by the Appellate Court of the

Royal Court and in Moron Mar Basselios (supra) by this Court is that both Catholicos and Patriarch Group continue to be members of the Syrian Orthodox church.

(b) The Patriarch of Antioch has no temporal powers over the churches.

(c) Effect of the creation of Catholicate at Malankara and 1934 Constitution is that the Patriarch can exercise spiritual powers subject to the Constitution.

(d) The spiritual powers of the Patriarch of Antioch can be exercised by the Catholico in accordance with the Constitution.

5. (a). The Hudaya Canon reduced by the Patriarch is not the authentic version.

(b). There is no power in the Hudaya Canon to ex-communicate Catholicos.

6. The ex-communication of the Catholicos by the Patriarch was invalid.

7. All churches, except those which are of Evangelistic Association or Simhasna or St. Mary are under spiritual and temporal control of the Malankara Association in accordance with 1934 Constitution.

76. Legal issues of jurisdiction, maintainability of the suits, ex-communication of the Catholico, authenticity of the canon, res judicata of the findings recorded in the Samudayam Suit, relationship of Malankara Association with Parish churches having been resolved not much difficulty remains in the manner in which these appeals should be decided. But before doing so the stage is also ripe for recording the deep anguish on baffling tenacity, to fight till finish, between two groups, rather, members of the same family of a community which is, 'a living tradition of faith and culture' which teaches honesty, simplicity and above all sacrifice. What is astonishing is that the two groups have had several rounds of bouts in the courts, where mass evidence both oral and documentary was led not on ideological clash, religious difference, theological conflict or any scriptural dispute or controversy about the right of worship, rituals and ceremonies or belief and faith surfaced but on matters which appear to be extraneous to establishment of the Syrian church a religious institution which has a glorious history and proud record of service. Mr. Parasaran was justified in submitting that Syrian churches could not be thought of without Patriarch of Antioch. But where is the dispute about it. Even the Catholicos acknowledge that he is the highest spiritual head. Extent of his powers and prerogative and not the existence or his being highest spiritual authority was disputed. Therefore, in nutshell the entire exercise was much ado about nothing. If the Catholicos went to one extreme and claimed that a declaration be granted that the Church had become autocephalous then the Patriarch went to other extreme by raising all possible defence denying even the most basic and fundamental concepts which had been settled either by judicial decision or the Constitution and Kalpanas issued from time to time. Even when Patriarch of Antioch was constituted in the meeting of Nicea held in 325 A.D. the other higher spiritual authority was the Catholico of the East. It was agreed even at that time that the Catholico could perform every spiritual function but the Patriarch had the overall superiority. There is no deviation from that, except to the extent it is provided in the Constitution with consent of all and in accordance with the convention and custom which has developed for all these long years. Therefore, in order to bring down the curtain and avoid any future digging of the grave activated by personal prejudices and rivalry, it is necessary to hold that the Constitution of 1934 as amended from time to time accepted and acted upon till the spurt of activities in 1970 shall be taken as final, governing the right and

relationship of all the parties.

77. When hearing of these appeals commenced it was felt both at the outset and in the midst that if both parties agreed, the dispute could be referred to some high-powered committee of religious authorities. But probably the issue being less religious and more legalistic and technical, both the parties through their counsel reposed confidence in this Court and entreated the Bench to bring an end to this litigation. Therefore, now after dealing with various legal matters which could not have probably been satisfactorily resolved it is appropriate to declare that,

(1) Relationship between the two spiritual superiors, that is, the Patriarch of Antioch and Catholico of the East at Malankara is neither of superior no subordinate but of two independent . spiritual authorities with Patriarch at the highest in the hierarchy.

(2) The Catholicos and the Patriarch are declared as followers of one creed, namely, Syrian Orthodox Church.

(3) The Constitution framed by the Malankara Association as amended from time to time shall govern the Churches attached to the Malankara Association.

78. Before concluding it may be observed that while highlighting the relationship between Malankara Association and the Parish Churches, it was submitted by Mr. Parasaran that the provisions in the Constitution permitting every church to send same number of representatives irrespective of the strength of churches was not very fair. May be. But this is a provision governing matters not only of administration of churches but of faith and religion. The Malankara Association is like the executive body of the Malankara Church to exercise control over religion and temporal matters. The Courts' function is restricted to ensure its proper implementation and not to determine whether the provisions in the Constitution framed by the religious body was fair or unfair. Religion is not governed, necessarily, by logic. In any case, it is not in the domain of secular courts to substitute itw own opinion of fairness. Further, no foundation was laid for it either in the pleading in the trial court or in the SLPs filed in this Court nor any argument appears to have been advanced either before the Single judge or the Division Bench. In fact, if the figures given in the Encyclopedia of Religion is any guide then the numerical strength of Catholicos in 1970 was more than the Patriarch. However paragraphs 120 and 121 of the Constitution of 1934 provide for a Rule Committee which is empowered to amend the Constitution from time to time. The grievance, therefore of fair representation, if it has any substance, can be raised before the Committee.

79. In a separate judgment written by Brother Jeevan Reddy, J., he has agreed, although for different reasons, that the creation of catholicate in 1912 was valid and that the Constitution framed in 1934 was binding and it could not be appealed by the Patriarch Group, therefore the Patriarch of Antioch could not act on his own even in spiritual matters. He has also agreed that the ex-communication of Catholico was invalid and the Malankara Church was Episcopal in character to the extent it was so declared in 1934 Constitution which also governs the affairs of the Parish Churches. In respect of Hudaya canon he did not record any finding as according to him in view of subsequent developments it was not necessary to decide whether the canon filed by the Patriarch Group was authentic. He, in fact, has agreed with every conclusion reached on merits in my judgment. The narrow difference has arisen on the power of this Court to direct any amendment in the Constitution framed by a Religious body and whether the fairness of such amendment can be judged by this Court. However, the direction issued

by him in this regard in appeals arising out of suits does not make any difference so far as merits of the appeals are concerned.

80. Consequently the appeals are decided by affirming the conclusions of the Division Bench of the Kerala High Court which do not call for any interference.

The parties shall bear their own costs.

B.P. Jeevan Reddy, J.

81. Leave granted in Special Leave Petitions.

82. These appeals represent the latest round of litigation between two rival sections in the Malankara Jacobite Syrian Christian Community. A brief reference to the earlier rounds of litigation is necessary for a proper appreciation of the questions arising herein.

83. St. Thomas, one of the disciples of Jesus Christ came to Malabar in 52 A.D. to spread his message. He died in India.

84. At the Council held at Nicea in 325 A.D. - First General Council -convened by the Roman Emperor Constantine, four Patriarchates were established spanning the Christendom as it was known then, viz., Rome, Constantinople, Alexandria and Antioch, each headed by a Patriarch. Within the jurisdiction of Patriarch of Antioch was established another office, viz., the great metropolitan of the East, also known as "Catholicos". The office of Catholicate fell into disuse later and was revived in 628 A.D. Sometime later, it again fell into disuse. All these are matters of faith and are stated merely by way of introduction.

85. By the 16th century, Christianity had gained a fairly substantial foothold in the area now comprised in Kerala. The dominant faith was of the Syrian Orthodox Church. 16th century saw the rise of Portuguese political power on the West Coast of India. The Portuguese were Roman Catholics. They compelled the local Christians to accept Roman Catholic faith. They succeeded to some extent but not for long. In the year 1654, the Christians of Malabar rebelled against the imposition of an alien faith and affirmed their loyalty to Syrian Orthodox Christian Church headed by the Patriarch by taking an oath en masse at Mattancherry, known as the "Koonan Cross Oath". Since then the Patriarch of Antioch was exercising ecclesiastical supremacy over what may be called the "Malankara Syrian Christian Church". With the rise of the British power in the Southern India during the 19th century, they in turn pressurised the Malankara Syrian Christian Community to embrace the Protestant faith. They too succeeded in some measure. Disputes arose between the two groups (one that embraced the Protestant faith and the other adhering to the Orthodox faith), which was settled by an award called "Cochin Award" rendered on April 4, 1840. As per this award, the Church properties were divided between the Church Mission Society (Protestants) and the Malankara Jacobite Syrian Church (Orthodox faith). The amount of 3,000 Star Pagodas deposited by Mar Thoma VI (Dionysius the Great) with the East Indian Company at eight percent interest came to be allotted to Malankara Jacobite Syrian Church in this division.

86. On account of certain disputes and bickerings between the members of Malankara Jacobite Syrian Church, Patriarch Peter III of Antioch came to Malabar in 1876. He called a meeting of the accredited representatives of all Churches in Malabar which is known as the "Mulanthuruthy Synod". At this Synod, Malankara Syrian Christian Association, popularly called the "Malankara Association", was formed to manage the

affairs of the Church and the Community. The Malankara Metropolitan was made the ex-officio President of this Association. Each member Church was to send three representatives to the Association. A Managing Committee of twenty four, called the "Standing Working Committee of the Association" was also constituted. Until 1876, the entire Malabar was comprised in one Diocese. But thereafter it was divided into seven Dioceses, each Diocese headed by a Metropolitan. One of them was to be designated as Malankara Metropolitan who exercised spiritual and temporal powers over all the Dioceses.

SEMINARY SUIT:

On July 4, 1879 Mar Joseph Dionysius claiming to be the properly consecrated Metropolitan of Malankara Jacobite Syrian Church and as the President of Malankara Association filed O.S. No. 439 of 1054 in the Zilla Court of Alleppey against one Mar Thomas Athanasius. The main dispute between them was while the plaintiff asserted the supremacy of Patriarch comprised in consecrating and appointing Metropolitans from time to time to govern and rule over the Malankara Edavagai, in sending Morane (the sanctified oil) for baptismal purposes, in receiving the Ressissa (tribute) from the Community to maintain his dignity and in generally controlling the ecclesiastical and temporal affairs of the Edavagai, the defendants denied any such Patriarchal supremacy. The suit was ultimately disposed of by the judgment of Travancore Royal Court of Final Appeal in the year 1889. The Royal Court found that the ecclesiastical supremacy of the Patriarch of Antioch over Malankara Syrian Christian Church in Travancore had all along been recognised and acknowledged by Jacobite Syrian Christian Community and their Metropolitans; that the exercise of supreme power consisted in ordaining, either directly or through a duly authorised delegates, Metropolitans from time to time to manage the spiritual matters of the local Church, in sending Morone to be used in the Churches for baptismal and other purposes and in general supervision over the spiritual government of the Church. The Royal Court further ruled that the authority of Patriarch never extended to temporal affairs of the Church which in that behalf was an independent Church. It was further declared that the Metropolitan of the Syrian Christian Church in Travancore should be a native of Malabar consecrated by the Patriarch or by his duly authorised delegate and accepted by the people as their Metropolitan. The Court found that the plaintiff was so consecrated by Patriarch and accepted by the majority of the people and, therefore, entitled to be recognised and declared as the Malankara Metropolitan and as the trustee of the Church properties.

ARTHAT SUIT:

It appears that the Patriarch of Antioch did not relish the judgment of the Royal Court of Travancore insofar as it declared that he had no control over the temporal affairs of the Malankara Church. Some local Christians supported him in that behalf which led to the institution of a suit in 1877 which resulted in the judgment of the Court of Appeal of Cochin dated August 15, 1905, re-affirming the findings of the Travancore Royal Court. The Cochin Court of Appeal declared that while the Patriarch of Antioch is the spiritual head of Malankara Syrian Jacobite Christian Church, the Churches and their properties are subject to the spiritual, temporal and ecclesiastical jurisdiction of the Malankara Metropolitan. In other words, the Patriarch's claim of control over the temporal affairs of the Malankara Church was negatived once again.

THE REVIVAL OF CATHOLICATE IN 1912:

The Sultan of Turkey withdrew the recognition given to Abdul Messiah as the Patriarch

of Antioch and recognised Abdulla II as the Patriarch. There is a difference of opinion as to the effect of this withdrawal of recognition by the Sultan. While one view in that this recognition resulted in Abdul Messiah ceasing to exercise any and all the powers of Patriarch, the other view is that the said withdrawal did not affect the spiritual authority of Abdul Messiah. Be that as it may, there were not two rival claimants to the Patriarchate of Antioch and as we shall presently indicate it is this dispute between Abdul Messiah and Abdulla II which led to the formation of two groups in the Malankara Church.

87. In the year 1907, Mar Geevarghese Dionysius was ordained as Metropolitan by the Patriarch Abdulla II at Jerusalam. In 1909, Mar Geevarghese Dionysius became the Malankara Metropolitan on the death of Mar Joseph Dionysius. Because of certain differences arising between Mar Geevarghese Dionysius and Abdulla II, the latter ex-communicated the former on March 31, 1911. A few months later, Abdulla II appointed one Paulose Mar Kurlios as the Malankara Metropolitan. Mar Geevarghese Dionysius responded by convening a meeting of the Malankara Syrian Christian Jacobite Church which declared his excommunication as invalid. In the year 1912, Patriarch Abdul Messiah came to Malankara and declared the excommunication of Mar Geevarghese Dionysius by Abdulla II as invalid. In addition to that, Abdul Messiah also purported to revive and re-establish the Catholicate by consecrating one Mar Ivanios as the Catholicos. It is relevant to notice the proceedings relating to the revival of Catholicate.

88. Two documents are put forward as the Kalpana of Abdul Messiah reviving the Catholicate, namely, Exs. A.13 and A.14. The Patriarch group (who are the appellants before us) dispute Ex.A.13. They say that Ex.A.14 is the only version while Catholicos group (who are respondents before us) say that Ex.A.14 was preceded by Ex.A.13 and that without Ex.A.13 there ,-could not have been Ex.A.14. We may notice the contents of both the documents. Ex.A.13 which is dated September 17, 1912, says inter alia, "by virtue of the order of the office of the Shepherd, entrusted to Simon Peter by our Lord Jesus Messiah, *we are prompted to perpetuate for you Catholicos or Mapriyana to serve all spiritual requirements that are necessary for the conduct of the order of the holy true Church in accordance with its faith*.... With Geevarghese Mar Dionysius Metropolitan, who is the head of the Metropolitans in Malankara and with other Metropolitans, Ascetics, Deacons and a large number of faithful, we have ordained in person our spiritually beloved Evanios in the name of Baselius as Mapriyana, i.e., as the *Catholicos on the Throne of St. Thomas in the East*, i.e., in India and other places at the St. Mary's Church, Niranam on Sunday, 2nd Kanni, 1912 A.D. as per your request" (emphasis added). A.13 then sets out the authority and the jurisdiction of Catholicos so revived in the following words:

> The authority to serve all spiritual elements in public, which are necessary for protecting the tradition of the Holy Church has been given to him (Evanios) by the Holy Ghost as was given to the Holy Apostles by our Lord Jesus Messiah. Authority means the authority to ordain Metropolitans, Episcopas, and to consecrate Holy Morone and to serve all the other spiritual items and also to administer the Kandaiiadu Diocese as he was earlier.... You must respect and love him properly and suitably because he is your head, Shepherd and spiritual father. He who respects him, respects us. He who receives him, receives us. Those who do not accept his right words and those who standing against his opinions which are in accordance with the Canon of the Church, defy him and quarrel with him, will become guilty....

89. Coming to Ex.A.14, which is dated February 19, 1913, the third paragraph starts by

saying "After bestowing on you our blessings a second time, we desire to make known to you our true affection that ever since your letters reached our weakness in midiat, we have been deeply grieved at the dissensions sown by Abdulla Effendi among our spiritual children in all our Churches in Malabar". A little later A.14 says:

> Accordingly, we, by the Grace of God, in response to your request, *ordained a Maphrian, that is, Catholicos* by name Poulose Basselios and three new Metropolitans, the first being Gheevarghese Gregorius, the second Joachim Evanios and the third, Gheevarghese Philexinos. It appears to us that, unless we do install a Catholicos, our Church, owing to various causes, is not likely to stand firm, in purity and holiness. And, now, we do realise that by the might of our Lord, *it will endure unto Eternity, in purity and holiness, and more than in times bast, be confirmed in the loving bond of communion with the Throne of Antioch*. The Joy of our Heart is herein realised. Our children, abide ye now in peace. As for ourselves, we leave you, Rest assured that though we leave you, we shall never be unmindful of you. We shall incessantly lift up our eyes unto heaven and offer our prayers and intercessions for the guileless lambs, redeemed by the previous blood of our savoir Jesus Christ. Pray Ye for us, and for our entire community. Abide ye in love, peace and concord. Pray ye for your enemies, and, for those that revile you without cause. Be not afraid of the uneconomical and unjustifiable interdicts and curses of the usurper. Heed not those who create dissensions. God will reward them for their action, be they good or bad. We commend you into the hands of Jesus Christ, our Lord, the Great Shepherd of the flock. May he keep you. *We rest confident that the Catholicos and Metropolitans - your shepherds - will fulfill all your wants*. The Catholicos, aided by the Metropolitans, will ordain melpattakkars, in accordance with the Canon of our Holy fathers and consecrate Holy Morone. *In your Metropolitans is vested the sanction and authority to Install a Catholicos, when a Catholicos died*. No one can resist you in the exercise of this right and, do all things properly, and in conformity with precedents with the advice of the committee, presided over by Dionysius, Metropolitan of Malankara. We beseech your love, and counsel you in the name of our Lord Jesus that Ye faint not in your true faith of Saint Peter, on which is built, the Holy Catholic and Apostolic Church. What we enjoin your true love is that the unlawful conduct of a usurper, may not induce you to sever that communion which is the bond of love connecting you with the Apostolic Throne of Antioch.
>
> (Emphasis added)

90. The main difference between Ex.A.13 and Ex.A.14 is two fold: Firstly, A.13 speaks of "Catholicos on the Throne of St. Thomas in the East", which words are not to be found in A.14. Secondly, A. 14 contains the following words: "in your Metropolitans is vested the sanction and authority to install a Catholicos, when a catholicos dies. No one can resist you in the exercise of this right and do all things properly, and in conformity with precedents with the advice of the committee, presided over by Dionysius, Metropolitan of Malankara", which are not found in Ex.A.13. More about these documents later.

91. Mar Ivanios, who was consecrated as the Catholicos, died on April 16, 1913. Abdul Messiah died on August 30, 1915 and Abdulla II died on November 25, 1915. No one was installed as the Catholicos till 1925, when one Mar Geevarghese Philixinos of Vakathanam was installed as the second Catholicos but without reference to the Patriarch. On the death of Mar Philixinos on December 17, 1928, Geevarghese Gregorius

was installed as the third Catholicos, again without reference to the Patriarch.

VATTIPANAM SUIT:

Dispute arose as to the persons entitled to the interest on 3,000 Star Pagodas aforementioned. In view of the dispute, the Secretary of State for India instituted an interpleader Suit No. O.S.94 of 1088 in the District Court, Trivandrum, It was later converted into a representative suit between two groups, viz., defendants 1 to 3 representing what may be called the Catholicos group (i.e. the group owing allegiance to the Catholicos installed by Patriarch Abdul Messiah) and defendants 4 to 6 representing what may be called the Patriarch group (i.e., the group owing allegiance only to the Patriarch). The first defendant claimed to have been appointed as Malankara Metropolitan by Abdul Messiah and disputed the validity of the Bull of excommunication issued by Abdulla II. On the other hand, defendants 4 to 6 claimed that the first defendant having been ex-communicated by the Patriarch Abdulla II, ceased to be the Malankara Metropolitan and that the fourth defendant has been validly appointed by Abdulla II as the Malankara Metropolitan in the place of the first defendant. Defendants 4 to 6 further contended that by their conduct and declarations, defendants 1 to 3 have become schematics and hence disqualified to act as the trustees of the Church properties. The fourth defendant died pending the suit and in his place defendant No. 42 was impleaded as the Malankara Metropolitan. The learned District Judge held inter alia that the first defendant is the validly appointed Malankara Metropolitan, having been accepted by the community at the installation meeting held in the year 1084. He also held that the withdrawal of recognition by the Sultan of Turkey did not deprive Abdul Messiah of his purely spiritual functions and powers and that the ex-communication of the first defendant by Abdulla II was invalid. With these findings, the learned District Judge upheld the claim of defendants 1 to 3 to the interest amount.

92. The Patriarch group filed an appeal before the High Court of Travancore (reported in 41 T.L.R.I). A Full Bench of the High Court allowed the appeal and reversed the judgment and decree of the Trial Court and upheld the claim of defendants 4 to 6 as the true and valid trustees entitled to the said interest amount. The findings recorded by the High Court are :

(a) That Exhibit 18, and not Exhibit A, is the version of the Canon Law that has been recognised and accepted by the Malankara Jacobite Syrian Christian Church as binding on it;

(b) That under Ex.18, the Patriarch of Antioch possesses the power of ordaining and excommunicating Episcopas and Metropolitans by himself, i.e., in his own right and that it is not necessary for him to convene a Synod of Bishops and proceed by way of Synodical action, in order to enable him to exercise these powers; the person ordained should, of course, be a native of Malabar and be accepted by the people;

(c) That there is nothing in the Mulanthuruthy Resolutions, Exhibit EL, which limits the powers possessed by the Patriarch under the Canon Law in matters of spiritual character, or which imposes restrictions on him in regard to the exercise of such powers; and

(d) That no special forms of procedure are prescribed by Exhibit 18 for observance by Patriarch before he exercises his powers of excommunication.

Thereupon defendants 1 to 3 applied for review of the said judgment. The review

petition was admitted subject to the condition that the review petitioners shall not question the following three findings recorded in the judgment under review - the three findings being:

> (1) as to the authenticity of Ex.A.18, the version of Canon Law produced by defendants 5, 6 and 42.
>
> (2) as to the power of Patriarch to ex-communicate without the intervention of the Synod; and
>
> (3) as to the absence of an indirect motive on the part of the Patriarch which induced him to exercise his power of ex- communication.

Accordingly, the appeal was re-heard by another Full Bench which by its judgment pronounced on July 4, 1928 upheld the decision of the learned District Judge and confirmed his decree. Under this judgment, the Full Bench held:

> (i) The excommunication of Mar Geevarghese Dionysius (the first defendant) was invalid because of the breach of the rules of natural justice in that he was not apprised of the charges against him and had not been given a reasonable opportunity to defend himself. In other words, he remains the Malankara Metropolitan;
>
> (ii) That defendants 1 to 3 had not become heretic or aliens or had not set up a new Church by accepting the establishment of the Catholicate by Abdul Messiah with power to the Catholicos for the time being to ordain Metropolitans and to consecrate Morone and thereby reducing the power of the Patriarch over the Malankara Church to a vanishing point;
>
> (iii) That the defendants 4 to 6 had not been validly elected.

It is interesting to notice that in this suit while the Patriarch group was contending that members of the Catholicos group have become aliens to the faith by repudiating the supremacy of Patriarch (by recognising the authority and the power of the Catholicos), the Catholicate group contended that they have not repudiated the Patriarch and that by recognising the Catholicos, they have in no manner denied the ecclesiastical superiority of the Patriarch. It is equally relevant to note that the excommunication which was in question there was the excommunication of the Malankara Metropolitan and not of the Catholicos. The question whether the Patriarch has the power to excommunicate the Catholicos and if so in what manner and on what grounds was not in question in that suit. Another feature to be noted is that it was the Patriarch group which was saying that by espousing the cause of and the revival of Catholicos, defendants 1 to 3 therein had in effect reduced the power of the Patriarch over the Malankara Church to vanishing point - which in their view amounted to repudiation of the power and authority of the Patriarch - while the Catholicos group was denying that they have done any such thing or that they had any intention to do so. The excommunication of first defendant (Mar Geevarghese Dionysius, Malankara Metropolitan) was held invalid not on the ground of lack of power in the Patriarch but on the ground that he did not follow the principles of natural justice in excommunicating him. One the excommunication of first defendant was held to be invalid, it followed logically that the appointment of defendant No. 4 as Malankara Metropolitan was invalid. Yet another noticeable feature of this judgment is the following finding recorded by the Court:

> The whole matter resolves itself into a personal dispute between two claimants

> to the Patriarchate in which it is said, the first defendant deserted the Patriarch who had created him Metropolitan and supported his rival. Such conduct might amount to an ecclesiastical offence for which the offender could be deprived by his ecclesiastical superior but it could not be an offence for which the civil courts could try him or express any opinion as to his guilt....In the circumstances it cannot be said that the Church to which the defendants 1 to 3 belong is a different Church from that for which the endowment now in dispute was made.

DEVELOPMENTS SUBSEQUENT TO THE FINAL DISPOSAL OF THE VATTIPANAM SUIT:

After the aforesaid judgment, it appears, both the parties tried to strengthen their respective positions. On August 16, 1928 the Managing Committee of the Malankara Association was formed which was authorised to draw a Constitution for the Church and the Association. On the very next day, i.e., August 17, 1928, Mar Julius Elias, the delegate of the Patriarch who was then in Malabar, issued an order calling upon Mar Geevarghese Dionysius to execute an Udampadi (submission deed) within two days accepting the authority of the Patriarch and also suspending him for having committed several grave offences against the Holy Throme of Antioch and for having repudiated the authority of the ruling Patriarch. He addressed letters to the Governments of Travancore and Madras to withhold payment of interest to Mar Geevarghese Dionysius in view of his suspension from the office of Malankara Metropolitan.

93. On August 21, 1928, O.S.2 of 1104 was filed in the District Court of Kottayam by eighteen persons belonging to Patriarch group against Mar Geevarghese Dionysius and two others including the then Catholicos Mar Geevarghese Philixinos. Mar Geevarghese Philixinos died in 1929. Thereupon Moran Mar Basselios was impleaded as a defendant. On January 23, 1931, O.S.2 of 1104 was dismissed for non-compliance with certain orders regarding payment of monies to the Commissioner appointed in the suit. The application for restoration of the suit was dismissed on September 29, 1931, against which order the plaintiffs therein filed Civil Misc. Appeal No. 74 of 1107 in the High Court. While the aforesaid C.M.A. was pending in the High Court, certain developments took place which require to be noticed.

94. With a view to put an end to the disputes between the two rival groups in the Malankara Church, Patriarch Elias I visited Malabar in 1931 at the instance of Lord Irwin, the then Viceroy of India. Patriarch Elias I, however, died in Malabar before he could effect any settlement. In his place, one Ephraim was elected as the Patriarch of Antioch in the year 1933, but, it is said, without notice to the Malabar Community. For this reason, Mar Geevarghese Dionysius and his supporters did not recognise Ephraim as the duly elected Patriarch.

95. Mar Geevarghese Dionysius died in February, 1934 with the result the trust properties passed into the possession of his co- trustees, Mani Poulose Kathanar and E.J. Joseph. Shortly thereafter, the draft Constitution prepared by the Managing Committee of the Malankara Association was published in the shape of a pamphlet. On December 3, 1934 notices were issued convening a meeting of all the Churches to be held on December 26, 1934 at M.D. Seminary at Kottayam for, inter alia, electing the Malankara metropolitan and adopting the draft constitution. Notices were also published in two leading Malayalam newspapers. The meeting was held on the appointed day (the proceedings whereof were exhibited as Ex.64 in Samudayam suit), at which, the third Catholicos, Mar Basselios Geevarghese II was elected as Malankara Metropolitan. The draft Constitution was also adopted at the said meeting.

THE Constitution ADOPTED BY THE MALANKARA ASSOCIATION HELD ON DECEMBER 1934:

The Constitution which was adopted on December 26, 1934 provides for various aspects concerning the Malankara Church and the Malankara Association. The relevant Articles, as originally approved in 1934, read thus:

> (1) *Malankara Church is a division of Orthodox Syrian Church. Primate of the Orthodox Syrian Church is Patriarch*.
>
> (2) Malankara Church was founded by St. Thomas, the apostle*and supremacy in the Orthodox Syrian Church of the East and the Primate of the Orthodox Syrian Church is with the Catholicos*.
>
> (5) The approved canon of this church is Hudaya Canon written by Bar Hebreus (the same canon book as one printed in Paris in 1898).
>
> (90) *The throne of the Catholicos was re- established in the Orthodox Syrian Church of the East which includes Malankara church in 1088 M.E* (1913) and this institution has been functioning ever since then in the Orthodox Syrian Church of the East.
>
> (91) Catholicos shall the right to visit all churches in Malankara and that the expenses of such visits shall be borne by the respective Parish churches.
>
> (92) *Malankara church shall recognise the Patriarch consecrated in co-operation with the episcopal Synod of which the Catholicos is the President and in accordance with the canons*.
>
> (93) *Whenever Catholic is to be consecrated, if there be Patriarch recognised as stated above, the Patriarch should be invited for the consecration and if the Patriarch arrives, he shall as President of the Synod consecrate Catholicos with the co-operation of the Synod*.
>
> (101) No one shall have right to alter the faith of the Sabha. In case there is any dispute regarding matters of faith, episcopal synod is vested with power to decide the dispute.
>
> (Emphasis added)

96. The Constitution was amended in 1951 and again in 1967. When the 1951 amendments were made, the judgment of the Travancore High Court dated August 8, 1946 was holding the field whereunder the Catholicos group were declared as strangers to the Malankara Church. For that reason, it appears, none of the members of the Patriarch group participated in effecting the said amendments.

SAMUDAYAM SUIT:

On July 5, 1935 the Metropolitans of the Patriarchal party issued notice summoning a meeting of the Church representatives for August 22, 1935 at Karingasserai to elect the Malankara Metropolitan. The notice stated that none of the persons belonging to Catholicos party should be elected. The meeting was accordingly held on August 22, 1935 whereat Mar Poulose Athanasius was elected as the Malankara Metropolitan. The meeting purported to remove the trustees elected at the Meeting held on December 26, 1934 (i.e., Mani Poulose Kathanar and E.J. Joseph, belonging to Catholicos group) and

appointed two other persons in their place. Having done this, the Patriarch group (plaintiffs- appellants in C.M.A.74 of 1107 pending in the High Court) allowed the appeal to be dismissed for non-prosecution.

97. The Patriarch group then instituted, on March 10, 1938, O.S. 111 of 1113 in the District Court of Kottayam (hereinafter referred to as 'the Samudayam Suit') for a declaration of their title as trustees of the Samudam properties (common properties) of the Malankara Church and for a further declaration that the defendants to that suit (belonging to Catholicos group) were not lawful trustees and for possession of the trust properties. Certain ancillary reliefs were also asked for. The plaintiffs in the said suit based their title on the proceedings of the Karingasserai meeting aforesaid, whereat the plaintiffs therein were elected as Malankara Metropolitan and co-trustees and the trustees belonging to Catholicos group (defendants to the suit) were removed. The suit was dismissed by the Trial Court on January 18, 1943, against which the plaintiffs therein preferred an appeal to the Travancore High Court being A.S.1 of 1119. On August 8, 1946 the appeal was allowed and the suit decreed by a majority of Judges (2:1). The defendants (Catholicos group) thereupon applied for review which was rejected. The matter was carried to this Court in Civil Appeal No. 193 of 1952 which was allowed on May 21, 1954. This Court directed the High Court to re-hear A.S.I to 1119 on all the points. Accordingly, the High Court took up the appeal for hearing and allowed the same by its judgment dated December 13, 1956. The suit was decreed accordingly. On a certificate being granted by the High Court, the defendants (Catholicos group) filed an appeal in this Court which was allowed on September 12, 1958 (reported in A.I.R. 1959 S.C. 31). It is necessary to notice the relevant findings recorded by this Court:

> (1) The main plea of the plaintiffs that the defendants had become heretics or aliens or had gone out of Church by establishing a new Church because of the specific acts and conduct imputed to them is unacceptable for the reason that the said issue is concluded by the judgment of the High Court of Travancore in O.S. 94 of 1088 (Vattipanam suit). The charges which were sought to be relied upon as fresh cause of action in the suit (Samudayam suit) are not covered by the pleadings or the issues on which the parties went to trial. Some of them are pure after-thoughts and cannot therefore be permitted to be raised. The said charges, or at any rate most of them, ought to have been and should have been put forward in the vattipanam suit and and the plaintiffs having not done that, cannot now put them forward. They are barred by the rule of res judicata from doing so. It must therefore be held that it is not longer open to the plaintiffs to re-agitate the contention that the first defendant in the said suit had ipso facto become heretic or alien or had gone out of Church and in consequence has lost his status as a member of the Church or his office as a trustee.
>
> (2) The M.D. Seminary meeting held on 26.12.1934 at Kottayam was a properly held meeting and the first defendant in the said suit was validly appointed as the Malankara Metropolitan and as such became the ex-officio trustee of the Church properties.
>
> (3) The Karingasserai meeting cannot be held to be a properly held meeting of the Malankara Association and therefore the proceedings of the said meeting and the decisions taken therein are not valid.
>
> (4) Since the plaintiffs have failed to prove that they are validly elected trustees, their suit for ejectment must fail for want of title as trustees.

DEVELOPMENTS SUBSEQUENT TO THE JUDGMENT OF THIS COURT IN MORAN BASSELIOS CATHOLICOS AND ORS. V. THUKALAN PAULO AVIRA AND ORS. AIR (1959) S.C. 31:

Even while the aforesaid appeal was pending in this Court, the then Patriarch expressed a desire through his Kalpana dated November 30, 1957 (Ex.B.197) to settle outstanding disputes in the Malankara Church. He stated in the Kalpana that he was deeply interested in joining those who were divided and in strengthening the spiritual bond between Malankara and Antioch and that he was opening his heart for peace and unity. It appears that this desire of the Patriarch was reciprocated by the Catholicos group. The judgment of this Court delivered on 12th September, 1958 affirming that the Malankara Church remained a single unified Church and rejecting the contention that the defendants in the said suit (Samudayam suit) had become heretics and had established a separate Church away from the Jacobite Syrian Church appears to have given an impetus to the drive towards unity between the two groups.

On December 9, 1958, the Patriarch issued a Kalpana dated December 9, 1958 (Ex.A.19) stating inter alia:

> It is no secret that the disputes and dissensions that arose in the Malankara Church prevailing for a period of 50 years have in several ways weakened and deteriorated it. Although right from the beginning several persons who loved the Church and devout of God desired peace and unity putting an end to the dissension, they departed in sorrow without seeing the fulfilment of their desire. We also were longing for peace in the Malankara Church and the unity of the organs of the one body of the Church. We have expressed this desire of ours very clearly in the apostolic proclamation (reference is to the proclamation dated November 11,1957) we issued to you soon after our ascension on the Throne. This desire of ours gained strength with all vigour day by day without in any way slackened and the Lord God has been pleased to end the dissension through us. Glory be to him. *To bring forth the peace in the Malankara Church we hereby accept with pleasure Mar Baselious Gheevarghese as Catholicose*. Therefore we send our hearty greetings....
>
> (Emphasis added)

98. It is significant to mention here that this Kalpana Ex.A.19 was issued by Patriarch Yakub, who was in India during the conduct of Samudayam suit appeal, attending to the said litigation on behalf of the Patriarch party. He became the Patriarch sometime earlier to his Kalpana dated November 30, 1957.

99. On December 16, 1958 the Catholicos responded by issuing his Kalpana (Ex.A.20) wherein he described himself as "meek Baselious Catholicos named as Geevarghese II *seated on the Throne of the East of Apostle St. Thomas*". Having expressed his grief at the dissensions in the Malankara Church and his happiness at the end of discord, the Catholicos stated "*we, for the sake of peace, in the Church, are pleased to accept Moran Mar Ignatius Yakub III as Patriarch of Antioch subject to the Constitution passed by the Malankara Syrian Christian Association and now in force*". (Emphasis added). The Catholicos further stated in the said Kalpana, "we have also pleasure to accept the Metropolitans under him (Patriarch) in Malankara subject to the provisions of the said constitution...."

100. On December 22, 1958 the three Metropolitans appointed by Patriarch during the pendency of the Samudayam suit/appeal sent submission deeds Ex.A.37 and Ex.A.154

to the Catholicos. Under these letters of submission, the Metropolitans expressed their joy at the restoration of peace and unity in the Malankara Church and promised to perform their functions under the Catholicos and to follow the canons, the Constitution in force and the orders to be issued by the Catholicos. We may quote the last sentence in Ex.A.37 written by Poulose Philixinos, Metropolitan of Kandanad Diocese, (who has indeed been appointed later as Catholicos by the Patriarch). It reads : "I hereby inform that I shall act always in accordance with the directions issued by you from time to time and also in accordance with the canons of the Church and the Constitution now in force."

101. On December 26, 1958 a meeting of the Malankara Association was held. Ex.A.43 (a) is the copy of the minutes of the said meeting. It shows that the meeting was attended by Bishops, Clergy and laity of both the groups and was presided over by the Catholicos. This meeting was held after due notice intimating all concerned that new trustees of the Malankara Association would be elected at the said meeting. The Patriarch's delegate, who was then in India, also attended the meeting by special invitation. At this meeting, new trustees were elected. Ex. A.44, the newspaper report, contains a group photograph of the Metropolitans of both the groups and the delegate of Patriarch. A meeting of the Bishops of both the groups was held on January 12, 1959. Ex.A.153 is a copy of the minutes of the meeting. It was attended by six Metropolitans of Catholicos group and three Metropolitans of Patriarch group. The meeting resolved to unite various rival organisations, youth leagues, students' organisations and womens' organisations under one Association. Committees were formed to devise ways and means of unification. It was decided to implement the Constitution of Malankara Association wherever it was not implemented and to appoint a committee to study the particulars and report at the next meeting. It was also decided to re-allot the dioceses since the total number of Metropolitans of both the groups put together exceeded the number of dioceses. Accordingly, at the Synod meeting held on February 21, 1959 (Ex.A.153 (a)] attended by all the Metropolitans, re-allotment of dioceses was made. It was decided to send the copies of the Constitution to all the Parishioners with a direction to obey the same. Under the re-allotment of the dioceses, three dioceses were allotted to Metropolitans belonging to Patriarch group. The Catholicos issued the Kalpana dated February 25, 1959 (Ex.A.38) affirming the allotment of Dioceses as per Ex.A.153 (a). Ex.A.36 is a memorandum submitted by thirty person of Patriarch group (including D.W. 2 in the present suit) on January 12, 1959 to the Catholicos requesting him to inform the community about the Constitution of Malankara. In this memorandum, they requested that fresh elections should be held to the Managing Committee and that the Managing Committee should have members representing both the groups. This document inter alia refers to the peace and unity brought about in Malankara Church on December 16, 1958, complaining at the same time that complete unity has not been achieved as yet.

102. While the above developments were taking place here, the Patriarch addressed a letter dated April 8, 1959 (Ex.A.23) to the Catholicos, the purport of which is: I have received your two letters. I could not reply soon on account of some inevitable reasons. In your letter you have stated that you accepted me in accordance with the terms of Constitution. But you have not made it clear what is the substance of the terms. The developments in Malankara are contrary to my expectations. Your use of the expression 'holiness' with your name is not right. This expression can be used only by the Patriarchs. Your assertion that you are sitting at the Throne of St. Thomas is unacceptable. No one has ever heard of St. Thomas establishing a Throne. Similarly your assumption that yours is the Church of the East and that you are Catholicos of the East is equally untrue and unwarranted. I have learnt from the newspapers that a new

arrangement has been made in respect of dioceses in Malankara. Before effecting the said arrangement, it was necessary to decide the limits of the relationship between Malankara Church and Patriarchate. The new arrangement of dioceses could have been made only thereafter and that too with my knowledge. You also seem to have assumed the management of Simhasna Churches which are directly under my rule. Without my authority you could not have assumed the administration of the said churches.

103. On June 8, 1959, the Catholicos replied to the Patriarch (Ex.A.24). In this letter, the Catholicos stated that the letters Ex.A.19 and A.20 were exchanged by him and the representative of the Patriarch, Mar Julius Elias, Metropolitan, on 16th December at the old Seminary before an august gathering consisting of Bishops, Priests and laymen of both the parties. Before the said exchange, there were negotiations between the two parties in which it was made clear that the acceptance of Patriarch shall be subject to the Constitution. It was only after the acceptance of the same by the Patriarch's representative, Mar Julius Elias, that the letters, A.19 and A.20 were exchanged. Protesting against the same after four or five months is not justified. With respect to the use of the expression 'holiness', the Catholicos justified the same saying that it can be used by the Catholicos also and is not confined to Patriarchs only. Regarding the claim of the Throne of St. Thomas, the Catholicos stated in this letter that this expression is used not only by Patriarchs but also by Metropolitans and Bishops alike, as is evident from the Hudaya Canon and other books. As a matter of fact, no apostle had ever established a Throne anywhere. It is only a honorific. Indeed, Ex.A.13 and A.14 reviving the Catholicate refer to the Throne of St. Thomas in India. Therefore, the Throne of St. Thomas is not a new thing. Similarly the Church of the East and Catholicos of East are well established entities. The judgment of the Supreme Court affirms the Constitution and it is binding upon every one. For these reasons, there can be no ground or reason for entertaining any apprehensions by the Patriarch.

104. On July 16, 1960, the Patriarch again wrote to the Catholicos reiterating his objections. In this letter, the Patriarch asserted that the provisions of the said Constitution "seem to be destructive of every principle of apostolic and episcopal Churches. So we could not approve your constitution". The letter concluded by saying, "it is reported to us that our people there and the churches remained divided mainly on the scope of your acceptance and the validity of the Constitution which you hold more sacred than the holy scriptures, the canons of the church and its traditions. In the circumstances we have no alternative but to recognise those people and churches who hold fast to the original principles of the foundation of their church." The letter called upon the Catholicos to clarify his position immediately within a month failing which it would be taken that the Catholicos has nothing to reply and he could take such further steps as are deemed necessary for the peace of the church and preservation of its faith, order and discipline as a holy and apostolic church.

105. On August 13, 1960, the Catholicos replied to patriarch in which he reiterated that when the Samudayam suit was pending in the Courts, the Patriarch himself was in India (at that time, he was not the Patriarch) as the representative of the Patriarch and prosecuting the said suit. He appeared as a witness, produced several documents and was aware of all the developments including the enactment of the Constitution and its acceptance by the Supreme Court. With reference to the Patriarch's proposal to accept only his followers as members of the true faith, the Catholicos expressed a doubt whether a Patriarch can continue as such once he recognises schematics into the fold. He closed the letter by saying that he expected full cooperation from and recognition of the Constitution by the Patriarch.

106. The correspondence went on lie this with the language and accusations in each letter becoming more and more shrill with each exchange.

107. With the above correspondence was going on, following developments took place in Malankara: On September 16, 1959 a meeting of the Malankara Association was held wherein members of both the groups participated [Ex.A.43 (a) is the minutes of the meeting]. The strength of the Managing Committee was fixed at ninety, of which seventy four were to be elected and sixteen to be nominated by Malankara Metropolitan. Several other decisions were taken. Ex.A.98 shows that the elected members of the Managing Committee took oath to abide by the Constitution. Pursuant to the decision of the Managing Committee of the Malankara Association, Catholicos invited the Patriarch to come to Malankara. The Patriarch, however, replied on October 27, 1961 [Ex.A.31 (a)] that a canonical invitation should be issued which will be placed before the Patriarchal Synod. Accordingly, a canonical invitation Ex.A.32 was sent on January 18, 1962. Since the then Catholicos had become very old, a meeting of the Malankara Association was held on May 12, 1962 for electing his successor. It elected Ougen Mar Timothious, which was approved by the Synod on June 21, 1963. This was conveyed to Patriarch. On January 13, 1964, a letter of invitation was sent by Malankara Episcopal Synod inviting Patriarch to come to India for the installation of the new Catholicos. This letter Ex.A.35 was signed by nine Metropolitans belonging to both the groups. The plaintiffs-respondents say that this invitation was sent as contemplated by Article 114 of their Constitution. Ex.A.41 is the Kalpana dated April 29, 1964 issued by three Metropolitans (including one of the Patriarch group) regarding the proposed installation of Catholicos. The Patriarch arrived in India and the new Catholicos was installed by him on May 22, 1964. A day before the installation of new Catholicos, it may be mentioned, there was a discussion with respect to the demarcation of jurisdiction of Catholicos pursuant to which the Malankara Synod resolved that "hereafter the jurisdiction of the said see shall not be extended to the Arabian countries or Persia and that the see includes only eastern countries situated on the east of them. But H.H., the Patriarch shall agree to continue the present system of sending priests to the Arabian gulf countries from Malankara for ministering to the spiritual needs of the Malayali Parishioners as long as Malayalis stay there".

108. The address presented to the Patriarch by the Catholicos, Metropolitans, Clergy and the people of Malankara Orthodox Syrian Church on May 22, 1964 affirmed that the Patriarch's 'monumental act of December, 1958' has infused new hopes for a bright future and that the Malankara Church is thankful to the Patriarch for acting with imagination, courage and persistence in handling a difficult situation in the Church. The address further affirmed:

> we beg to assure your holiness that though we have had differences in the past, there was a deep-seated sense of attachment among our people irrespective of party opinions about our connection with the apostolic see of Antioch. Even in our worst period of controversy, that sense of attachment was not lost to us. The Catholicate was never visualised as a rival to the exalted Throne of Antioch. On the other hand it is the symbol of real cooperation with that Throne while it signifies the Church's right and freedom to carry out God's purposes in the land in the footsteps of the saints and the faith of the Fathers.

109. Ex.A.48, A.49, A.52, A.178, A.179 and A.189 series show that a new Managing Committee was elected for the Malankara Association and that the Committee was composed of representatives of both the groups and that the newly elected members took oath affirming the 1934 Constitution. More significantly in the year 1970, a

meeting of the Malankara Association was held (on December 31, 1970) participated by representatives of both the groups, whereat one Mathew Athanasius was elected as the successor Catholicos to Mar Ougen I. [It may be recalled that Mathew Athanasius was ordained as Metropolitan in 1951 by Basselios Geevarghese II, (first defendant in the Samudayam suit); Mathew Athanasius is the second plaintiff in O.S. 4 of 1979, the main suit before us.] It appears that this election was challenged by certain members owing allegiance to Patriarch by way of O.S. 3 of 1979 which was dismissed by the Trial Judge. The judgment became final since no appeal was preferred against it. Ex.A.5 shows that the Managing Committee of the Association appointed a Rules Committee in accordance with the Constitution to suggest amendments to the Constitution. The Rules Committee included the representatives of both the groups including D.W.2 in the present suit. The draft amendments suggested by the Rules Committee were approved by the Managing Committee and by the Synod meeting, as would be evident from the documents Ex.A.11 series and Ex.A.162 (f).

110. At this stage, what appears to have triggered the dispute again is the nomination of a delegate to Malankara Sabha by the Patriarch in the year 1972. This nomination implied the exercise of active spiritual supremacy by the Patriarch over Malankara Church which was evidently not relished by the Catholicos and other members. Under a letter dated February 16, 1972 (Ex.A.76) the Catholicos and nine Metropolitans including the members of the erstwhile Patriarch group requested the Patriarch not to send the delegate. They pointed out that sending such delegate will lead to disturbance of peace and to dissensions among the Malankara Church. The Patriarch did not pay heed to this request. On the contrary, he wrote back to the Secretary to the Malankara Association (Ex.A.192 dated July 9, 1973) that he is not aware of any such Sabha or of the Malankara Association. His delegate arrived in Malankara and started ordaining priests and deacons. The Catholicos objected to this activity of the delegate by his letter Ex.A.79 dated August 7, 1973 addressed to the Patriarch. Nothing happened. On September 1, 1973, the Patriarch himself ordained the first defendant in O.S.4 of 1979 (the main suit now before us) as Metropolitan of the Evangelistic Association of the East. Then started a series of correspondence between the Patriarch and the Catholicos each accusing the other of several ecclesiastical violations. .

EXCOMMUNICATION OF CATHOLICOS BY PATRIARCH:

On August 7, 1973 the Catholicos sent a telegram to Patriarch to the following effect:

> Local newspapers report your holiness intention to consecrate one of our priests as Bishop. We unequivocally object to such action if contemplated by your Holiness as uneconomical and as a clear violation of 1958 peace agreement. (Letter follows).

In the confirmatory letter, the Catholicos stated that there was no necessity for the Patriarch to send a delegate to Malankara and added further:

> *The Catholicate of the East is an autocephalous which consecrates its own Bishops and its own Morone. This autocephaly is a fact quite independent of the name of our Throne. The autonomy exercised by the Catholicate over Malankara has been well established. It was for no other reason that your Holiness in May, 1964 expressed a desire to delimit the geographical jurisdiction of this hierarchy*
>
> (Emphasis added)

111. The Catholicos then referred to the re-definition of the geographical jurisdictions

of both the Patriarch and the Catholicos prior to installation and to the installation of the new Catholicos by the Patriarch on May 22, 1964. He also referred to the activities of Mar Thimotheos, the delegate of Patriarch whom the Catholicos described as a troublemaker. The Catholicos stated that the activities of the delegate would have constituted a sufficient ground, normally speaking, for him to protest against his actions with the Patriarch but that he has not taken such action only because he considers his link with Patriarchate as valuable. Finally, he protested against any proposal to consecrate Metropolitans for India by Patriarch and stated that any such action would be treated as an uneconomical action.

112. After receiving the above letter of the Catholicos, the Patriarch communicated a list of charges to the Catholics on January 30, 1974 (Ex.A.80). This letter is in the nature of a show-cause notice calling upon the Catholicos to answer the charges leveled against him within one month. It is unnecessary to detail the charges herein. The main grievance of the Patriarch was the attempt of Catholicos to style himself as the head of an independent Church of Malankara and repudiation of the Patriarchal authority. The letter also complained of the "most discourteous and impudent manner which is unbecoming from the Catholicos" in which the letter dated August 7, 1973 was addressed to him.

113. On March 9, 1974 the Catholicos replied to the Patriarch stating that the Patriarch has no jurisdiction to level any charges against him or to ask for his explanation. He stated that the only authority to do so is the Malankara Episcopal Synod. He stated that the charges communicated by the Patriarch have been forwarded to the said Synod for consideration and appropriate action and that the Synod has assumed jurisdiction in the matter. A similar letter was addressed by the Secretary of the Malankara Synod on March 5, 1974 to the Patriarch. This letter also asked the Patriarch to prove his charges against Catholicos before the Malankara synod. This exchange went on with the language and tone of each letter becoming more and more discourteous towards each other. Suffice it to mention that on July 5, 1974 the Malankara Synod met and not only justified the actions of the Catholicos but found the Patriarch guilty of several ecclesiastical violations. A copy of the proceedings was forwarded to the Patriarch.

114. On January 10, 1975 the Patriarch suspended the Catholicos from his office until further orders. On January 11, 1975 the Patriarch wrote to all the Metropolitans in Malankara inviting them to the Universal Synod convened by him for June 6, 1975 to consider the charges against the Catholicos. The Patriarch also addressed letters on the same day to several Bishops in Malankara condemning the several actions of the Catholicos which according to him were contrary to the faith.

115. On May 22, 1975, another meeting of Malankara Episcopal Synod was held reiterating the independent nature of Malankara Church and disputing the authority of the Patriarch. All these minutes were duly communicated to the Patriarch including the minutes of the meeting held on June 5, 1975.

116. On June 16, 1975 the Universal Synod met at Damuscus to consider the charges against the Catholicos. The Synod met on several subsequent dates upto December 20, 1975, the proceedings whereof are enclosed to the letter Ex.A.22 dated June 22, 1975 addressed by the Patriarch to Catholicos. The Universal Synod concluded that the Catholicos Ougen I is guilty against the faith and the laws of the Church and has violated the oath taken by him at his consecration as the Catholicos of the East and as the Metropolitan of Malankara and must be considered to have become an apostate to the Syrian Orthodox Church. Accordingly, he was stripped off all the offices, authority

and privileges of the said office. The Synod authorised the Patriarch to announce the said decision to whole church and to all concerned. The Patriarch issued a notice to the Catholicos calling upon him to intimate whether he accepts and submits to the resolutions of the Universal Synod within ten days. He was intimated that if he does not so submit, he will be declared as apostate. A Bull of excommunication was issued by the Patriarch excommunicating the Catholicos from the Syrian Orthodox Church.

THE INSTITUTION OF THE PRESENT SUITS:

Eight suits in all were instituted which were later transferred to the High Court for disposal. Of these eight suits, two are no longer before us, viz., O.S. 347/73 (numbered as O.S. 3/79 in the High Court of Kerala) and O.S. 35/76 (numbered as O.S.7/79 No. the High Court). The other six suits which are now before us are the following. (For the sake of convenience, we shall mention their High Court numbers only):

(1). O.S. 2/79, a suit filed by the Catholicos and his group challenging the authority of the Patriarch to ordain Bishops and Metropolitans on the ground that Bishops and Metropolitans so appointed were interfering with the worship and other functions of the Malankara Church in Kottayam.

(2) O.S. 6/79 - also filed by the Catholicos and his group. This suit pertains to the ordaining of priests by Patriarch in certain dioceses.

(3) O.S. 4/79 - this is treated as the main suit by the parties (It was actually instituted in the District Court on 27.6.1974). We shall presently mention the frame of the suit since that would constitute the main-frame of the dispute before us.

(4) O.S. 8/79 - that was instituted by Catholicos Ougen. On his death his successor Catholicos was impleaded as the plaintiff.

(5) O.S. 1/79, instituted by Parishnes of Kothamangalam belonging to the Catholicos group against the members of the Patriarch group.

(6) O.S. 5/79, instituted by Metropolitan of the Diocese of Kottayam and certain other members belonging to Catholicos group against the Managing Committee of Simhasana Church at Pom-pady, Kottayam.

The plaintiff-respondent's case, as put forward in O.S. 4/79, is to be following effect:

Until 1912 the Malankara Metropolitan, necessarily a native of Malankara, was invariably exercising administrative powers over temporal and ecclesiastical matters which authority was derived because of his election/approval by the members of the community. The persistent interference by the Patriarch in the affairs of the Church compelled the community to feel the need for re-establishment of Catholicate. Accordingly, it was revived and re- established in 1912. The seat of Catholicate was transferred from Tigris in Persia to Malankara. After the establishment of Catholicate, "practically no residuary power (was) left with the Patriarch of Antioch over this Episcopal Church". There are about 1,000 Parish Churches comprised in the Malankara Church. They are under the authority of Malankara Metropolitan. The Malankara Church is neither a union nor a federation of congregational autonomous units, but a Church with a unique solidarity derived from apostolic succession. The 1934 Constitution governs and regulates all the affairs of this Church. The

Constitution enables the Malankara Metropolitan to hold the office of Catholicos as well. "Thus in the Malankara Metropolitan-cum-Catholicos converge all temporal, spiritual and ecclesiastical powers without mitigating the exalted position and status of the Patriarch, the Primate of the Orthodox Syrian Church". After the judgment of the Supreme Court the Patriarch and his group accepted the Catholicos and the 1934 Constitution. But later they have been acting against the interests of the Church at the instance of Patriarch and others. They also denied the authority of the first plaintiff (Catholicos-Malankara Metropolitan). The defendants are impleaded in their individual capacity and as representing the Patriarchal group. "No person irrespective of his position has any locus standi in the Malankara Church without believing in the holy church, headed by the Catholicos of the East-cum-Malankara Metropolitan and without affirming and accepting the ecclesiastical authority of the first plaintiff and the administrative set up and hierarchy, the principle being that the lawful Metropolitan is necessary to the very being of the Church". In Para 24 a reference is made to Church properties. The paragraph reads thus: "Defendants and their partisans are trying to intermeddle in the affairs of individual churches and create dissensions and discord therein, they are attempting to make use of the properties of the church in this illegal and unlawful attempt.

It is relevant to notice the reliefs sought for in the suit. They are :

A. To declare that the Malankara Church is Episcopal in character and is not a union or federation of autonomous church units and is governed in its administration by the Constitution of the Malankara Church;

B. To declare that defendants 1 to 3 are not competent to ordain priests and deacons for Malankara church;

C. To declare that defendants 1 to 3 are not legally consecrated Metropolitans of the Malankara Church and defendants 4 to 8 are not legally ordained priests or deacons of the Malankara Church.

D. To declare that no Metropolitan, priest or deacon unless validly ordained and appointed under the provisions of the Constitution of the Malankara Church can officiate in any of the churches or its institutions in Malankara Church.

E. To declare that any priest who refuses to recognise the authority of the first plaintiff and other Metropolitans under him is to entitled to minister in any of the churches or its institutions in Malankara.

F. To prohibit defendants 1 to 3 by an order or permanent injunction from ordaining priests or deacons or performing any other sacraments, service, etc. for the Malankara church or its institutions.

G. To prohibit defendants 4 onwards from performing any religious service or sacraments whatsoever in or about any of the church of Malankara and for the Malankara church or its constituent churches or institutions.

H. To prohibit the defendants from interfering in any manner with the administration of the Malankara Church.

117. The defendants in their written statements denied and disputed the several

averments, assertions and claims made in the plaint and reiterated the supremacy of the Patriarch in the affairs of the Malankara Church. According to them, the Catholicos and the members of his group have become apostates to the faith on account of their acts and declarations and are not entitled to any of the reliefs prayed for.

118. A number of issues were framed on the basis of the pleadings. The learned Single Judge dismissed the suits. On appeal, the Division Bench of the Kerala High Court reversed. The Division Bench re-formulated the issues in controversy into 31 issues. Of them Issues 1 to 22 and 27 to 31 pertain to the main dispute now under discussion, whereas Issues 23 to 26 pertain to certain individual churches to which we shall advert later. The Division Bench has upheld the claim of the Catholicos Division Bench has upheld the claim of the Catholicos group to a large extent. O.S. 4/79, the main suit, has been decreed as prayed for against defendants 1 to 17 without costs. It has been dismissed against defendant No. 18 (Evangelical Association of the East). So far as D.19 (Knanaya Samudayam) is concerned, the suit has been decreed but with certain qualifications which we shall mention while dealing with the appeal preferred by D.19. The result of the other suits is consistent with the decree in O.S. 4/79 and need not be mentioned separately.

OUR FINDINGS:

The following facts, in our considered view, are of fundamental significance. Once they are kept in view, it would be unnecessary to go into many of the issues agitated before the learned single Judge and the Division Bench of the High Court. The fundamental facts which decide the fate of the main dispute are:

(a) The Patriarch of Antioch was undoubtedly acknowledged and recognised by all the members of the Malankara Church as the supreme head of their Church. In the year 1654, they took the oath known as the 'Koonan Cross Oath' re-affirming their loyalty to the Syrian Orthodox Christian Church headed by the Patriarch. It was the Patriarch who convened the Mulanthuruthy Synod at which the Malankara Syrian Christian Association was formed. However, the authority of the Patriarch extended only to spiritual affairs - the Syrian Christians in Malankara believed in the efficacy of 'Kaivappu' (laying of hands by Patriarch on the head) while consecrating the Metropolitan and considered it essential to a proper ordaining - but not to the temporal affairs of the Malankara Church as declared finally by the Travancore Royal Court of Final Appeal in the year 1889 in the Seminary suit. The Royal Court declared that the authority of the Patriarch never extended to temporal affairs of the Church which in that behalf was an independent Church. The Royal Court further declared that the Metropolitan of the Church in Travancore should be native of Malabar consecrated by the people as their Metropolitan, as decided by the Mulanthuruthy Synod. This declaration was affirmed by the Cochin Court of Appeal in the Arthat suit in 1905.

(b) The revival of Catholicate in 1912 by Patriarch Abdul Messiah made a qualitative change in the situation. Under Ex.A.14, the Kalpana issued by the Patriarch Abdul Messiah, (which document was produced in several earlier suits and whose authenticity is not disputed by the Patriarch group before us) and A.13 which precedes A.14, empower the Catholicos to ordain metropolitans and other officials of the Church in accordance with the canons of the Church and also to consecrate holy Morone. A.14 states expressly that the power to instal a Catholicos on the death of the incumbent is vested in the Metropolitans. It is in

this manner that the power of ordaining Metropolitans and melpattakkars and consecrating holy Morone, which hitherto vested in Patriarch, came to be vested in the Catholicos by the Patriarch himself. Further, the power to instal a Catholicos on the death or disability of the incumbent was also vested in the Metropolitans of Malankara Church and it is in exercise of this power that on the death of the first Catholicos installed by Patriarch Abdul Messiah in 1913, the second Catholicos Basselios Geevarghese I (Mar Geevarghese Philixinos) was installed in the year 1924 by the Malankara Synod without reference to the Patriarch. Again in 1929, Basselios Geevarghese II was elected as the third Catholicos by the Association and was installed as such. In the M.D. Seminary meeting held on December 26, 1634 the third Catholicos was elected as the Malankara Metropolitan, thus combining both the posts in one person. In other words, the spiritual and temporal powers over the Malankara Church came to be concentrated in one person. It may be that by this act of revival of Catholicate and the Kalpanas A.13 and A.14, the Patriarch is not denuded of the powers delegated by him to the Catholicos - assuming that these powers were not already possessed by the Catholicos and that they came to be conferred upon him only under A.13 and A.14 -yet, reasonably speaking, the Patriarch was, and is, expected to exercise those powers thereafter in consultation with the Catholicos and the Malankara Sabha (Association) - and, of course, in accordance with the 1934 Constitution. This was necessary for the reason (i) to avoid creating parallel authorities leading to conflict and confusion and (ii) the acceptance by the local people was a sine qua non for any Metropolitan or melpattakar in Malankara Church as provided in the Mulanthuruthy Synod (convened and presided over by the then Patriarch himself) and given a judicial sanction by the judgment of the Travancore Royal Court of Appeal aforementioned. Without removing the Catholicos in accordance with the canon law and the principles of natural justice, the Patriarch could not have purported to exercise unilaterally the powers delegated by him to the Catholicos under A.14.

(c) It is significant to notice that the Catholicos-cum-Malankara Metropolitan, Basselios Geevarghese II, was accepted and recognised as the Catholicos by the Patriarch Yakub under his Kalpana Ex.A.19 dated December 9, 1958. Basselios Geevarghese II was elected as Catholicos by the local Metropolitans and installed as such by the local melpattakkars without reference to the Patriarch and which Catholicos was all through fighting against the Patriarch group in the Samudayam suit. It is no less significant that Patriarch Yakub, who issued the Kalpana A.19, was, before his installation as the Patriarch, the delegate of the Patriarch in India and was prosecuting the Samudayam suit for a number of years. If so, it is reasonable to infer that when he accepted and recognised the Catholicos as such under Ex.A.19, he did so with the full knowledge that he was thereby recognising the Catholicos as revived by Abdul Messiah in 1912 under A.14 and as described and affirmed in the 1934 Constitution. Moreover, the Kalpanas A.19 and A.20 were not issued in an abrupt fashion - they could not have been - but were preceded by a good amount of discussion and negotiations between members of both the groups. Under his Kalpana Ex.A.20 dated December 16, 1958, from the Catholicos to the Patriarch, the Catholicos accepted the Patriarch subject to the Constitution passed by the Malankara Association and as then in force. The Metropolitans ordained by Patriarch duly accepted the authority of Catholicos and participated in several proceedings. There was re-allotment or dioceses among the Metropolitans of both the groups. The members of the erstwhile Patriarch group swore loyalty to the 1934

Constitution. (These events have been detailed hereinabove). After all these developments, and after a lapse of four months after A.20, the Patriarch raised an objection to the use of certain expression employed in Ex.A.20, viz., the Catholicos claiming to be seated on the Throne of St. Thomas and also to the qualification added by he Catholicos to his acceptance to the Patriarch, viz., "subject to the constitution...." But even this objection which is reflected in the correspondence which passed between them during the years 1959 to 1962 (referred to supra) must be deemed to have been given up and abandoned by the Patriarch by his acts and declarations in the year 1964. As stated supra, the Patriarch came to India pursuant to a canonical invitation from the Malankara Synod and consecrated and duly installed the new Catholicos (Mar Ougen), who was elected by the Malankara Association in accordance with the 1934 Constitution. Before he did so, the Patriarch took care to see that the respective territorial jurisdictions of the Patriarchate and the Catholicate are duly defined and demarcated. The Middle East which was supposed to be hitherto under the jurisdiction of the Catholicos was excluded from his jurisdiction confining his authority to India and East alone.

119. Now what do the above facts signify? Do they not show that Patriarch had, by 1964, recognised and accepted the revival of the Catholicate A.13, A.14 and the 1934 Constitution? Do they not show that the Patriarch had also given up his objections to the use of the words "seated on the throne of St. Thomas in the East" and to the "qualification" added by Catholicos in A.20? We think, they do. Once this is so, it is no longer open to the Patriarch or his followers to contend that the revival of Catholicate was not in accordance with the religious tenets and faith of the Syrian Jacobite Christian Church, that the Constitution of 1934 was not duly and validly passed or that the power and authority of the Patriarch as obtaining prior to 1912 remains and continues unaffected and undiminished. In this connection, it is relevant to remind ourselves that it was the contention of the Patriarch group in Vattipanam suit that the Catholicos group had, by espousing the cause of and the revival of Catholicate, reduced the power Of the Patriarch to a vanishing point and have thereby become aliens to the faith. The power and authority of the Catholicos under A.13 and A.14 was affirmed, re-enforced and enlarged in the 1934 Constitution (as amended in 1951) and yet under Ex.A.19 the Patriarch accepted with pleasure Mar Basselios Geevarghese as the Catholicos. At the same time, it is equally significant to note that the 1934 Constitution does not repudiate the Patriarch. On the contrary, it re-affirms that he is the primate of the Orthodox Syrian Church of which the Malankara Church is said to be a part - though it is true, all the effective powers exercised by the Patriarch prior to 1912 were vested in the Catholicos under Ex.A.13 and Ex.A.14.

120. In this view of the matter, the submissions of the Patriarch group that the 1934 Constitution was not put forward by the Catholicos group as one of the bases of their claim in Samudayam suit or that no finding as such was recorded by this Court in the said suit regarding the validity of the Constitution are of little consequence. We are not relying upon the rule of estoppel in this behalf but are only pointing out that having conceded, recognized and affirmed all the above things, the Patriarch group cannot make a legitimate grievance of these very things. They cannot be heard to say so. Nor have they made any effort to explain the said acts and conduct of the Patriarch and of the persons owing allegiance to him. They must be deemed to have given up and abandoned all their objections to the aforesaid events and documents.

THE VALIDITY OF THE EXCOMMUNICATION OF THE CATHOLICOS:

In the Vattipanam suit, the High Court found that of the two versions of Hudaya Canon put forward by the Patriarch group and Patriarch group (Ex.18 in that suit) is the correct one. The very same version was put forward by the Patriarch group as the true version in the Seminary suit. Of course, at that time, both the groups concerned herein were comprised in Patriarch group and were fighting against the renegade group of Mar Athanasius. It is really pointless to go into the question whether the judgment in Vattipanam suit operates as res judicata. Even if it is assumed that it does not, yet its value as a precedent - a finding arrived at by the High Court after a full enquiry - cannot be denied. According to the first judgment of the High Court, the Patriarch has the power to excommunicate the Metropolitans. It does not say anything about the power of the Patriarch to excommunicate Catholicos and if so according to what procedure. We have seen supra that while granting the review of the said judgment, the High Court specified that three findings recorded by it in the judgment under review should not be reopened. The three findings inter alia included the finding relating to the authenticity of Ex.18. According to the said version of the Hudaya Canon, the Catholicos "shall act according to the orders of (be subject to) the Patriarch of Antioch. He shall not defy (act against) his superiors". It repeatedly says that the Catholicos is subject to the authority of Patriarch and that the Patriarch is the "head or superior" of the Catholicos. Though the canon does not say so, we shall proceed on the assumption for the purpose of this case -without recording any finding to that effect - that the Patriarch has the power to excommunicate the Catholicos. Yet the question remains whether the grounds on which the excommunication of the Catholicos has been effected are valid and permissible grounds. A perusal of the charges communicated to the Catholicos by the Patriarch in his letter dated January 30, 1974 makes it clear that charges related to the use of the word "Holiness" along with his name by the Catholicos, his assertion of being "seated on the Throme of St. Thomas in the East" and his assertion of "cordial relationship" with the Patriarch instead of admitting his subordinate all objections which were raised by Patriarch during the years 1959 to 1961 but given up and abandoned in May, 1964, as explained supra. It is also alleged that the Catholicos did not accept the delegate sent by Patriarch to Malankara and has also changed the oath administered to the members of the Church wherein he substituted himself for the Patriarch. The proceedings of the Malankara Association were also cited as one of the charges. Having revived the Catholicos with the powers under Ex.A.13 and 14 and having accepted (by necessary implication) the Constitution of 1934 under his Kalpana Ex.A.19 and having installed the Catholicos in 1964 notwithstanding his objections raised in his letters written during the years 1959 to 1962, it was not open to the Patriarch to seek to excommunicate the Catholicos on those very grounds. Ex.A.13 speaks of Throne of St. Thomas. Ex.A.13 and Ex.A.14 specifically vest the Catholicos with the power to consecrate Metropolitans and other officials of the Church and to consecrate Morone. A.14 empowers the Metropolitans to elect their own Catholicos. In these circumstances, it is difficult to understand how could the use of the expression "Holiness" or the assertion of being seated at the Throne of St. Thomas in the East or the claim that the Malankara Church is an autocephalous Church can be treated as heresy when the very Constitution by which the Catholicos and his group were swearing affirmed in clear terms that the Patriarch is the supreme head of the Malankara Church. As a matter of fact, some of the charges in the letter dated January 30, 1974 can also be termed as vogue. For example, Charge No. 9 reads thus:

> The books taught in the Sunday Schools there contain uneconomical and wrong teachings and fallacious historical facts especially with a view to inject wrong ideas into the tender minds regarding the fundamentals and history of the Church.

The letter does not set out or refer to the alleged uneconomical or wrong teachings and fallacious historical facts taught in the books in the Sunday Schools. Similarly, Charge no. 8 says that in the ordinations administered by the Catholicos, the heretical two-nature theory propounded by Pope Leo is not repudiated. It is not stated under what Canonical Law such an assertion is obligatory. So far as the non-acceptance of the delegate sent by Patriarch is concerned, it can hardly be considered to be a ground for excommunication. After all that has happened between 1912 and 1964, the sending of a delegate over the protestations of all the Metropolitans of Malankara including those belonging to Patriarch group was totally uncalled for. The delegate started ordaining priests here and the Patriarch himself ordained the first defendant in O.S. 4/79. All this certainly could not have been done unilaterally. It is one thing to say that the Patriarch could do these things in cooperation with the Catholicos but the ordaining of the priests and metropolitans by him and his delegate without reference to - indeed over the protestations of the Catholico - was certainly not the right thing to do since it purported to create a parallel administrative mechanism for the Church in spiritual/temporal matters. We are, therefore, of the opinion that the charges, at any rate the main charges, on which the excommunication is based were not available as grounds of excommunication and could not constitute valid grounds therefore. Accordingly, it is held that the excommunication of Catholicos is not valid and legal.

PLAINTIFFS CLAIM THAT MALANKARA CHURCH IS EPISCOPAL IN CHARACTER AND A UNION OR FEDERATION OF AUTONOMOUS UNITS:

Though in Para (1) of the Plaint in O.S. 4/79 an assertion is made that "the Malankara Orthodox Syrian Church... is an autocephalous division of the Orthodox Syrian Church which traces its origin to Jesus Christ and his apostles", the relief asked for in the plaint is for a declaration "that the Malankara Church is Episcopal in character and is not a union or federation of autonomous church unit.... The expression "Episcopal" appears to have been used in contrast to the expression "congregational". In the absence of any material brought to our notice with respect to the meaning of these expressions, we may refer to Para 66 of the judgment under appeal where the meaning of these expressions has been explained. It reads thus:

> Episcopalism is defined in the New English Dictionary of Historical Principles - By Sir John Murray Vol. III as Theory of Church Polity which place*the supreme authority in the hands of Episcopal or pastoral orders'*. The same dictionary defines the word Congregationalism as 'A system of ecclesiastical polity which regards all legislative disciplinary and judicial functions as vested in the individual church or local congregation of believers'. Chambers Dictionary Vol. 4 defines Congregationalism as 'the doctrine held by churches which put emphasis on the autonomy of the individual congregations'. Congregationalims has for its sign-manual the words of Jesus 'Where two or three are gathered together in my name, there am I in the midst of them'.
>
> (Emphasis in original).

121. The Division Bench also referred to the judgment of the Kerala High Court in John v. Rev. Thomas Williams (1953) K.L.T. 605 on the meaning and content of the expression "Congregationalism. The judgment describes "Congregationalism" as one of the non-conformist Protestant denominations. Relying upon the Encyclopedia of Britanica, it says that the Congregationalism is the name given to that type of church organisation in which the autonomy of the local church or body of persons assembling in Christian fellowship is fundamental. It constitutes one of the three main types of ecclesiastical polity, the others being Episcopacy and Pres-byterianism. It regards

church authority as inherent in each local body of believers, as a miniature realisation of the whole church which can itself have only an ideal corporate being on earth. While in practice it is religious democracy, in theory it claims to be a theocracy since it assumes that God himself rules directly through Christ. It springs from the religious principle that each body of believers in actual Church Fellowship must be free of all external human control, in order the more fully to obey the Will of God as conveyed to conscience by His Spirit. The essential features of Congregationalism are stated to be the autonomy or independence of the individual Churches or organisations, though in matters in which the individual charges are interested as a whole and in order to enable the churches to effectively fulfil their responsibilities, they may enter into unions. Congregationalims is stated to be the opposite of Episcopacy which means Government of the Church by the Bishops on the theory of apostolic succession. In other words, the Bishops are supposed to be the successors of the apostles of the Christ. The Congregationalism believe that every Christian has the right to perform all functions pertaining to the priestly office and permits the laymen to celebrate sacraments whereas in Episcopal Churches only the ordained priests can celebrate sacraments.

122. On a consideration of the relevant material placed before it, the Division Bench has held that while the Orthodox Syrian Church including the Malankara Church is Episcopal in spiritual matters, in temporal matters it is not Episcopal. It referred, in our opinion rightly, to the judgment of the Royal Court of Final Appeal of Travancore in Seminary Suit where it is observed: "parties agree that head of Syrian Church in this country or its Metropolitan should be a properly ordained Bishop and that regarding temporal affairs acceptance of Malankara Metropolitan as such by the community is necessary". It was further held in the said judgment that "while the ecclesiastrical supremacy of the Patriarch has all along been recognised, authority of Patriarch never extended to Government of temporalities of the Church. The Division Bench at the same time clarified that it does not mean to hold that the Metropolitan has the jurisdiction over the day-to-day management of temporal affairs of Parish Churches. The Division Bench has also referred to the Mulanthuruthy Synod resolutions which say that the Parish Churches have a degree of autonomy with certain supervisory powers along being vested in the Managing Committee of the Association or Catholicos or the Malankara Metropolitan, as the case may be. The Division Bench has held that "Malankara Church though it has some episcopal characteristics is not a purely episcopal church. But we are not able to agree that the individual Parish Churches are independent churches or churches with independent status.... The Parish Churches are constituent parts of the Malankara Church and enjoy a degree of autonomy and he administration of the day-to-day affairs vests in the Parish Assembly and committee elected by the Parish Assembly subject to supervisory powers of the Metropolitan - and the provisions of the Constitution of the Malankara Sabha do not affect this position" We are, however, of the opinion that in this suit no declaration can be granted affecting the rights of Parish Churches in their absence not can it be declared that the properties held by Malankara Parish Churches vest in the Catholicos or the Malankara Metropolitan or the Metropolitan of the concerned diocese, as the case may be. Indeed, no such specific relief has been asked for in the suit and without impleading the affected parties, no declaration can be claimed by the plaintiffs that their church is episcopal in nature, if that declaration means that it gives the Catholicos/Malankara Metropolitan/the Metropolitan of the Diocese any title to or any control over the properties held by the Parish Churches. We have pointed out hereinbefore that the only place in the plaint where a reference is made to the properties of the Parish Churches is in Para 24 where all that it is alleged is that the defendants and their partisans are trying to intermeddle in the affairs of individual churches and are attempting to make use of the properties of the church to further their illegal and unlawful objects. No list of Parish properties is

enclosed nor are the particulars of the alleged intermeddling mentioned in the plaint. In the state of such a pleading, the only observation that can be made herein is that the 1934 Constitution shall govern and regulate the affairs of the Parish Churches too, insofar as the said Constitution provides for the same. In this connection, the learned Counsel for appellants has brought to our notice the following facts: Inasmuch as the plaintiffs asked for a declaration that Malankara Church is an Episcopal Church and appended a list of more than one thousand Churches to their plaint, several Parish Churches came forward with applications under Order I Rule 10(2) of the Civil Procedure Code to implead themselves as defendants to the suit. All the applications were dismissed by the Trial Judge against which a batch of Civil Revision Petitions was filed before the Kerala High Court being C.R.P. Nos. 1029/75 and batch. It was contended by the revision petitioners (Parish Churches who were seeking to be impleaded in the suit) that if the first relief prayed for in O.S. 142/74 (O.S. 4/79) is granted, it will affect the autonomy and individuality of the individual Parish Churches and, therefore, they should be impleaded as defendants to the suit. This argument was repelled by Khalid, J. (as he then was) in the following words :

> I do not think that this apprehension is well founded. Even under Order I Rule 10 a party does not have any inherent right to get himself impleaded; that lies in the discretion of the Court on being satisfied that the petition is well founded on merits. *The counsel for the contesting respondents (plaintiffs) would contend that all that the plaintiffs want is for a declaration of the supervisory and spiritual control over the Church*.
>
> (Emphasis supplied)

Accordingly, the revision petitions were dismissed. If the plaintiffs mean merely spiritual control by saying episcopal, probably there may be no difficulty in holding that Catholicos and the Malankara Metropolitan have spiritual control over the Parish Churches, but if it means control over temporal affairs of, or title to or control over the properties of, the Parish Churches beyond what is provided for in the Constitution, a declaration to that effect can be obtained only after hearing and in the presence of the concerned Parish Churches. It also appears that each of these Parish Churches/Associations has its own constitution, whereunder the general body of the Parishes is declared to be the final authority in temporal matters. All this is mentioned only to emphasis that in the absence of the Parish Churches and proper pleadings and proof, no declaration touching the Parish Churches can be granted in these suits. In Para 103 of its judgment, the Division Bench has held that while the Malankara Metropolitan has supervisory jurisdiction over the Parish properties as provided in the 1934 Constitution, it cannot be said that the administration of the Parish properties vests in him. It held that the administration vests in Parish Assemblies or Parish Churches, subject again to the provisions of the Constitution. In sum, we observe that the 1934 Constitution governs the affairs of the Parish Churches too insofar as it does. The power of the Malankara Metropolitan or the Metropolitan in temporal affairs must be understood in these suits too in the same manner as has been declared in Samudayam judgment, i.e., with respect to the common properties of the Malankara Church as such.

The result of the above discussion may be summarised thus:

> (1). The Vattipanam judgment has held that the version of Hudaya Canon put forward by Patriarch group as Ex.18 in the suit is the correct version and not the version put forward by the Catholicos group. However, in Samudayam suit, the District Judge (Trial Court) accepted the version of Canon put forward by the Catholicos group as against the version put forward by Patriarch group. It is

suggested by the learned Counsel for the respondent that this finding of the District Judge must be deemed to have been restored by this Court in A.I.R. 1959 S.C. 31. It is really unnecessary for use to go into this question since it has lost all significance in view of the subsequent developments and their effect, as accepted by us.

(2). The Catholicate was revived and re-established by Patriarch Abdul Messiah in the year 1912. The powers and functions of the Catholicos are set out in Ex.A.14. Moreover by virtue of their acts and conduct subsequent to the judgment of this Court (in A.I.R. 1959 S.C. 31), the defendants in the present suit (i.e., the members of the Patriarch group) cannot now dispute the validity of the revival of the Catholicate or of Ex.A.14.

(3). It may be that by conferring upon the Catholicos the powers of ordaining Metropolitans, consecrating Morone and to exercise other spiritual powers over Malankara Church, the Patriarch may not have denuded himself completely of the said powers which he enjoyed until then. But in view of the fact that he had himself created another center of power in India with the aforesaid powers, it would be reasonable to hold that thereafter the Patriarch cannot exercise those powers unilaterally, i.e., without reference to the Catholicos. He can exercise those powers only in consultation with the Catholicos. Moreover, the person to be appointed as Metropolitan or Malankara Metropolitan has to be accepted by the people as has been affirmed in the judgment in Seminary suit. The Patriarch's power to ordain the Metropolitans now is subject to the Constitution of 1934.

(4). It may be that be virtue of the revival of Catholicate and by issuing the Kalpana Ex.a.14 - and also by accepting the 1934 Constitution (as to be mentioned presently) - the power of the Patriarch may have been reduced to a vanishing point, but all the same he remains 'the supreme head of the Syrian Church of which the Malankara Church is a division. He is spiritually superior to the Catholicos though he does not, and indeed never did, enjoy any temporal powers over the Malankara Church or its properties.

(5). The 1934 Constitution was approved at a validly convened meeting of Malankara Association, which Association was created by the Patriarch himself under the Resolutions of Mulanthuruthy Synod. The defendants in the present suits (Patriarch group) cannot question its legality and validity in view of the acts and conduct of the Patriarch and the members of his group subsequent to the judgment of this Court in A.I.R. 1959 S.C. 31.

(6). Ex.A.19, Kalpana, was issued by Patriarch Yakub with the full knowledge of revival of Catholicate, Ex.A.14 and the 1934 Constitution and the various claims and contentions of both the parties put forward in Samudayam suit and the decision of this Court in A.I.R. 1959 S.C. 31. It must, therefore, be held that the Patriarch has thereby accepted the validity of the revival of Catholicate Ex.A.14 and the 1934 Constitution, and abandoned and gave up all or any objections they had in that behalf. Several members of his group including some of the defendants also accepted the Constitution and took oath to abide by it. They cannot now turn round and question the same.

(7). Though the Patriarch raised objections to the honorifics (e.g., use of "Holiness" with the name of the Catholicos and his assertion that he was seated

"on the Throne of St. Thomas in the East") and to the qualification added by the Catholicos in his Kalpana Ex.A.20 (i.e., accepting the Patriarch subject to the Constitution), the Patriarch must be deemed to have given up and abandoned all those objections when he came to India, pursuant to a canonical invitation from the Malankara Synod and installed and consecrated the new Catholicos on May 22, 1964. It is also worth noticing that a day before such installation/consecration, the Patriarch took care to have the territorial jurisdiction of Catholicate duly defined and delimited by excluding certain areas in the Middle East from the jurisdiction of the Catholicos.

(8). So far as the declaration of the Malankara Church being Episcopal in character is concerned, all we need hold is that it is episcopal to the extent it is so declared in the 1934 Constitution. The said Constitution also governs the affairs of the Parish Churches and shall prevail.

(9). The excommunication of Catholicos by the Patriarch and/or by the Universal Synod is invalid for the reason that the grounds/charges on which the excommunication has been effected are not permissible or relevant grounds. The denial of Patriarch's spiritual authority by the Catholicos and his group and similarly the Patriarch's refusal to recognise the Catholicos or the 1934 Constitution in the correspondence that passed during the years 1972 to 1975 are attributable to the personal differences and the mutual bickering between the two dignitaries and their respective groups. On that basis, it can neither be said that the Catholicos or his followers have become apostates or that they have deviated from the tenets of the faith. Similarly, Patriarch cannot be said to have lost his spiritual supremacy over the Malankara Church (on account of his accusations and declarations) which he enjoyed prior to the commencement of the said correspondence, i.e., according to the 1934 Constitution.

(10). The common properties (Samudam properties) held by the Malankara Church are vested in Malankara Metropolitan and others as declared in the judgment of this Court in A.I.R. 1959 S.C. 31.

123. In view of the above findings, it is unnecessary to go into the other questions urged before us, viz., maintainability of the suit (in view of Section 9 of the Civil Procedure Code), effect of the Places of Worship (Special Provisions) Act, 1991, non-joinder of parties and so on. Indeed, so far as the objection on the basis of Section 9 of the Civil Procedure Code is concerned, it was not urged by the defendants-appellants before the Division Bench and must be deemed to have been abandoned.

124. The situation resulting from the above summary of the findings is that the situation obtaining on January 1, 1971 (i.e., the day after the election of Mathew Atanasius at the meeting of the Malankara Association held on December 31, 1970, in accordance with the 1934 Constitution) shall be deemed to be the position even today in all respects. It is after January 1, 1971 that there was fresh spurt of quarrel between two groups and between the Patriarch and the Catholicos. Any attempt to bring peace, reconciliation and rapprochement between the two groups must take the said date as the starting point - [This does not, however, mean that installation of Mathew Athanasius, elected as the Catholicos on December 31, 1970, in October, 1975 is to be ignored. Similarly, the election and installation of sixth Catholicos. Mathew II (third respondent in the present appeals) cannot also be ignored. They are accomplished facts and shall remain unquestioned]. It is with reference to the said date that the directions to be mentioned hereinafter are made with the hope that the said measures will succeed

in bringing about a reconciliation between the two warring groups and establish peace in Malankara Church which should be the desire of every well meaning member of that Church. Before, however, we set out the bases of reconciliation between the two groups, we may indicate the approach we are adopting in this case.

125. The resolutions passed by the Mulanthuruthy Synod establish that to prevent mismanagement of the Church affairs and to check the autocracy of the Metropolitans, it was thought necessary that there should be an organisation for the entire community called "Syrian Christian Association", of which Patriarch should be the Patron and the ruling Metropolitan its President. For transacting the business of the Association, a Chief Committee consisting of eight priests and sixteen laymen with the ruling Metropolitan as the President was formed. This Committee was "entrusted with complete responsibility and management of every matter connected with religious and communal affairs of the entire Syrian Community". Neither party before us disputes the validity of these resolutions. In Seminary suit, it was held by the Royal Court of Final Appeal on the basis of the said resolutions and other material placed before it that the Metropolitan of the Syrian Christian Church in Travancore should be a native of Malabar consecrated by Patriarch or his delegate and accepted by the people as their Metropolitan. Indeed, this aspect has been repeatedly stressed before us by the learned Counsel for the Catholicos group. We too find this to be a very desirable feature - an instance of infusion of democratic spirit in religious affairs. It may be mentioned that in the appeal preferred in this Court against the rejection of their review petition in Samudayam suit (judgment reported in A.I.R. 1954 S.C. 526), the stand of the Catholicos group was that the said judgment of the Royal Court represents the Constitution of the Malankara Church. The subsequent judgments too re-affirms the said position. It is thus clear that the Malankara Association was formed not only to manage the temporal affairs of the Church but also its religious affairs and that the appointment of Metropolitans was subject to acceptance by the people of Malankara. The emphasis is upon the people of Malankara and not upon the individual Churches/Parish Churches. It is true that the 1934 Constitution of the Malankara Association provides that the members of the said Association shall be one priest and two laymen elected by each Parish Yogam (Assembly) (clause 68), yet Clause 4 of the very Constitution declares that "all those men and women who accepted the Holy Bapitms and who believe in the Godhead of the Trinity, in the incarnation of the Son and the procession of the Holy Ghost, in the Holy Church, in the performance of the seven sacraments, in the observance of the precepts, in the use of the Nice creed and who have undertaken the responsibility of performing them are members of this Church". It thus appears that while the membership of the Malankara Association is limited to one priest and two laymen elected by each Parish Assembly, the membership of the Malankara Church as such consists of al men and women, who accept the tenets and the faith mentioned in Clause (4) aforesaid. The learned Counsel for the appellants contended that with a view to retain control over the Malankara Association, the Catholicos group have created a large number of Parish Churches though among the individual members of the Church, the majority swears allegiance to Patriarch. His contention is that because in the Malankara Association each Parish Church, whether big or small, is entitled to have three delegates, the Association is not a true representation of the will of the members of the Church as such. He suggests that while some Churches have a large body of believers running into several thousands, there are Churches having as little as fifty members and yet each of them has equal representative in the Malankara Association. On this account, the learned Counsel says, the proceedings of the Malankara Association cannot be said to be reflecting the will of the majority of the Malankara Christians truly. It cannot be said that there is no substance in this submission. If the Malankara Association is to be vested with the control over the religious and communal affairs of the entire Malankara

Christian community, it must truly and genuinely reflect the will of the said community. For ensuring it, its composition must be so structured as to represent the entire spectrum of the community. A powerful body having control over both spiritual and communal affairs of the Malankara Church should be composed in a reasonable and fair manner. Judged from this angle, Clause (68) of the 1934 Constitution cannot be said to be a fair one. [After 1967 amendment, the corresponding clause is Clause (71) which reads, "a priest and two payment elected by each Parish Assembly (and the members of he existing Managing Committee?) shall be members of the Association"]. It may, therefore, be necessary to substitute Clause (68)(now Clause (71) and other relevant clauses of the Constitution to achieve the aforesaid objective which would also affirm the democratic principle, which appears to be one of the basic tenets of this Church. Accordingly, we direct both the parties as well as the Rule Committee (mentioned in Clause (120) of the Constitution) to place before this Court within three months from today draft amendments to the Constitution. After perusing the same, we shall give appropriate directions. Thereafter, elections to the Malankara Association shall be held on the basis of the amended Constitution. The Association so elected shall be the Association for all purposes within the meaning of and for the purposes of the 1934 Constitution (as amended from time to time).

126. We hope that the unity and integrity of the Malankara Church will be maintained and continued by the above arrangement which is wholly consistent with and indeed in furtherance of the objectives underlying the Mulanthuruthy Synod resolutions. Elections to the Malankara Association shall have to be held periodically so as to keep its representative character alive and effective.

THE POSITION OF SIMHASANAM CHURCHES, KNANAYA CHURCHES, EVANGELI ASSOCIATION OF THE EAST AND ST. ANTHONY'S CHURCH, MANGALORE:

Before we conclude, it is necessary to deal with the position of the above Churches. The Division Bench of the High Court has dealt with them under Points 23, 24, 25 and 26 formulated by it. So far as Simhasanam Churches, Evangelical Association of the East and St. Anthony's Church, Mangalore are concerned, the Division Bench has dismissed the suits, viz., O.S. 5/79, O.S. 6/79 and O.S. 4/79, insofar as they related to the above Churches agreeing with the findings and the decree of the learned Single Judge in that behalf. We see no grounds to depart from the concurrent findings recorded by the learned Single judge and the Division Bench. We affirm their judgment and decree in this behalf. so far as Knanaya Samudayam is concerned, while the learned Single Judge had dismissed O.S. 4/79 with respect to this defendant (D.19) subject to the declaration that Knanaya Sabha is part of Malankara Church, the Division Bench has modified the decree in the following terms: "decree is granted declaring that Catholicos is the spiritual superior of Knanaya community and Knanaya Metropolitan and in regard to temporal matters as long as the parties do not harmonise the provisions of the Knanaya Constitution and the Constitution of the Malankara Sabha, the latter can be implemented with reference to Knanaya diocese and parishes only subject to the terms of the Knanaya Constitution".

127. The Division Bench has arrived at its finding regarding the Knanaya Church being a part of Malankara Church and the Knanaya Metropolitan being subject to the spiritual superior of the Catholicos on the basis of the following facts mainly, apart from other material, viz., (a) in the Manarcadu meeting of the Malankara Association (after the judgment of the High Court in Samudayam suit declaring Catholicos group as heretics) convened pursuant to the directions of the High Court, not only the Knanaya Churches participated therein but the Knanaya Metropolitan, Mar Clemis, was elected as the

Malankara Metropolitan; and (b) after the judgment of this Court in A.I.R. 1959 S.C. 31, Knanaya Churches participated in the meetings of the Malankara Association held in 1959, 1962, 1965 and 1970 as would be evident from Ex.A.47 (h), A.50 (h) and A.53 (h). Leading members of the Knanaya Community were elected as members of the Managing Committee of the Malankara Association.

128. The above facts were placed against the following facts appearing in favour of the Knanaya Church, viz.,

(i) in the plaint, there was no specific prayer with respect to the Knanaya Church. Because Knanaya Churches were also listed in the list of Parish Churches appended to the plaint, the Knanaya Samudayam applied for impleading itself as a defendant to the suit and was impleaded as D.19. only in response to the averments made in written statement of D. 19, did the plaintiffs aver facts on the basis of which they claimed that Knanaya Churches are part of Malankara Association and subject to the 1934 Constitution;

(ii). the material established that Knanaya Churches had adopted their own Constitution in 1912 (which was brought into force in 1918), that they had indeed constituted a Committee known as "Knanaya Committee" even in 1882, which was later designated as "Knanaya Association" and that throughout these Churches stood by the Patriarch and its Metropolitans were always ordained by Patriarch alone.

(iii). the proceedings of the Malankara Episcopal Synod meetings held during the period January 12, 1959 to June 7, 1960, which indicate certain discussions between the Malankara Church and Knanaya Church with respect to relationship between them. A Committee was appointed to submit a report in that behalf to the Synod.

(iv). the tradition relating to the origin of Knanaya Committee in India and their zealous concern throughout to maintain and retain their separate ethnic identity and beliefs.

129. After hearing the learned Counsel for the appellant (D.19) and the respondents and perusing their written submissions, we are of the opinion that the decree of the Division Bench has to be affirmed but with certain modification. The modification is called for the reason that when a particular people say that they believe in the spiritual superiority of the Patriarch and that it is an article of faith with them, the Court cannot say 'no; your spiritual superior is the Catholicos'. The guarantee of Article 25 of the Constitution has also got to be kept in view. The decree of the Division Bench makes no difference to the Patriarch. It only says that Catholicos is declared to be the spiritual superior of the Knanaya Community. Then it says that in temporal matters, the 1934 Constitution of Malankara Association can be implemented subject to the Knanaya Constitution only until both the Constitutions are reconciled. In all the facts and circumstances of the case, it would be enough to declare that by their acts and conduct, D.19 has accepted that they are an integral unit within the Malankara Church and that, therefore, the 1934 Constitution of the Malankara Church shall govern them but subject to their own Knanaya Constitution until such time the Knanaya Church Samudayam decides otherwise.

130. The appeals cross-objections and applications are disposed of in the above terms.

131. List the matters for further orders after three months along with the draft

amendments (suggestions), if any, submitted by the parties pursuant to the directions given hereinbefore.

MANU/SC/0722/2015

Equivalent Citation: (2015)9SCC461

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 3276-3278 of 2013, W.P. (C) Nos. 72, 91, 140 of 2012 and S.L.P. (C) Nos. 18070-18072 of 2015 (CC 8089-8091/2012)

Decided On: 07.07.2015

Appellants: **Riju Prasad Sarma and Ors.**
Vs.
Respondent: **State of Assam and Ors.**

Hon'ble Judges/Coram:
F.M. Ibrahim Kalifulla and S.K. Singh, JJ.

Counsels:
For Appearing Parties: Shanti Bhushan, Jayant Bhushan, Bhaskar Prasad Gupta, Rajeev Dhawan, Jaideep Gupta, Sr. Advs., Parthiv K. Goswami, Vaibhav Tomar, Karma Dorjee, Gainilung Panmei, Sanjeeb Kr. Deka, Anirudh Singh, Anupam Lal Das, Arunabh Chowdhury, Kartik Seth, Diksha Rai, Vikas Singh, S. Hariharan, Hrishikesh Baruah, Nishant Das, Ishant Das, Manish Goswami, Rameshwar Prasad Goyal, Avijit Roy, Kankana Arandhara, Apeksha Sharan, Advs. for Corporate Law Group, Ajay Bansal, Ansar Ahmad Chaudhary, Gaurav Yadava and Puneet Taneja, Advs.

Case Category:
RELIGIOUS AND CHARITABLE ENDOWMENTS

JUDGMENT

S.K. Singh, J.

1. The Civil Appeals arise out of three writ petitions, two of the year 2000 and one of the year 2002 which were heard together and disposed of by a learned Single Judge of Guwahati High Court by a common judgment and order dated 06.08.2004. That judgment was challenged before the Division Bench through two writ appeals bearing W.A. Nos. 311 and 312 of 2004 preferred by the Appellants who confined the scope of the appeals only to the width and scope of Section 25A of the Assam State Acquisition of Lands Belonging to Religious or Charitable Institutions of Public Nature Act, 1959 (for brevity referred to as 'the Act'). Admittedly neither the State Government nor the private Respondents preferred any cross appeal. However, there was a fresh writ petition filed directly before the Division Bench bearing Writ Petition No. 923/2005 preferred in the name of The Deity, Sri Sri Ma Kamakhya claimed to be represented by Appellant-Riju Prasad Sarma who further described himself as the Administrator, Kamakhya Debutter. The said writ petition sought to challenge the constitutional validity of Section 25A of the Act. The writ appeals and the Writ Petition No. 923 of 2005 were finally disposed of by a common judgment and order of the Division Bench of Guwahati High Court dated 25.10.2011 which is under challenge in the principal matter-Civil Appeal Nos. 3276-3278 of 2013 filed by Sri Riju Prasad Sarma and Ors. claiming to represent The Kamakhya Debutter Board.

2. Along with the Civil Appeals three writ petitions bearing No. 72, 91 and 140 of 2012 have also been heard together as connected matters because they either throw a

challenge to the validity of the Section 25A of the Act or the Rules framed thereunder or to the actual election of Dolois held on 16.11.2011 on account of this Court not staying the direction of the Division Bench to hold such election governed by custom. The same dispute covered by the Civil Appeals noticed above is sought to be raised again through S.L.P.(C) Nos. 18070-18072 of 2015 [CC 8089-8091/2012] which have been filed along with an application for permission to prefer the special leave petitions by those who were not parties earlier, Hiten Sarma and some others, against the same very common judgment of the Division Bench dated 25.10.2011. This judgment shall govern all the matters noticed above. For the sake of convenience the facts have been noted from the records of civil appeals except where indicated otherwise.

3. It is necessary to have a look at the nature of the three writ petitions decided by the learned single judge. But before that it will be useful to notice the background facts which led to those writ petitions. The Appellants have, in one of their written submissions, furnished the introduction, it reads as follows:

INTRODUCTION

> The present group of matters concerns the Sri Sri Maa Kamakhya Devalaya, which is one of the most significant amongst the 51 Shaktipeethas. The temple and the site are referred to in the Sanskrit text "Kalikapurana" which is one of the eighteen upapurana. The Deity of Shri Shri Kamakhya is one of the most venerated Goddesses. The main Kamakhya temple and the subsidiary temples in and around the three Hills of Nilachal are collectively known under the general name of "Kamakhya". It may be mentioned that the subsidiary temples are also known in Assames as "Nanan Devalayas". The families of the priests of the main temple call themselves "Bordeuris". The families of the priests of the subsidiary temples are known as "Deuris". The head priest is called the "Doloi". "Shebait" means and includes all the community of persons who are directly connected to the performance of any kind of duty associated with the temple complex and thus, includes the Bordeuris, Deuris and other Brahamin and non Brahmin persons directly connected to the performance of any kind of duty associated with the temple complex.
>
> There are before this Hon'ble Court four proceedings raising different aspects of the matter.
>
> **1.** The principal matter is C.A. No. 3276-3278/2013 filed by Shri Riju Prasad Sarma and Ors. (representing the Kamakhya Debuttar Board) challenging the final judgment and order of 25.10.2011 passed by the Division Bench of the Hon'ble Gauhati High Court. In the said matter, the Learned Single Judge had upheld the locus standi of the Appellants on the ground that it does not lie in the mouth of the State Respondents/Private Respondents to challenge the authority of the Kamakhya Debuttar Board to manage the affairs of the temple as they have not made any attempt to de-recognize or question its authority in any court of law. (pg. 216). The learned Single Judge had also upheld the vires of Section 25A of the Assam State Acquisition of Lands belonging to Religious or Charitable Institutions of Public Nature (Amendment) Act, 1987 (pg. 218-225). The Appellants preferred a limited Writ Appeal confined to the scope of Section 25A of the said Act. There was no cross appeal preferred by the State Government or the Private Respondents. The Division Bench of the Hon'ble Guwahati High Court vide impugned judgment has held that Section 25A of the said Act has very limited scope confined to the language used in the said

provision and has held as follows:

> **117.**..Section 25A, as would be apparent on its face, only engrafts the enjoinment of the legislature for the constitution of a Managing Committee to exercise control over the matter of utilization of annuity and verification of the proper maintenance of the institution....

It may be mentioned that all the parties have stated on Affidavit before this Hon'ble Court that the said interpretation rendered by the Division Bench of the Hon'ble Guwahati High Court is correct. Thus, interpretation of Section25A of the Act is not in issue any more.

However, the Division Bench of the Hon'ble Guwahati High Court has erroneously reversed the finding of the Learned Single Judge on the issue of the locus standi of the Appellants and has further held without any basis whatsoever that the Kamakhya Debutter Regulations/Kamakhya Debutter Board has no sanctity in law (pg. 34-36). This was not an issue before them as it was not even the subject matter of the writ appeal. In fact, there was no cross appeal against the finding of the Ld. Single Judge on the issue of locus standi in favour of the Appellants. Moreover, the Division Bench of the Hon'ble Guwahati High Court has gone into and examined the issue of election of Doloi (Head Priest) which was not the subject matter of the writ proceedings and thereafter, rendered an erroneous finding solely on the basis of the purported customary practices that the electorate for the said election to the post of Doloi should be confined only to the male members of the four Bordeurie families (pag. 89-90).

In terms of the order dated 13.5.2002 passed by the Hon'ble High Court and the orders dated 11.11.2011 and 21.11.2011 passed by this Hon'ble Court, the administration of the temple has been carried on by the Appellants, the Kamakhya Debuttar Board. Further, the two Dolois has been given exclusive monopoly in religious affairs by this Hon'ble Court vide its order dated 21.11.2011. Thus as stated above, Section 25A of the said Act is confined to "control over the matter of utilization of annuity and verification of proper maintenance of the institution." The interpretation of Section 25 of the Act is not in issue here. The State Government has paid only Rs. 80,500/- and further deposited Rs. 50,000/- with the Hon'ble High Court till date for acquisition of the land belonging to the temple. The issue regarding the administration of non-ritual activities other than those covered by Section 25A of the said Act was never and is not the subject matter of these proceedings.

It may be mentioned that when the matter was heard at some length on an earlier occasion, this Hon'ble Court had observed that parties may consider initiating proceedings Under Section 92 Code of Civil Procedure Pursuant thereto, the Appellants have filed a Title Suit being T.S. No. 2 of 2013 before the Ld. District Judge, Kamrup (Metro) Under Section 92(g) Code of Civil Procedure with an application seeking leave of the Court as required under the said provision. The District Judge, Kamrup has issued notice on the said application on 7.1.2013 and the matter is now kept on 8th August, 2014.

2. Writ Petition (C) No. 72 of 2012 filed by Shri Shailen Sarma challenging the validity of Assam State Acquisition of Lands belonging to Religious or Charitable Institutions of Public Nature (Election of Managing Committee of Sri

Sri Maa Kamakhya Temple) Rules framed Under Section 25A of the said Act. Though the electoral college Under Section 25A of the Act for the post of ex-officio Secretary to the managing committee to be constituted under the said provision of the Act includes "deuris/Bordeuris, the said Rules have illegally excluded the Deuris (both male and female) and the female bordeuris of their voting rights as well as the right to contest. It may be mentioned that this Hon'ble Court in its order dated 21.11.2011 had stated that the State Government shall take steps to frame rules and any objection to the rules should be challenged only before this Court.

3. Writ Petition (C) No. 140 of 2012 filed by Shri Shailen Sharma and Ors. challenging the actual election of Dolois held on 16.11.2011 on the ground that confining the electoral college and right to vote to only the male Bordeuris to the exclusion of Deuris (both male and female) and the female Bordeuris is illegal, arbitrary and unconstitutional in law.

4. Writ Petition No. 91 of 2012 filed by Nanan Bordeuris regarding the validity of Section 25A of the said Act and the rights of the shebaits.

4. From the above introduction furnished by the Appellants, it is evident that according to the Appellants the Division Bench erred in deciding the issue relating to administration of non-religious activities of Maa Kamakhya Temple (other than those which relate to scope and interpretation of Section 25A of the Act). To same effect was the first and main submission advanced by learned senior Counsel Sri Ashok H. Desai, appearing for the Appellants. According to Mr. Desai, the issue relating to customary right of Bordeuris represented by the two Dolois who are elected by adult male Bordeuris belonging at present to four specified priest families vis-à-vis the rights and the status of the Debutter Board was never and is still not the subject matter of the present proceedings and hence the judgment of the Division Bench deciding the above said issue in favour of the Bordeuries and the Dolois must be set aside. Further stand of the Appellants is that even if the issue did arise before the Division Bench, the same has been wrongly decided by ignoring break in the old custom since 1970/1973 and thereafter through creation of Debutter Board in 1998. The stand of the Appellants is that essential religious rites of Maa Kamakhya Temple is still left in the hands of the Dolois as per custom and the Debutter Board is governing and entitled to govern only the secular/non religious activities of the temple and its properties because for that it is empowered by the Debutter Board Regulation of 1998.

5. On behalf of the Appellants, as an alternative it was highlighted in the oral as well as in the written submissions that no observations be made by this Court which may have any impact in the pending proceeding initiated by the Appellants Under Section 92 of the Code of Civil Procedure pending before the learned District Judge, Kamrup, Guwahati.

6. On the other hand, it is the categorical stand of private Respondents except the State of Assam that there is no dispute between the parties with respect to amplitude of Section 25A of the Act. All except State of Assam are in agreement that it has to be given a narrow meaning in the context of the Act and the various provisions contained therein which restrict the functions of the Statutory Managing Committee conceptualized thereunder to exercise control only over the matter of utilization of annuity and verification of the proper maintenance of the institution. According to Respondents, the Debutter Board represented by the Appellants has used writ petitions filed before the learned single judge for the clandestine and concealed object of grabbing control over

the properties and affairs of the Maa Kamakhya temple after its attempt to get recognition from the District Judge failed. According to Respondents only the two Dolois whose term has expired and who did not want holding of elections to elect Dolois for a further term of five years, went in collusion with the Deuries/priests of other subsidiary temples known as Nanan Devalayas to support the formation of a body which describes itself as Debutter Board and its self serving constitution as Debutter Board Regulation 1998, which has no legal sanctity.

7. Dr. Rajeev Dhavan, learned senior Counsel for the private Respondents took great pains to take us through the pleadings and prayers in the three writ petitions decided by the learned single judge to show that in writ petition Nos. 6184 and 5385 of 2000, while challenging the Deputy Commissioner's Committee, the Debutter Board cleverly raised the issue of its status in several paragraphs. In addition, in writ petition No. 2955 of 2002 Mr. Riju Prasad Sarma as Petitioner went on to describe himself as the administrator of Maa Kamakhya Debutter with a further claim that as an administrator he is responsible and authorized to represent the grievances of Brahamins and non-Brahamins Shebaits as well as devotees of the Maa Kamakhya Debutter. In Paragraph 34 the Appellant Riju Prasad Sarma made a specific prayer that the annuity which is payable under the Act be paid to the Maa Kamakhya Debutter Board.

8. The contents of the writ appeal No. 311 of 2004 were similarly highlighted to show that at various places the Debutter Board had claimed a status for itself even in the writ appeals. The writ petition No. 923 of 2005 filed by Appellant Riju Prasad Sarma was heard originally by the Division Bench along with writ appeals. In this writ petition the Petitioner claimed to represent the Deity. In their counter affidavits the State Authorities as well as the private Respondents strongly disputed such claim. According to learned senior Counsel Mr. Dhavan, the issue was though loosely referred to and argued as an issue of locus but it was actually an issue relating to status and/or rights of the Appellants and the Debutter Board; whether the Board had any established right to claim a share in the management of even secular affairs of Maa Kamakhya temple. According to learned senior Counsel, the Debutter Regulation of 1998 is a self serving document which does not have any sanctity of law and did not create any right in the Debutter Board to take over the religious endowment of Maa Kamakhya and represent the deity.

9. On behalf of the Appellants, a number of judgments have been cited in course of reply to the aforesaid stand of the Respondents in respect of locus/status. No doubt, the concept of locus was seriously diluted in the majority of cited cases which were noticeably in the nature of Public Interest Litigation. But the writ petitions filed before the learned single judge or even before the Division Bench claimed rights in the Petitioners as administrator or as lawful representative of religious endowment or the deity and were not in the nature of PIL. In any case, in view of strong and categorical denial made by the Respondents to the right of the Debutter Board to represent the deity of Maa Kamakhya in writ petition No. 923 of 2005, the Division Bench could not have ignored the issue of rights and status. Hence, in our considered view it was necessary for the Division Bench on being called upon through pleadings, to decide the locus or status of the Appellants representing the Debutter Board. In its wholesome writ jurisdiction, the Division Bench could not have shut its eyes and ears to such a serious dispute arising in the context of a public religious endowment relating to Maa Kamakhya temple in the Nilachal hills of Assam at Guwahati, which is highly revered by the Hindus residing anywhere since several centuries.

10. In view of above, the foremost contention of Appellants advanced by learned senior

Counsel Mr. Desai that the Division Bench erred in deciding the locus or status of the Debutter Board represented by the Appellants cannot be accepted. This brings us to the next contention, which is more intricate and challenging; whether the findings of the Division Bench upholding the control of Bordeuries and their representatives, the Dolois over the religious and secular affairs of Maa Kamakhya temple and endowment as per customs is correct or not.

11. Before adverting to the above issue, it will be useful to notice some past disputes, their adjudication by courts as also the recent events, disputes and consequent three writ petitions decided by the learned single Judge.

12. A title suit bearing No. 45 of 1919 Under Section 92 of the Code of Civil Procedure was filed against the then two Dolois, seeking a fresh scheme for management of endowment known collectively as Kamakhya Endowment inclusive of Maa Kamakhya Temple or Devalaya. The suit was finally decided in favour of the Dolois by judgment dated 25.2.1931. Both the parties have referred to the said judgment in detail not only to demonstrate the custom which empowered the four Bordeori families to elect Dolois which is the main issue decided by the judgment but also to highlight the claim of the Bordeoris and the Dolois that they being the sole trustees of the endowment were alone competent to elect the Dolois to supervise the affairs of the temple. The judgment reveals that the bordeoris who earlier belonged to five principal families of priests attached to the main temple at Kamakhya, now reduced to four families, were found to be not only the de facto but also de jure trustees of the entire concern in the Kamakhya Scheme of Endowment and the Dolois were really their agents or managers. The object of that suit was held to be an attempt to supersede the Bordeoris from their exclusive management and control and substitute them with a body consisting of all subordinate Shebaits belonging to Brahmins of Nanan Devalayas as well as non Brahmins. The word 'Bordeori' or 'Panda' in relation to five families of Bordeoris was found used in old copper plate dated 1686 Saka era which was in force in Assam at that time and also in a parwana issued by the Commissioner of Assam to the Managing Bordeori in 1827 A.D. which used the expression 'five pandas of Kamakhya Dham'. Decrees in old suits of the year 1838 and 1855 were also noted by the Civil Court along with several old agreements between Bordeoris and Dolois to come to a conclusion that five distinctive families of priests known by the names of Brahma, Bura, Deka, Hota and Bidhipathak originally constituted the five families of Bordeoris out of which Brahmas later became extinct. The judgment also indicates that descendents of the five principal and leading families of priests who were originally appointed for the Kamakhya temple were also sometimes called collectively as five Pandas and sometimes as five Deoris.

13. It is interesting to note that in the 1931 judgment the Civil Court looked into an old decree of the Sadar Diwani Adalat of Calcutta dated 1838 made in appellate jurisdiction in connection with a dispute over the Doloiship at Kamakhya. The Sadar Diwani Adalat judgment contained several references to the five ancient families of priests and made it clear that save and except those five houses, the work of the Doloiship and Sebayati could not be conferred on anyone else; that none of the other Brahmins at Kamakhya or elsewhere had any right, power or authority of even touching or handling the Goddess at Nilachal Kamakhya Temple proper for conducting the Sevapuja (Rajaki puja) at the temple. Such rights and privileges were held to be hereditary ancestral rights of the Bordeori families and hence the Dolois elected by them were restored to possession and management of Kamakhya by replacing another person who was put in as Doloi by an independent agency during the chaos and disorder of the Burmese occupation. The Judicial Commissioner's findings in 1873 have been summarised in the said judgment as follows:

(1) That the office of the Doloi is not a hereditary office, but elective and the right of election is in the hands of the Bordeoris;

(2) That as the Government will no longer take any steps, as of old, to guard the Temple funds from misappropriation by the Dalois, the power to guard them must be held to have developed upon the Elective Body;

(3) That the power of guarding is clearly a power some one must exercise, as it would be in the highest degree wrong to have left the uncontrolled management to the Dolois.

(4) That the Bordeoris as a class fall within the description of 'Zamindars and other recipients of the rent of lands', according to the spirit of the law and that they do fall within that description;

(5) That the Bordeoris, as a class, have a right to watch over the administration of the temple lands, and protect such funds from waste, and that the Dolois are, so to speak, their (the Bordoris') agents in that matter.

14. Another judgment in the case of **Baroda Kanta** v. **Bangshi Nath** reported in MANU/WB/0089/1939 : AIR 1940 Cal. 269 is a judgment of Calcutta High Court datec 30.11.1939 which again clearly recognized the custom of exclusive control of Dolois elected by Bordeori families to be incharge of religious as well as secular affairs of Kamakhya temple and endowment. It is also not in dispute that in the Act of 1959 which came into force on 11.1.1963 and in the Rules of 1963 framed thereunder, there are provisions requiring the identification of the Head of a religious or charitable institution as defined in Section 2(d) in whom the control and management of the properties of that institution is vested. The notification of acquisition Under Section 3(2) has to be served on such Head in the manner prescribed. The consequences of such notification take place as per Sections 4 to 6 leading to the payment of compensation which is determined Under Section 8 and as per Sub-section (5) thereof the net income as per calculations is required to be paid in cash annually as perpetual annuity as compensation to the Head of the institution for lands acquired under the Act. The proviso to Sub-section (5) of Section 8 takes care of entitlement of any person to a share of the income of any such institution or to a lump sum allowance under the terms of any grant or endowment relating to that institution which is required to be determined in the prescribed manner. Besides containing provisions for appeal, as per Section 18 the Head of religious or charitable institution is obliged to submit to the Deputy Commissioner a return giving the particulars of all his lands including the lands selected for retention Under Section 5, etc. Admittedly, the Dolois as agents of Bordeoris are recognized as the Head of the public religious endowment of Kamakhya including the Maa Kamakhya Temple.

15. The Act was amended by Assam Act No. XIX of 1987 which received the assent of the Governor on 19.10.1987. Inter alia, this Amendment Act introduced a new Section 25A which reads as follows:

25A. Constitution of the Managing Committee-For each of the Religious or Charitable Institution of Public Nature, a Managing Committee shall be constituted with the following members to have a control over the matter of utilization of the annuity and verification of the proper maintenance of the Institution.

(a) The Deputy Commissioner or Sub-divisional Officer or his nominee-

President.

(b) An Ex-Officio Secretary to be elected by the Deuries/Bor Deuries.

(c) 5 (five) elected members - to be elected from amongst the devotees.

The term of the Committee shall be for three years from the date of its constitution.

The Statement of Objects & Reasons of the Amending Act are noted in paragraph 111 of the impugned judgment under appeal as follows:

111. The statement of objects and reasons of the Amending Act discloses the following impelling factors therefor:

i) certain religious or charitable institutions of public nature whose lands had been acquired did neither take proper steps for finalization of compensation nor did they file appeal within the stipulated time;

ii) it was felt necessary to enhance the annuity payable to the institution due to rise of market price of essential commodities for its maintenance and upkeep;

iii) it was felt imperative to have control over the annuity and to verify and audit the accounts to the satisfaction of the concerned authority.

16. The last election of Dolois by the members of Bordeori families or bordeori samaj was made in 1991-1992 in accordance with the custom. Sri Jnanada Prasad Sarma and Sri Paran Chandra Sarma were elected as the Doloi and Saru Doloi respectively. The constitutional validity of Section 25A was challenged by head of another religious institution through a Writ Petition bearing No. 3118 of 1994 before the Guwahati High Court.

17. Pendency of that writ petition could not have posed any hindrance to election of successor Dolois after five years, in 1996-1997. But that did not happen. An attempt was made by the shabiats, brahamins as well non-brahmins including priests/Deories of Nanan Devalayas to democratize the management of Kamakhya temple by diluting the control of Bordeori Samaj and the Dolois by framing a new scheme of management described as the Kamakhya Debutter Regulation, 1998 providing for constitution of a Board for the superintendence, management and administration of all the affairs of the main Kamakhya temple and also the temples of Dasa Mahavidyalaya and all other temples and places of religious significance in and around the three hills of Nilachal described as temples' complex.

18. The Board as defined under the Regulation means the general Board of members of Kamakhya Debutter or the Kamakhya Temple Trust Board constituted under the Regulation. The Regulation also ordained that the Board shall be the head of the institution for the purpose of Section 2(d) of the Act. Doloi of the Kamakhya Temple as per Regulation means the person elected by the brahamin shabaits and not only by Bordeori Samaj. The Regulation vests women also with the right to vote but not the right to contest for the post of Doloi because the Doloi is the head priest or poojari. Though the Debutter Regulation and the Board contemplated therein claimed their existence from 1998 but according to the list of dates and events given by the Appellants in the course of arguments and from the list of dates filed as a document in

the course of arguments on behalf of the State of Assam, it appears that when the two elected Dolois did not hold the elections even after the expiry of their term of five years, Bordeori Samaj approached the district Judge Kamrup for holding of elections. Before the District Judge an attempt was made by other shebiats to include themselves in the list of voters for electing the Dolois but their claim was rejected by the District Judge by an order passed on 12.6.1998. By another order dated 21.10.1998, the District Judge Kamrup, Guwahati in file No. D9/K/KT/6/95 maintained in connection with Kamakhya temple, disposed of the petition filed by Bordeori samaj of the Kamakhya temple seeking election of the managing Committee of Kamakhya temple against which the then Dolois and some others had filed objections.

19. In that Order the District Judge has noted that there was a de facto Managing Committee described as "the present Managing Committee" supported by the then two dolois who took the stand that there was no scheme of holding election nor there was any term of office of managing committee fixed in Constitution. Such de facto Committee also challenged the jurisdiction of the District Judge to impose any election. The District Judge was not impressed with xerox copy of the so-called Constitution which as per arguments was of the year 1970-1971 and after perusing the judgment and decree rendered by the Civil Court long back, the District Judge found that the shebaits had not been given any power of voting in the election of Dolois and their prayer to include them in the voters list had already been rejected on 12.6.1998 but even thereafter the present committee had filed a Constitution wherein Shebiats had been included as voters. The District Judge therefore, did not accept the Constitution as a valid document. On the issue of jurisdiction of the District Judge, the order reveals that the entire records relating to the management of the Kamakhya temple disclosed that earlier also on many occasions the Managing Committee of even those very persons who had challenged the jurisdiction of the District Judge had accepted notices and directions regarding proper management of the temple without raising any challenge to the exercise of such power by the District Judge. Since the District Judge noticed that there was a Public Interest Litigation pending before the Guwahati High Court, hence instead of ordering for election of Dolois he directed to get a Committee formed through the Deputy Commissioner, Kamrup, Guwahati Under Section 25A of the Act by dissolving the present committee or to form an ad-hoc Committee from amongst the Bordeori Samaj till regular election is held after disposal of Public Interest Litigation.

20. Against such direction the then Dolois preferred writ petition No. 6221 of 1998 which was heard and disposed of by the Division Bench of the High Court of Guwahati along with writ Petition No. 3118 of 1994 relating to vires of Section 25A of the Act. By a common judgment and order dated 2.5.2000, the Division Bench upheld the vires of Section 25A. It also noted the stand on behalf of the then Dolois who had preferred Writ Petition No. 6221 of 1998, that there were no instructions to challenge Section 25A and they had challenged only the jurisdiction of the District Judge in passing the order dated 21.10.1998. The Division Bench did note that the District Judge had passed the order not in any judicial proceeding but in accordance with the past practice whereunder parties used to approach the Court of District Judge for making arrangement for constituting Committee to manage the affairs of the Kamakhya temple. That Division Bench did not go further into the issue because it concluded that it may not be necessary to do so because the vires of Section 25A of the Act had been upheld and that would take care of any remaining controversy between the parties. To the same effect was the submission made on behalf of the writ Petitioners, hence Writ Petition No. 6221 of 1998 was dismissed as infructuous.

21. In the light of above noted Division Bench judgment the Deputy Commissioner

issued an order dated 15.9.2000 in which he also took notice of some other judgments including one by the High Court in PIL No. 35 of 1997 decided on 12.1.2000 and ordered for immediate dissolution of the then Managing Committee of Kamakhya Devalaya headed by the then two Dolois whose tenure was noted to have expired. They were directed to hand over charge of office to the Deputy Commissioner, Kamrup, Guwahati within three days. Further, to look after the management of the Kamakhya Temple, an ad-hoc Managing Committee of six members along with Deputy Commissioner as Chairman was also ordered. It was clarified that the ad-hoc Managing Committee will look after the management of the Kamakhya Devalaya till regular election is held or till the constitution of Managing Committee as per Section 25A of the Act, for which a period of one month only was indicated. The Appellants challenged that order by filing a writ petition in September 2000 itself bearing W.P.(C) No. 5385 of 2000 before the High Court. By an order dated 25.9.2000, a learned Single Judge issued rule and stayed the operation of order dated 15.9.2000. However an interim arrangement was made by ordering that the Deputy Commissioner or his nominee shall discharge the functions of the Managing Committee to be constituted Under Section 25A, till it is constituted. It was also clarified that in respect of religious functions, status quo shall be maintained. Against the same very order dated 15.9.2000 another writ petition bearing W.P.(C) No. 6184 of 2000 was preferred by Sri Kamal Chandra Sarma, a member of the Kamakhya Debutter Board and Sri Paran Chandra Sarma, one of the then Dolois. In this writ petition also similar interim order was made.

22. On 20.03.2002 the Deputy Commissioner passed an order whereby in terms of the Court's interim orders he appointed one S.K. Roy, Additional Deputy Commissioner, Kamrup to discharge the functions of the Managing Committee till a Committee Under Section 25A could be constituted. In that order also it was made clear that so far as the religious functions are concerned, the status quo shall be maintained. Through a notice dated 25.4.2002 Sri Roy communicated that he would take over the management of the Temple as per order of the Deputy Commissioner and by another notice dated 6.5.2002 he notified that he had taken over the responsibility of the Managing Committee on 27.4.2002. Against the order of the Deputy Commissioner as well as the orders and notices issued by Sri Roy, the Appellants filed another writ petition bearing W.P.(C) No. 2955 of 2002. In this third writ petition also an interim order was passed on 13.5.2002 restraining the Respondents therein not to use the main Bharal, existing office of the Kamakhya Debutter Board and not to interfere with the functioning of "Peethas" of the "Jal Kuber" and "Dhan Kuber" and also religious functions of the Kamakhya Temple. By another interim order passed in that case on 16.10.2003, the Kamakhya Debutter Board and its office bearers were restrained from preparing draft voters list and also from holding or conducting any general election of the Board without prior permission of the Court. The aforesaid three writ petitions, two of the year 2000 and third of the year 2002 were disposed of by the learned Single Judge, as noted at the outset, by a common judgment dated 6.8.2004.

23. The judgment of the learned Single Judge is mainly founded upon earlier Division Bench judgment upholding the constitutionality of Section 25A of the Act. Learned Single Judge noted the arguments advanced on behalf of the rival parties that Section 25A must be given a narrow meaning so as to confine the Committee constituted under that provision only to matters concerning the utilization of annuity. But in paragraph 14 of the judgment it fell back upon judgment of the Division Bench dated 2.5.2000 for holding that since Section 25A was held to be constitutionally valid, "there will hardly be any room to consider the argument advanced on behalf of the Petitioners and the supporting Respondents to the effect that having regard to the object of 1959 Act, the Managing Committee constituted Under Section 25A of the Act must be ascribed a

limited role restricted to the annuity paid".

24. While dealing with the objection that the writ Petitioners were not competent and had no right to maintain the writ petitions, in paragraph 12 of the judgment the learned Single Judge actually decided not to go deeper into that issue and preferred to dispose of the writ petitions on merits. The reasons indicated for adopting such a course are recorded thus:

> ...What appears to be of significance is that though in the writ petitions filed, it has been clearly stated that the writ Petitioners have approached this Court as Administrators/Members of the Board of Trustees. In course of the oral arguments, advanced, Mr. DK Bhattacharyya, learned senior Counsel for the Petitioners in WP(c) 5385/2000, has made it clear that the approach to this Court by the Petitioners is in their capacity as Shebaits of the Temple. Notwithstanding the slightly contradictory stand taken, this Court has noticed that though the Debutter Board had been constituted in the year 1998 and though the Deputy Commissioner in his affidavit has given no credence or recognition to the said Board and the private Respondents Nos. 4 to 8 in WP(c) 2955/02 represented by Shri KN Chaudhary has also disowned the Board, yet surprisingly no attempt was made either by the Deputy Commissioner to derecognize the Debutter Board or by the private Respondents 4 to 8 to challenge the authority of the Debutter Board even to claim to have a right to manage the affairs of the Temple before any competent Court of law....

25. Out of the two main reasons given above by the learned Single Judge for not pursuing the issue of locus seriously, the first cannot be questioned. Once the Petitioners gave up their claim of having approached in the capacity of administrators/members of the Board of Trustees, relief of action in terms of Section 25A of the Act could have been granted for the benefit of the religious institution even on the asking of Petitioners in their capacity as Shebaits of the Temple. The other reason however does not merit acceptance and must be treated only as an obiter or a passing reference. At no point of time the State or Deputy Commissioner had recognized the Debutter Board as Head of the institution and in such a situation there was no need for even the private Respondents to challenge the authority of the Debutter Board. The issue as to who could be voter for electing the Dolois and who could stand for that post had not arisen at that stage because election of the Dolois had not been ordered by any court till then.

26. It appears that at least for a brief period the District Judge, the District Administration as well as the High Court had acted under misconception and confusion to equate the limited supervisory role of the statutory Committee Under Section 25A of the Act with the rights of the Bordeoris and their representative, the Dolois to manage the religious as well as secular activities of the Kamakhya Temple, a public religious institution.

27. The scope and amplitude of Section 25A was wrongly not touched upon by the learned Single Judge. The earlier Division Bench judgment had merely affirmed the constitutionality of this provision at the instance of another religious institution but had no occasion to weigh the powers of the statutory Committee vis-à-vis the customary rights of Bordeori Samaj and its elected representatives, the Dolois. The Division Bench, therefore rightly examined the width and scope of powers of customary trustees - The Bordeories and their elected agent, the Dolois considering all the relevant materials and custom, it committed no error in upholding their right to take care of management of

secular as well as religious affairs of the Kamakhya Temple.

28. The powers of the Bordeories and Dolois has not been taken away or adversely affected by the Act as it stood earlier or even after Section 25A was inserted. The reasons and objects of introducing the statutory Committee Under Section 25A as noted by the Division Bench in paragraph 111 of the judgment under appeal and extracted earlier in this judgment categorically clarify that it was (i) "to have control over the annuity" and (ii) "to verify and audit the accounts to the satisfaction of the concerned authority." The statutory Committee Under Section 25A is therefore concerned only with the annuity payable or paid under the Act to the Head of the Institution and not with its ownership or management. The words - ".....and verification of the proper maintenance of Institution." in Section 25A have to be understood in the background of all other provisions of the Act including the objects and reasons for the Amending Act No. XIX of 1987. In that light, the power of the Committee is indeed quite limited to verification of the proper maintenance of accounts of the Institution concerned and that too relating only to utilization of the annuity and other government grants under the Act, if any. Favouring the statutory Committee with powers to manage or oversee even only the secular aspect of management of the Institution will not only run counter to the objects and reasons for the Amending Act of 1987, it shall create an undesirable diarchy when the Act does not divest the Bordeories and Dolois of their customary powers, roles and rights. Hence we have no difficulty in accepting the contention of most of the parties that Section 25A postulates a Committee with limited role - only to exercise control over annuity and other grants under the Act and its proper accounting, if and when utilized, through the power of verification of relevant accounts for proper maintenance of Institutions.

29. We hasten to make it clear that the above inference is in view of peculiar features of the Act dealing mainly with acquisition of lands of certain types of Institutions. There can be no doubt that within the constitutional scheme guaranteeing freedom of religion, the legislature has to exercise restraints in matters essentially religious but still it has ample powers to legislate for better management of any religious or charitable Institution of public nature. However, in the present case, there is no such legislation.

30. Submissions have been advanced on behalf of the Appellants that Kamakhya Debutter Regulation is a perfect solution for all the ills allegedly affecting proper management of the Kamakhya Temple; its provisions do not interfere with the customary rights of the Dolois in the religious matters and in secular matters its provisions promote democracy to the satisfaction of large number of concerned persons including Deuris/priests looking after the other temples known as Nanan Devalayas. Hence, it is pleaded that no interference is required with the Kamakhya Debutter Regulation. From the discussions made earlier, we find that there has been no interruption in the essential custom whereunder the Bordeori Samaj consisting of all adult males of Bordeori families enjoys exclusive monopoly over the power to elect Dolois. We also find no merit in the plea of Appellants that if there was a custom in favour of Bordeori Samaj, it stood discontinued by agreement or by framing of some sort of Constitution in 1970 and/or 1973 such plea is vague and not backed by any acceptable evidence. So far Dolois have always been elected as per the old custom, by the Bordeori Samaj. The custom of electing the Dolois was no doubt attempted to be changed by a group of persons who claimed to have formulated and adopted the Kamakhya Debutter Regulation but such Regulation does not have acceptance of the Bordeori Samaj and the dispute on account of the Kamakhya Debutter Regulation is now before this Court by way of the present proceedings.

31. For the reasons assigned by the Division Bench of the High Court, with which we are in agreement, it has to be held that Kamakhya Debutter Regulation, 1998 is not a valid instrument and has no sanction of law for depriving the customary rights of the Bordeori Samaj to elect the Dolois who have been customarily exercising the right to manage the religious as well as secular affairs of the Kamakhya Temple. Admittedly, the Appellants have now taken recourse to provisions of Section 92 of the Code of Civil Procedure for seeking whatever relief they want against the Bordeori Samaj and the Dolois elected by the Bordeori Samaj. In view of their categorical submissions that this Court may not make any observation which might affect either of the parties in Section 92 Code of Civil Procedure proceeding, we leave the matter at rest without commenting on the provisions of Kamakhya Debutter Regulations. However, in the light of discussions and findings made earlier, except to clarify, as pleaded on behalf of the Appellants that Section 25A of the Act provides for a Committee having only a narrow and limited role, we find no merit in the Appeals and no scope to interfere with the impugned judgment of the Division Bench. The Appeals are therefore dismissed along with SLP... cc 8089-8091/2012. This order, however, shall not prejudice the case of the Appellants and similarly placed persons in the proceeding Under Section 92 of the Code of Civil Procedure pending before the District Judge, Kamrup, Guwahati.

32. Having taken note of the background facts and expressed our views on merits of the Appeals, now we shall take note of some interim orders passed by this Court after the Division Bench judgment dated 25.10.2011 came under challenge through Special Leave Petitions filed in 2011 itself. This is necessary to understand the real controversy between the parties in the three writ petitions which have been preferred directly before this Court. In the SLP preferred by the Appellants, an order was passed on 11.11.2011 to direct that the interim arrangement made by the High Court vide order dated 13.5.2002 shall remain operative. As a consequence the official Respondents continued under an obligation not to use the main Bharal and the existing office of Kamakhya Debutter Board and not to interfere with the religious affairs of the temple. In view of twin directions by the Division Bench in the impugned order, to hold elections of Dolois as per custom and to hold elections for constituting the Committee Under Section 25A of the Act, the State Authorities issued a notice for election of Doloies and that election was held on 16.11.2011. On 21.11.2011 further interim order was passed by this Court for framing of rules for election of members of Managing Committee as per Section 25A of the Act and also for holding of such elections. It was clarified that till the Managing Committee is constituted the administration of the temple will be as per order of the High Court dated 13.5.2002. No interference was made with the elections of Dolois held on 16.11.2011 and hence the elected Dolois were left with the power to carry out all religious functions of the temple. It was also observed that any challenge to the validity of the Rules for constitution of the Managing Committee Under Section 25A could be raised before this Court. On 3rd February, 2012 this Court by another interim order directed Deputy Commissioner to take control of precious articles belonging to the deity and prepare an inventory. The Dolois were permitted to perform worship but the office complex was directed to be handed over to the Kamakhya Debutter Board and such arrangement was to remain operative until the constitution of Managing Committee Under Section 25A. Admittedly, the said Committee has not been constituted as yet because the rules framed for the purpose and notified on 27.1.2012 have been challenged before this Court in Writ Petition No. 72 of 2012 as well as in Writ Petition No. 91 of 2012. The other writ petition bearing No. 140 of 2012 filed by Sailen Sharma, Petitioner of Writ Petition No. 72 of 2012 seeks to challenge the election of Dolois as well as the legality of the electoral college prepared for that election, mainly on the ground that women Bordeories and other Deuris, both male and female, were wrongly

excluded from the same. We shall first take up the challenge to the Rules framed Under Section 25A of the Act, i.e. Writ Petition Nos. 72 and 91 of 2012.

33. The rules notified on 27.1.2012 are called The Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature (Election of managing committee of Sri Sri Maa Kamakhya Temple) Rules, 2012 (hereinafter referred to as 'The Rules of 2012'). The notification clearly mentions that the Rules are pursuant to order of this Court dated 21.11.2011 for carrying out the elections of ex-officio secretary and elected members of the managing committee as contemplated by Section 25A of the Act in respect of Sri Sri Maa Kamakhya Temple. Rule 2 defines various definitions such as Devotee, Temple and Bordeories. The term 'Devotee' is wide enough to include all worshippers, priests and shebaits or persons associated with the Maa Kamakhya Temple residing permanently in Revenue Village Kamakhya either directly or through ancestors since last 50 years or more. But Temple has been defined to mean only the Temple of Sri Sri Maa Kamkhya situated on the Nilachal Hill near the city of Guwahati. Bordeories mean the devotees constituting the traditional Bordeori Samaj of the temple. There are two electoral colleges Under Rule 3, one for the election to the post of ex-officio secretary, restricted to the Bordeories of the temple and the other for the election of five members of the managing committee, consisting of the 'Devotees'.

34. Rule 6 requires the Deputy Commissioner to treat the list of electors already prepared by the Bordeories and published in connection with the election of Dolois as the electoral rolls for the election of ex-officio secretary. Claims and objections on the basis of such tentative electoral rolls are to be entertained from the Bordeories only. It is not in dispute that the traditional list of electors for election of Dolois includes only adult male Bordeories and hence women members of Bordeori families did not find place in the draft electoral rolls which were published under the Rules. It goes without saying that Deuries and priests of other Devalayas known as Nanan Devalayas are also not included in this electoral roll because for election to the post of ex-officio secretary only the Bordeories are qualified to be in the electoral college and be a candidate also. Hence a strong grievance has been raised by the Dolois of Nanan Devalayas, both male and female as well as female members of the Bordeori families that their exclusion by virtue of Rules notified by the State Government is unconstitutional being violative of Article 14 of the Constitution of India.

35. On behalf of State of Assam a categorical stand has been taken that the Rules do not debar the female members of the Bordeori families rather the nomination form in Schedule II of the Rules requires the candidate to declare that their names as well as that of their father/mother/husband has been correctly spelt out. Hence the State has no objection in allowing claims by female members of Bordeories family if they want their names to be included in the electoral rolls. However, on behalf of the State Mr. Jaideep Gupta learned senior Counsel took a categorical stand that Deories cannot claim equality with Bordeories for the purpose of election of ex-officio secretary because, according to State, in the Temple of Sri Sri Maa Kamakhya, which does not include the Nanan Devalayas, the four Bordeori families occupy the status of trustees whose representatives are the Dolois elected for the purpose of looking after the secular as well as religious affairs of the temple. He submitted that the Deories are priests only in the Nanan Devalayas and for the main temple of Sri Sri Maa Kamakhya which alone is covered by the Rules of 2012, they can only be included in the definition of 'Devotees' and in that capacity they are entitled to be in the electoral college for the purpose of electing the other five members of the Managing Committee. Hence, according to him the State has not committed any discrimination or perpetrated any illegality in creating two electoral colleges, one for the single post of ex-officio secretary confined to the

Bordeori families on account of their *de jure* as well as *de facto* status since long and another electoral college for the five other members of the Managing Committee, consisting of the Devotees which shall include all other Dolois, Shebaits/Worshippers etc. He made it clear that for the purpose of statutory Managing Committee Under Section 25A of the Act, the State shall not discriminate between the male and female members of the Bordeori families or the male and female Devotees, as the case may be.

36. In view of discussions made earlier it is evident that the Bordeori families enjoy a distinct status and monopoly in matters connected with the religious as well as secular management of the temple of Sri Sri Maa Kamakhya and hence the claim of equality on behalf of Deoris associated with the Nanan Devalayas or even with Maa Kamakhya Temple does not have any merit. In view of such clear and categorical legal distinction, the State cannot be blamed for creating two electoral colleges and confining election rolls for the post of ex-officio secretary only to the members of the Bordeori families including females. The alleged discrimination vis-à-vis Deoris has no foundation. Fair treatment to others interested in the temple is assured by permitting the 'Devotees' to elect as many as five members of the Managing Committee. Hence the challenge to the impugned provisions in the Rules on ground of Article 14 fails. The plea that Rules must cover not only the temple and endowment of Sri Sri Maa Kamakhya Devalaya but the entire complex including Nanan Devalayas has no support or basis in law. The Act permits the State to constitute a Managing Committee for each of the Institution covered by Section 25A of the Act. It has not been pleaded or proved that Sri Sri Maa Kamakhya temple and endowment is not so covered. In fact the lands acquired under the Act appear mainly of main temple of Sri Sri Maa Kamakhya. Submissions were advanced but no pleading or proof was placed before us to show that lands of Nanan Devalayas have also been acquired. Moreover, it is discretionary power Under Section 25A under which the State may choose not to have any Managing Committee separately for the Nanan Devalayas.

37. On behalf of writ Petitioners the same very impugned provisions of the Rules have been challenged also on the ground that they are contrary to the mandate of Section 25A of the Act which under Clause (b) requires that an ex-officio secretary be elected by the Deories/Bordeories. According to Petitioners, the Kamakhya Temple Complex enjoys the services of Dolois as well as Bordeories hence the Act requires both the groups to be treated as equal and the Rules must be declared to be against the Act inasmuch as they run counter to the Act by giving recognition only to Bordeories at the cost of Deories.

38. To meet the aforesaid contention, Mr. Jaideep Gupta, learned senior Counsel referred to the various provisions of the Act to highlight that the scheme was to recognize the Head of the Institution in whom the control and management of the properties is vested under any enactment, grant or usages relating to the Institution or any scheme of management framed by a court Under Section 92 of the Code of Civil Procedure. Such a Head, upon notice has to deliver the possession of the acquired property and is entitled to receive compensation in the form of annuity. In this background he laid stress upon the fact that Section 25A was inserted not for constitution of a common Managing Committee for all the religious or charitable institutions in the State but for constitution of a Managing Committee for each of the religious or charitable institutions of public nature. In this context, considering that some of the religious institutions have only Deories whereas some like the Kamakhya Temple have their control vested totally in Bordeories, the legislature provided for election of ex-officio secretary either by the Deories or by Bordeories as the case may be. According to him, the use of 'slash' (/) between the word Deories and the word

Bordeories, in the background of scheme and provisions of the Act connotes the option to act as per factual situation obtaining in a particular institution. His further submission was to the effect that factually the claim of the Petitioners that the temple of Shri Shri Maa Kamakhya requires daily worship/puja not only by the Bordeories but also by atleast two families of Deories, the Chandi Pathaks and the Supakars has been controverted by explaining that the daily worship/puja is under the management of Dolois who represent the Bordeories and it is only on some special occasions, once or twice in a year that the Chandi Pathaks and the Supakars participate as Shebaits. Thus, on facts it has been seriously contested that the temple of Sri Sri Maa Kamakhya requires services of Deories for daily worship/puja.

39. After considering the rival submissions and on going through the pleadings as well as provisions in the Act, we are in agreement that the submission advanced on behalf of the State of Assam that Clause (b) in Section 25A gives a choice or option for electing the ex-officio secretary either by the Deories or Bordeories depending upon the facts of a particular religious or charitable institution has merits and deserves to be accepted. It is not the case of Petitioners that all the institutions in the State have both Deories and Bordeories. In that view of the matter it would be inevitable to get the ex-officio secretary elected either by the Deories or the Bordeories, whosoever may be managing the concerned institution.

40. It is important to notice that the terms 'Deories' and 'Bordeories' is not defined under the Act. Under Section 30 of the Act, the State Government has the power to make rules for carrying out the purposes of the Act. Such rules are required to be laid before the Assam Legislative Assembly as soon as possible after they are made, for not less than fourteen days and are subject to such modifications as the Legislative Assembly may make. Clearly the task of defining or explaining the terms 'Deories' or 'Bordeories' in the context of a particular institution has been left to be done by making of rules. The Rules of 2012 seek to provide for a Managing Committee in terms of Section 25A only for the temple of Sri Sri Maa Kamakhya. Under statutory powers, the State Government in the context of this particular institution has recognized only Bordeories by referring to the traditional Bordeori Samaj of the temple. The other Devotees, Shebaits and Deories, if any, have been included in the category of 'Devotee' with a right to participate in the election of other five members of the Managing Committee. The Rules of 2012 thus supplement the provisions of the Act and do not run counter to the intention of the legislature which has accepted the Rules of 2012 without exercising its power to make modifications. Such Rules must be treated as part of the Act and in absence of any conflict it has to be held that the Rules of 2012 only explain the real intention of the legislature in using the sign of slash (/) between the words Deories and the Bordeories in Clause (b) of the Section 25A. The second ground of assailing the rules, therefore, must also fail. Accordingly Writ Petition Nos. 72 and 91 of 2012 are dismissed for lack of any merits.

41. As already noticed earlier the third Writ Petition bearing No. 140 of 2012 has also been filed by the same person - Shailen Sharma who is the Petitioner in Writ Petition No. 72 of 2010 - to challenge the election of Dolois held on 16.11.2011. The only ground urged on behalf of the Petitioners is denial of equality or in other words, violation of Article 14 of Constitution of India. According to Petitioners even if the electoral college was required to be confined by tradition only to Bordeories Samaj, the custom of depriving women members of such families the right to vote and to stand as candidate for the post of Dolois is obnoxious, immoral, discriminatory and against Public policy. It is also the case of Petitioners that another class of priests known as Dolois play equally important role as the Bordeories and hence the male and female

members of Deories families have also been subjected to hostile discrimination by the customs that are archaic and must be struck down as law contrary to the fundamental right of equality guaranteed by the Article 14 of the Constitution of India.

42. It is not in dispute that the impugned custom is not in existence on account of any State action. The temple in question is admittedly an ancient religious institution of public nature. The temple of Sri Sri Maa Kamakhya occupies a place of pride among Hindu temples, especially as a Shakti Peeth. No doubt there are other smaller temples which have sprung up on or around the same hill of Neelachal near the town of Guwahati in Assam under the belief that there are secret Peethas which may be discovered/found by the enlightened persons gradually in due course of time. From the judgments referred in earlier litigations of old times it is evident that the monopolistic control of Bordeories over the religious and secular spheres of the temple has been resented and challenged by the other priests including Deories of Nanan Devalayas but without success. It has already been noticed that the Appellants before this Court have now taken resort to a proceeding Under Section 92 of Code of Civil Procedure which is pending before the District Judge, Kamrup, Guwahati. The Appellants and the Petitioners have evidently spared no efforts to break the power and control of the Bordeories and the Dolois but so far without success. The aforesaid facts have been noted in view of strong objection by Mr. Rajiv Dhawan, learned senior advocate for the Respondents that the writ petitions including No. 140 of 2012 are not bonafide petitions because they have been filed only to support the case of the Appellants and the Debuttar Board of 1998.

43. On going through the pleadings in the said petition we find as a fact that writ Petitioners have at places taken contradictory stand to challenge the custom granting rights to the Bordeories and Dolois and at places they have praised the Debuttar Board which recognizes the supremacy of the Dolois atleast in matters relating to the religious practices in the temple. However, it would not be proper to decide the writ petition merely on such technical pleas when it has been heard at quite some length.

44. The plea of the Petitioners is that no doubt fundamental rights Under Articles 14 and 15 unlike rights such as against untouchability are guaranteed only against State action and not against private customs or practices but Judiciary is as much a part of State as the Executive and the Legislature and hence it cannot permit perpetuation of discrimination in violation of Article 14, particularly in view of Article 13(1) which mandates that all pre Constitution Laws in the territory of India to the extent they are inconsistent with the provisions of part III of Constitution shall, to the extent of such inconsistency, be void.

45. Part III of the Constitution contains fundamental rights and begins with Article 12 which defines 'the State' for the purposes of part III. For better appreciation of the issues involved, Articles 12 and 13 are extracted here in below:

> **12.** Definition - In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
>
> **13. Laws inconsistent with or in derogation of the fundamental rights**
>
> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such

inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye law, rule, Regulation, notification, custom or usages having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made Under Article 368.

46. Since the controversy at hand embraces Articles 25 and 26, these also, must be noted in extenso:

2 5 . Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

26. Freedom to manage religious affairs - Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

47. It is the case of the Petitioners that the custom relating to election of the Dolois to the extent it violates Article 14, must be treated as void and this Court should grant relief to the women members of Bordeories families and also to the Deories by ordering for inclusion of their names in the electoral college.

48. On the other hand, the Respondents have taken a firm stand that for the purpose of part III of the Constitution Article 12 defines the term "the State" to include the Government as well as Parliament of India as well as Government and legislature of the States but conspicuously it has left out the Judiciary and hence the Judiciary cannot be included and treated as 'the State' when it performs strictly judicial functions in contradistinction to administrative powers. It is also the stand of the Respondents that personal laws and religious practices are not covered by the sweep of Article 13(1). Lastly it was submitted on behalf of the Respondents that Articles 25 and 26 guarantee freedom to practice and propagate religion of choice as well as to establish and maintain institutions for religious and charitable purposes with further rights to manage its own affairs in matters of religion; to own and acquire all moveable and immoveable property and administer such property in accordance with law. Such rights being in part III of the Constitution itself, must be respected and read in harmony with each other and other provisions in Part III. With this stand the Respondents have supported their plea that Article 13 will have no application in respect of personal laws based on Shastaras and Scriptures and also in respect of essential religious practices which are matters of faith based upon religious scriptures that are inviolable for the believers.

49. Before referring to the various judgments by Mr. Shanti Bhushan, learned senior Counsel for the Petitioners and the judgments relied upon by Mr. Rajiv Dhawan and Mr. Jaideep Gupta, senior advocates for the Respondents, the basic facts pleaded by the parties may be noted with a view to find out whether the factual foundation has been laid down and established for claiming equality with Bordeories Samaj which elects the Dolois as per customs. In the pleadings, Petitioners have highlighted that in the several kinds of pujas the women Bordeories take active part and hence are equally aware of all the rituals and have the necessary qualification to be treated as equal of men Bordeories for the purpose of electing the Dolois and also for being a candidate. The reply of the Respondents in essence is a complete denial of aforesaid assertion with a counter plea that women participate only as worshippers and not as priests and they have no say in the matter of management of the temple so as to claim same knowledge and consequent equality with the male Bordeories. Such dispute of facts may be resolved only on basis of a detailed proper study of the customs and practices in the temple of Sri Sri Maa Kamakhya but there is no authoritative textual commentary or report which may help this Court in coming to a definite finding that women belonging to Bordeori families are equally adapt in religious or secular matters relating to that temple. The relevant scriptures have also not been disclosed to this Court which could have helped in ascertaining whether the basic religious tenets governing the Shakti Peethas in the Kamakhya Temple would not stand violated by permitting female Bordeories to elect or to get elected as Dolois. Hence on facts we are not in a position to come to a definite finding on the issue of equality for the purpose at hand as claimed by the Petitioners. The same logic is equally, if not more forcefully, applicable in the case of claim of the Deories that they are equally situated as the Bordeories Samaj in the matter of election of Dolois. The Petitioners have also not explained at all as to why equality be extended only to female Bordeories and Deories and not to all and sundry.

50. In the aforesaid situation it is always with a heavy heart that a Writ Court has to deny relief. It may not always be safe for a Writ Court to decide issues and facts having great impact on the general public or a large part of it only on the basis of oath against

oath. Where the right is admitted and well established, the Writ Court will not hesitate in implementing such a right especially a fundamental right. But enforcement of established rights is a different matter than the establishment of the right itself. When there is a serious dispute between two private parties as to the expertise, experience and qualification for a particular job, the prime task before the Court is first to analyse the facts for coming to a definite conclusion whether the right stands established and only when the answer is in affirmative, the Court may have no difficulty in enforcing such an established right, whether statutory, fundamental or constitutional. In the present case, as indicated above, it is indeed difficult for this Court to come to a definite conclusion that the Petitioners claim to equality for the purpose at hand is well established. Hence we have no option but to deny relief to the Petitioners.

51. Coming to the issues of law, on behalf of the Petitioners Mr. Shanti Bhushan placed reliance upon judgment in case of **Sant Ram v. Labh Singh** MANU/SC/0045/1964 : 1964 (7) SCR 756 in support of his submission that any law which includes customs, as per Article 13 must be declared void to the extent it is inconsistent with fundamental rights in part III of the Constitution. For the same purpose he also placed reliance upon the case of **Bhau Ram v. B. Baijnath Singh** MANU/SC/0096/1962 : 1962 (Suppl.) 3 SCR 724 and **Atam Prakash v. State of Haryana and Ors.** MANU/SC/0366/1986 : (1986) 2 SCC 249.

52. On the aforesaid issue Mr. Rajiv Dhavan has pointed out a categorical distinction that in all those three cases the concerned right was a right of pre-emption claimed by a land holder on account of vicinage and not any personal or religious right flowing out of religious scriptures and believes. In **Bhau Ram** the pre-emption right arose out of a statute and it was found to be against Article 19(1)(f). Only a reference was also made to Article 15. In the case of **Atam Prakash** also the right was based upon Punjab Pre-emption Act, 1913. In the case of **Sant Ram** on which strong reliance has been placed, the custom based right of pre-emption was found invalid on the ground of infringing Article 19(1)(f).

53. Mr. Dhavan has referred to as many as 13 cases as per list given below:

1 . Shirur Math (The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt) MANU/SC/0136/1954 : 1954 SCR 1005

2. Tilkayat (Tilkayat Shri Govindlalji Maharaj v. The State of Rajasthan and Ors.) MANU/SC/0028/1963 : 1964 1 SCR 561

3. Raj Bira Kishore Deb v. State of Orissa MANU/SC/0038/1964 : 1964 7 SCR 32

4. Seshammal and Ors. etc. etc. v. State of Tamil Nadu 1972, 2 SCC 11

5. State of Rajasthan v. Sajjanlal Panjawat MANU/SC/0428/1973 : 1974 (1) SCC 500

6. Pannalal Bansilal Pitti and Ors. v. State of Andhra Pradesh and Anr. MANU/SC/0276/1996 : 1996 (2) SCC 498

7 . A.S. Narayana Deekshitulu v. State of A.P. and Ors. MANU/SC/0455/1996 : 1996 9 SCC 548

8. Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors. v. State of U.P. and Ors. MANU/SC/1164/1997 : 1997 (4) SCC 606.

9. Bhuri Nath v. State of J and K MANU/SC/1077/1997 : 1997 (2) SCC 745.

10. Sri Kanyaka Parameswari Anna Satram Committee and Ors. v. Commissioner, Hindu Religious and Charitable Endowments Deptt. and Ors. MANU/SC/0579/1999 : 1999 7 SCC 666

11. N. Adityam v. Travancore Devaswrom Board MANU/SC/0862/2002 : (2002) 8 SCC 106

12. M.P. Gopalkrishnan Nair v. State of Kerala MANU/SC/0305/2005 : 2005 (11) SCC 45

13. Durgah Committee v. Syed Hussain Ali MANU/SC/0063/1961 : 1962 (1) SCR 383

54. It is highlighted that in all these cases relating to religious endowment and institution, under challenge were changes in customs that had been brought about by Statutes enacted by the legislature. According to the Respondents while granting right to profess, practice and propagate religion Under Article 25(1), by Sub-clause (ii) of the same Article the Constitution has saved the operation of any existing law and also vested power in the State to make laws for "(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." In contrast Article 26 does not envisage any restriction through a statute made by the State so far as freedom to manage religious affairs is concerned. But the right Under Article 26 has also been made subservient to public order, morality and health, the same three factors that also control the right Under Article 25(1) which has been made subject to the other provisions of Part III also.

55. There is no need to go into all the case laws in respect of Articles 25 and 26 because by now it is well settled that Article 25(2)(a) and Article 26(b) guaranteeing the right to every religious denomination to manage its own affairs in matters of religion are subject to and can be controlled by a law contemplated Under Article 25(2)(b) as both the articles are required to be read harmoniously. It is also well established that social reforms or the need for Regulations contemplated by Article 25(2) cannot obliterate essential religious practices or their performances and what would constitute the essential part of a religion can be ascertained with reference to the doctrine of that religion itself. In support of the aforesaid established propositions, Respondents have referred to and relied upon the judgment in the case of **Shirur Math (The Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,** MANU/SC/0136/1954 : 1954 SCR 1005 and also upon **Shri Venkataramana Devaru and Ors. v. State of Mysore and Ors.** MANU/SC/0026/1957 : 1958 (SCR) 895.

56. An interesting situation arose in the case of **Bijoe Emmanuel and Ors. v. State of Kerala and Ors.** MANU/SC/0061/1986 : (1986) 3 SCC 615. School children having faith in Jehovah's Witnesses Sect refused to sing national anthem in their school for which they were expelled on the basis of executive instructions contained in circulars which obliged singing of national anthem in schools. Such action against the children was challenged with the help of defence based upon Articles 25(1) and 19(1)(a). In the

aforesaid judgment, this Court upheld the defence of the children on both counts. In Paragraphs 19 and 20, Article 25 was considered with a view to find out the duty and function of the Court whenever the fundamental right to freedom of conscience and to profess, practice and propagate religion is invoked. The answer given in the judgment in a concise and succinct manner is as follows:

> **...**Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practise or to provide for social welfare and reform. It is the duty and function of the court so to do. Here again as mentioned in connection with Article 19(2) to (6), it must be a law having the force of a statute and not a mere executive or a departmental instruction.

57. Respondents have also relied upon judgment of this Court in the case of **Pannalal Bansilal Pitti and Ors. v. State of Andhra Pradesh and Anr.**MANU/SC/0276/1996 : 1996 (2) SCC 498. The challenge in this case was to the constitutionality of certain provisions of an Andhra Pradesh Act bringing certain reforms in respect of Hindu Religious Institutions. At the behest of adversely affected hereditary trustees of Hindu Religious and Charitable Institutions, this Court considered the argument that by confining the reforms only to Institutions maintained by Hindus, the provisions of the Act had violated Article 14. Paragraph 12, made it clear that though an uniform law may be highly desirable, in a democracy the legislature should have the freedom to bring about gradual progressive changes and the process may start where the need is most acute. This Court further held that it would be inexpedient and incorrect to think that all laws must be made uniformly applicable to all people in one go. In other words the legislature has to be trusted for bringing about necessary changes by way of reforms in matters relating to faith and religion which at times may include personal laws flowing from religious scriptures. In the case of **Seshammal and Ors. etc. etc. v. State of Tamil Nadu** MANU/SC/0631/1972 : 1972 (2) SCC 11, paragraphs 11 and 12 exhibit a detailed discussion relating to the Agamas which contain elaborate rules relating to construction of temple as well as consecration of the idol. It is the religious belief of Hindu worshippers that once the image of the deity is consecrated, it is fit to be worshipped in accordance with the detailed rituals only by a competent and trained priest. The religious belief extends to protecting any defilement of the idol and if the image of the deity is defiled on account of violation of any of the rules relating to worship, purificatory ceremonies must be performed for restoring the sanctity of the shrine. The worshipers value the rituals and ceremonies as a part of Hindu religious faith. In paragraph 12, the Court concluded that "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".

58. In the aforesaid judgment it was also held that the matter of appointment of a competent Archaka i.e. the priest is a secular matter and therefore can be regulated by a State action. However, the situation may be different and more complicated if, like in the present case, the Bordouries are the trustees as well as the priest and the management of religious and secular activities have been entrusted by the Bordouries themselves to their elected representatives, the Dolois. The element of appointment

stands substituted by the action of the trustees themselves performing the necessary rituals. This aspect need not be pursued any further because there is no statute framed by the State so far to regulate even the secular affairs of the temple. Only when such State action takes place, there may arise an occasion to examine the related issues as to whether interference with the custom governing appointment of Dolois would amount to regulating only the secular affairs of the temple or it shall obliterate the essential religious practices of the institution.

59. On considering the rival submissions and the relevant case laws, we are inclined to agree with the submissions on behalf of the Respondents that Article 13(1) applies only to such pre-constitution laws including customs which are inconsistent with the provisions of Part III of the Constitution and not to such religious customs and personal laws which are protected by the fundamental rights such as Articles 25 and 26. In other words, religious believes, customs and practices based upon religious faith and scriptures cannot be treated to be void. Religious freedoms protected by Articles 25 and 26 can be curtailed only by law, made by a competent legislature to the permissible extent. The Court can surely examine and strike down a State action or law on the grounds of Articles 14 and 15. But in a pluralist society as existing in India, the task of carrying out reforms affecting religious believes has to be left in the hands of the State. This line of thinking is supported by Article 25(2) which is clearly reformist in nature. It also provides scope for the State to study and understand all the relevant issues before undertaking the required changes and reforms in an area relating to religion which shall always be sensitive. While performing judicial functions stricto-sensu, the Judiciary cannot and should not be equated with other organs of state - the executive and the legislature. This also fits in harmony with the concept of separation of powers and spares the judiciary or the courts to dispassionately examine the constitutionality of State action allegedly curbing or curtailing the fundamental rights including those Under Articles 25 and 26.

60. On the related issue of the scope of Article 12 and whether for the purposes of issuance of writ, judicial decisions by the judiciary can be included in State action, we are in agreement with the submissions advanced by Mr. Rajiv Dhavan that definition of 'the State' Under Article 12 is contextual depending upon all relevant facts including the concerned provisions in Part III of the Constitution. The definition is clearly inclusive and not exhaustive. Hence omission of judiciary when the government and Parliament of India as well as government and legislature of each of the State has been included is conspicuous but not conclusive that judiciary must be excluded. Relevant case laws cited by Mr. Dhavan are:

(i) **Pradeep Kr. Biswas v. Indian Institute of Chemical Biology and Ors.** MANU/SC/0330/2002 : (2002) 5 SCC 111

(ii) **Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra And Anr.** MANU/SC/0044/1966 : (1966) 3 SCR 744

(iii) **Triveniben v. State of Gujarat** MANU/SC/0520/1989 : (1989) 1 SCC 678

(iv) **Poonam v. Sumit Tanwar** MANU/SC/0187/2010 : (2010) 4 SCC 460

61. Hence, in accordance with such judgments holding that judgments of High Court and Supreme Court cannot be subjected to writ jurisdiction and for want of requisite governmental control, Judiciary cannot be a State Under Article 12, we also hold that while acting on the judicial side the courts are not included in the definition of the State. Only when they deal with their employees or act in other matters purely in

administrative capacity, the courts may fall within the definition of the State for attracting writ jurisdiction against their administrative actions only. In our view, such a contextual interpretation must be preferred because it shall promote justice, especially through impartial adjudication in matters of protection of fundamental rights governed by Part III of the Constitution.

62. On the aforesaid issue Mr. Shanti Bhushan has placed reliance upon the judgment of this Court in **Harjinder Singh v. Punjab State Warehousing Corporation** MANU/SC/0060/2010 : 2010 (3) SCC 192 and**Indira Nehru Gandhi v. Raj Narain** MANU/SC/0304/1975 : 1975 (Suppl.) SCC 1, The aforesaid judgments do not require us to change our view because the issues in both the cases were quite different. In the case of Harjinder Singh this Court while considering the proper parameters for the exercise of writ jurisdiction, held that there was no justification in entertaining a new plea raised by the employer for the first time before the High Court. The context in which some minority views that the judiciary is a State within the meaning of Article 12 of the Constitution were noted in Paragraphs 40 and 41 of the judgment was quite different and such exercise was undertaken only to highlight that judiciary is essentially one of the three arms of the State and as such it must also be aware of its responsibilities flowing from the Preamble and Article 38 of the Constitution. At best, those observations are clearly an obiter.

63. In order to fully appreciate the implication of including judiciary within 'the State' as defined Under Article 12 it may be recapitulated that in catena of judgments it has been held that writ petitions will not be entertained against purely private parties. Further, elaborate tests have been laid down for finding out when an authority can be treated to be the State for the purposes of Part III of the Constitution.

64. If the submission of Mr. Shanti Bhushan is accepted that by simply hearing a writ petition the Court becomes a party with same duties and responsibilities as the State, then the rights which can be claimed only against the State can also be claimed against all private parties because judiciary has to hear and decide almost all cases. Such plea is required to be noticed only for rejection otherwise all disputes against private persons will have to be treated as a dispute against the State also, because it is primary responsibility of the judiciary to hear and adjudicate all disputes. The judicial forum will then loose its impartiality because Petitioners, like in the present case, will make a demand that court itself should act as the State and deliver all reliefs in a dispute where the executive or the legislature is not at all involved as a party. For the aforesaid reasons we find no merit in the contention that while acting in judicial capacity the judiciary acts as the State and hence it must, as a corollary, entertain a writ petition against purely private parties only because the matter has been brought before the court.

65. The writ petitions are, therefore, liable to be dismissed for want of merits. In some of the Writ Petitions, there is a prayer to accord a narrow scope to Section 25A of the Act and powers of the Managing Committee contemplated thereunder. Since that relief has already been granted in the Appeals, the same does not require fresh consideration. With this clarification the writ petitions are dismissed.

66. Since the Debutter Board is occupying some part of the premises in the temple of Sri Sri Maa Kamakhya temple on account of interim orders of this Court, all those interim orders are now vacated. The District administration is directed to ensure that those premises are vacated by the members or representatives of the Debutter Board at the earliest and in any case within four weeks. The premises and other properties of Sri

Sri Maa Kamakhya Temple shall, if required, be placed back within the same time in possession of the Bordeories Samaj through the last elected Dolois against receipts which shall be retained in the office of Deputy Commissioner, Guwahati. The parties representing the Debutter board are also directed to hand over the vacant and peaceful possession of the concerned premises and other properties of the temple, if any, within four weeks. There shall be no order as to costs.

67. Before parting with the order we would like to direct in the larger interest of Justice, that like in the past if there is any need of mediation or intervention of an authority for election of Dolois at five years interval etc. or for smooth functioning of affairs of the Sri Sri Maa Kamakhya Devalaya, the concerned affected parties can approach the District Judge, Kamrup, Guwahati who shall try and settle such disputes as in the past, till a specific law is enacted for this purpose. In such matters the decisions of the District Judge shall be of course subject to supervisory writ jurisdiction of the High Court.

MANU/PR/0062/1921

Equivalent Citation: AIR1922PC123, (1921)ILR 44PR831

BEFORE THE PRIVY COUNCIL

Decided On: 05.07.1921

Appellants: **Vidya Varuthi Thirtha**
Vs.
Respondent: **Balusami Ayyar and Ors.**

Hon'ble Judges/Coram:
Buckmaster, Dunedin, Shaw and Ameer Ali, JJ.

JUDGMENT

Ameer Ali, J.

1. The suit that has given rise to this Appeal relates to certain lands lying in the town of Madura in the Madras Presidency which admittedly belong to an old mutt (Math) situated within the Mysore State. The origin, development, and raison d'etre of these mutts have been discussed in a number of cases decided in the Madras High Court, to some of which their Lordships propose to refer in the course of this judgment. In their general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs and usages of each institution. The superior of this particular mutt has been called in these proceedings Matathipathe and sometimes Pandarasannadhi, which their Lordships understand connote the same idea of headship. At the time this action was brought the twenty-sixth defendant held the office of Matathipathe. He has since died and the present appellant is the head of the institution. In 1891 one Srinivasa was the Matathipathe and he on the 17th March of that year granted to the second plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit-rent of Rs. 24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Samudra, who held the office until 1906. On his death the now deceased defendant No. 26 became the head. In 1902 the second plaintiff sub-leased the lands to the first and second defendants for a period of ten years.

2. Since 1905 the mutt Las been under the management of the Mysore State under a power-of-attorney, executed at first by the Matathipathe Samudra and afterwards by his successor, in favour of the Diwan and his successors in office. About the same time the second plaintiff conjointly with his son (the third plaintiff) assigned their right and interest in the lands in suit to the first plaintiff. It is in evidence and, so far as appears from the judgments of the two Courts in India, does not appear to be contradicted, that it was only in 1908 that the representative of the Diwan, acting under the power granted by the Matathipathe, became aware of the transaction of 1891 under which the plaintiffs claim title. The sub-lease created in 1902 by the second plaintiff in favour of the first and second defendants was to have expired in 1912. But before its expiry they obtained a lease for 17 years from the representative of the Diwan. They are now in possession of the lands in suit under this lease. The plaintiffs are and were at the time they brought their suit in the Court of the Subordinate Judge of Madura on the 5th March 1913, admittedly out of possession. The present action is for a declaration of title and for ejectment and possession, principally directed against the Matathipathe as the

head of the mutt and the first and second defendants lessees holding possession under him. The other defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those defendants.

3. The plaintiffs base their title on two grounds: Firstly, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his successors; and secondly, that even if the lease was not valid they had acquired a title under the Indian Limitation Act by adverse possession for over twelve years from the date of the grant.

4. Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees," that the lands were granted on a "specific" trust, and that consequently under Article 134 of the second schedule of the Indian Limitation Act (IX of 1908) they have acquired a good title against the mutt. The Matathipathe controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the mutt; he further denied that he and his predecessors were "trustees" of the mutt or that the second plaintiff or his assignee had acquired any right to the mutt lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues. The trial judge after giving the substance of the second plaintiff's evidence and of the other witnesses, formulates the position which the pleader took up:

> He contends," says the learned Judge, "that the plaint property is trust property set apart for the worship of the titular deity of the mutt, that the head of the mutt is a trustee merely, and that the permanent lease to second plaintiff is an alienation of mutt property, and that twenty-sixth defendant at this distance of time could possibly have no right to such property. The alienation being ab initio void, the twenty-sixth defendant had no right to plaint property as he succeeded only in 1906 and first plaintiff had perfected his title by adverse possession for over twelve years.

5. The Subordinate Judge negatived this contention; he held upon the admissions of the second plaintiff that the property in suit was "ordinary mutt property," and was not set apart on any specific trust; that the head of the mutt was not a "bare trustee," as it was admitted that the income was at his absolute disposal and that "none had a right to question him about it." He found also that the second plaintiff took the lease with full knowledge of the character of the endowment and had learnt on inquiry that "he could not safely purchase it."

6. With regard to the question of estoppel arising from the alleged acceptance of rent by the twenty-sixth defendant as the plaintiffs contended, the Subordinate Judge held:

> In fact the first plaintiff never paid money as rent and the twenty-sixth defendant or his agent never accepted payment with knowledge that the payment was as rent for plaint property. In these circumstances, I find that these defendants are not estopped from denying plaintiff's title. I find this issue against plaintiffs.

7. He accordingly dismissed the suit save and except in respect of a money claim against the first and second defendants.

8. The plaintiffs appealed to the High Court of Madras, which reversed the trial Judge's order and decreed the claim. The learned Judges do not negative the finding of the first Court that the second plaintiff took the lease with notice. But they considered that the

matter in dispute fell within Article 134 referred to above. They summed up their conclusion in the following words:

> that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Article 134 have been complied with.

9 . The findings of the learned Judges on the issue relating to limitation and the acquisition of right by adverse possession require notice. They deal first with the question of justifiable necessity, which they decide against the plaintiffs. They say: "there is no doubt that the head of a mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time."

10. And then add:

> There is no allegation, much less proof, of any such necessity. The first contention must be rejected.

11. They then proceed to discuss the nature of the endowment in question and the position of its head. Their finding on this point is important; they say as follows:

> In connexion with the second point a question arises as to the nature of the endowment and the position of the head of the mutt in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Nayakan dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, i.e., for the worship of Gopalakrishnaswami, who is described by defendants' first witness as the "titular deity of the mutt." The evidence does not support this contention and it has been found against in the Lower Court. A statement made by a local agent of the mutt during the Inam Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the Inam as given at the close of the inquiry is that it was granted 'for the support of Vyasaraya Matam' (Exhibit L). Compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the mutt. I think the grant must be held to have been made for the general purposes of the mutt.

12. They thus concur with the first Court that there was no "specific trust," which was the foundation of the plaintiff's case. But, after examining some of the judgments of their own Court, they apparently felt constrained to hold that the decision of this Board in Ram Parkash Das v. Anand Das (1916) I.L.R., 43 Calc., 707 (P.C.); L.R., 43 I.A., 73 had crystallized the law on the subject, and definitely declared the Mahant to be a "trustee." It is to be observed that in that case the decision related to the office of Mahant, but in the course of their judgment their Lordships conceived it desirable to indicate inter alia what, upon the evidence of the usages and customs applicable to the institution with which they were dealing and similar institutions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense as in previous decisions of the Board, by way of a compendious expression to convey a general conception of those obligations. They did not attempt to define the term or to hold that the word in its specific sense is applicable to the laws and usages of the country. As pointed out by their predecessors in Greedharee Doss v. Nundokissore Doss, Mohunt (1867) 11 I.A., 405, 428,

The only law as to these Mahants and their functions and duties is to be found in custom and practice, which is to be proved by testimony.

13. Generally speaking, however, the duties and obligations resting on the superior, indicated in Ram Parkash Das v. Anand Das (1916) I.L.R., 43 Calc., 707 (P.C.); L.R., 43 I.A., 73, do not seem to vary. In this particular institution, the position of the Matathipathe in relation to the mutt was clearly established by testimony and concurrently found by both Courts. But the learned Judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa, who granted the permanent lease, was a "trustee," his act fell under Article 134. To this article their Lordships will presently refer. Before doing so, however, they consider it necessary to observe that there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each, there are well-recognized rules relating to their religious and charitable institutions. From, the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs, so far as they are not in conflict with the statutory laws, by Hindus and Muhammadans. It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Muhammadan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in pari materia. The vice of this method of construction by analogy is well illustrated in the case of Vidyapuena Tirtha Swami v. Vidyanidhi Tirtha Swami (1904) I.L.R.,27 Mad., 435, where a Mahant's position was attempted to be explained by comparing it with that of a bishop and of a benefited clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case, which arose also in the Madras High Court, of Kailasam Pillai v. Nataraja Thambiran (1910) I.L.R , 33 Mad., 265 (F.B.), To this judgment their Lordships will have to refer farther later on.

14. It is also to be remembered that a "trust," in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple. (J.G. Ghose, "Hindu Law," page 276.) Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system: to Brahmans, Goswamis, sanyasis, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a "juristic entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of mutt were founded under spiritual teachers of recognized sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee, in the general sense, for maladministration.

15. The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Muhammadan influence has been predominant, such as Upper India and the Carnatic, the expression wakf is used to express dedication.

16. But the Muhammadan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means, "the tying up of the property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings."

17. When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in Jewun Doss Sahoo v. Shah Kubeerooddeen (1840) 2 M.I.A., 390), that a dedication to pious or charitable purposes is meant, the right of the wakf is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the mutwalli, the governor, superintendent, or curator. In Jewun Doss Sahoo's case (1840) 2 M.I.A., 390, the Judicial Committee call him "procurator." It related to a Kankah, a Muhammadan institution analogous in many respects to a mutt where Hindu religious instruction is dispensed. The head of these Khankhas, which exist in large numbers in India, is called a sajjada-nashin. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary mutwalli. But neither the sajjada-nashin nor the mutwalli has any right in the property belonging to the wakf; the property is not vested in him, and he is not a "trustee" in the technical sense.

18. It was in view of this fundamental difference, between the judicial conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Muhammadan systems, that the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope the rules of law applicable to wakf and Hindu religious endowments. Section 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down:

> but nothing herein contained affects the rules of Muhammadan law as to wakf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments...

19. Section 3 of the Act gives a definition of the word "trust" in terms familiar to English lawyers. It says:

> A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trusts is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the instrument of trust.

20. In this connexion it may be observed that in Muhammad Rustam Ali Khan v.

Mushtaq Husain (1920) I.L.R., 42 All., 609 (P.C.); L.R., 47 I.A., 224 the dedication was of specific property created by an instrument called a "trustee-namah." Lord Buckmaster, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document.

> It is argued" said the noble Lord, "that 'the trustee-namah' must have dealt with an interest in immovable property for otherwise the trustees could have no right to maintain the suit; and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the wakf-nama in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The wakf-nama itself does not purport to assign property to trustees.

21. In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Muhammadan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX of 1863 was enacted; a system of committees was devised to which were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents"; rules were enacted to ensure proper management and to empower the superior Court in the district to take cognizance of allegations of misfeasance against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863, the Committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents."

22. Article 134 of Schedule I to the Indian Limitation Act (IX of 1908) is in these terms:

> To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration,

and the period prescribed for the institution of the suit is twelve years "from the date of transfer." In the old Act (XV of 1877) the words were "purchased from the trustee or mortgagee." The alteration was made with the object of including permanent leases in transactions of the character contemplated in the article;

23. Article 134 is, as pointed out in Abiram Goswami's case (1909) I.L.R., 36 Calc., 1003 (P.C.); L.R., 36 I.A., 148, controlled by Section 10 of the Limitation Act, which runs thus:

> Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof or for an account of such property or proceeds, shall be

barred by any length of time.

24. The language of Section 10 gives the clue to the meaning and applicability of Article 134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu law nor in the Muhammadan system is any property "conveyed" to a shebait or a mutwalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Muhammadan law, the moment a wakf is created all rights of property pass out of the wakf, and vest in God Almighty. The curator, whether called, mutwalli or sajjada-nashin, or by any other name, is merely a manager. He is certainly not a "trustee" as understood in the English system.

25. In Sammantha Pandara v. Sellapa Chetti (1879) I.L.R., 2 Mad., 175 the position of the superior in relation to the properties of the mutt was laid down in terms which have an important bearing on the present case. The learned Judges say there:

> The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his mattam, and debts, so contracted might be recovered from the mattam property and would devolve as a liability on his successor to the extent of the assets received by him.

26. The origin and nature of these mutts were again considered at great length in a case which arose in the same Court in 1886. In this case, Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran (1887) I.L.R., 10 Mad., 375, the learned Judges pronounced that the head of the institution held the matam under his charge, and its endowment in trust for the maintenance of the mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connexion therewith according to usage. An almost identical question came up for consideration in 1904 in Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami (1904) I.L.R., 27 Mad., 435 already referred to. In this case the learned Judges, after an elaborate examination of English institutions which they conceived to be analogous to Hindu mutts, came to the conclusion that whilst a dharmakarta of a temple, who has specific duties to perform, might be regarded as a trustee the superior of a mutt is not a trustee but a "life-tenant."

27. The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in Kailasam Pillai v. Nataraja Thambiran (1910) I.L.R., 33 Mad., 265 (F.B.). The learned Judges before whom the point arose considered that the view taken in Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami (1910) I.L.R., 33 Mad., 265 (F.B.) was in conflict with that propounded in the two earlier cases Sammantha Pandara v. Sellappn Chetti (1879) I.L.R., 2 Mad., 175 and Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran (1887) I.L.R., 10 Mad., 375 and referred the question to a Full Bench. The reference was in these terms:

> Does the head of a mutt hold the properties constituting its endowment as a life-tenant or as a trustee?

28. The Officiating Chief Justice expressed his opinion in the following terms:

> I think, then, that it cannot be predicated of the head of a mutt, as such, that he holds the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long-continued and well-established usage and custom of the institution in respect thereto.

29. Mr. Justice Wallis substantially agreed in this view.

30. Mr. Justice Sankaran Nayar pointed out that in the case of these mutts:

> Any surplus that remains in the hands of the Pandara Sannadhi, he is expected to utilize for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to anyone and he is not bound to utilize the surplus. He may leave it to accumulate.

31. And he further added:

> It is also true, in my opinion, that he is under a legal obligation to maintain the mutt, to support the disciples and to perform certain ceremonies which are indispensable. That will be only a charge on the income in his hands and does not show that the surplus is not at his disposal.

In the result, he was of opinion:

> that in the absence of any evidence to the contrary, the Pandara Sannadhi (the superior) as such, is not a trustee. He is not also a life-tenant for the reasons already stated.

32. All three Judges agreed in thinking that if. any specific property was specifically entrusted to the head for specific purposes he might be regarded a "trustee" with regard to that property; but that in the absence of any such evidence the superior was not a trustee in respect of any part of the endowment.

33. The point came up for discussion again in a concrete form in 1913 in Muthusamier v. Sree Sreemethanithi Swamier (1915) I.L.R., 38 Mad., 356, where the exact point for decision was the question of limitation. The facts which gave rise to the litigation were almost identical with the present case before their Lordships, with this difference, that the suit there was brought by the head of the mutt to recover possession of the leased properties.

34. Mr. Justice Miller states thus the question for determination:

> The principal question, a question which arises in both the Appeals, is whether the suit is barred by limitation. It is conceded for the appellants that the lease is in excess of the powers of the matathipathe, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890.

35. The learned Judges held in substance that there was no specific trust, that the properties were given or endowed generally for the performance of the worship of the

deities in the mutt and other attendant duties, and for the support of the superior and his disciples; that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term of office; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession.

36. These cases deal exclusively with the position of the superior of a mutt in relation to its endowment. But there are some others respecting the powers of the managers of religious institutions generally. In Mahomed v. Ganapati (1890) I.L.R., 13 Mad., 277, a lease was granted by the dharmakarta of a temple; and the suit to recover the leased lands was brought by his successor in office. The defence was limitation, running from the date of the alienation. Mr. Justice Shephard (Muttuswami Ayyar, J., concurring) held as follows:

> In the present case, though the plaintiff may in point of time have succeeded the dharmakarta who made the alienation, he does not derive his title from that dharmaharta and is, therefore, not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors [Papaya v. Ramana (1884) I.L.R., 7 Mad., 85, Jamal Saheb v. Murgeya Swami (1886) I.L.R., 10 Bom., 34, Modho Kooery v. Tekait Ram Chunder Singh (1883) I.L.R., 9 Calc., 11], and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885, the plaintiff's suit cannot be barred by limitation.

37. That was followed in Sathianama Bharati v. Saravanabagi Ammal (1895) I.L.R., 18 Mad., 266. In this case the superior is called the "manager."

38. In Chockalingam Pillai v. Mayandi Chettiar (1896) I.L.R., 19 Mad., 485 it was conceded that "the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation" But from the long lapse of time between the alienation and the challenge of its validity, coupled with other circumstances, the learned Judges came to the conclusion that necessity may reasonably be presumed.

39. From the above review of the general law relating to Hindu and Muhammadan pious institutions, it would prima facie follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

40. But the respondents rely on three decisions of the Indian Courts in support of their contention that persons holding properties generally for Hindu and Muhammadan religious purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in Dattagiri v. Dattatraya (1903) I.L.R., 27 Bom., 363. The facts of that case were peculiar. The mutt there was an old one and the dedication was recognized and confirmed by the Mahratta Government. The village was granted to a holy ascetic for the

maintenance of a charity attached to the mutt; the governance went by succession to the disciples of the guru (the spiritual preceptor or head). In 1871 the village was divided between two disciples, Shivgiri and Shankargiri, in equal moieties, and each held his half separately from the other. In the same year one of them, Shankargiri, sold the lands in dispute to the defendant. In 1897 Shankargiri obtained a sanad from Government under Act II of 1863 declaring him to be the absolute owner of his share. He died in August, 1897, after appointing the plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to alienate them as they were dedicated property. The defence was, firstly, that the sanad had altered the character of the property, and secondly, that the suit was barred. The lower appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the plaintiff's counsel on Second Appeal. He contended that as it was dedicated property its holders from time to time "could not allow the Government to treat it as private property." The learned Judges of the High Court refrained from deciding that point; and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say:

> On the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the mutt and as trustees therefore.

On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the mutt in relation to its property under the Hindu Law, custom and practice, was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words:

> We have then here a suit to recover possession of Immovable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration.

41. Conveyed in trust" is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. The learned Judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in St. Mary Magdalen, Oxford v. The Attorney-General (1857) 6 H.L. Cas., 189. With respect to it they say as follows:

> In farther support of this conclusion we would also refer to the already cited case of St. Maty Magdalen, Oxford v. The Attorney-General (1857) 6 H.L. Cas., 189 for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. We propose to refer to that case in some detail, as it probably is not within the reach of most mufassal Courts in this Presidency.

42. They set out the provisions of Sections 2, 24 and 25, of Will. IV, cap. 27, and then add:

> the Section (Section 25), it will be seen, corresponds more or less with our Articles 134 and 144 and Section 10 of the Limitation Act.

43. Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Muhammadan law was overlooked, and the case was decided on analogies drawn from

English law inapplicable in the main to Hindu and Muhammadan institutions. That case can hardly be treated as authority in the decision of the present controversy.

44. Narayan v. Shri Ramchandra (1903) I.L.R., 27 Bom., 373 only followed the view expressed in Dattagiri v. Dattatraya (1903) I.L.R., 27 Bom., 363. But the facts, when examined, show a marked difference in the legal position of the parties in the two cases. The mulgeni lease under which the defendant claimed title was granted in 1845, and the suit to set it aside was brought somewhere in 1899. Repeated attempts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably withdrawn. There was thus clear acquiescence on the part of successive managers in the validity of the transaction. The case fell within the principle of Chockalingam Pillai's case (1896) I.L.R., 19 Mad. 485 and might well have been decided without disturbance of Hindu Law or usage.

45. The second decision relied upon in support of the respondent's contention is Behari Lal v. Muhammad Muttaki (1898) I.L.R.,20 All., 482 (F.B.), which related to a Muhammadan "shrine." The origin and history of these "shrines" or durgahs, as they are called, is described compendiously in the judgment in Piran v. Abdool Karim (1892) I.L.R., 19 Calc., 203, 220, 222:

> The sajjada-nashin has certain spiritual functions to perform. He is not only a mutwali, but also a spiritual preceptor. He is the curator of the durgah where his ancestor is buried, and in him is supposed to continue the spiritual line (silsilla). As is well known, these durgahs are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established khankahs where they lived and their disciples congregated. Many of them never rose to the importance of a khankah, and when they died their mausolea became shrines or durgahs. These dervishes professed esoteric doctrines and distinct systems of initiation. . . . The preceptor is called the pir, the disciple the murid. On the death of the pir his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making murids, of imparting to them spiritual knowledge, is one of the functions which the sajjada-nashin performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. The head of the institution, like that of a khankah, is called a sajjada-nashin. The governance (towliat) of the endowment is in his hands; he is a mutwali, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is wakf 'tied up in the ownership of God.

46. The appointment of the sajjadanashin is regulated by usage and practice. This is referred to in the same judgment:

> Upon the death of the last incumbent, generally on the day of what is called the sium or teja ceremony (performed on the third day after his decease), the fakirs and murids of the durgah, assisted by the heads of neighbouring durgahs, install a competent person on the guddi; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent.

47. The duties in connexion with the "shrine," apart from giving spiritual instruction, consist in the due observance of the annual ceremonies at the tomb of the Saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet, and the performance of other rites and ceremonials prescribed either by the religious law or by usage and practice. Ordinarily speaking, the sajjadanashin has a larger right in the surplus income than a mutwali, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the mohant of a Hindu mutt, has full power of disposition over it.

48. In Behari Lal v. Muhammad Muttaki (1898) I.L.R., 20 All., 482 (F.B.), the plaintiff as sajjadanashin sued to set aside certain mortgages executed by his predecessor in office, and dated his cause of action from the time he was appointed as sajjadanashin. The learned Judges, on a misconception of the rules of the Muhammadan law and of the judgment of their Lordships in Jewun Doss Sahoo v. Shah Kubeer-ood-deen (1840) 2 M.I.A., 390, held that the sajjadanashin was a "trustee." One Judge held that the suit was barred either under Article 134 or Article 144; the two others held that Article 134 was applicable as the mortgages were created by a "trustee."

49. Their Lordships have to differ from this conclusion. In their opinion this case was not, in view of the considerations set forth above, correctly decided.

50. As regards the third case, Nilmony Singh v. Jagabandhu Roy (1896) I.L.R., 23 Calc., 536, the suit was brought by the plaintiff as the shebait of a Hindu idol to set aside a dur-mokurrai pottah, executed in respect of certain of the debottar lands by two ladies who acted as shebaits during his minority. He alleged that he became entitled to sue for possession of the alienated lands on his appointment to the office of shebait by a decree of the Court. The material defence was that the claim was barred. It should be observed that the dur-mokurrai was created in 1857 and the suit was brought after 1888. In the judgment of the High Court the words "shebait" and "trustee" are used as synonymous and convertible terms; the expression is always "shebait or trustee." Probably the fact that the shebait has duties and obligations in connexion with the dedication, influenced the employment of the word "trustee" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the learned Judge did not regard the shebait as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of Article 134 to the plaintiff's claim.

51. It is quite clear, however, that the legal position of a shebait is quite different from that of a trustee to whom specific properly is "conveyed" on a specific trust. In Prosunno Kumari Debya v. Golab Chand Baboo (1875) L.R., 2 I.A., 145; 14 B.L.R., 450, 458, where the question for determination was whether a particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir Montague E. Smith, in delivering the judgment of the Board, scrupulously avoided the use of the confusing word "trustee." Dealing with the powers of the shebait, he said as follows:

> But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the shebait of property dedicated to the worship of an idol, in his capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the

> existing necessity for incurring them. The authority of the shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Knight Bruce, L.J. It is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must, in the nature of things, be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them.

52. The identical question relating to the powers and position of a shebait was again before the Board in Abhiram Goswami's case (1909) I.L.R., 36 Calc., 1003 (P.C.); L.R., 36 I.A., 148 already referred to. With regard to the powers of the shebait, their Lordships say as follows:

> The second question is whether, this being so, the Mohant had power to grant a Mokarari Pottah of the Mouzah. It is well settled law that the power of the Mahant to alienate debottar property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity: Prosunno Kumari Debya v. Golab Chand Baboo (1875) L.R., 2 I.A., 145; 14 B.L.R., 450. In the case of Konwur Doorganath Roy v. Ram Chunder Sen (1876) L.R., 4 I.A., 52 a Mokarari Pottah of debottar lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of Maharanee Shibessouree Debia v. Mothooranath Acharjo (1869) 13 M.I.A., 270, 275., that apart from such necessity 'to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty' in the Mahant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the Pottah of 1860, which on the most favourable construction enured only for the lifetime of the grantor, Prananda, who died in 1891, or of the Pottah of 1896, which, at best, could only be deemed operative during the lifetime of Raghubananda, who died in 1900.

53. The question came up again for consideration by the Board in Palaniappa Chetty v. Sreemath Devasi kamony Pandara Sannadhi (1917) I.L.R., 40 Mad., 709 (P.C.); L.R., 44 I.A , 147, 155, 156. The suit was instituted by the head of a mutt to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the mutt, and had been granted by his predecessor to the defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution; that contention was overruled, and the decision proceeded on the basis that the shebait was only a manager. Lord Atkinson, delivering the judgment of the Board, further added:

> Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have, if the rent

were variable, of deriving benefit from the enhancement in value in the future of the lands leased.

54. In that case the leased lands were situated in the street of a village; here they are in the town of Madura.

55. Reverting then to the judgment in Nilmony Singh's case (1896) I.L.R., 23 Calc., 536 their Lordships think that the expression "trustees" was loosely and, speaking with respect, wrongly applied to the shebait in order to bring the case under Article 134. It is to be observed that in none of the three cases was there any examination of the laws and usages governing the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

56. In the present case the character of the endowment in relation to the superior is proved beyond contradiction. It has been found concurrently by both the Courts in India that the endowment was held by the defendant No. 26 for the general purposes of the institution. Considerable stress was laid on behalf of the respondents on the entry in the Inam register that the dedication was for a specific purpose, viz., the worship of the idol. The Inam proceedings did not create any dedication. They were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. The gifts were made, long before the Inam proceedings, by the Hindu kings or chiefs who then held the country. The purposes of the dedication must therefore be gathered from established usage and practice, and that has been found by the Courts in India. Again, "valuable consideration" forms the essence of both Section 10 of the Limitation Act and of Article 134 of the second Schedule. Even if this were a specific trust, which it is not, it would be ridiculous to hold that the rent reserved in the grant to the second plaintiff was "valuable consideration."

57. In the Courts below the plaintiffs rested their claim mainly, if not entirely, on Article 134. Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years' adverse possession under Article 144. That article declares that for a suit "for possession of Immovable property or any interest therein not hereby (i.e., by the schedule) otherwise specially provided for" the period of limitation is twelve years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could enure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity, which does not here arise) a Mahant is incompetent to create any interest in respect of the mutt property to enure beyond his life. With" regard to Mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death.

58. There is one other point which deserves notice. The administration of the second Mahant lasted until 1906. In 1905, however, the mutt went under the management of the Diwan of the Mysore State, under a power of attorney granted by the Mahant and his successor, who may conveniently be designated as Mahant No. 3. Certain persons,

to whom the second plaintiff had sub-leased the lands for ten years, thereupon obtained from the Diwan during the currency of their term a lease for seventeen years. It is a direct lease from the Diwan as holder of a power of attorney from Mahant No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the plaintiff in possession, but to eject these possessors, who hold under a title proceeding from the Diwan and Mahant No. 3, and to upset the act of administration of Mahant No. 3, on the ground of rights acquired adversely to the mutt by lapse of time during the incumbency of Mahant No. 2.

59. For the foregoing reasons their Lordships are of opinion that neither Article 134 nor Article 144 applies to this case: that the plaintiffs have acquired no title under either of those articles; that the judgment and decree of the High Court of Madras must therefore be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the appellate Court.

60. Their Lordships will humbly advise His Majesty accordingly.

MANU/SC/0393/1999

Equivalent Citation: AIR1999SC2131, (1999)5SCC50, [1999]3SCR442

IN THE SUPREME COURT OF INDIA

C. A. No. 107 of 1992

Decided On: 11.05.1999

Appellants: **Ram Jankijee Deities and Ors.**
Vs.
Respondent: **State of Bihar and Ors.**

Hon'ble Judges/Coram:
M. Jagannadha Rao and U.C. Banerjee, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: D. Goburdhan, Adv

For Respondents/Defendant: B.B. Singh, Adv., Jitendra Sharma, Adv., J. Ahmed, Adv. for P. Gaur, Adv. for Respondent Nos. 6 to 27

JUDGMENT

U.C. Banerjee, J.

1. The core question that falls for consideration in this appeal, by the grant of special leave, is whether a Deity being consecrated by performance of appropriate ceremonies having a visible image and residing in its abode is to be treated as a juridical person for the purpose of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962).

2. On a reference to the factual backdrop, the records depict, that one Mahanth Sukhram Das did execute two separate deeds of dedication in December, 1950, and duly registered under the Indian Registration Act, dedicating therein the landed properties to the deities 'Ram Janki Ji' (Appellant No. 1) and Thakur Raja (wrongly described in the records of the High Court as 'Raja Rani') (Appellant No. 2). Both the deities were separately given the landed property to the extent of 81.14 acres of land and in fact were put in possession through the shebaits. After however the death of the aforesaid Mahanth Sukhram Das, Petitioner No. 3 became the shebait of both the deities. The properties of the deities were also duly registered and enlisted with the Religious Trust Board and the same are under the control and guidance of the Board.

3. Be it noted that both 'Ram Janki Ji' and 'Raja Rani' (for convenience sake since the High Court referred to the deity as such in place and stead of Thakur Raja) are located in two separate temples situated within the area of the land.

4. On the basis of an Inquiry Report, the Deputy Collector in the matter of fixation of Ceiling Area by his order dated 18th November, 1976 in Ceiling Case No. 222/76-77 allowed two units to the Deities, on the ground that there are two temples to whom lands were gifted by means of separate registered deeds of Samarpan namas and declared only 5 acres, as excess land, to be vested on to the State. The Collector of the District however, came to a conclusion different to the effect that mere existence of two temples by itself can not be said to be a ground for entitlement of two separate units

under the Act, since the entire property donated to the two units are being managed by a committee formed under the direction of the Religious Trust Board and prior conferment of the managerial right to only one person and there being no evidence on record to show that the property donated to the deities are to be managed separately, having separate account, question of recommendation for exemption under Section 5 and entitlement of two units would not arise. As a matter of fact the Collector passed an order recording therein that the entitlement of the trust would be one unit only, The Revision Petition subsequent thereto however was rejected though on the ground of being hopelessly barred by the laws of limitation.

5. The records depict that against the order of the Member Board of Revenue, wherein the rights and contentions of the petitioners to hold two units for two separate deities were rejected, the petitioner moved the Patna High Court in Writ Petition 5020 of 1984 for quashing of the orders passed by the Collector and Member Board of Revenue. The record further depicts that the High Court on 19th November 1984 allowed the Writ Petition and granted the relief of two units as claimed by the petitioner. The judgment of the High Court became final and binding between the parties by reason of the factum of there being no appeal therefrom.

6. Subsequently however, after about two years a Writ Petition was filed before this Court under Article 32 of the Constitution being Civil Writ No. 52563 of 1985 (Badra Mahato v. State of Bihar) wherein one Badra Mahato prayed for issuance of a mandatory order as regards the allotment order in favour of the petitioner (the aforesaid Badra Mahato). This Court, however, remitted the matter to the High Court with a direction that the petition before this Court be treated as a Review Petition before High Court and be disposed of accordingly.

7. On 21st October, 1987 in terms of the direction of this Court the Division Bench of the High Court directed that the matter should be placed before the Division Bench on 23rd November 1987 subject to any part heard matter and on 25th November, 1987 as the chronology depicts the Review Petition was allowed and the order dated 19th November, 1984, was recalled. The matter was, however, directed to be listed before the appropriate Bench on 4th December, 1987. The matter was not however placed in the list or heard for over two years and finally the matter came up for hearing before the learned Single Judge who in turn has rejected the contention of the petitioner and hence the appeal before this Court.

8. Before proceeding with the matter any further, it would be convenient to note that while on a review of the order, the Division Bench of the High Court has been pleased to recall its earlier order dated 19th November, 1984, but the observations pertaining to the entitlement of two idols seems to be apposite. The High Court in its order dated 19th November, 1984 observed:

> **...**This aspect of the matter has been considered by a Bench of this Court in the case of Shri Lakshmi Narain and Ors. v. State of Bihar and Ors.(1978) BBCJ 489 where it has been pointed out that once endowment is separate in the name of separate deities the legal ownership under the endowment vests in idols; the matter would have been different if the endowment was to any Math in which there were two deities. From the order of the learned Collector itself it appears that the two endowments were made by name of the two deities on whose behalf claims have been made. It is settled by several pronouncements of the Judicial Committee that under the Hindu Law images of the deities are juristic entities with the capacity of receiving gift and holding property. As

> such, when the gift is directly to an idol, each idol or deity holds it in its own right to be managed either by separate managers or by a common manager.
>
> ....

9. It is on this score that Mr. Goburdhan, the learned Advocate appearing in support of the appeal very strongly criticised the judgment of the learned Single Judge both on the count of not being sustainable as per the provisions of Hindu law as also on the question of propriety.

10. Mr. Goburdhan contended that there is a Division Bench judgment recording therein the entitlement of the Appellants for exemption and judicial propriety requires one learned Single Judge to follow a binding precedent of an earlier Division Bench judgment from the same High Court and more so, in the same matter. The issue as a matter of fact according to Mr. Goburdhan was no longer res integra and open for further discussion but the learned Single Judge went on to decide the issue once again not withstanding the earlier finding as regards Idols' entitlement. We are constrained to record that we find some justification for such a criticism. It is true that the earlier Division Bench's order stands recalled and strictly speaking there may not be any necessity to refer to the same, but when there was an existing order of the Division Bench, judicial propriety demands that the learned Single Judge dealing with the matter ought to have referred to the same, more so when a contra view is being expressed by the learned Judge. It is a matter of judicial efficacy and propriety though not a mandatory requirement of law. 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.

11. 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 v. Pradyumna Kumar Mullick and Anr. LR 52 IA 245 observed:

> One of the questions emerging at this point, is as to 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.
>
> A useful narrative of the concrete realities of the position is to be found in the judgment of Mukerji J. in Rambrahma Chatterjee v. Kedar Nath Banerjee (1922) 36 CLJ 478, "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 flowers, 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, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."

The person founding a deity and becoming responsible for these duties is de facto and in common parlance called shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or - as in the case of Sudras, to which caste the parties belonged - by the employment of a Brahmin priest to do so on his behalf. Or the founder, any time before his death, or his successor likewise, may confer the office of shebait on another.

12. The only question that falls for consideration is whether 'Ram Jankiji' and 'Raja Rani' can be termed to be Hindu deities and separate juristic entities and it is on this score the learned Judge in the judgment under appeal observed:

...The image of the deity is to be found in Shastras. 'Raja Rani' is not known to Shastras. It is unknown in Hindu Pantheon. It is a particular image which is a juristic person. Idol is again an image of the deity. There cannot be a dedication to any name or image not recognised by the Shastras. Here, in the present case, the petitioners assert that the dedication is to both the deities 'Raja Rani' but none of these have been recognised by the Shastras.

11. The petitioners contended that the Raja Rani are the deities under the Hindu Pantheon. The Upanishads are the highest sacred books of the Hindus. It was admitted that in Kaushitaki-Brahamana-Upanishad, IInd Chapter 'sloka 1' as translated in Hindi by Pt. Sriram Sharma Acharya, in the book styled as '108 Upanishads', the following has been said:

> It is the statement of Rishi Kaushitaki that soul is God and the soul God is imagined as a king and the sound is his queen.

12. The above translation has been seriously challenged by the respondents-Parcha-holders.

It may be noticed that Pt. Sriram Sharma Acharya is not an authority on the subject .... .

13. We are afraid the entire approach of the learned Single Judge was on a total misappreciation of the principles of Hindu law.

14. Divergent are the views on the theme of images or idols in Hindu Law. One school propagates God having Sayambhu images or consecrated images: the other school lays down God as omnipotent and omniscient and the people only worship the eternal spirit of the deity and it is only the manifestation or the presence of the deity by reason of the charm of the mantras.

15. Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. The Padma Purana says: "the image of Hari (God) prepared of stone earth, wood, metal or the like and established according to the rites laid down in the Vedas, Smritis and Tantras is called the established images...where the self- possessed Vishnu has placed

himself on earth in stone or wood for the benefit of mankind, that is styled the self-revealed." (B.K. Mukherjea -Hindu Law of Religious and Charitable Trusts: 5th Edn.) A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a man-made image requires consecration. This man-made image may be painted on a wall or canvas. The Salgram Shila depicts Narayana being the Lord of the Lords and represents Vishnu Bhagwan. It is a Shila - the shalagram form partaking the form of Lord of the Lords Narayana and Vishnu.

16. It is further to be noticed that while usually an idol is consecrated in temple, it does not appear to be an essential condition. In this context reference may also be made to a decision of the Andhra Pradesh High Court in the case of Addangi Nageswara Rao v. Sri Ankamma Devatha Temple (1973) 1 A.W.R. 379. The High Court in paragraph 6 of the Report observed:

> **6.** The next question to be considered is whether there is a temple in existence. 'Temple as defined means a place by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship. That is the definition by the Legislature to the expression 'temple' in Act (II of 1927), Act (XIX of 1951) and Act (XVII of 1966). Varadachariar, J., sitting with Pandrang Row, J., in H.R.E. Board v. Narasimham MANU/TN/0029/1938 : AIR1939Mad134, construing the expression- 'a place of public religious worship' observed:
>
> > The test is not whether it conforms to any particular school of Agama Shastras. The question must be decided with reference to the view of the class of people who take part in the worship. If they believe in its religious efficacy, in the sense that by such worship they are making themselves the object of the bounty of some super-human power, it must be regarded as "religious worship".
> >
> > To the same effect was the view expressed by Viswanatha Sastry, J., in T.R.K. Ramaswami Sarvai and Anr. v. The Board of Commissioner for the Hindu Religious Endowments, Madras ILR (1950) Mad 799.
> >
> > The presence of an idol, though it is an invariable feature of Hindu temple, is not a legal requisite under the definition of a temple in Section 9(12) of the Act. If the public or that section of the public who go for worship consider that there is a divine presence in a particular place and that by offering worship there they are likely to be the recipients of the blessings of God, then we have the essential features of a temple as defined in the Act.
>
> A Division Bench of this Court consisting of Justice Satyanarayana Raju (as he then was) and Venkatesam, J., in Venkataramana Murthi v. Sri Rama Mandhiram (1964) 2 An. W.R. 457, observed that the existence of an idol and a Dhwajasthambham are not absolutely essential for making an institution a temple and so long as the test of public religious worship at that place is satisfied, it answers the definition of a temple.
>
> Their Lordships of the Supreme Court in P.F. Sadavarthy v. Commissioner, H.R. & C.E. MANU/SC/0354/1961 : AIR1963SC510 , held

> A religious institution will be a temple if two conditions are satisfied. One is that it is a place of public religious worship and the other is that it is dedicated to or is for the benefit of, or is used as of right by the Hindu Community, or any section thereof, as a place of religious worship.
>
> To constitute a temple it is enough if it is a place of public religious worship and if the people believe in its religious efficacy irrespective of the fact whether there is an idol or a structure or other paraphernalia. It is enough if the devotees or the pilgrims feel that there is some super human power which they should worship and invoke its blessings.

17. The observations of the Division Bench has been in our view true to the Shastras and we do lend our concurrence to the same. If the people believe in the temples' religious efficacy no other requirement exists as regards other areas and the learned Judge it seems has completely overlooked this aspect of Hindu Shastras - In any event, Hindus have in Shastras "Agni" Devta; "Vayu" Devta - these deities are shapeless and formless but for every ritual Hindus offer their oblations before the deity. The Ahuti to the deity is the ultimate - the learned Single Judge however was pleased not to put any reliance thereon. It is not a particular image which is a juridical person but it is a particular bent of mind which consecrate the image.

18. One cardinal principle underlying idol worship ought to be borne in mind:

> that whichever god the devotee might choose for purposes of worship and whatever image he might set up and consecrate with that object, the image represents the Supreme God and none else. There is no superiority or inferiority amongst the different gods. Siva, Vishnu, Ganapati or Surya is extolled, each in its turn as the creator, preserver and supreme lord of the universe. The image simply gives a name and form to the formless God and the orthodox Hindu idea is that conception of form is only for the benefit of the worshipper and nothing else.(B.K. Mukherjea - on Hindu Law of Religious and Charitable Trusts - 5th Edn.).

19. In this context reference may also be made to an earlier decision of the Calcutta High Court in the case of Bhupatinath v. Ramlal Maitra ILR 37 Cal 128, wherein Chatterjee, J. (at page 167) observed:

> A Hindu does not worship the "idol" or the material body made of clay or gold or other substance, as a mere glance at the mantras and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the mantras peculiar to a particular deity that causes the manifestation or presence of the deity or according to some, the gratification of the deity.

20. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. 'The Supreme Being has no attribute, which consists of pure spirit and which is without a second being, i.e. God is the only Being existing in reality, there is no other being in real existence excepting Him - (see in this context Golap Chandra Sarkar, Sastri's Hindu Law: 8th Edn.). It is the human concept of the Lord of the Lords - it is the human vision of the Lord of the Lords: How one sees the deity: how one feels the deity and recognises the deity and then

establishes the same in the temple upon however performance of the consecration ceremony. Shastras do provide as to how to consecrate and the usual ceremonies of Sankalpa and Utsarga shall have to be performed for proper and effective dedication of the property to a deity and in order to be termed as a juristic person. In the conception of Debutter, two essential ideas are required to be performed: In the first place, the property which is dedicated to the deity vests in an ideal sense in the deity itself as a juristic person and in the second place, the personality of the idol being linked up with natural personality of the shebait, being the manager or being the Dharam karta and who is entrusted with the custody of the idol and who is responsible otherwise for preservation of the property of the idol. The Deva Pratistha Tatwa of Raghunandan and Matsya and Devi Puranas though may not be uniform in its description as to how Pratistha or consecration of image does take place but it is customary that the image is first carried to the Snan Mandap and thereafter the founder utters the Sankalpa Mantra and upon completion thereof, the image is given bath with Holy water, Ghee, Dahi, Honey and Rose water and thereafter the oblation to the sacred fire by which the Pran Pratistha takes place and the eternal spirit is infused in that particular idol and the image is then taken to the temple itself and the same is thereafter formally dedicated to the deity. A simple piece of wood or stone may become the image or idol and divinity is attributed to the same. As noticed above, it is formless, shapeless but it is the human concept of a particular divine existence which gives it the shape, the size and the colour. While it is true that the learned Single Judge has quoted some eminent authors but in our view the same does not however, lend any assistance to the matter in issue and the Principles of Hindu Law seems to have been totally misread by the learned Single Judge.

21. On the factual score there are temples- In one there is 'Jankijee' and in the second there is 'Raja Rani' but by no stretch of imagination, the Deity can be termed to be in fake form and this concept of introduction of fake form, it appears is a misreading of the provisions of Hindu Law Texts. What is required is human consecration and in the event of fulfilment of rituals of consecration, Divinity is presumed: There cannot be any fake deity: whole concept of Hindu Law seems to have been misplaced by the High Court.

22. In more or less a similar situation Patna High Court in the case of Shri Lakshmi Narain and Ors. v. State of Bihar and Ors. (1978) BBCJ 489, observed:

> **5.** In this Court Mr. Balbhadra Pd. Singh, learned Counsel appearing in support of the application, strongly contended that the Revenue authorities have entirely misdirected themselves in allowing only one unit to the petitioners under an erroneous impression that they being installed in only one temple and there being only one document of endowment in their favour, they could not get more than one unit. Learned Counsel contended that as a matter of fact, all the four deities were entitled to separate units in their own rights, notwithstanding the fact that no specified properties were endowed to them separately and that the endowment was made in their favour jointly.
>
> **9.** On consideration of the facts of this case and the relevant position in point of law, I come to the conclusion that all the four petitioners are separate juristic entities, properties being endowed to them just like any other human being. Learned Counsel appearing for the respondents rightly conceded that had it been a gift to four individuals, they were entitled to four units separately each of them being a 'landholder' within the meaning of Clause (g) of Section 2 of the Act and entitled to a separate unit. If that be so, I do not see any reason for

taking a view that the position should be different as the beneficiaries in this case are idols. It could not be conceded that all the four petitioners would constitute one 'family' within the meaning of Section 2 (ee) of the Act. The definition of 'family' in Section 2 (ee) is as follows:

> 'Family' means and includes a person, his or her spouse and minor children.

Even applying the above rigid test laid down in the Act, the first two petitioners, namely, Shri Lakshmi Narain and Shri Mahabirji must be treated as separate units. And even assuming that the fourth petitioner, namely, Shri Parbatiji is considered to be a spouse of the third petitioner namely, Shri Shivajee, even then both these petitioners were entitled to one unit. In that view of the matter, the petitioners were entitled to at least three units, being in the same position of Hindu co-parceners and, therefore, separate 'land holder' or "families" in the eye of law. The petitioners had, however, claimed only two units before the Revenue authorities. It is, therefore, not possible to grant them any larger relief of more than two units. Their purpose also will be served if only two units are allowed to them as the surplus land declared in this case is a little over 20 acres only.

23. It is needless to point out that even though admittedly there are two idols, but the learned Single Judge thought it fit to ascribe one of them as fake, which in our view is wholly unwarranted an observation and the finding devoid of any merit whatsoever. Quotations from English Authors unfortunately are totally misplaced and the meaning misappreciated. The quotes are not appropriate and not apposite, as such we refrain ourselves from dilating thereon.

24. In the view as above, The factum of two idols cannot be denied and as such question of deprivation of another unit to the second idol does not and cannot arise. As regards the provisions of the statute, be it noted that there is no amount of controversy involved that in the event there are two idols capable of being ascribed of juridical personality, two units ought to be granted rather than one as has been effected by the learned Single Judge.

25. We thus feel "it expedient to record that petitioner Nos. 1 and 2 (or Thakur Raja as the case may be) are entitled to individual grant and thus entitlement for two units to be noted in the records of the Government and exemption of 75 acres Taal land only would be made available to the Petitioners and the balance 5 acres of land be made available to the Government and the State Government would be at liberty to deal with the above noted five acres of land in accordance with the law.

26. Since no other issue was raised before us. The appeal is allowed. The order of the High Court stands set aside and quashed. No order however as to costs.

MANU/SC/0136/1954

Equivalent Citation: AIR1954SC282, [1954]1SCR1005

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 38 of 1953

Decided On: 16.03.1954

Appellants:**The Commissioner, Hindu Religious Endowments, Madras**
Vs.
Respondent:**Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.**

Hon'ble Judges/Coram:
M.C. Mahajan, C.J., B.K. Mukherjea, Ghulam Hasan, N.H. Bhagwati, Sudhi Ranjan Das, T.L. Venkatarama Aiyyar and Vivian Bose, JJ.

Overruled / Reversed by:
State of HP v. Shivalik Agro Poly Products, MANU/SC/0751/2004 (2004) 8 SCC 556

JUDGMENT

B.K. Mukherjea, J.

1. This appeal is directed against a judgment of a Division Bench of the Madras High Court, dated the 13th of December, 1951, by which the learned Judges allowed a petition, presented by the respondent under article 226 of the Constitution, and directed a writ of prohibition to issue in his favour prohibiting the appellant from proceeding with the settlement of a scheme in connection with a Math, known as the Shirur Math, of which the petitioner happens to be the head or superior. It may be stated at the outset that the petition was filed at a time when the Madras Hindu Religious Endowments Act (Act II of 1927), was in force and the writ was prayed for against the Hindu Religious Endowment Board constituted under that Act, which was the predecessor in authority of the present appellant and had initiated proceedings for settlement of a scheme against the petitioner under section 61 of the said Act.

2. The petition was directed to be heard along with two other petitions of a similar nature relating to the temple at Chidambaram in the district of South Arcot and questions were raised in all of them regarding the validity of Madras Act II of 1927, hereinafter referred to as the Earlier Act. While the petitions were still pending, the Madras Hindu Religious and Charitable Endowments Act, 1951 (hereinafter called the New Act), was passed by the Madras Legislature and came into force on the 27th of August, 1951. In view of the Earlier Act being replaced by the new one, leave was given to all the petitioners to amend their petitions and challenge the validity of the New Act as well. Under section 103 of the New Act, notifications, orders and acts under the Earlier Act are to be treated as notifications, orders and acts issued, made or done by the appropriate authority under the corresponding provisions of the New Act, and in accordance with this provision, the Commissioner, Hindu Religious Endowments, Madras, who takes the place of the President, Hindu Religious Endowments Board under the Earlier Act, was added as a party to the proceedings.

3. So far as the present appeal is concerned, the material facts may be shortly narrated as follows : The Math, known as Shirur Math, of which the petitioner is the superior or Mathadhipati, is one of the eight Maths situated at Udipi in the district of South Kanara

and they are reputed to have been founded by Shri Madhwacharya, the well-known exponent of dualistic theism in the Hindu Religion. Besides these eight maths, each one of which is presided over by a Sanyasi or Swami, there exists another ancient religious institution at Udipi, known as Shri Krishna Devara Math, also established by Madhwacharya which is supposed to contain an image of God Krishna originally made by Arjun and miraculously obtained from a vessel wrecked at the coast of Tulava. There is no Mathadhipati in the Shri Krishna Math and its affairs are managed by the superiors of the other eight Maths by turns and the custom is that the Swami of each of these eight Math presides over the Shri Krishna Math in turn for a period of two years in every sixteen years. The appointed time of change in the headship of the Shri Krishna Math is the occasion of a great festival, known as Pariyayam, when a vast concourse of devotees gather at Udipi from all parts of Southern India, and an ancient usage imposes a duty upon the Mathadhipati to feed every Brahmin that comes to the place at that time.

4. The petitioner was installed as Mathadhipati in the year 1919, when he was still a minor, and he assumed management after coming of age some time in 1926. At that time the Math was heavily in debt. Between 1926 and 1930 the Swami succeeded in clearing off a large portion of the debt. In 1931, however, came the turn of his taking over management of the Shri Krishna Math and he had to incur debts to meet the heavy expenditure attendant on the Pariyayam ceremonies. The financial position improved to some extent during the years that followed, but troubles again arose in 1946, which was the year of the second Pariyayam of the Swami. Owing to scarcity and the high price of commodities at that time, the Swami had to borrow money to meet the expenditure and the debts mounted up to nearly a lakh of rupees. The Hindu Religious Endowment Board, functioning under the Earlier Act of 1927, intervened at this stage and in exercise of its powers under section 61-A of the Act called upon the Swami to appoint a competent manager to manage the affairs of the institution. The petitioner's case is that the action of the Board was instigated by one Lakshminarayana Rao, a lawyer of Udipi, who wanted to have control over the affairs of the Math. It appears that in pursuance of the direction of the Board, one Sripath Achar was appointed an agent and a Power of Attorney was executed in favour on the 24th of December, 1948. The agent, it is alleged by the petitioner, wanted to have his own way in all the affairs of the Math and paid no regard whatsoever to the wishes of the Mahant. He did not even submit accounts to the Mahant and deliberately flouted his authority. In this state of affairs the Swami, on the 26th of September, 1950, served a notice upon the agent terminating his agency and calling upon him to hand over to the Mathadhipati all account papers and vouchers relating to the institution together with the cash in hand. Far from complying with this demand, the agent, who was supported by the aforesaid Lakshminarayana Rao, questioned the authority of the Swami to cancel his agency and threatened that he would refer the matter for action to the Board. On the 4th of October, 1950, the petitioner filed a suit against the agent in the Sub-Court of South Kanara for recovery of the account books and other articles belonging to the Math, for rendering an account of the management and also for an injunction restraining the said agent from interfering with the affairs of the Math under colour of the authority conferred by the Power of Attorney which the plaintiff had canceled. The said Sripath Achar anticipating this suit filed an application to the Board on the 3rd of October, 1950, complaining against the cancellation of the Power of Attorney and his management of the Math. The Board on the 4th October, 1950, issued a notice to the Swami proposing to inquire into the matter on the 24th of October following at 2 p.m. at Madras and requesting the Swami either to appear in person or by a pleader. To this the Swami sent a reply on 21st October, 1950, stating that the subject-matter of the very enquiry was before the court in the original suit filed by him and as the matter was sub judice, the enquiry

should be put off. A copy of the plaint filed in that suit was also sent along with the reply. The Board, it appears, dropped that enquiry, but without waiting for the result of the suit, initiated proceedings suo motu under section 62 of the Earlier Act and issued a notice upon the Swami on the 6th of November, 1950, stating that it had reason to believe that the endowments of the said Math were being mismanaged and that a scheme should be framed for the administration of its affairs. The notice was served by officer on the Swami and the 8th of December, 1950, was fixed as the date of enquiry. On that date at the request of the counsel for the Swami, it was adjourned to the 21st of December, following. On the 8th of December, 1950, an application was filed on behalf of the Swami praying to the Board to issue a direction to the agent to hand over the account papers and other documents, without which it was not possible for him to file his objections. As the lawyer appearing for the Swami was unwell, the matter was again adjourned till the 10th of January, 1951. The Swami was not ready with his objections even on that date as his lawyer had not recovered from his illness and a telegram was sent to the Board on the previous day requesting the latter to grant a further adjournment. The Board did not accede to this request and as no explanation was filed by the Swami, the enquiry was closed and orders reserved upon it. On the 13th of January, 1951, the Swami, it appears, sent a written explanation to the Board, which the latter admittedly received on the 15th. On the 24th of January, 1951, the Swami received a notice from the Board stating inter alia that the Board was satisfied that in the interests of proper administration of the Math and its endowments, the settlement of a scheme was necessary. A draft scheme was sent along with the notice and if the petitioner had any objections to the same, he was required to send in his objections on or before the 11th of February, 1951, as the final order regarding the scheme would be made on the 15th of February 1951. On the 12th of February, 1951, the petitioner filed the petition, out of which this appeal arises, in the High Court of Madras, praying for a writ of prohibition to prohibit the Board from taking further steps in the matter of settling a scheme for the administration of the Math. It was alleged inter alia that the Board was actuated by bias against the petitioner and the action taken by it with regard to the settling of a scheme was not a bona fide act at all. The main contention, however, was that having regard to the fundamental rights guaranteed under the Constitution in matters of religion and religious institutions belonging to particular religious denominations, the law regulating the framing of a scheme interfering with the management of the Math and its affairs by the Mathadhipati conflicted with the provisions of articles 19(1)(f) and 26 of the Constitution and was hence void under article 13. It was alleged further that the provisions of the Act were discriminatory in their character and offended against article 15 of the Constitution. As has been stated already, after the New Act came into force, the petitioner was allowed to amend his petition and the attack was now directed against the constitutional validity of the New Act which replaced the earlier legislation.

5. The learned Judges, who heard the petition, went into the matter with elaborate fullness, both on the constitutional questions involved in it as well as on its merits. On the merits, it was held that in the circumstances of the case the action of the Board was a perverse exercise of its jurisdiction and that it should not be allowed to proceed in regard to the settlement of the scheme. On the constitutional issues raised in the case, the learned Judges pronounced quite a number of sections of the New Act to be ultra vires the Constitution by reason of their being in conflict with the fundamental rights of the petitioner guaranteed under articles 19(1)(f), 25, 26, and 27 of the Constitution. In the result, the rule nisi issued on the petition was made absolute and the Commissioner, Hindu Religious Endowments, Madras, was prohibited from proceeding further with the framing of a scheme in regard to the petitioner's Math. The Commissioner has now come up on appeal before us on the strength of a certificate

granted by the High Court under article 132(1) of the Constitution.

6. The learned Advocate-General for Madras, who appeared in support of the appeal, confined his arguments exclusively to the constitutional points involved in this case. Although he had put in an application to urge grounds other than the constitutional grounds, that application was not pressed and he did not challenge the findings of fact upon which the High Court based its decision on the merits of the petition. The position, therefore, is that the order of the High Court issuing the writ of prohibition against the appellant must stand irrespective of the decision which we might arrive at on the constitutional points raised before us.

7. It is not disputed that a State Legislature is competent to enact laws on the subject of religious and charitable endowments, which is covered by entry 28 of List III in Schedule VII of the Constitution. No question of legislative incompetency on the part of the Madras Legislature to enact the legislation in question has been raised before us with the exception of the provision relating to payment of annual contribution contained in section 76 of the impugned Act. The argument that has been advanced is, that the contribution is in reality a tax and not a fee and consequently the State Legislature had no authority to enact a provision of this character. We will deal with this point separately later on. All the other points canvassed before us relate to the constitutional validity or otherwise of the several provisions of the Act which have been held to be invalid by the High Court of Madras on grounds of their being in conflict with the fundamental rights guaranteed under articles 19(1)(f), 25, 26 and 27 of the Constitution. In order to appreciate the contentions that have been advanced on these heads by the learned counsel on both sides, it may be convenient to refer briefly to the scheme and the salient provisions of the Act.

8 . The object of the legislation, as indicated in the preamble, is to amend and consolidate the law relating to the administration and governance of Hindu religious and charitable institutions and endowments in the State of Madras. As compared with the Earlier Act, its scope is wider and it can be made applicable to purely charitable endowments by proper notification under section 3 of the Act. The Earlier Act provided for supervision of Hindu religious endowments through a statutory body known as the Madras Hindu Religious Endowments Board. The New Act has abolished this Board and the administration of religious and charitable institutions has been vested practically in a department of the Government, at the head of which is the Commissioner. The powers of the Commissioner and of the other authorities under him have been enumerated in Chapter II of the Act. Under the Commissioner are the Deputy Commissioners, Assistant Commissioners and Area Committees. The Commissioner, with the approval of the Government, has to divide the State into certain areas and each area is placed in charge of a Deputy Commissioner, to whom the powers of the Commissioners can be delegated. The State has also to be divided into a number of divisions and an Assistant Commissioner is to be placed in charge of each division. Below the Assistant Commissioner, there will be an Area Committee in charge of all the temples situated within a division or part of a division. Under section 18, the Commissioner is empowered to examine the records of any Deputy Commissioner, Assistant Commissioner, or Area Committee, or of any trustee not being the trustee of a Math, in respect of any proceeding under the Act, to satisfy himself as to the regularity, correctness, or propriety of any decision or order. Chapter III contains the general provisions relating to all religious institutions. Under section 20, the administration of religious endowments is placed under the general superintendence and control of the Commissioner and he is empowered to pass any orders which may be deemed necessary to ensure that such endowments are properly administered and their income

is duly appropriated for the purposes for which they were founded or exist. Section 21 gives the Commissioner, the Deputy and Assistant Commissioners and such other officers as may be authorised in this behalf, the power to enter the premises of any religious institution or any place of worship for the purpose of exercising or any power conferred, or discharging any duty imposed, by or under the Act. The only restriction is that the officer exerting the power must be a Hindu. Section 23 makes it obligatory on the trustee of a religious institution to obey all lawful orders issued under the provisions of this Act by the Government, the Commissioner, the Deputy Commissioner, the Area Committee or the Assistant Commissioner. Section 24 lays down that in the administration of the affairs of the institution, a trustee should use as much care as a man of ordinary prudence would use in the management of his own affairs. Section 25 deals with the preparation of registers of all religious institutions and section 26 provides for the annual verification of such registers. Section 27 imposes a duty on the trustee to furnish to the Commissioner such accounts, returns, reports and other information as the Commissioner may require. Under section 28, power is given to the Commissioner or any other office authorized by him to inspect all movable and immovable properties appertaining to a religious institution. Section 29 forbids alienation of all immovable properties belonging to the trust, except leases for a term not exceeding five years, without the sanction of the Commissioner. Section 30 lays down that although a trustee may incur expenditure for making arrangements for securing the health and comfort of pilgrims, worshipers and other people, when there is a surplus left after making adequate provision for purpose specified in section 79(2), he shall be guided in such matters by all general or special instructions which he may receive from the Commissioner or the Area Committee. Section 31 deals with surplus funds which the trustee may apply wholly or in part with the permission, in writing, of the Deputy Commissioner for any of the purpose specified in section 59(1). Chapter IV deals specifically with Maths. Section 52 enumerates the grounds on which a suit would lie to remove a trustee. Section 54 relates to what is called "dittam" or scale of expenditure. The trustee has got to submit to the Commissioner proposals for fixing the "dittam" and the amounts to be allotted to the various objects connected with the institution. The proposals are to be published and after receiving suggestions, if any, from persons interested in the institution, they would be scrutinised by the Commissioner. If the Commissioner thinks that a modification is necessary, he shall submit the case to the Government and the orders of the Government would be final. Section 55 empowers the trustee to spend at his discretion and for purposes connected with the Math the "Pathakanikas" or gifts made to him personally, but he is required to keep regular accounts of the receipts and expenditure of such personal gifts. Under section 56, the Commissioner is empowered to call upon the trustee to appoint a manager for the administration of the secular affairs of the institution and in default of such appointment, the Commissioner may make the appointment himself. Under section 58, a Deputy Commissioner is competent to frame a scheme for any religious institutions if he has reason to believe that in the interests of the proper administration of the trust any such scheme is necessary. Sub-section (3) of this section provides that a scheme settled for a Math may contain inter alia a provision for appointment of a paid executive office professing the Hindu religion, whose salary shall be paid out of the funds of the institution. Section 59 makes provision for application of the "by pass" doctrine when the specific objects of the trust fail. Chapter VI of the Act, which comprises sections 63 to 69, deals with the notification of religious institutions. A religious institution may be notified in accordance with the provisions laid down in this chapter. Such notification remains in force for five years and the effect of it is to take over the administration and vest it in an executive officer appointed by the Commissioner. Chapter VII deals with budgets, accounts and audit and Chapter VIII

relates to finance. Section 76 of Chapter VIII makes it compulsory for all religious institutions to pay annually to the Government a contribution not exceeding 5 per cent. of their income on account of the services rendered to them by the Government and their officers functioning under this Act. Chapter IX is not material for our purpose, and Chapter X deals with provisions of a miscellaneous nature. Section 89 in Chapter X prescribes the penalty for refusal by a trustee to comply with the provisions of the Act. Section 92 lays down that nothing contained in the Act shall be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination under clauses (a), (d) and (c) of article 26 of the Constitution. Section 99 vests a revisional jurisdiction in the Government to call for and examine the records of the Commissioner and other subordinate authorities to satisfy themselves as to the regularity and propriety of any proceeding taken or any order or decision made by then, in brief, are the provisions of the Act material for our present purpose.

9. The learned Judges of the High Court have taken the view that the respondent as Mathadhipati has certain well defined rights in the institution and its endowments which could be regarded as rights to property within the meaning of article 19(1)(f) of the Constitution. The provisions of the Act to the extent that they take away or unduly restrict the power to exercise these rights are not reasonable restrictions within the meaning of article 19(5) and must consequently be held invalid. The High Court has held in the second place that the respondent, as the head and representative of a religious institution, has a right guaranteed to him under article 25 of the Constitution to practice and propagate freely the religion of which he and his followers profess to be adherents. This right, in the opinion of the High Court, has been affected by some of the provisions of the Act. The High Court has held further that the Math in question is really an institution belonging to Sivalli Brahmins, who are a section of the followers of Madhwacharya and hence constitutes a religious denomination within the meaning of article 26 of the Constitution. This religious denomination has a fundamental right under article 26 to manage its own affairs in matters of religious through the Mathadhipati who is their spiritual head and superior, and those provisions of the Act, which substantially take away the rights of the Mathadhipati in this respect, amount to violation of the fundamental right guaranteed under article 26. Lastly, the High Court has held that the provision for compulsory contribution made in section 76 of the Act comes within the mischief of article 27 of the Constitution. This last point raises a wide issue and we propose to discuss it separately later on. So far as the other three points are concerned, we will have to examine first of all the general contentions that have been raised by the learned Attorney-General, who appeared for the Union of India as an intervener in this and other connected case, and the questions are raised are, whether these articles of the Constitution are at all available to the respondent in the present case and whether they give him any protection regarding the rights and privileges, of the infraction of which he complains.

10. As regards article 19(1)(f) of the Constitution, the question that requires consideration is, whether the respondent as Mathadhipati has a right to property in the legal sense, in the religious institution and its endowments which would enable him to claim the protection of this article ? A question is also formulated as to whether this article deals with concrete rights of property at all ? So far as article 25 of the Constitution is concerned, the point raised is, whether this article which, it is said, is intended to protect religious freedom only so far as individuals are concerned, can be invoked in favour of an institution or organisation ? With regard to article 26, the contention is that a Math does not come within the description of a religious denomination as provided for in the article and even if it does, what cannot be interfered with is its right to manage its own affairs in matters of religion only and

nothing else. It is said, that the word "religion", as used in this article, should be taken in its strict etymological sense as distinguished from any kind of secular activity which may be connected in some way with religion but does not form an essential part of it. Reference is made in this connection to clause (2)(a) of article 25 and clause (d) of article 26. We will take up these points for consideration one after another.

11. As regards the property rights of a Mathadhipati, it may not be possible to say in view of the pronouncements of the Judicial Committee, which have been accepted as good law in this country ever since 1921, that a Mathadhipati holds the Math property as a life-tenant or that his position is similar to that of a Hindu widow in respect to her husband's estate or of an English Bishop holding a benefice. He is certainly not a trustee in the strict sense. He may be, as the Privy Council (Vide Vidya Varuthi v. Batusami, 48 I.A. 302.) says, a manager or custodian of the institution who has to discharge the duties of a trustee and is answerable as such; but he is not a mere manager and it would not be right describe Mahantship as a mere office. A superior of a Math has not only duties to discharge in connection with the endowment but he has a personal interest of a beneficial character which is sanctioned by custom and is much larger than that of a Shebait in the debutter property. It was held by a Full Bench of the Calcutta High Court (Vide Monahai v. Bhupendra, 60 Cal. 452.), that Shebaitship itself is property, and this decision was approved of by the Judicial Committee in Ganesh v. Lal Behary (63 I.A. 448.), and again in Bhabatarini v. Ashalata (70 I.A. 57.). The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasis the proprietary element in the Shebaiti right and to show that though in some respects an anomaly, it was an anomaly to be accepted as having been admitted into Hindu law from an early date view was adopted in its entirety by this court in Angurbala v. Debabrata MANU/SC/0062/1951 : 1951 SCR 1125.) and what was said in that case in respect to Shebaiti right could, with equal propriety, be applied to the office of a Mahant. Thus in the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right. It is true that the Mahantship is not heritable like ordinary property, but that is because of its peculiar nature and the fact that the office is generally held by an ascetic, whose connection with his natural family being completely cut off, the ordinary rules of succession do not apply.

12. There is no reason why the word "property", as used in article 19(1)(f) of the Constitution, should not be given a liberal and wide connotation and should not be extended to those well recognised types of interest which have the insignia or characteristics of proprietary right. As said above, the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy his character as a Mahant altogether. It is true that the beneficial interest which he enjoys is appurtenant to his duties and as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interest of the public. But the restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and superior of spiritual fraternity and the purpose of Math is to encourage

and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to the disciples and followers of the Math and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the Mathadhipati down to the level of a servant under a State department. It is from this standpoint that the reasonableness of the restrictions should be judged.

13. A point was suggested by the learned Attorney-General that as article 19(1)(f) deals only with the natural rights inherent in a citizen to acquire, hold and dispose of property in the abstract without reference to rights to any particular property, it can be of no real assistance to the respondent in the present case and article 31 of the Constitution, which deals with deprivation of property, has no application here. In the case of The State of West Bengal v. Subodh Gopal Bose (MANU/SC/0018/1953 : 1954 S.C.R. 587.) (Civil Appeal No. 107 of 1952, decided by this court on the 17th December, 1953), an opinion was expressed by Patanjali Sastri C.J that article 19(1)(f) of the Constitution is concerned only with the abstract right and capacity to acquire, hold and dispose of property and that it has no relation to concrete property rights. This, it may be noted, was an expression of opinion by the learned Chief Justice alone and it was not the decision of the court; for out of the other four learned Judges who together with the Chief Justice constituted the Bench, two did not definitely agree with this view, while the remaining two did not express any opinion one way or the other. This point was not raised before us by the Advocate-General for Madras, who appeared in support of the appeal, nor by any of the other counsel appearing in this case. The learned Attorney-General himself stated candidly that he was not prepared to support the view taken by the late Chief Justice as mentioned above and he only raised the point to get an authoritative pronouncement upon it by the court. In our opinion, it would not be proper to express any final opinion upon the point in the present case when we had not the advantage of any arguments addressed to us upon it. We would prefer to proceed, as this court has proceeded all along, in dealing with similar cases in the past, on the footing that article 19(1)(f) applies equally to concrete as well as abstract rights of property.

14. We now come to article 25 which, as its language indicates, secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. A question is raised as to whether the word "person" here means individuals only or includes corporate bodies as well. The question, in our opinion, is not at all relevant for our present purpose. A Mathadhipati is certainly not a corporate body; he is the head of a spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. It is his duty to practice and propagate the religious tenants, of which he is an adherent and if any provision of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guarantied to every person under article 25. Institutions as such cannot practice or propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenants for which the institution stands is really immaterial for purposes of article 25. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlor meeting.

15. As regards article 26, the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford

Dictionary to mean "a collection of individuals classed together under same name : a religious sect or body having a common faith and organisation and designated by a distinctive name." It is well know that the practice of setting up Maths as centers of theological teaching was stated by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, - in many cases it is the name of the founder, - and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As article 26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article.

16. The other thing that remains to be considered by it regard to article 26 is, what is the scope of clause (b) of the article which speaks of management "of its own affairs in matters of religion ?" The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply. The question is, where is the line to be drawn between what are matters of religion and what are not ?

17. It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion.

The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the article applies.
What then are matters of religion ? The word "religion" has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case (Vide Davis v. Benson, 133 U.S. 333 at 342.), it has been said

> "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cults of form or worship of a particular sect, but is distinguishable from the latter."

We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) of the Constitution of Eire and we have great doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism

and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine of belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

18. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a relation and this is made clear by the use of the expression "practice of religion" in article 25. Latham C.J. of the High Court of Australian while dealing with the provision of section 116 of the Australian Constitution which inter alia forbids the Commonwealth to prohibit the "free exercise of any religion" made the following weighty observations (Vide Adelaide Company v. The Commonwealth 67 C.L.R. 116, 127.) :

> "It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."

19. These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under articles 25 and 26 on grounds of public order, morality and health. Clause (2)(a) of article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon clause (2)(a) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

20. The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.

If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b). What article 25(2)(a) contemplates is not regulation by the

State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as : Jehova's Witnesses." This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of "Jehova's Witnesses" incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them under the National Security Regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations (Vide Adelaide Company v. The Commonwealth, 67 C.L.R. 116.). These were undoubtedly political activities though arising out of religious belief entertained by a particular community. Such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery.

21. The court of America were at one time greatly agitated over the question of legality of a State regulation which required the pupils in public schools on pain of compulsion to participate in daily ceremony of saluting the national flag, while reciting in unison, a pledge of allegiance to it in a certain set formula. The question arose in Minersville School District, Board of Education, etc. v. Gobitis (310 U.S. 586.). In that case two small children, Lillian and William Gobitis, were expelled from the public school of Minersville, Pennsylvania, for refusing to salute the national flag as part of the daily exercise. The Gobitis family were affiliated with "Jehova's Witnesses" and had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by the scripture. The point for decision by the Supreme Court was whether the requirement of participation in such a ceremony exacted from a child, who refused upon sincere religious ground, infringed the liberty of religion guaranteed by the First and the Fourteenth Amendments ? The court held by a majority that it did not and that it was within the province of the legislature and the school authorities to adopt appropriate means to evoke and foster a sentiment of national unity amongst the children in public schools. The Supreme Court, however, changed their views on this identical point in the later case of West Virginia State Board of Education v. Barnette (319 U.S. 624.). There it was held overruling the earlier decision referred to above that the action of a State in making it compulsory for children in public schools to salute the flag and pledge allegiance constituted a violation of the First and the Fourteenth Amendments. This difference in judicial opinion brings out forcibly the difficult task which a court has to perform in cases of this type where the freedom or religious convictions genuinely entertained by men come into conflict with the proper political attitude which is expected from citizens in matters of unity and solidarity of the State organization.

22. As regards commercial activities, which are prompted by religious beliefs, we can cite the case of Murdock v. Pennsylvania (319 U.S. 105.). Here also the petitioners were "Jehova's Witnesses" and they went about from door to door in the city of Jeannette distributing literature and soliciting people to purchase certain religious books and pamphlets, all published by the Watch Tower Bible and Tract Society. A municipal ordinance required religious colporteurs to pay a licence tax as a condition to the pursuit of their activities. The petitioners were convicted and fined for violation of the ordinance. It was held that the ordinance in question was invalid under the Federal Constitution as constituting a denial of freedom of speech, press and religion; and it was held further that upon the facts of the case it could not be said that Jehova's Witnesses" were engaged in a commercial rather than in a religious venture. Here again, it may be pointed out that a contrary view was taken only a few years before in the case of Jones v. Opelika (316 U.S. 584.), and it was held that a city ordinance, which required that licence be procured and taxes paid for the business of selling books and pamphlets on the streets from house to house, was applicable to a member of a religious organisation who was engaged in selling the printed propaganda pamphlets without having complied with the provisions of the ordinance.

23. It is to be noted that both in the American as well as in the Australian Constitutions the right to freedom of religion has been declared in unrestricted terms without any limitation whatsoever. Limitations, therefore, have been introduced by courts of law in these countries on grounds of morality, order and social protection. An adjustment of the competing demands of the interests of Government and constitutional liberties is always a delicate and a difficult task and that is why we find difference of judicial opinion to such an extent in cases decided by the American courts where questions of religious freedom were involved. Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down.

Under article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under article 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of right guaranteed under clause (d) of article 26.

24. Having thus disposed of the general contentions that were raised in this appeal, we will proceed now to examine the specific grounds that have been urged by the parties

before us in regard to the decision of the High Court so far as it declared several sections of the new Act to be ultra vires the Constitution by reason of their conflicting with the fundamental rights of the respondent. The concluding portion of the judgment of the High Court where the learned Judges summed up their decision on this point stands as follows :

> "To sum up, we hold that the following sections are ultra vires the State Legislature in so far as they relate to this Math : and what we say will also equally apply to other Maths of a similar nature. The sections of the new Act are : sections 18, 20, 21, 25(4), section 26 (to the extent section 25(4) is made applicable), section 28 (though it sounds innocuous, it is liable to abuse as we have already pointed out earlier in the judgment), section 29, clause (2) of section 30, section 31, section 39(2), section 42, section 53 (because courts have ample powers to meet these contingencies), section 54, clause (2) of section 55, section 56, clause (3) of section 58, sections 63 to 69 in Chapter VI, clauses (2), (3) and (4) of section 70, section 76, section 89 and section 99 (to the extent it gives the Government virtually complete control over the Mathadhipati and Maths)."

25. It may be pointed out at the outset that the learned Judges were not right in including sections 18, 39(2) and 42 in this list, as these sections are not a applicable to Maths under the Act itself. This position has not been disputed by Mr. Somayya, who appears for the respondent.

26. Section 20 of the Act describes the powers of the Commissioner in respect to religious endowments and they include power to pass any orders that may be deemed necessary to ensure that such endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded. Having regard to the fact that the Mathadhipati occupies the position of a trustee with regard to the Math, which is a public institution, some amount of control or supervision over the due administration of the endowments and due appropriation of their funds is certainly necessary in the interest of the public and we do not think that the provision of this section by itself offends any fundamental right of the Mahant. We do not agree with the High Court that the result of this provisions would be to reduce the Mahant to the position of a servant. No doubt the Commissioner is invested with powers to pass orders, but orders can be passed only for the purposes specified in the section and not for interference with the rights of the Mahant as are sanctioned by usage or for lowering his position as the spiritual head of the institution. The saving provision contained in section 91 of the Act makes the position quite clear. An apprehension that the powers conferred by this section may be abused in individual cases does not make the provision itself had or invalid in law.

27. We agree, however, with the High Court in the view taken by it about section 21. This section empowers the Commissioner and his subordinate officers and also persons authorised by them to enter the premises of any religious institution or place of worship for the purpose of exercising any power conferred or any duty imposed by or under the Act. It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed. Section 21, it is to be noted, does not confine the right of entry to the outer

portion of the premises; it does not even exclude the inner sanctuary "the Holy of Holies" as it is said, the sanctity of which is zealously preserved. It does not say that the entry may be made after due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution. We think that as the section stands, it interferes with the fundamental rights of the Mathadhipati and the denomination of which he is head guaranteed under articles 25 and 26 of the Constitution. Our attention has been drawn in this connection to section 91 of the Act which, it is said, provides a sufficient safeguard against any abuse of power under section 21. We cannot agree with this contention. Clause (a) of section 91 excepts from the saving clause all express provisions of the Act within which the provision of section 21 would have to be included. Clause (b) again does not say anything about custom or usage obtaining in an institution and it does not indicate by whom and in what manner the question of interference with the religious and spiritual functions of the Math would be decided in case of any dispute arising regarding it. In our opinion, section 21 has been rightly held to be invalid.

28. Section 23 imposes a duty upon the trustees to obey all lawful orders issued by the Commissioner or any subordinate authority under the provisions of the Act. No exception can be taken to the section if those provisions of the Act, which offend against the fundamental rights of the respondent, are left out of account as being invalid. No body can make a grievance if he is directed to obey orders issued in pursuance of valid legal authority. The same reason would, in our opinion, apply to section 24. It may be mentioned here that sections 23 and 24 have not been specifically mentioned in the concluding portion of the judgment of the High Court set out above, though they have been attacked by the learned Judges in course of their discussion.

29. As regards section 25, the High Court has taken exception only to clause (4) of the section. If the preparation of registers for religious institutions is not wrong and does not affect the fundamental rights of the Mahant, one fails to see how the direction for addition to or alteration of entries in such registers, which clause (4) contemplates and which will be necessary as a result of enquiries made under clause (3), can, in any sense, be held to be invalid as infringing the fundamental rights of the Mahant. The enquiry that is contemplated by clauses (3) and (4) is an enquiry into the actual state of affairs, and the whole object of the section is to keep an accurate record of the particulars specified in it. We are unable, therefore, to agree with the view expressed by the learned Judges. For the same reasons, section 26, which provides for annual verification of the registers, cannot be held to be bad.

30. According to the High Court section 28 is itself innocuous. The mere possibility of its being abused is no ground for holding it to be invalid. As all endowed properties are ordinarily inalienable, we fail to see why the restrictions placed by section 29 upon alienation of endowed properties should be considered bad. In our opinion, the provision of clause (2) of section 29, which enables the Commissioner to impose conditions when he grants sanction to alienation of endowed property, is perfectly reasonable and to that no exception can be taken.

31. The provision of section 30(2) appears to us to be somewhat obscure. Clause (1) of the section enables a trustee to incur expenditure out of the funds in his charge after making adequate provision for the purposes referred to in section 70(2), for making arrangements for the health, safety and convenience of disciples, pilgrims, etc. Clause (2), however, says that in incurring expenditure under clause (1), the trustee shall be guided by such general or special instruction as the Commissioner or the Area Committee might give in that connection. If the trustee is to be guided but not fettered

by such directions, possibly no objection can be taken to this clause; but if he is bound to carry out such instructions, we do think that it constitutes an encroachment on his right. Under the law, as it stands, the Mahant has large powers of disposal over the surplus income and the only restriction is that he cannot spend anything out of it for his personal use unconnected with the dignity of his office. But as the purposes specified in sub-clauses (a) and (b) of section 30(1) are beneficial to the institution there seems to be no reason why the authority vested in the Mahant to spend the surplus income for such purposes should be taken away from him and he should be compelled to act in such matters under the instructions of the Government officers. We think that this is an unreasonable restriction on the Mahant's right of property which is blended with his office.

32. The same reason applies in our opinion to section 31 of the Act, the meaning of which also is far from clear. If after making adequate provision for the purposes referred to in section 70(2) and for the arrangements mentioned in section 30(2) there is still a surplus left with the trustee, section 31 enables him to spend it for the purposes specified in section 59(1) with the previous sanction of the Deputy Commissioner. One of the purposes mentioned in section 59(1) is the propagation of the religious tenants of the institution, and it is not understood why sanction of the Deputy Commissioner should be necessary for spending the surplus income for the propagation of the religious tenets of the order which is one of the primary duties of a Mahant to discharge. The next thing that strikes one is, whether sanction is necessary if the trustee wants to spend the money for purposes other than those specified in section 59(1) ? If the answer is in the negative, the whole object of the section becomes meaningless. If, on the other hand, the implication of the section is that the surplus can be spent only for the purposes specified in section 59(1) and that too with the permission of the Deputy Commission, it undoubtedly places a burdensome restriction upon the property rights of the Mahant which are sanctioned by usage and which would have the effect of impairing his dignity and efficiency as the head of the institution. We think that sections 30(2) and 31 have been rightly held to be invalid by the High Court.

33. Sections 39 and 42, as said already, are not applicable to Maths and hence can be left out of consideration. Section 53 has been condemned by the High Court merely on the ground that the court has ample jurisdiction to provide for the contingencies that this section is intended to meet. But that surely cannot prevent a competent legislature from legislating on the topic, provided it can do so without violating any of the fundamental rights guaranteed by the Constitution. We are unable to agree with the High Court on this point. There seems to be nothing wrong or unreasonable in section 54 of the Act which provides for fixing the standard scale of expenditure. The proposals for this purpose would have to be submitted by the trustee; they are then to be published and suggestions invited from persons having interest in the amendment. The commissioner is to scrutinise the original proposals and the suggestions received and if in his opinion a modification of the scale is necessary, he has to submit a report to the Government, whose decision will be final. This we consider to be quite a reasonable and salutary provision.

34. Section 55 deals with a Mahant's power over Pathakanikas or personal gifts. Ordinarily a Mahant has absolute power of disposal over such gifts, though if he dies without making any disposition, it is reckoned as the property of the Math and goes to the succeeding Mahant. The first clause of section 55 lays down that such Pathakanikas shall be spent only for the purposes of the Math. This is an unwarranted restriction on the property right of the Mahant. It may be that according to customs prevailing in a particular institution, such personal gifts are regarded as gifts to the institution itself

and the Mahant receives them only as the representative of the institution; but the general rule is otherwise. As section 55(1) does not say that this rule will apply only when there is a custom of that nature in a particular institution, we must say that the provision in this unrestricted form is an unreasonable encroachment upon the fundamental right of the Mahant. The same objection can be raised against clause (2) of the section; for if the Pathakanikas constitute the property of a Mahant, there is no justification for compelling him to keep accounts of the receipts and expenditure of such personal gifts. As said already, if the Mahant dies without disposing of these personal gifts, they may form part of the assets of the Math, but that is no reason for restricting the powers of the Mahant over these gifts so long as he is alive.

35. Section 56 has been rightly invalidated by the High Court. It makes provision of an extremely dramatic character. Power has been given to the Commissioner to require the trustee to appoint a manager for administration of the secular affairs of the institution and in case of default, the commissioner can make the appointment himself. The manager thus appointed though nominally a servant of the trustee, has practically to do everything according to the directions of the Commissioner and his subordinates. It is to be noted that this power can be exercised at the mere option of the Commissioner without any justifying necessity whatsoever and no pre-requisites like mismanagement of property or maladministration of trust funds are necessary to enable the trustee to exercise such drastic power. It is true that the section contemplates the appointment of a manager for administration of the secular affairs of this institution. But no rigid demarcation could be made as we have already said between the spiritual duties of the Mahant and his personal interest in the trust property. The effect of the section really is that the Commissioner is at liberty at any moment he chooses to deprive the Mahant of his right to administer the trust property even if there is no negligence or maladministration on his part. Such restriction would be opposed to the provision of article 26(d) of the Constitution. It would cripple his authority as Mahant altogether and reduce his position to that of an ordinary priest or paid servant.

36. We find nothing wrong in section 58 of the Act which relates to the framing of the scheme by the Deputy Commissioner. It is true that it is a Government officer and not the court who is given the power to settle the scheme, but we think that ample safeguards have been provided in the Act to rectify any error or unjust decision made by the Deputy Commissioner. Section 61 provides for an appeal to the Commissioner against the order of the Deputy Commissioner and there is a right of suit given to a party who is aggrieved by the order of the Commissioner with a further right of appeal to the High Court.

37. The objection urged against the provision of clause (3)(b) of section 58 does not appear to us to be of much substance. The executive officer mentioned in that clause could be nothing else but a manager of the properties of the Math, and he cannot possibly be empowered to exercise the functions of the Mathadhipati himself. In any event, the trustee would have his remedy against such order of the Deputy Commissioner by way of appeal to the Commissioner and also by way of suit as laid down in sections 61 and 62. Section 59 simply provides a scheme for the application of the cy pres doctrine in case the object of the trust fails either from the inception or by reason of subsequent events. Here again the only complaint that is raised is, that such order could be made by the Deputy Commissioner. We think that this objection has not much substance. In the first place, the various objects on which the trust funds could be spent are laid down in the section itself and the jurisdiction of the Deputy Commissioner is only to make a choice out of the several heads. Further an appeal has been provided from an order of the Deputy Commissioner under this section to the

Commissioner. We, therefore, cannot agree with the High Court that sections 58 and 59 of the Act are invalid.

38. Chapter VI of the Act, which contains sections 63 to 69, relates to notification of religious institutions. The provisions are extremely drastic in their character and the worst feature of it is that no access is allowed to the court to set aside an order of notification. The Advocate-General for Madras frankly stated that he could not support the legality of these provisions. We hold, therefore, in agreement with High Court that these sections should be held to be void.

39. Section 70 relates to the budget of religious institutions. Objection has been taken only to clause (3) which empowers the Commissioner and the Area Committee to make any additions to or alterations in the budget as they deem fit. A budget is indispensable in all public institutions and we do not think that it is per se unreasonable to provide for the budget of a religious institution being prepared under the supervision of the Commissioner or the Area Committee. It is to be noted that if the order is made by an Area Committee under clause (3), clause (4) provides an appeal against it to the Deputy Commissioner.

40. Section 89 provides for penalties for refusal by the trustee to comply with the provisions of the Act. If the objectionable portions of the Act are eliminated, the portion that remains will be perfectly valid and for violation of these valid provisions, penalties can legitimately be provided. Section 99 vests an overall revisional power in the Government. This, in our opinion, is beneficial to the trustee, for he will have an opportunity to approach the Government in case of any irregularity, error or omission made by the Commissioner or any other subordinate officer.

41. The only other point that requires consideration is the constitutional validity of section 76 of the Act which runs as follows :

> "76. (1) In respect of the services rendered by the Government and their officers, every religious institution shall, from the income derived by it, pay to the Government annually such contribution not exceeding five per cent. of its income as may be prescribed.
>
> (2) Every religious institution, the annual income of which for the fasli year immediately preceding as calculated for the purposes of the levy of contribution under sub-section (1), is not less than one thousand rupees, shall pay to the Government annually, for meeting the cost of auditing its accounts, such further sum not exceeding one and a half per centum of its income as the Commissioner may determine.
>
> (3) the annual payments referred to in sub-sections (1) and (2) shall be made, notwithstanding anything to the contrary contained in any scheme settled or deemed to be settled under this Act for the religious institution concerned.
>
> (4) The Government shall pay the salaries, allowances, pensions and other beneficial remuneration of the Commissioner, Deputy Commissioners, Assistant Commissioners and other officers and servants (other than executive officers of religious institutions) employed for the purposes of this Act and the other expenses incurred for such purposes, including the expenses of Area Committees and the cost of auditing the accounts of religious institutions."

42. Thus the section authorises the levy of an annual contribution on all religious

institutions, the maximum of which is fixed at 5 per cent. of the income derived by them. The Government is to frame rules for the purposes fixing rates within the permissible maximums and the section expressly states that the levy is in respect of the services rendered by the Government and its officers. The validity of the provision has been attacked on a two-fold ground : the first is, that the contribution is really a tax and as such it was beyond the legislative competence of the State Legislature to enact such provision. The other is, that the contribution being a tax or imposition, the proceeds of which are specifically appropriated for the maintenance of a particular religion or religious denomination, it comes within the mischief or article 27 of the Constitution and is hence void.

43. So far as the first ground is concerned, it is not disputed that the legislation in the present case is covered by entries 10 and 28 of List III in Schedule VII of the Constitution. If the contribution payable under section 76 of the Act is a "fee", it may come under entry 47 of the Concurrent List which deals with "fees" in respect of any of the matters included in that list. On the other hand, if it is a tax, as this particular tax has not been provided for in any specific entry in any of the three lists, it could come only under entry 97 of List or article 248(1) of the Constitution and in either view the Union Legislature alone would be competent to legislate upon it. On behalf of the appellant, the contention raised is that the contribution levied is a fee and not a tax and the learned Attorney-General, who appeared for the Union of India as intervener in this as well as in the other connected appeals, made a strenuous attempt to support this position. The point is certainly not free from doubt and requires careful consideration.

44. The learned Attorney-General has argued in the first place that our Constitution makes a clear distinction between taxes and fees. It is true, as he has pointed out, that there are a number of entries in List I of the Seventh Schedule which relate to taxes and duties of various sorts; whereas the last entry, namely entry 96, speaks of "fees" in respect of any of the matters dealt with in the list. Exactly the same is with regard to entries 46 to 62 in List II all of which relate to taxes and here again the last entry deals only with "fees" leviable in respect of the different matters specified in the list. It appears that articles 110 and 119 of the Constitution which deal with "Money Bills" lay down expressly that a bill will not be deemed to be a "Money Bill" by reason only that it provides for the imposition of fines.... or for the demand or payment of fees for licences or fees for services rendered, whereas a bill dealing with imposition or regulation of a tax will always be a Money Bill. Article 277 also mentions taxes, cesses and fees separately. It is not clear, however, whether the word "tax" as used in article 265 has not been used in the wider sense as including all other impositions like cesses and fees; and that at least seems to be the implication of clause (28) of article 366 which defines taxation as including the imposition of any tax or impost, whether general, local or special. It seems to us that though levying of fees is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists, it has given a power to the particular legislature to legislate on the imposition of fees in respect to every one of the items dealt with in the list itself. Some idea as to what fees are may be gathered from clause (2) of articles 110 and 119 referred to above which speak of fees for licences and for services rendered. The question for our consideration really is, what are the indices or special characteristics that distinguish a fee from a tax proper ? On this point we have been referred to several authorities by the learned counsel appearing for the different parties including opinions expressed by writers of recognised treatises on public finance.

45. A neat definition of what "tax" means has been given by Latham C.J. of the High

Court of Australia in Matthews v. Chicory Marketing Board (60 C.L.R. 263, 276.).

> "A tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered".not payment for services rendered

This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law (Vide Lower Mainland Dairy v. Orystal Dairy Ltd.1933 AC 168.). The send characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected form part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the taxpayer and the public authority (See Findlay Shirras on "Science of Public Finance", Vol. p. 203.). Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

46. Coming now to fees, a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay (Vide Lutz on "Public Finance" p. 215.). These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

47. As regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person has got to pay if he wants certain services from the Government; but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If a man wants a licence that is entirely his own choice and then only he has to pay the fees, but not otherwise. We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees. It is difficult, we think, to conceive of a tax except, it be something like a poll tax, the incidence of which falls on all person within a State. The house tax has to be paid only by those who own houses, the land tax by those who possess lands, municipal taxes or rates will fall on those who have properties within a municipality. Persons, who do not have houses, lands or properties within municipalities, would not have to pay these taxes, but nevertheless these impositions come within the category of taxes and nobody can say that it is a choice of these people to own lands or houses or specified kinds of properties, so that there is no compulsion on them to pay taxes at all. Compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent; and this element is present in taxes as well as in fees. Of course, in some cases whether a man would come within the category of a service receiver may be a matter of his choice, but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition. The distinction between a tax and a fee lies primarily in the fact that a tax is

levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest (Vide Findlay Shirras on "Science of Public Finance" Vol. I, p. 202.). Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action (Vide Seligman's Essays on Taxation, p. 408.).

48. If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services. As indicated in article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred. A most common illustration of this type of cases is furnished by the licence fees for motor vehicles. Here the costs incurred by the Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant (Vide Seligman's Essays on Taxation, p. 409.), and if the money paid by licence holders goes for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regard as a tax.

49. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes (Ibid, p. 406.).

50. Our Constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists with regard to various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included in it. The implication seems to be that fees have special reference to governmental action undertaken in respect to any of these matters.

51. Section 76 of the Madras Act speaks definitely of the contribution being levied in respect to the services rendered by the Government; so far it has the appearance of fees. It is true that religious institution do not want these services to be rendered to them and it may be that they do not consider the State interference to be a benefit at all. We agree, however, with the learned Attorney-General that in the present day concept of a State, it cannot be said that services could be rendered by the State only at the request of those who require these services. If in the larger interest of the public, a State considers it desirable that some special service should be done for certain people, the people must accept these services, whether willing or not (Vide Findlay Shirras on "Science of Public Finance" Vol. I, p. 202.). It may be noticed, however, that the

contribution that has been levied under section 76 of the Act has been made to depend upon the capacity of the payer and not upon the quantum of benefit that is supposed to be conferred on any particular religious institution. Further the institutions, which come under the lower income group and have income less than Rs. 1,000 annually, are excluded from the liability to pay the additional charges under clause (2) of the section. These are undoubtedly some of the characteristics of a 'tax' and the imposition bears a close analogy to income-tax. But the material fact which negatives the theory of fees in the present case is that the money raised by levy of the contribution is not ear-marked or specified for defraying the expenses that the Government has to incur in performing the services. All the collections go to the consolidated funds of the State and all the expenses have to be met not out of these collections but out of the general revenues by a proper method of appropriation as is done in case of other Government expenses. That in itself might not be conclusive, but in this case there is total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution under the provision of section 76 and in these circumstances the theory of a return or counter-payment or quid pro quo cannot have any possible application to this case. In our opinion, therefore, the High Court was right in holding that the contribution levied under section 76 is a tax and not a fee and consequently it was beyond the power of the State Legislature to enact this provision.

5 2 . In view of our decision on this point, the other ground hardly requires consideration. We will indicate, however, very briefly our opinion on the second point raised. The first contention, which has been raised by Mr. Nambiar in reference to article 27 of the Constitution is that the word "taxes", as used therein, is not confined to taxes proper but is inclusive of all other impositions like cesses, fees, etc. We do not think it necessary to decide this point in the present case, for in out opinion on the facts of the present case, the imposition, although it is a tax, does not come within the purview of the latter part of the article at all. What is forbidden by the article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision is obvious. Ours being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination. But the object of the contribution under section 76 of the Madras Act is not the fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered. It is a secular administration of the religious institutions that the legislature seeks to control and the object, as enunciated in the Act, is to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for the purposes for which they were founded or exist. There is no question of favouring any particular religion or religious denomination in such cases. In our opinion, article 27 of the Constitution is not attracted to the facts of the present case. The result, therefore, is that in our opinion sections 21, 30(2), 31, 56 and 63 to 69 are the only sections which should be declared invalid as conflicting with the fundamental rights of the respondent as Mathadhipati of the Math in question and section 76(1) is void as beyond the legislative competence of the Madras State Legislature. The rest of the Act is to be regarded as valid. The decision of the High Court will be modified to this extent, but as the judgment of the High Court is affirmed on its merits, the appeal will stand dismissed with costs to the respondent.

53. Appeal dismissed.

MANU/SC/0862/2002

Equivalent Citation: AIR2002SC3538, (2002)8SCC106, [2002]SUPP3SCR76

IN THE SUPREME COURT OF INDIA

Appeal (civil) 6965 of 1996

Decided On: 03.10.2002

Appellants: **N. Adithayan**
Vs.
Respondent: **The Travancore Devaswom Board and Ors.**

Hon'ble Judges/Coram:
S. Rajendra Babu and Doraiswamy Raju, JJ.

Counsels:
K. Rajendra Chowdhary, K. Sukumaran and R.F. Nariman, Sr. Advs., A. Raghunath, Anand Nandan, N.R. Shonker, Ramesh Babu, M.R., Roy Abraham, Himinder Lal, Krishnamurthi Swami, Kartika S. and Baby Krishnan, Advs. for the appearing parties

JUDGMENT

Doraiswamy Raju, J.

1 . The question that is sought to be raised in the appeal is as to whether the appointment of a person, who is not a Malayala Brahmin, as "Santhikaran" or Poojari (Priest) of the Temple in question - Kongorpilly Neerikode Siva Temple at Alangad Village in Ernakulam District, Kerala State, is violated of the constitutional and statutory rights of the appellant. A proper and effective answer to the same would involve several vital issues of great constitutional, social and public importance, having, to certain extent, religious overtones also.

2. The relevant facts, as disclosed from the pleadings, have to be noticed for a proper understanding and appreciation of the questions raised in this appeal. The appellant claims himself to be a Malayala Brahmin by community and a worshipper of the Siva Temple in question. The Administration of the Temple vests with Travancore Devaswom Board, a statutory body created under the Travancore Cochin Hindu Religious Institutions Act, 1950. One Shri K.K. Mahanan Poti was working as temporary Santhikaran at this Temple, but due to complaints with reference to his performance and conduct, his services were not regularized and came to be dispensed with by an order dated 6.8.1993. In his place, the third respondent, who figured at rank No. 31 in the list prepared on 28.4.1993, was ordered to be appointed as a regular Santhikaran and the Devaswom Commissioner also confirmed the same on 20.9.1993. The second respondent did not allow him to join in view of a letter said to have been received from the head of the Vazhaperambu Mana for the reason that the third respondent was a non-Brahmin. The Devaswom Commissioner replied that since under the rules regulating the appointment there is no restriction for the appointment of a non-Brahmin as a Santhikaran, the appointment was in order and directed the second respondent to allow him to join and perform his duties. Though, on 12.10.1993 the third respondent was permitted to join by an order passed on the same day, the appointment was stayed by a learned Single Judge of the Kerala High Court and one Sreenivasan Poti came to be engaged on duty basis to perform the duties of Santhikaran, pending further orders. The

main grievance and ground of challenge in the Writ Petition filed in the High Court was that the appointment of a non-Brahmin Santhikaran for the Temple question offends and violates the alleged long followed mandatory custom and usage of having only Malayala Brahmins for such jobs or performing poojas in the Temples and this denies the right of the worshippers to practice and profess their religion in accordance with its tenets and manage their religious affairs as secured under Articles 25 and 26 of the Constitution of India. The Thanthri of a Temple is stated to be the final authority in such matters and the appointment in question was not only without his consultation or approval but against his wish, too.

3. The Travancore Devaswom Board had formulated a Scheme and opened a Thanthra Vedantha School at Tiruvalla for the purpose of training Santhikarans and as per the said Scheme prepared by Swami Vyomakesananda and approved by the Board on 7.5.1969 the School was opened to impart training to students, irrespective of their caste/community. While having Swami Vyomakesananda as the Director - Late Thanthri Thazhman Kandarooru Sankaru and Thanthri Maheswara Bhattathiripad, Keezhukattu l am were committee members. On being duly and properly trained and on successfully completing the course, they were said to have been given 'Upanayanam' and 'Shodasa Karma' and permitted to wear the sacred thread. Consequently, from 1969 onwards persons, who were non-Brahmins but successfully passed out from the Vendantha School, were being appointed and the worshippers - Public had no grievance or grouse whatsoever. Instances of such appointments having been made regularly also have been disclosed. The third respondent was said to have been trained by some of the Kerala's leading Thanthris in performing archanas, conducting temple ritual, pooja and all other observances necessary for priesthood in a Temple in Kerala and elsewhere based on Thanthra system. Nothing was brought on record to substantiate the claim that only Malayala Brahmins would be 'Santhikaran' in respect of Siva Temple or in this particular Temple. In 1992 also, as has been the practice, the Board seems to have published a Notification inviting applications from eligible persons, who among other things possessed sufficient knowledge of the duties of Santhikaran with knowledge of Sanskrit also, for being selected for appointment as Santhikaran and inasmuch as there was no reservations for Brahmins, all eligible could and have actually applied. They were said to have been interviewed by the Committee of President and two Members of the Board, Devaswom Commissioner and a Thanthri viz., Thanthri Vamadevan Parameswaram Thatathiri and that the third respondent was one among the 54 selected out of 234 interviewed from out of 299 applicants. Acceptance of claims to confine appointment of Santhikarans in Temples or in this temple to Malayala Brahmins, would, according to the respondent-State, violate Articles 15 and 16 as well as 14 of the Constitution of India. As long as appointments of Santhikars were of persons well versed, fully qualified and trained in their duties and Manthras, Thanthras and necessary Vedas, irrespective of their case, Articles 25 and 26 cannot be said to have been infringed, according to the respondent-State.

4 . Mr. K. Rajendra Choudhary, learned Senior Counsel for the appellant, while reiterating the stand before the High Court, contended that only Namboodri Brahmins alone are to perform poojas or daily rituals by entering into the Sanctum Sanctorum of Temples in Kerala, particularly the Temple in question, and that has been the religious practice and usage all along and such a custom cannot be thrown over Board in the teeth of Articles 25 and 26, which fully protect and preserve them. Section 31 of the 1950 Act was relied upon for the same purpose. It was also contended for the appellant that merely because such a religious practice, which was observed from time immemorial, involve the appointment of a Santhikar or Priest, it would not become as secular aspect to be dealt with by the Devaswom Board dehors the wishes of the

worshippers and the decisions of the Thanthri of the Temple concerned. Strong reliance has also been placed upon the decisions of this Court reported in ***The Commissioner, Hindu Religious Endowments, Madras*** v. ***Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*** [MANU/SC/0136/1954 : [1954]1SCR1005];***Sri Venkataramana Devaru and Ors.*** v . ***The State of Mysore and Ors.*** [MANU/SC/0026/1957 : [1958]1SCR895]; ***Tilakayat Shri Govindlalji Maharaj*** v. ***The State of Rajasthan and Ors.*** MANU/SC/0028/1963 : [1964]1SCR561 and***Seshammal and Ors. Etc. Etc.*** v. ***State of Tamil Nadu*** MANU/SC/0631/1972 : [1972]3SCR815 , besides inviting our attention to ***A.S. Narayana Deekshitulu*** v . ***State of A.P. and Ors.*** MANU/SC/0455/1996 : [1996]3SCR543 : [1996]3SCR543 to claim that such a religious practice as claimed for the appellant became enforceable under Article 25(1) as also Section 31 of the 1950 Act.

5. Shri R.F. Nariman, learned Senior Counsel, contended that the appellant failed to properly plead or establish any usage as claimed and this being a disputed question of fact cannot be permitted to be agitated in the teeth of the specific finding of the Kerala High Court to the contrary. It was also urged that the rights and claims based upon Article 25 have to be viewed and appreciated in proper and correct perspective in the light of Articles 15, 16 and 17 of the Constitution of India and the provisions contained in The Protection of civil Rights Act, 1955, enacted pursuant to the constitutional mandate, which also not only prevents and prohibits but makes it an offence to practice 'untouchability' in any form. Accordingly, it is claimed that no exception could be taken to the decision of the Full Bench of the Kerala High Court in this case. Reliance has also been placed on the decisions reported in ***Mannalal Khetan Etc. Etc.*** v. ***Kedar Nath Khetain and Ors. Etc.*** MANU/SC/0060/1976 : [1977]2SCR190 : [1977]2SCR190 ; ***Bhuri Nath and Ors.*** v . ***State of J & K and Ors.*** MANU/SC/1077/1997 : [1997]1SCR138 and ***Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi, and Ors.*** v . ***State of U.P. and Ors.*** MANU/SC/1164/1997 : [1997]2SCR1086 : [1997]2SCR1086 , in addition to referring to the law declared in the earlier decisions of this Court on the scope of Articles 25 and 26 of the Constitution.

6. Shri K. Sukumaran, learned Senior Counsel, strongly tried to support the decision under appeal by placing reliance in addition to certain other decisions reported in ***Sastri Yagnapurushadji and Ors.*** v . ***Muldas Bhudardas Vaishya and Anr.*** MANU/SC/0040/1966 : [1966]3SCR242 : [1966]3SCR242 ;***Sri Jagannath Temple Puri Management Committee rep. Through its Administrator and Anr.*** v. ***Chintamani Khuntia and Ors.*** MANU/SC/1339/1997 : AIR1997SC3839 and***Acharya Jagdishwaranand Avadhuta and Ors.*** v. ***Commissioner of Police, Calcutta and Anr.*** MANU/SC/0050/1983 : 1983CriLJ1872 : 1983CriLJ1872 . The other learned counsel adopted one or other of the submissions of the learned Senior Counsel.

7. This Court in ***The Commissioner, Hindu Religious Endowments Madras*** v. ***Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*** MANU/SC/0136/1954 : [1954]1SCR1005 (known as Shirur Mutt's case) observed that Article 25 secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. It was also observed that what is protected is the propagation of belief, no matter whether the propagation takes place in a church or monastery or in a temple or parlor meeting. While elaborating the meaning of the words, "of its own affairs in matters of religion" in Article 26(b) it has been observed that in contrast to secular matters relating to administration of its property the religious denomination or organization enjoys complete autonomy in deciding as to

what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. In ***Sri Venkataramana Devaru and Ors.*** v. ***The State of Mysore and Ors.*** (MANU/SC/0026/1957 : [1958]1SCR895), it has been held that though Article 25(1) deals with rights of individuals, Article 25(2) is wider in its contents and has reference to rights of communities and controls both Articles 25(1) and 26(b) of the Constitution, thought the rights recognized by Article 25(2)(b) must necessarily be subject to some limitations or regulations and one such would be inherent in the process of harmonizing the right conferred by Article 25(2)(b) with that protected by Article 26(b).

8 . In ***Tilkayat Shri Govindlalji Maharaj*** v. ***The State of Rajasthan and Ors.*** MANU/SC/0028/1963 : [1964]1SCR561 : [1964]1SCR561 dealing with the nature anc extent of protection ensured under Articles 25(1) and 26(b), the distinction between a practice which is religious and one which is purely secular, it has been observed as follows:

> "In this connection, it cannot be ignored that what is protected under Articles 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Article 25(1) or Article 26(b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practise religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matters of religion, then, of course, the rights guaranteed by Article 25(1) and Article 26(b) cannot be contravened.
>
> It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Articles 25(1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Articles 25(1) and 26(b), Latham, C.J.'s observation in *Adelaide Company of Jehovah's witnesses Incorporated v. the Commonwealth* 67 C.L.R. 116, that "what is religion to one is superstition to another", on which Mr. Pathak relies, is of no relevance. If an obviously secular

matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Article 25(1) and 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not mattes of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Article 25(1) and 26(b). This aspect of the matter must be borne in mind in dealing with the true scope and effect of Article 25(1) and 26(b)."

9 . This Court, in ***Seshammal and Ors. Etc. Etc.*** v . ***State of Tamil Nadu*** MANU/SC/0631/1972 : [1972]3SCR815 : [1972]3SCR815 , again reviewed the principles underlying the protection engrafted in Articles 25 and 26 in the context of a challenge made to abolition of hereditary right of Archaka, and reiterated the position as hereunder:

"This Court in *Sardar Syadna Taher Saifuddin Saheb* v. *The State of Bombay*, [1962] Suppl. S.C.R. 496 (1) has summarized the position in law as follows (pages 531 and 532).

> "The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in the *Commissioner, Hindu Religious Endowments Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt,* 1964 S.C.R. 1005; *Mahant Jagannath Ramanuj Das* v. *The State of Orissa,* MANU/SC/0137/1954 : [1954]1SCR1046 , *Sri Venkatamona Devaru* v. *The State of Mysore,* 1952 S.C.R. 895; *Durgah Committee, Ajmer* v. *Syed Hussain Ali* , MANU/SC/0063/1961 : [1962]1SCR383 ; several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion."

Bearing these principles in mind, we have to approach the controversy in the present case."

10. It has also been held that compilation of treatises on construction of temples, installation of idols therein, rituals to be performed and conduct of worship therein, known as "Agamas" came to be made with the establishment of temples and the institution of Archakas, noticing at the same time the further fact that the authority of such Agamas came to be judicially recognized. It has been highlighted that "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." Thereafter for continuing the divine spirit, which is considered to have descended into the idol on consecration, daily periodical worship has to be made writ two-fold object to attract the lay worshippers

and also to preserve the image from pollution, defilement or desecration, which is believed to take place in ever so many ways. Delving further on the importance of rituals and Agamas it has been observed as follows:

> "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 Venkatacharlu and Ors., 73 Indian Appeals 156 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 measures 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 *Garbhangriha* 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 discipline 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 *Punahpratistha* (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 deities 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 an 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 authorized 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."

11. While repelling, in the same decision, the grievance that the innocent looking amendment brought the State right into the sanctum sanctorum, through the agency of Trustee and Archarka, this Court observed as hereunder:

"By the Amendment Act the principle of next-in-the-line of succession is abolished. Indeed it was the claim made in the statement of Objects and Reasons that the hereditary principle of appointment of office-holders in the temples should be abolished and that the office of an Archaka should be thrown open to all candidates trained in recognized institutions in priesthood irrespective of caste, creed or race. The trustee, so far as the amended Section 55 went, was authorized to appoint any body as an Archaka in any temple whether Saivite or Vaishnavite as long as he possessed a fitness certificate from one of the institutions referred to in Rule 12. Rule 12 was a rule made by the Government under the Principal Act. That rule is always capable of being varied or changed. It was also open to the Government to make no rule at all or to prescribe a fitness certificate issued by an institution which did not teach the Agamas or traditional rituals. The result would, therefore, be that any person, whether he is a Saivite or Vaishnavite or not, or whether he is proficient in the rituals appropriate to the temple or not, would be eligible for appointment as an Archaka and the trustee's discretion in appointing the Archaka without reference to personal and other qualifications of the Archaka would be unbridled. The trustee is to function under the control of the State, because under Section 87 of the Principal Act the trustee was bound to obey all lawful orders issued under the provisions of the Act by the Government, the Commissioner, the Deputy Commissioner or the Assistant Commissioner. It was submitted that the innocent looking amendment bought the State right into the sanctum sanctorum through the agency of the trustee and the Archaka.

It has been recognised for a long time that where the ritual in a temple cannot be performed except by a person belonging to a denomination, the purpose of worship will be defeated: See Mohan Lalji v. Gordhan Lalji Maharaj MANU/PR/0013/1913 . In that case the claimants to the temple and its worship were Brahmins and the daughter's some of the founder and his nearest heirs under the Hindu law. But their claim was rejected on the ground that the temple

was dedicated to the sect following the principles of Vallabh Archaya in whose temples only the Gossains of that sect could perform the rituals and ceremonies and, therefore, the claimants had no right either to the temple or to perform the worship. In view of the Amendment Act and its avowed object there was nothing, in the petitioner's submission, to prevent the Government from prescribing a standardized ritual in all temples ignoring the Agamic requirements, and Archakas being forced on temples from denominations unauthorized by the Agamas. Since such a departure, as already shown, would inevitably lead to the defilement of the image, the powers thus taken by the Government under the Amendment Act would lead to interference with religious freedom guaranteed under Articles 25 and 26 of the Constitution."

12. This Court repelled a challenge to the provisions in Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956, in ***Sastri Yagnapurushadji and Ors.*** v. ***Muldas Bhudardas Valshya and Anr.*** MANU/SC/0040/1966 : [1966]3SCR242 and quoted with approval the observation of Monier Williams (a reputed and recognized student of Indian sacred literature for more than forty years and played important role in explaining the religious thought and life in India) that "Hinduism is far more than a mere form of theism resting on Brahminism" and that "It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested and assimilated something from all creeds." This Court ultimately repelled the challenge, after adverting to the changes undergone in the social and religious outlook of the Hindu community as well as the fundamental change as a result of the message of social equality and justice proclaimed by the Constitution and the promise made in Article 17 to abolish "untouchability", observing that as long as the actual worship of the deity is allowed to be performed only by the authorized poojaris of the temple and not by all devotees permitted to enter the temple, there can be no grievance made.

13. In ***Bhuri Nath and Ors.*** v. ***State of J & K and Ors.*** (Supra), this Court while dealing with the validity of J & K Mata Vaishno Devi Shrine Act, 1988, and the abolition of the right of Baridars to receive share in the offerings made by pilgrims to Shri Mat Vaishno Devi, observed their right to perform pooja is only a customary right coming from generations which the State can and have by legislation abolished and that the rights seemed under Articles 25 and 26 are not absolute or unfettered but subject to legislation by the State limiting or regulating any activity, economic, financial, political or secular which are associated with the religious behalf, faith, practice or custom and that they are also subject to social reform by suitable legislation. It was also reiterated therein that though religious practices and performances of acts in pursuance of religious beliefs are, as much as, a part of religion, as further belief in a particular doctrine, that by itself is not conclusive or decisive and as to what are essential parts of religion or behalf or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question arise on the basis of materials-factual or legislative or historic if need be giving a go bye to claims based merely on supernaturalism or superstitious beliefs or actions and those which are not really, essentially or integrally matters of religion or religious belief or faith or religious practice.

14. A challenge made to U.P. Sri Kashi Vishwanath Temple Act, 1983 and a claim asserted by a group of Shaivites the exclusive right to conduct worship and manage the temple in question came to be repelled by this Court in ***Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors.*** v . ***State of U.P. and Ors.***

MANU/SC/1164/1997 : [1997]2SCR1086 : [1997]2SCR1086 . While taking note of the aim of the constitution to establish an egalitarian social order prescribing any discrimination on grounds of religion, race, caste, sect or sex alone by Articles 15 to 17 in particular, it was once again reiterated as hereunder:

> "28. The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to community life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his Cosmos/Creator and realize his spiritual self. Sometimes, practices religious or secular are inextricably mixed up. This is more particularly so in regard to Hindu religion because under the provisions of the ancient Smriti, human actions from birth to death and most of the individual actions from day-to-day are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One hinges upon constitutional religious model and another diametrically more on traditional point of view. The legitimacy of the true categories is required to be adjudged strictly within the parameters of the right of the individual and the legitimacy of the State for social progress, well-being and reforms, social intensification and national unity. Law is a tool of social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo has put it in his Judicial Process, life is not logic but experience. History and customs, utility and the accepted standards of right conduct are the forms which singly or in combination all be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be, thereby, impaired. There shall be symmetrical development with history or custom when history or custom has been the motive force or the chief one in giving shape to the existing rules and with logic or philosophy when the motive power has been theirs. One must get the knowledge just as the legislature gets it from experience and study and reflection in proof from life itself. All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. Though the performance of certain duties is part of religion and the person performing the duties is also part of the religion of religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is matter of religion or a secular management by the State. Whether the traditional practices are matters of religion or integral and essential part of the religion and religious practice protected by Articles 25 and 26 is the

question. And whether hereditary archaka is an essential and integral part of the Hindu religion is the crucial question.

29. Justice B.K. Mukherjea in his *Tagore Law Lectures on Hindu Law of Religious and Charitable Trust* at p. 1 observed:

> "The popular Hindu religion of modern times is not the same as the religion of the Vedas though the latter are still held to be the ultimate source and authority of all that is held sacred by the Hindus. In course of its development the Hindu religion did undergo several changes, which reacted on the social system and introduced corresponding changes in the social and religion institution. But whatever changes were brought about by time - and it cannot be disputed that they were sometimes of a revolutionary character - the fundamental moral and religious ideas of the Hindus which lie at the root of their religious and charitable institutions remained substantially the same; and the system that we see around us can be said to be an evolutionary product of the spirit and genius of the people passing through different phases of their cultural development."

15. As observed by this Court in ***Kailash Sonkar*** v . ***Smt. Maya Devi*** MANU/SC/0061/1983 : [1984]2SCR176 , in view of the categorical revelations made in Gita and the dream of the Father of the Nation Mahatma Gandhi that all distinctions based on castes and creed must be abolished and man must be known and recognized by his actions, irrespective of the caste to which he may on account of his birth belong, a positive step has been taken to achieve this in the Constitution and, in our view, the message conveyed thereby got engrafted in the form of Articles 14 to 27 and 21 of the Constitution of India, and paved way for the enactment of the Protection of civil Rights Act, 1955.

16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part-III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such rights of the State or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Article 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion,

came to be equally firmly laid down.

17. Where a Temple has been constructed and consecrated as per Agamas, it is considered necessary or perform the daily rituals, poojas and recitations as required to

maintain the sanctity of the idol and it is not that in respect of any and every Temple any such uniform rigour of rituals can be sought to be enforced, dehors its origin, the manner of construction or method of consecration. No doubt only a qualified person well versed and properly trained for the purpose alone can perform poojas in the Temple since he has not only to enter into the sanctum sanctorum but also touch the idol installed therein. It therefore goes without saying that what is required and expected of one to perform the rituals and conduct poojas is to know the rituals to be performed and mantras, as necessary, to be recited for the particular deity and the method of worship ordained or fixed therefore. For example, in Saivite Temples or Vaishnavite Temples, only a person who learnt the necessary rites and mantras conduce to be performed and recited in the respective Temples and appropriate to the worship of the particular deity could be engaged as an Archaka. If traditionally or conventionally, in any Temple, all along a Brahman alone was conducting poojas or performing the job of Santhikaran, it may not be because a person other than the Brahmam is prohibited from doing so because he is not a Brahman, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in public or private Temples. Consequently, there is no justification to insist that a Brahman or Malayala Brahman in this case, alone can perform the rites and rituals in the Temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long any one well versed and properly trained and qualified to perform the puja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a Court of Law. There has been no proper plea or sufficient proof also in this case of any specific custom or usage specially created by the Founder of the Temple or those who have the exclusive right to administer the affairs - religious or secular of the Temple in question, leave alone the legality, propriety and validity of the same in the changed legal position bought about by the Constitution and the law enacted by Parliament. The Temple also does not belong to any denominational category with any specialized form of worship peculiar to such denomination or to its credit. For the said reason, it becomes, in a sense, even unnecessary to pronounce upon the invalidity of any such practice being violative of the constitutional mandate contained in Article 14 to 17 and 21 of the Constitution of India.

18. In the present case, it is on record and to which we have also made specific reference to the details of facts showing that an Institution has been started to impart training to students joining the Institution in all relevant Vedic texts, rites, religious observances and modes of worship by engaging reputed scholars and Thanthris and the students, who ultimately pass through the tests, are being initiated by performing the investiture of sacred thread and gayatri. That apart, even among such qualified persons, selections based upon merit are made by the Committee, which includes among other scholars a reputed Thanthri also and the quality of candidate as well as the eligibility to perform the rites, religious observances and modes of worship are once again tested before appointment. While that be the position to insist that the person concerned should be a member of a particular caste born of particular parents of his caste can neither be said to be an insistence upon an essential religious practice, rite, ritual, observance or mode of worship nor any proper or sufficient basis for asserting such a claim has been made out either on facts or in law, in the case before us, also. The decision in Shirur Mutt's case (supra) and the subsequent decisions rendered by this

Court had to deal with the broad principles of law and the scope of the scheme of rights guaranteed under Articles 25 and 26 of the Constitution, in the peculiar context of the issues raised therein. The invalidation of a provision empowering the Commissioner and his subordinates as well as persons authorized by him to enter any religious institution or place of worship in any unregulated manner by even persons who are not connected with spiritual functions as being considered to violate rights secured under Articles 25 and 26 of the Constitution of India, cannot help the appellant to contend that even persons duly qualified can be prohibited on the ground that such person is not a Brahman by birth or pedigree. None of the earlier decisions rendered before Seshammal's case (supra) related to consideration of any rights based on caste origin and even Seshammal's case (supra) dealt with only the fact of rights claimed on the basis of hereditary succession. The attempted exercise by the learned Senior Counsel for the appellant to read into the decisions of this Court in Shirur Mutt's case (supra) and others something more than what it actually purports to lay down as if they lend support to assert or protect any and everything claimed as being part of the religious rituals, rites, observances and method of worship and make such claims immutable from any restriction or regulation based on the other provisions of the Constitution or the law enacted to implement such constitutional mandate, deserves only to be rejected as merely a superficial approach by purporting to deride what otherwise has to have really an overriding effect, in the scheme of rights declared and guaranteed under Part III of the Constitution of India. Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country.

19. For the reasons stated supra, no exception, in our view, could be taken to the conclusions arrived at by the Full Bench of the Kerala High Court and no interference is called for with the same, in our hands. The appeal consequently fails and shall stand dismissed. No costs.

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IN THE SUPREME COURT OF INDIA
CIVIL INHERENT/ORIGINAL JURISDICTION

REVIEW PETITION (CIVIL) No. 3358 OF 2018
IN
WRIT PETITION (CIVIL) No. 373 OF 2006

KANTARU RAJEEVARU ..... Petitioner

Versus

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

WITH

SLP(C) No. 18889/2012, W.P.(C) No. 286/2017, R.P.(C) No. 3359/2018 in W.P.(C) No. 373/2006, Diary No. 37946-2018, R.P.(C) No. 3469/2018 in W.P.(C) No. 373/2006, Diary No. 38135-2018, Diary No. 38136-2018, R.P.(C) No. 3449/2018 in W.P.(C) No. 373/2006, W.P.(C) No. 1285/2018, R.P.(C) No. 3470/2018 in W.P.(C) No. 373/2006, R.P.(C) No. 3380/2018 in W.P.(C) No. 373/2006, R.P.(C) No. 3379/2018 in W.P.(C) No. 373/2006, R.P.(C) No. 3444/2018 in W.P.(C) No. 373/2006, R.P.(C) No. 3462/2018 in W.P.(C) No. 373/2006, Diary No. 38764-2018, Diary No. 38769-2018, Diary No. 38907-2018, R.P.(C) No. 3377/2018 in W.P.(C) No. 373/2006, Diary No. 39023-2018,Diary No. 39135-2018,Diary No. 39248-2018, Diary No. 39258-2018, Diary No. 39317-2018, W.P.(C) No. 1323/2018, W.P.(C) No. 1305/2018, Diary No. 39642-2018, R.P.(C) No. 3381/2018 in W.P.(C) No. 373/2006, Diary No. 40056-2018, Diary No. 40191-2018, Diary No. 40405-2018, Diary No. 40570-2018, Diary No. 40681-2018, Diary No. 40713-2018, Diary No. 40840-2018, Diary No. 40885-2018, Diary No. 40887-2018, Diary No. 40888-2018,Diary No. 40898-2018, R.P.(C) No. 3457/2018 in W.P.(C) No. 373/2006, Diary No. 40910-2018, Diary No. 40924-2018, Diary No. 40929-2018,Diary No. 41005-2018, Diary No. 41091-2018, W.P.(C) No. 1339/2018, Diary No. 41264-2018, R.P.(C) No. 3473/2018 in W.P.(C) No. 373/2006, Diary No. 41395-2018, Diary No. 41586-2018, R.P.(C) No. 3480/2018 in W.P.(C) No. 373/2006, Diary No. 41896-2018, Diary No. 42085-2018,Diary No. 42264-2018, Diary No. 42337-2018, MA 3113/2018 in W.P.(C) No. 373/2006, Diary No. 44021-2018, Diary No. 44991-2018, Diary No. 46720-2018, Diary No. 47720-2018, Diary No. 2252-2019, R.P.(C) No. 345/2019 in W.P.(C) No. 373/2006, Diary No. 2998-2019, W.P.(C) No. 472/2019

O R D E R

We have heard the parties at length. For reasons to follow, we hold that this Court can refer questions of law to a larger bench in a Review Petition.

.....CJI.
[S.A. BOBDE]

.....J.
[R. BANUMATHI]

.....J.
[ASHOK BHUSHAN]

.....J.
[L. NAGESWARA RAO]

.....J.
[MOHAN M. SHANTANAGOUDAR]

.....J.
[S. ABDUL NAZEER]

.....J.
[R. SUBHASH REDDY]

.....J.
[B.R. GAVAI]

.....J.
[SURYA KANT]

NEW DELHI
FEBRUARY 10, 2020

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IN THE SUPREME COURT OF INDIA
CIVIL INHERENT/ORIGINAL JURISDICTION

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IN

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WITH

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O R D E R

The following issues are framed for consideration by this Court: -

1. What is the scope and ambit of right to freedom of religion under Article 25 of the Constitution of India?

2. What is the inter-play between the rights of persons under Article 25 of the Constitution of India and rights of religious denomination under Article 26 of the Constitution of India?

3. Whether the rights of a religious denomination under Article 26 of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health?

4. What is the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality?

5. What is the scope and extent of judicial review with regard to a religious practice as referred to in Article 25 of the Constitution of India?

6. What is the meaning of expression "Sections of Hindus" occurring in Article 25 (2) (b) of the Constitution of India?

7. Whether a person not belonging to a religious denomination or religious group can question a practice of that religious denomination or religious group by filing a PIL?

.....CJI
[S.A. BOBDE]

.....J.
[R. BANUMATHI]

471

.....J.
[ASHOK BHUSHAN]

.....J.
[L. NAGESWARA RAO]

.....J.
[MOHAN M. SHANTANAGOUDAR]

.....J.
[S. ABDUL NAZEER]

.....J.
[R. SUBHASH REDDY]

.....J.
[B.R. GAVAI]

.....J.
[SURYA KANT]

NEW DELHI
FEBRUARY 10, 2020

MANU/SC/0072/1962

Equivalent Citation: AIR1962SC853, [1962]Supp(2)SCR496

IN THE SUPREME COURT OF INDIA

Petition No. 128 of 1958

Decided On: 09.01.1962

Appellants: **Sardar Syedna Taher Saifuddin Saheb**
Vs.
Respondent: **The State of Bombay**

Hon'ble Judges/Coram:
B.P. Sinha, C.J., A.K. Sarkar, J.R. Mudholkar, K.C. Das Gupta and N. Rajagopala Ayyangar, JJ.

JUDGMENT

B.P. Sinha, C.J.

1. By this petition under Art. 32 of the Constitution, the petitioner, who is the 51st Dai-ul-Mutlaq and head of the Dawoodi Bohra Community, challenges the constitutionality of the Bombay Prevention of Excommunication Act, 1949 (Bombay Act XLII of 1949) (hereinafter referred to as the Act) on the ground that the provisions of the Act infringe Arts. 25 and 26 of the Constitution. The sole respondent in this case is the State of Bombay.

2. The petition is founded on the following allegations. The Dawoodi Bohra Community consists of Muslims of the Shia sect, holding in common with all members of that sect the belief that there is one God, that Mohammad is His Prophet to whom he revealed the Holy Koran; that Ali, the son-in-law of Mohammad, was the Wasi (executor) of the Prophet, and that the said Ali succeeded the Prophet by Nas-e-Jali. The Dawoodi Bohras believe that the said Ali was succeeded by a line of Imams, each of whom in turn was appointed by Nas-e-Jali by his immediate predecessor. The Shia sect itself became divided into two sub-sects, known respectively as Ismailis and Isna Asharia. The Dawoodi Bohras belong to the former sect, and believe that owing to persecution Imam Tyeb (the 21st Imam) went into seclusion and that an Iman from his line will appear, it being their belief that an Iman always exists although at times he may be invisible to his believers, while in seclusion; that owing to the impending seclusion of the 21st Imam (Imam Tyeb) his predecessor, the 20th Imam, directed his Hujjat (a dignitary ranking next to an Imam), one Hurra-tul-Malaka, to appoint a Dai, a Mazoon (a dignitary next to a Dai) and a Mukasir (a dignitary ranking next to a Mazoon) to carry on the Dawal (mission) of the Imam so long as the Imam should remain in seclusion, and to take and receive from the faithful an oath of allegiance. The Dais are known as Dai-ul-Mutlaq. The petitioner, as the Head Priest of the community of Dawoodi Bohras, is the vicegerent of Imam on Earth in seclusion. The petitioner is a citizen of India. As Dai-ul-Mutlaq and the vicegerent of Imam on Earth in seclusion, the Dai has not only civil powers as head of the sect and as trustee of the property, but also ecclesiastical powers as religious leader of the community. It is the right and privilege of the petitioner as Dai-ul-Mutlaq to regulate the exercise of religious rights in places where such rights and ceremonies are carried out and in which religious exercise are performed. In his capacity as the Dai-ul-Mutlaq, that is to say, as religious leader as

well as trustee of the property of the community, one of his duties is to manage the properties which are all under his directions and control. He has also the power of excommunication. This power of excommunication is not an absolute, arbitrary and untrammelled power, but has to be exercised according to the usage and tenets of the community. Save in exceptional circumstances, expulsion from the community can be effected only at a meeting of the Jamat, after the person concerned has been given due warning of the fault complained of and an opportunity of mending, after a public statement of the grounds of expulsion. The result of excommunication properly and legally effected involves exclusion from the exercise of religious rights in places under the trusteeship of the Dai-ul-Mutlaq. The petitioner claims that as the head of the Dawoodi Bohra community and as Dai-ul-Mutlaq, he has the right and power, in a proper case and subject to the conditions of legal exercise of that power, to excommunicate a member of the Dawoodi Bohra community, and this power of excommunication is an integral part of the religious faith and belief of the Dawoodi Bohra community. The petitioner further affirms that the exercise of the right of excommunication is a matter of religion, and that, in any event, the right is an incident of the management of the affairs of the Dawoodi Bohra community in matters of religion. He also asserts that the Dawoodi Bohra community constitutes a religious denomination within the meaning of Art. 26 of the Constitution; the said right of the petitioner of excommunicate a member of the community, for reasons of which the petitioner is the sole judge in the exercise of his position as the religious head, is a guaranteed right under Arts. 25 and 26 of the Constitution.

3. The Bombay Legislature enacted the Act, which came into force on November 1, 1949. The petitioner asserts that the Act violates his right and power, as Dai-ul-Mutlaq and religious leader of the Dawoodi Bohra community, to excommunicate such members of the community as he may think fit and proper to do; the said right of excommunication and the exercise of that right by the petitioner in the manner aforesaid are matters of religion within the meaning of Art. 26(b) of the Constitution. It is submitted by the petitioner that the said Act violates or infringes both the Arts. 25 and 26 of the Constitution, and to that extent, after the coming into force of the Constitution, has become void under Art. 13 of the Constitution. The petitioner claims that notwithstanding the provisions of the Act, he, as the religious leader and Dai-ul-Mutlaq of the community, is entitled to excommunicate any member of the Dawoodi Bohra community for an offence, which according to his religious sense justifies expulsion; and insofar as the Act interferes with the said right of the petitioner, it is ultra vires the Legislature. The Act is also challenged on the ground of legislative incompetence of the then Legislature of Bombay, inasmuch as it is contended that such a power is not contained in any of the entries in the Seventh Schedule of the Government of India Act, 1935.

4. One Tayebhai Moosaji Koicha (Mandivala) instituted a suit, being suit No. 1262 of 1949, in the High Court of Judicature at Bombay, praying inter alia, for a declaration that certain orders of excommunication passed by the petitioner against him prior to the enactment of the Act were void and illegal and of no effect, and that the plaintiff continued to remain a member of the Dawoodi Bohra community. The said suit was heard by J. C. Shah, J., who, by his judgment dated February 21, 1952, held that the Act was not inconsistent with Art. 26 of the Constitution, and was not ultra vires the Legislature of the Province of Bombay. The petitioner, being dissatisfied with the judgment of the learned Judge, preferred an appeal that came up for hearing before the Court of Appeal, composed of Chagla, C.J., and Bhagwati J. By its judgment dated August 26, 1952, the Court of Appeal upheld the judgment of the learned single Judge, though on different grounds. The petitioner obtained leave from the High Court to

appeal to this Court, and ultimately filed the appeal, being Civil Appeal No. 99 of 1954. During the pendency of the appeal, the plaintiff-respondent aforesaid died and an application made on behalf of his heirs for being brought on the record was not granted by the High Court of Bombay. This Court dismissed the said appeal on the ground that the plaintiff having died, the cause of action did not survive.

5 . The petitioner further alleges that parties inimical to him and to the Dawoodi Community have written scurrilous articles challenging and defying the position, power or authority of the petitioner as the religious head of the community; the challenge to the petitioner's position and his power to excommunicate as the head of the Dawoodi Bohra community is violative of the petitioner's guaranteed rights under Arts. 25 and 26 of the Constitution. It is, therefore, claimed that it is incumbent upon the respondent, in its public character, to forbear from enforcing the provisions of the Act against the petitioner. By the petitioner's attorney's letter, annexure B to the petition, dated July 18, 1958, the petitioner pointed out to the respondent the unconstitutionality of the Act and requested the latter to desist from enforcing the provisions of the Act against the petitioner or against the Dawoodi Bohra community. In the premises, a writ of Mandamus or a writ in the nature of Mandamus of other appropriate writ, direction or order under Art. 32 of the Constitution was prayed for against the respondent restraining it, its officers, servants and agents from enforcing the provisions of the Act.

6. The answer of the State of Bombay, the sole respondent, is contained in the affidavit sworn to by Shri V. N. Kalghatgi, Assistant Secretary to the Government of Bombay, Home Department, to the effect that the petitioner not having taken any proceedings to excommunicate any member of the community had no cause of action or right to institute the proceedings under Art. 32 of the Constitution; that it was not admitted that the Dai-ul-Mutlaq, as the head of the community, has civil powers, including the power to excommunicate any member of the community; that, alternatively, such power is not in conformity with the policy of the State, as defined in the Constitution; that the petitioner, as the head of the community may have the right to regulate religious rights at appropriate places and occasions, but those rights do not include the right to excommunicate any person and deprive him of his civil rights and privileges; and that, in any event, after the coming into effect of the impugned Act, the petitioner has no such rights of excommunication; that it was denied that the right to excommunicate springs from or has its foundation in religion and religious doctrines, tenets and faith of the Dawoodi Bohra community that, at any rate, it was denied that the right to excommunicate was an essential part of the religion of the community; that, alternatively, assuming that it was part of a religious practise, it runs counter to public order, morality and health. It was also asserted that the impugned Act was a valid piece of legislation enacted by a competent legislature and within the limits of Art. 25 and 26 of the Constitution; and that the right to manage its own affairs vested in a religious community is not an absolute or untrammelled right but subject to a regulation in the interest of public order, morality and health. It was denied that the alleged right of the petitioner to excommunicate a member of the community is guaranteed by Arts. 25 and 26 of the Constitution. In the premises, it was denied that the petitioner had any right to the declaration sought or the relief claimed that the provisions of the Act should not be enforced.

7. At a very late stage of the pendency of the proceedings in this Court, in April 1961, one Kurbanhusein Sanchawala of Bombay, made an application either for being added as a party to the Writ Petition or, alternatively, for being granted leave to intervene in the proceedings. In his petition for intervention, he stated that he was a citizen of India and was by birth a member of the Dawoodi Bohra community and as such had been

taking an active part in social activities for bettering the conditions of the members of the community. He asserted that members of the community accepted that up to the 46th Dai-ul-Mutlaq there was no controversy, that each one of them had been properly nominated and appointed, but that a controversy arose as regards the propriety and validity of the appointment of the 47th Dai-ul-Mutlaq, which controversy continued all along until the present time so that opinion is divided amongst the members of the Dawoodi Bohra community as to the validity of appointments and existence of Dai-ul-Mutlaq, from the 47th to the 51st Dai-ul-Mutlaq, including the present petitioner. The intervener also alleged that but for the impugned Act, the petitioner would have lost no time in excommunicating him. In the premises, he claims that he is not only a proper but necessary party to the Writ Petition. He, therefore, prayed to be added as a party-respondent, or, at any rate, granted leave to intervene at the hearing of the Writ Petition. We have to dispose of this petition because no orders have been passed until the hearing of the main case before us. In answer to the petitioner's claims, the intervener has raised the following grounds, namely, that the Holy Koran does not permit excommunication, which is against the spirit of Islam; that, in any event, the Dai-ul-Mutlaq had no right or power to excommunicate any member of the community, and alternatively, that such a right, assuming that it was there, was wholly "out of date in modern times and deserves to be abrogated and was rightly abrogated by the said Act." It was further asserted that the alleged right of excommunication was opposed to the universally accepted fundamentals of human rights as embodied in the "Universal Declaration of Human Rights." It was also asserted that the Act was passed by a competent legislature and was in consonance with the provisions of Arts. 25 and 26 of the Constitution. The intervener further claims that the rights to belief, faith and worship and the right to a decent burial were basic human rights and were wholly inconsistent with the right of excommunication claimed by the petitioner, and that the practise of excommunication is opposed to public order and morality; that the practise of excommunication was a secular activity associated with religious practise and that the abolition of the said practise is within the saving clause 2(a) of Art. 25 of the Constitution. It was also asserted that, under the Mohamadan Law, properties attached to institutions for religious and charitable purposes vested in the Almighty God and not in the petitioner, and that all the members of the Dawoodi Bohra community had the right to establish and maintain such institutions, in consonance with Art. 26 of the Constitution; that is to say that Art. 26 guarantees the right of the denomination as a whole and not an individual like the petitioner. It was also asserted that the provisions of the Act prohibiting excommunication was in furtherance of public order and morality and was just and reasonable restriction on a secular aspect of a religious practise. The petitioner challenged the right of the intervener either to intervene or to be added as the party-respondent. In his rejoinder to the petition for intervention, the petitioner further alleged that the practise of excommunication was essential to the purity of religious denominations because it could be secured only by removal of persons who were unsuitable for membership of the community. It was, therefore, asserted that those who did not accept the headship of the Dai-ul-Mutlaq, including the petitioner, must go out of the community and anyone openly defying the authority of the Dai-ul-Mutlaq was liable to be excommunicated from the membership of the community, entailing loss of rights and privileges belonging to such members. It was, therefore, claimed that the practise of excommunication was, and is, an essential and integral part of the religion and religious belief, faith and tenets of Dawoodi Bohra community, which have been guaranteed by Art. 26 of the Constitution.

8. It has been argued on behalf of the petitioner, in support of the petition, that the Dawoodi Bohra community, of which the petitioner is the religious head, as also a trustee in respect of the property belonging to the community, is a religious

denomination within the meaning of Art. 26 of the Constitution; that as such a religious denomination it is entitled to ensure its continuity by maintaining the bond of religious unity and discipline, which would secure the continued acceptance by its adherents of certain essential tenets, doctrines and practises; the right to such continuity involves the right to enforce discipline, if necessary by taking the extreme step of excommunication; that the petitioner as the religious head of the denomination is invested with certain powers, including the right to excommunicate dissidents, which power is a matter of religion within the meaning of Art. 26(b) of the Constitution that the impugned Act, insofar as it takes away the power to enforce religious discipline and thus compels the denomination to accept dissidents as having full rights as a member of the community, including the right to use the properties and funds of the community dedicated to religious use, violates the fundamental rights of the petitioner guaranteed under Art. 26. In this connection, reliance was placed on the decision of this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt MANU/SC/0136/1954 : [1954]1SCR1005 , which, it is contended, has laid down that the guarantee under the Constitution not only protects the freedom of opinion, but also acts done in pursuance of such religious opinion, and that it is the denomination itself which has a right to determine what are essential parts of its religion, as protected by the provisions of Arts. 25 and 26 of the Constitution. It was further contended that the right to worship in the mosque belonging to the community and of burial in the graveyard dedicated to the community were religious rights which could not be enjoyed by a person who has been rightly excommunicated. Insofar as the Act took away the right of the petitioner as the head of the community to excommunicate a particular member of the community and thus to deprive him of the use of the funds and property belonging to the community for religious purposes, had the effect of depriving the petitioner of his right as the religious head to regulate the right to the use of funds and property dedicated to religious uses of the community. It has also been contended that religious reform, if that is the intention of the impugned Act, is outside the ambit of Art. 25(2)(b) of the Constitution.

9. The learned Attorney-General for the respondent contended on the other hand, that the right to excommunicate, which has been rendered invalid by the impugned Act, was not a matter of religion within the meaning of Art. 26(b) of the Constitution; that what the Act really intended was to put a stop to the practise indulged in by a caste or a denomination to deprive its members of their civil rights as such members, as distinguished from matters of religion, which were without the protection of Art. 25 and 26. Alternatively, it was also argued that even assuming that excommunication was concerned with matters of religion, the Act would not be void because it was a matter of reform in the interest of public welfare. It was also argued that there was no evidence on the record to show that excommunication was an essential matter of religion. The right to worship at a particular place or the right of burial in a particular burial ground were questions of civil nature, a dispute in respect of which was within the cognizance of the Civil Courts. The legislation in question, in its real aspects, was a matter of social welfare and social reform and not within the prohibitions of Art. 25(1) or Art. 26. Excommunication involving deprivation of rights of worship or burial and the like were not matters of religion within the meaning of Art. 26(b), and finally, Art. 26(b) was controlled by Art. 25(2)(b) of the Constitution, and, therefore, even if excommunication touched certain religious matters, the Act, insofar as it had abolished it, was in consonance with modern notions of human dignity and individual liberty of action even in matters of religious opinion and faith and practice.

10. Shri Shroff, appearing for the intervener, attempted to reopen the question whether the petitioner as Dai-ul-Mutlaq, assuming that he had been properly elected as such,

had the power to excommunicate, in spite of the decision of their Lordships of the Judicial Committee of the Privy Council in Hasan Ali v. Mansoor AliI.L.R. [1947] IndAp 1. He also supported the provisions of the impugned Act on the ground that they were in furtherance of public order. As we are not here directly concerned with the question whether or not the petitioner as the head of the religious community had the power to excommunicate, we did not hear Mr. Shroff at any length with reference to that question. We shall proceed to determine the controversy in this case on the assumption that the petitioner had that power. We are only directly concerned with the questions whether the provisions of the Act, insofar as they have rendered invalid the practise of excommunication, are unconstitutional as infringing Art. 26(b), and enacted by a legislature which was not competent to do so, as contended on behalf of the petitioner. We will, therefore, confine our attention to those questions. Keeping in view the limited scope of the controversy, we have first to determine the ambit and effect of the impugned Act. The Bombay Prevention of Excommunication Act (Bombay Act XLII of 1949) is an Act to prohibit excommunication in the province of Bombay. Its preamble, which shortly states the background of the legislation, is in these terms :

> "Whereas it has come to the notice of Government that the practise prevailing in certain communities of excommunicating its members is often followed in a manner which results in the deprivation of legitimate rights and privileges of its members;
>
> And whereas in keeping with the spirit of changing times and the public interest it is expedient to stop, the practise; it is hereby enacted is follows:
>
> > The definition of "Community" as given in s. 2(a) would include the Dawoodi Bohra community, because admittedly its members are knit together by reason of certain common religious doctrines, and admittedly its members belong to the same religion or religious creed of a section of the Shia community of Muslims. The term "community" includes a caste or a sub-caste also. "Excommunication" has been defined by s. 2(b) as meaning "the expulsion of a person from any community of which he is member depriving him of rights and privileges which are legally enforceable by a suit of civil nature.....", and the explanation to the definition makes it clear that the rights and privileges within the meaning of the definition include the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such right depends entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community. By s. 3, excommunication of a member of a community has been declared to be invalid and of no effect, notwithstanding any law, custom or usage to the contrary. Any act of excommunication, or any act in furtherance of excommunication, of any member of a community has been made a penal offence liable to a punishment, on conviction, of fine which may extend to one thousand rupees. The explanation has made it clear that any person who has voted in favour of a decision of excommunication at a meeting of a body or an association of a particular denomination is deemed to have committed the offence made punishable by s. 4, as aforesaid. Sections 5 and 6 lay down the procedure for the trial of an offence under the Act, the limit of time within which the prosecution must be launched and the necessity of previous sanction of the authority indicated therein.

11. These, in short, are the provisions of the impugned Act. It will be noticed that the Act is a culmination of the history of social reform which began more than a century ago with the enactment of s. 9 of Regulation VII of 1832 of the Bengal Code, which provided, inter alia, that the laws of Hindus and Muslims shall not be permitted to operate to deprive the parties of any property to which, but for the operation of such laws, they would have been entitled. Those provisions were subsequently incorporated in the India Act (XXI of 1850) - known as the Caste Disabilities Removal Act - which provided that a person shall not be deprived of his rights or property by reason of his or her renouncing or exclusion from the communion of any religion or being deprived of caste, and that any such forfeiture shall not be enforced as the law in the Courts. The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others. The legislature had to take the logical final step of creating a new offence by laying down that nobody had the right to deprive others of their civil rights simply because the latter did not conform to a particular pattern of conduct. The Act, in substance, has added a new offence to the penal law of the country by penalising any action which has the effect of depriving a person of his human dignity and rights appurtenant thereto. It also adds to the provisions of the Criminal Procedure Code and has insisted upon the previous sanction of the prescribed authority as a condition precedent to launching a prosecution for an alleged offence against the provisions of the Act. In my opinion, therefore, the enactment, in pith and substance, would come within Entries 1 & 2 of List III of the Concurrent Legislative List of the Constitution Act of 1935. It is true that "excommunication" does not, in terms, figure as one of the entries in any one of the three lists. The legislative competence of the Bombay Legislature to enact the Act has not been seriously challenged before us, and, therefore, no particular argument was addressed to us to show that the legislation in question could not be within the purview of Entries 1 & 2 of List III aforesaid. What was seriously challenged before us was the constitutionality of the Act, in the light of the Constitution with particular reference to Arts. 25 & 26, and I shall presently deal with that aspect of the controversy. But before I do that, it is convenient to set out the background of the litigation culminating in the present proceedings.

12. The first reported case in relation to some aspects of Shia Imami Ismailis is that of the Advocate General ex relation Dave Muhammad v. Muhammad Husen Huseni(1875) 2 Bom. H.C.R. 323. That was a suit commenced before the coming into existence of the Bombay High Court, on the Equity Side of the late Supreme Court, instituted by an information and bill, filed by the relators and plaintiffs, representing a minority of the Khoja community, against the defendants representing the majority of that community. The prayer in the action was that an account be taken of all property belonging to or held in trust for the Khoja community of Bombay in the hands of the treasurer and the accountant, respectively called Mukhi and Kamaria, and other cognate reliefs not relevant to the present controversy. In that case, which was heard on the Original side by Arnould J., judgment was delivered in November 1866, after a prolonged hearing. In that case, the learned Judge went into a detailed history of the several sects amongst Muslims, including the Shia Imami Ismailis, with particular reference to the Aga Khan and his relation with the Jamat of the Khojas of Bombay. In that case it was laid down that there was no public property impressed with a trust, either express or implied, for the benefit of the whole Khoja community and that Aga Khan, as the spiritual head of the Khojas was entitled to determine on religious grounds who shall or shall not remain members of the Khoja community. In that case, the learned Judge, with reference to

authoritative texts, went into the detailed history of the two sects of the Sunnies and Shias. He discussed the origin of the Ismailis as an offshoot of the Shias, and traced the hereditary succession of the unrevealed Imams in unbroken line down to Agha Khan. Except for its historical aspect, the case does not deal with any matter relevant to the present controversy.

13. The next reported case which was brought to our notice is the case of the Advocate General of Bombay v. Yusufalli Ebrahim MANU/MH/0224/1921 : (1922)24BOMLR1060 . That was a case directly in relation to the Dawoodi Bohra community, with which was are concerned in this case. In that case, there was a dispute as regards a mosque and a tomb, and was heard by Marten J., on the Original side in 1921. We are not concerned with the details of the controversy in that case. But the learned Judge has noticed the history of this community, with particular reference to the position of the Dai-ul-Mutlaq, and how the differences between the majority of the community and the minority arose on the question of the regularity of the succession of the 47th Dai in 1840. The learned Judge has pointed out that the powers of the Dai are at least thrice delegated, namely, by God to Prophet Mohammad, by the latter to the Imam, and by the Imam to the Dai-ul-Mutlaq.

14. The more directly in point is the litigation which was concluded by the judgment of their Lordships of the Judicial Committee of the privy Council in the case of Hasanali v. Mansoorali I.L.R. [1947] IndAp 1. In that case, the powers of the Dai-ul-Mutlaq to excommunicate were directly in controversy. The petitioner was the first defendant in that action, which had been commenced in October, 1925, and was decided by the judgment of the Subordinate Judge of Burhanpur, dated January 2, 1931. That decision was reversed by the Judicial Commissioner of Central Provinces & Berar (later the High Court at Nagpur) by his judgment dated October 25, 1934. That judgment was taken on appeal to the Privy Council and the judgment of the Privy Council very succinctly traces the history of the Dawoodi Bohra community until we come to the 51st Dai, who was the first defendant in that action, and is the petitioner before us. In that case, certain orders of excommunication were under challenge. As a result of those orders of excommunication, the plaintiffs had been obstructed in, and prevented from, entering the property in suit for the purposes of worship, burial and resting in the rest house. In that case, their Lordship did not uphold the claim of the Dai-ul-Mutlaq that he had unrestricted power of excommunication, though they found that he could be regarded as Dai-ul-Mutlaq. As regards the power to excommunicate, it was held that though the power was there, it was not absolute, arbitrary and untrammelled; and then their Lordships laid down the conditions for the valid exercise of that power. The effect of a valid excommunication, in their Lordships' view, was exclusion from the exercise of religious rights in places under the trusteeship of the head of the community, because the Dai was not only a religious leader but also a trustee of the property of the community. After examining the evidence in that case, their Lordships held that the persons alleged to have been excommunicated had not been validly expelled from the community.

15. The judgment of the Privy Counsel was given on December 1, 1947. Within two years of that judgment the impugned Act was passed, and soon after a suit on the Original side of the Bombay High Court was commenced (being suit No. 1262 of 1949). That was a suit by a member of the Dawoodi Bohra community, who had been excommunicated by the petitioner, functioning as the Dai-ul-Mutlaq, by two orders of excommunication, one passed in 1934 and the other in 1948, soon after the judgment of the Privy Council. The suit was, inter alia, for a declaration that the orders of excommunication were void in view of the Act. A number of issues were raised at the

trial, which was heard by Shah J. Two questions, by way of preliminary issues, with which we are immediately concerned in the present proceedings, were raised before the learned Judge of the Bombay High Court, namely :

(1) Was the Act within the legislative competence of the Legislature of the Province of Bombay ?

(2) Whether after the coming into force of the Constitution, the Act was invalid in view of Arts. 25 and 26 of the Constitution ?

16. The learned Judge, after an elaborate examination of the Constitution Act of 1935, came to the conclusion that the Bombay Legislature was competent to enact the Act, and that it was not unconstitutional even after the coming into effect of the Constitution because it was not inconsistent with the provisions of Arts. 25 and 26. An appeal was taken to the Court of Appeal, which was heard by Chagla C.J. and Bhagwati J. The Court of Appeal upheld the decision of Shah J. The matter was brought up on appeal to this Court in Civil Appeal 99 of 1954. During the pendency of the appeal in this Court, the plaintiff died and it was held, without deciding the merits of the controversy, that the suit giving rise to the appeal in this Court had abated by reason of the fact that the plaintiff had died and the cause of action being personal to him was also dead. The Order of this Court dismissing the appeal as not maintainable is dated November 27, 1957.

17. This Writ Petition was filed on August 18, 1958 by the petitioner as the 51st Dai-ul-Mutlaq and head of the Dawoodi Bohra community for a declaration that the Act was void so far as the petitioner and the Dawoodi Bohra community were concerned, and that a writ of mandamus or a writ in the nature of mandamus or other appropriate writ, direction or order under Art. 32 of the Constitution be issued restraining the respondent, its officers, servants and agents from enforcing the provisions of the Act, against the petitioner or the Dawoodi Bohra community, or in any manner interfering with the right of the petitioner, as the religious leader and Dai-ul-Mutlaq of the Dawoodi Bohra community, to excommunicate any member of the community for an offence which the petitioner, in the exercise of his religious sense as the religious head of the community may determine as justifying such an expulsion.

18. It is not disputed that the petitioner is the head of the Dawoodi Bohra community or that the Dawoodi Bohra community is a religious denomination within the meaning of Art. 26 of the Constitution. It is not even disputed by the State, the only respondent in the case, that the petitioner as the head of the community had the right, as found by the Privy Council in the case of Hasanali v. Mansoorali I.L.R. (1947) IndAp 1, to excommunicate a particular member of the community for reasons and in the manner indicated in the judgment of their Lordships of the Privy Council. But what is contended is that, as a result of the enactment in question, excommunication has been completely banned by the Legislature, which was competent to do so, and that the ban in no way infringes Arts. 25 and 26 of the Constitution. I have already indicated my considered opinion that the Bombay Legislature was competent to enact the Act. It now remains to consider the main point in controversy, which was, as a matter of fact, the only point urged in support of the petition, namely, that the Act is void in so far as it is repugnant to the guaranteed rights under Arts. 25 and 26 of the Constitution. Art. 25 guarantees the right to every person, whether citizen or non-citizen, the freedom of conscience and the right freely to profess, practise and propagate religion. But this guaranteed right is not an absolute one. It is subject to (1) public order, morality and health, (2) the other provisions of Part III of the Constitution, (3) any existing law regulating or restricting

an economic, financial, political or other secular activity which may be associated with religious practise, (4) a law providing for social welfare and reform, and (5) any law that may be made by the State regulating or restricting the activities aforesaid or providing for social welfare and reform. I have omitted reference to the provisions of Explanations I and II and other parts of Art. 25 which are not material to our present purpose. It was noteworthy that the right guaranteed by Art. 25 is an individual right as distinguished from the right of an organised body like a religious denomination or any section thereof, dealt with by Art. 26. Hence, every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess, practise and propagate his religion, and everyone is guaranteed his freedom of conscience. The question naturally arises : Can an individual be compelled to have a particular belief on pain of a penalty, like excommunication ? One is entitled to believe or not to believe a particular tenet or to follow or not to follow a particular practise in matters of religion. No one can, therefore, be compelled, against his own judgment and belief, to hold any particular creed or follow a set of religious practises. The Constitution has left every person free in the matter of his relation to his Creator, if he believes in one. It is, thus, clear that a person is left completely free to worship God according to the dictates of his conscience, and that his right to worship as he pleased is unfettered so long as it does not come into conflict with any restraints, as aforesaid, imposed by the State in the interest of public order, etc. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs, by the State or by any other person. Thus, though his religious beliefs are entirely his own and his freedom to hold those beliefs is absolute, he has not the absolute right to act in any way he pleased in exercise of his religious beliefs. He has been guaranteed the right to practise and propagate his religion, subject to the limitations aforesaid. His right to practise his religion must also be subject to the criminal laws of the country, validly passed with reference to actions which the Legislature has declared to be of a penal character. Laws made by a competent legislature in the interest of public order and the like, restricting religious practises, would come within the regulating power of the State. For example, there may be religious practises of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practises. It must, therefore, be held that though the freedom of conscience is guaranteed to every individual so that he may hold any beliefs he likes, his actions in pursuance of those beliefs may be liable to restrictions in the interest of the community at large, as may be determined by common consent, that is to say, by a competent legislature. It was on such humanitarian grounds, and for the purpose of social reform, that so called religious practises like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a god to function as a devadasi, or of ostracising a person from all social contacts and religious communion on account of his having eaten forbidden food or taboo, we stopped by legislation.

19. But it has been contended on behalf of the petitioner that the right guaranteed, under Art. 25, to freedom of conscience and the freedom to profess, practise and propagate religion is available not only to an individual but to the community at large, acting through its religious head; the petitioner, as such a religious head has, therefore, the right to excommunicate, according to the tenets of his religion, any person who goes against the beliefs and practises connected with those beliefs. The right of the petitioner to excommunicate is, therefore, a fundamental right, which cannot be affected by the impugned Act. In this connection, reference was made to the following observations in the leading judgment of this Court, bearing upon the interpretations of

Arts. 25 and 26 (vide The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt) MANU/SC/0136/1954 : [1954]1SCR1005] :

> "A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.
>
> The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in Art. 25."

20. On the strength of those observations, it is contended on behalf of the petitioner that this practise of ex-communication is a part of the religion of the community with which we are concerned in the present controversy, Art. 26, in no uncertain terms, has guaranteed the right to every religious denomination or a section thereof "to manage its own affairs in matters of religion" (Art. 26(b)). Now what are matters of religion and what are not is not an easy question to decide. It must vary in each individual case according to the tenets of the religious denomination concerned. The expression "matters of religion" in Art 26(b) and "activities associated with religious practice" do not cover exactly the same ground. What are exactly matters of religion are completely outside State interference, subject of course to public order, morality and health. But activities associated with religious practices may have many ramifications and varieties - economic, financial, political and other - as recognised by Art. 25(2)(a). Such activities, as are contemplated by the clause aforesaid cover a field much wider than that covered by either Art. 25(1) or Art. 26(b). Those provisions have, therefore, to be so construed as to create no conflict between them. We have, therefore, to classify practices into such as are essentially and purely of a religious character, and those which are not essentially such. But it has been contended on behalf of the petitioner that it is for the religious denomination itself to determine what are essentially religious practises and what are not. In this connection, reliance is placed on the following observations of this Court in the leading case, aforesaid, of The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [1954] S.C.R. 1005 :

> "As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Art. 26(b), therefore, 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 they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."

21. It should be noted that the complete autonomy which a religious denomination enjoys under Art. 26(b) is in 'matters of religion', which has been interpreted as including rites and ceremonies which are essential according to the tenets of the religion. Now, Art. 26(b) itself would seem to indicate that a religious denomination has to deal not only with matters of religion, but other matters connected with religion, like laying down rules and regulations for the conduct of its members and the penalties attached to infringement of those rules, managing property owned and possessed by the religious community, etc., etc. We have therefore, to draw a line of demarcation between practises consisting of rites and ceremonies connected with the particular kind

of worship, which is the tenet of the religious community, and practises in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion. In this connection, the following observations of this Court in The Durgah Committee, Ajmer v. Syed Hussain Ali MANU/SC/0063/1961 : [1962]1SCR383 which were made with reference to the earlier decisions of this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt MANU/SC/0136/1954 : [1954]1SCR1005 and in Sri Venkataramana Devaru v. The State of Mysore MANU/SC/0026/1957 : [1958]1SCR895 , that "matters of religion" in Art. 26(b) include even practises which are regarded by the community as part of its religion, may be noted :

> "Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practises in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practises which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practises within the meaning of Art. 26. Similarly, even practises though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practises are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practises as are an essential and integral part of it and no other."

22. But then it is contended that a religious denomination is a quasi-personality, which has to ensure its continuity and has, therefore, to lay down rules for observance by members of its community, and, in order to maintain proper and strict discipline, has to lay down sanctions; the right to excommunicate a recusant member is an illustration of that sanction. In this connection, it was contended that the Privy Council had laid down in the case of Hasanali v. Mansoorali I.L.R. [1947] IndAp 1, that the power of excommunication was a religious power exercisable by the Dai. In my opinion, those passages in the judgment of the Privy Council do not establish the proposition that the right which the Privy Council found inhered in the Dai was a purely religious right. That it was not a purely religious right becomes clear from the judgment of the Judicial Committee of the Privy Council, which laid down the appropriate procedure and the manner of expulsion, which had to be according to justice, equity and good conscience, and that it was justiciable. A matter which is purely religious could not come within the purview of the Courts. That conclusion is further strengthened by the consideration that the effect of the excommunication or expulsion from the community is that the expelled person is excluded from the exercise of rights in connection not only with places of worship but also from burying the dead in the community burial ground and other rights to property belonging to the community, which are all disputes of a civil nature and are not purely religious matters. In the case before their Lordships of the Privy Council, their Lordships enquired into the regularity of the proceedings resulting in the excommunication challenged in that case, and they held that the plaintiff had not been validity expelled. It cannot, therefore, be asserted that the Privy Council held the matter of excommunication as a purely religious one. If it were so, the Courts would be out of the controversy.

2 3 . The same argument was advanced in another form by contending that excommunication is not a social question and that, therefore, Art. 25(2)(b) could not be

invoked in aid of holding the Act to be constitutional. In this connection, it has to be borne in mind that the Dai-ul-Mutlaq is not only the head of the religious community but also the trustee of the property of the community in which the community as a whole is interested. Even a theological head has got to perform acts which are not wholly religious but may be said to be quasi religious or matters which are connected with religious practises, though not purely religious. Actions of the Dai-ul-Mutlaq in the purely religious aspect are not a concern of the courts, but his actions touching the civil rights of the members of the community are justiciable and not outside the pale of interference by the legislature or the judiciary. I am not called upon to decide, nor am I competent to do so, as to what are the religious matters in which the Dai-ul-Mutlaq functions according to his religious sense. I am only concerned with the civil aspect of the controversy relating to the constitutionality of the Act, and I have to determine only that controversy.

24. It has further been argued on behalf of the petitioner that an excommunicated person has not the right to say his prayers in the mosque or to bury his dead in the community burial ground or to the use of other communal property. Those may be the result of excommunication, but I am concerned with the question whether the Legislature was competent and constitutionally justified in enacting the law declaring excommunication to be void. As already indicated, I am not concerned in this case with the purely religious aspect of excommunication. I am only concerned with the civil rights of the members of the community, which rights they will continue to enjoy as such members if excommunication was held to be invalid in accordance with the provision of the Act. Hence, though the Act may have its repercussions on the religious aspect of excommunication, in so far as it protects the civil rights of the members of the community it has not gone beyond the provisions of Art. 25(2)(b) of the constitution.

25. Then it is argued that the guaranteed right of a religious denomination to manage it own affairs in matters of religion (Art. 26(b)) is subject only to public order, morality and health and is not subject to legislation contemplated by Art. 25(2)(b). This very argument was advanced in the case of Shri Venkataramana Devaru v. The State of Mysore MANU/SC/0026/1957 : [1958]1SCR895this arguments has been specifically dealt with and negatived. This Court observed as follows :

> "The answer to his contention is that it is impossible to read any such limitation into the language of Art. 25(2)(b). It applies in terms to all religious institutions of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprises therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a priori reasoning as the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in the Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Art. 25(2)(b)."

26. In that case also, as in the present case, reference was made to the earlier decisions of this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur MuttMANU/SC/0136/1954 : [1954]1SCR1005 , but the latter decision has explained the legal position with reference to the earlier decision, and after examining the arguments for and against the proposition at pages 916-918, it has been distinctly laid down that Art. 26(b) must be

read subject to Art. 25(2)(b) of the Constitution.

27. It has further been contended that a person who has been excommunicated as a result of his non-conformity to religious practices is not entitled to use the communal mosque or the communal burial ground or other communal property, thus showing that for all practical purposes he was no more to be treated as a member of the community, and is thus an outcast. Another result of excommunication is that no other member of the community can have any contacts, social or religious, with the person who has been excommunicated. All that is true. But the Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his sight to follow the dictates of his own conscience. The Act is, thus, aimed at fulfilment of the individual liberty of conscience guaranteed by Art. 25(1) of the Constitution, and not in derogation of it. In so far as the Act has any repercussions on the right of the petitioner, as trustee of communal property, to deal with such property, the Act could come under the protection of Art. 26(d), in the sense that his right to administer the property is not questioned, but he has to administer the property in accordance with law. The law, in the present instance, tells the petitioner not to withhold the civil rights of a member of the community to a communal property. But as against this it is argued on behalf of the petitioner that his right to excommunicate is so bound up with religion that it is protected by clause (b) of Art. 26, and is thus completely out of the regulation of law, in accordance with the provisions of clause (d) of that Article. But, I am nor satisfied on the pleadings and on the evidence placed before us that the right of excommunication is a purely religious matter. As already pointed out, the indications are all to the contrary, particularly the judgment to the Privy Council in the case of Hasanali v. Mansoorali I.L.R. [1947] IndAp 1, on which great reliance was placed on behalf of the petitioner.

28. On the social aspect of excommunication, one is inclined to think that the position of an excommunicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practises to be void has only carried out the strict injunction of Art. 17 of the Constitution, by which untouchability has been abolished and its practice in any form forbidden. The Article further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The Act, in this sense, is its logical corollary and must, therefore, be upheld.

29. In my Opinion, it has not been established that the Act has been passed by a legislature which was not competent to legislate on the subject, or that it infringes any of the provisions of the Constitution. This petition must, therefore, fail.

K.C. Das Gupta, J.

30. In our opinion this petition should succeed.

31. The petitioner is the head of the Dawoodi Bohras who form one of the several sub-sects of the Shia sect of Musalmans. Dawoodi Bohras believe that since the 21st Imam went to seclusion, the rights, power and authority of the Iman have been rightfully exercised by the Dai-ul-Mutalq, as the vice-regent of the Imam is seclusion. One of such rights is the exercise of disciplinary powers including the right to excommunicate any member of the Dawoodi Bohra community. The existence of such a right in the Dai-ul-Mutlaq who is for the sake of convenience often mentioned as the Dai was questioned before the courts in a case which went up to the Privy Council. But since the decision of the Privy Council in that case, viz., Hasanali v. Mansoorali I.L.R. (1947)

IndAp 1, that question may be taken to have been finally settled, and it is no longer open to dispute that the Dai, as the head of the Dawoodi Bohra community has the right to excommunicate any member of the community. The claim of the present petitioner to be the 51st Dai-ul-Mutlaq of the community was also upheld in that case and is no longer in dispute. The Privy Council had also to consider in that case the question whether this power to excommunicate could be exercised by the Dai in any manner he liked and held after consideration of the previous cases of excommunication and also a document composed about 1200 A.D. that normally members of the community can be expelled "only at a meeting of the Jamat after being given due warning of the fault complained of and an opportunity of amendment, and after a public statement of the grounds of expulsion." Speaking about the effect of excommunication their Lordships said :-

> "Excommunication..... necessarily involve exclusion from the exercise of religious rights in places under the trusteeship of the head of the community in which religious exercises are performed." The present petition, it may be mentioned, was a party to that litigation.

32. This decision was given on December 1, 1947; shortly after that, the Bombay Legislature - it may be mentioned that there is a large concentration of Dawoodi Bohras in the State of Bombay - stepped in to prevent, as mentioned in the preamble, the practice of excommunication "which results in the deprivation of legitimate rights and privileges of" members of certain religious communities and enacted the Bombay Act No. XLII of 1949.

33. It is a short Act of six sections. Section 3 - the main operative section - invalidates all excommunication of members of any religious community. Excommunication is defined in section 2 to mean "the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of a civil nature by him or on is behalf as such member". The explanation to the definition to this section makes it clear that a right to office or property or to worship in any religious place or a right to burial or cremation is included as a right legally enforceable by suit even though the determination of such right may depend entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community. Section 4 makes a person who does any act which amount to excommunication or is in furtherance of the excommunication liable to punishment which may extend to one thousand rupees.

34. Faced with the position that the legislation wholly destroys his right of excommunicating any member of the Dawoodi Bohra community, the Dai has presented this petition under Art. 32 of the Constitution. He contends that the Act violates the fundamental right of the Dawoodi Bohras, including himself, freely to practise religion according to their own faith and practice - a right guaranteed by Art. 25 of the Constitution, and further that it violates the right of the Dawoodi Bohra community to manage its own affairs in matters of religion guaranteed by Art. 26. Therefore, says he, the Act is void and prays for a declaration that the Act is void and the issue of an appropriate writ restraining the respondent, the State of Bombay, its officers, servants and agents from enforcing the provisions of the Act against the petitioner and/or any other member of the Dawoodi Bohra community.

35. It may be mentioned that in the petition the legislative competence of the Bombay legislature to enact the Bombay Prevention of excommunication 1949 was also challenged. This, however was not pressed at the time of the hearing.

36. The respondent contends that neither the right guaranteed under Art. 25 nor that under Art. 26(b) is contravened by the impugned Act. Briefly stated, the respondent's case is that the right and privilege of the petitioner as Dai-ul-Mutlaq to regulate the exercise of religious rights do not include the right to excommunicate any person so as to deprive him of his civil rights and privileges. It was denied that the petitioner's power to excommunicate was an essential part of the religion of the Dawoodi Bohra community and that the right has its foundation in religion and religious doctrines, tenets and faith of the Dawoodi Bohra community. It was also denied that the right to excommunicate is the religious practice and it was further pleaded that assuming that it was a religious practice, it was certainly not a part of religion of the Dawoodi Bohra community.

37. The same points were urged on behalf of the intervener, except that the learned counsel for the intervener wanted to reopen the question whether the petitioner as the head of the Dawoodi Bohra community had the power to excommunicate. As already stated, however, this question is hardly open to dispute in the face of the decision of the Privy Council in Hasanali v. Mansoorali I.L.R. (1947) IndAp 1 and the point was not pressed.

38. The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt MANU/SC/0136/1954 : [1954]1SCR1005 ; Mahant Jagannath Ramanuj Das v. The State of Orissa MANU/SC/0137/1954 : [1954]1SCR1046 ; Sri Venkatamana Devaru v. The State of Mysore MANU/SC/0026/1957 : [1958]1SCR895 ; Durgah Committee, Ajmer v. Syed Hussain Ali MANU/SC/0063/1961 : [1962]1SCR383 and several other cases and the main principles underlying these provision have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

39. Before however we can give a proper answer to the two questions raised, viz., (i) Has the impugned Act interfered with a right freely to practise religion and (ii) Has it interfered with the right of the Dawoodi Bohra Community to manage its own affairs in matters of religion; it is necessary to examine first the place of excommunication in the life of a religious community. Much valuable information about this is furnished by an article in the Encyclopedia of the Social Sciences from the pen of Prof. Hazeltine. "Excommunication," says Prof. Hazeltine, "in one or another of the several different meanings of the term has always and in all civilizations been one the principal means of maintaining discipline within religious organizations and hence of preserving and strengthening their solidarity." Druids in old Britain are said to have claimed the power to exclude offenders from sacrifice. The early Chiristian Church exercised this power very largely and expelled and excluded from the Christian association, those members who proved to be unworthy of its aims or infringed its rules of governance. During the middle ages the Pope used this power frequently to secure the observance of what was considered the proper religious rights and practices of Christianity by excommunicating even to kings of some European countries when they introduced or tried to introduce different forms of divine worship. The power was often used not perhaps always fairly and justly, as a weapon in the struggle for the principle that the Church was above the

State. Impartial historians have recognised, however, that many of the instances of excommunication were for the purpose of securing the adherence to the orthodox creed and doctrine of Christianity as pronounced by the Catholic Church. (Vide The Catholic Encylopedia, Vol. V, articles on England and Excommunication).

40. Turning to the Canon law we find that excommunication may be inflicted as a punishment for a number of crimes, the most serious of these being, heresy, apostasy or schism. Canon 1325, section 2 defines a heretic to be a man who while remaining nominally a Christian, pertinaciously denies or doubts any one of the truths which must be believed de fide divina et catholica; if he falls away entirely from the Christian faith, he is an apostate; finally if he rejects the authority of the Supreme Pontiff or refuses communion with the members of the Church who are subject to him, he is a schismatic. (Vide Cannon Law by Bouscaren and Ellis).

41. Among the Muslims also the right of excommunication appears to have been practised from the earliest times. The Prophet and the Imam, had this right; and it is not disputed that the Dais have also in the past exercised it on a number of occasions. There can be little doubt that heresy or apostasy was a crime for which excommunication was in force among the Dawoodi Bohras also. It may be pointed out in its connection that excommunication in the case of Hasanali v. Mansoorali L.R. (1947) IndAp 1, which was upheld by the Privy Council was based on the failure to comply with the tenants and traditions of the Dawoodi Bohra community and certain other faults.

42. According to the petitioner it is "an integral part of the religion and religious faith an belief of the Dawoodi Bohra community" that excommunication should be pronounced by him in suitable cases. It was urged that even if this right to excommunicate is considered to be a religious practice as distinct from religious faith such religious practice is also a part of the religion of the Dawoodi Bohra community. It does appear to be a fact that unquestioning faith in the Dai as the head of community is part of the creed of the Dawoodi Bohras. It is unnecessary to trace the historical reason for this extraordinary position of the Dai as it does not appear to be seriously disputed that the Dai is considered to be the vice-regent of Imam so long as the rightful Imam continues in seclusion.

43. Mention must be made in this connection of the Mishak which every Dawoodi Bohra takes at the time of his initiation. This includes among other things, an oath of unquestioning faith in and loyalty to the Dai. It is urged therefore that faith in the existence of the disciplinary power of the Dai including his power to excommunicate forms one of the religious tenants of this community. The argument that Art. 25 has been contraveneb by the impugned Act is based mainly on this contention and the further contention that in any case excommunication is a religious practice in this community. As regards Art. 26(b) the argument is that excommunication among the Dawoodi Bohras forms such an integral part of the management of the community by the religious head that interference with that right cannot but amount to an interference with the right of the community to the manage its own affairs in matters of religion.

44. Let us consider first whether the impugned Act contravenes the provisions of Art. 26(b). It is unnecessary for the purpose of the present case to enter into the difficult question weather every case of excommunication by the Dai on whatever grounds inflicted is a matter of religion. What appears however to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism

under the Cannon Law) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community, through its religious head, "of its own affairs in matters of religion." The impugned Act makes even such excommunications invalid and takes away the power of the Dai as the head of the community to excommunicate even on religious grounds. It therefore, clearly interferes with the right of the Dawoodi Bohra community under clause (b) of Art. 26 of the Constitution.

45. That excommunication of a member of a community will affect many of his civil rights is undoubtedly true. This particular religious denomination is possessed of properties and the necessary consequence of excommunication will be that the excommunicated member will lose his rights of enjoyment of such property. It might be thought undesirable that the head of a religious community would have the power to take away in this manner the civil right of any person. The right given under Art. 26(b) has not however been made subject to preservation of civil rights. The express limitation in Art. 26 itself is that this right under the several clauses of the article will exist subject to public order, morality and health. It has been held by this Court in Sri Venkataramana Devaru v. The State of Mysore MANU/SC/0026/1957 : [1958]1SCR895 , that the right under Art. 26(b) is subject further to clause 2 of Art. 25 of the Constitution.

46. We shall presently consider whether these limitations on the rights of a religious community to manage is own affairs in matters of religion can come to the help of the impugned Act. It is clear however that apart form these limitations the Constitution has not imposed any limit on the right of a religious community to manage its own affairs in matters of religion. The fact that civil rights of a person are affected by the exercise of this fundamental right under Art. 26(b) is therefore of no consequence. Nor it is possible to say that excommunication is prejudicial to public order, morality and health.

47. Though there was a statement in paragraph 10 of the respondent's counter affidavit that "the religious practice, which runs counter to the public order, morality and health must give way before the good of the people of the State", the learned Attorney-General did not advance any argument in support of this plea.

48. It remains to consider whether the impugned Act comes within the saving provisions embodied in clause 2 of Art. 25. The clause is in these words :-

> "Nothing in this Article shall effect the operation of any existing law or prevent the State from making any law -
>
> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

49. Quite clearly, the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. Indeed that was not even suggested on behalf of the respondent State. It was faintly suggested however that the Act should be considered to be a law "providing for social welfare and reform." The mere fact that certain civil rights which might be lost by members of the Dawoodi

Bohra community as a result of excommunication even though made on religious grounds and that the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform." The barring of excommunication on grounds other than religious grounds say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause 2(b) of Art. 25. But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law in so far as it invalidates excommunication on religious grounds and takes away the Dai's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. As the Act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community under Art. 26(b) of the Constitution.

50. It is unnecessary to consider the other attack on the basis of Art. 25 of the Constitution.

51. Our conclusion is that the Act is void being in violation of Art. 26 of the Constitution. The contrary view taken by the Bombay High Court in Taher Saifuddin v. Tyebbhai Moosaji MANU/MH/0099/1953 : AIR1953Bom183 , is not correct.

52. We would, therefore, allow the petition, declare the act to be void and direct the issue of a writ in the nature of mandamus on the respondent, the State of Bombay, not to enforce the provisions of the Act. The petitioner will get his costs.

N. Rajagopala Ayyangar, J.

53. I agree that the petition should succeed and I generally concur in the reasoning of Das Gupta J., by which he has reached this conclusion. In view, however, of the importance of the case I consider it proper to state in my own words the grounds for my concurrence.

54. It was not in dispute that the Dawoodi Bohras who form a sub-sect of the Shia sect of Muslims is a "religious denomination" within the opening words of Art. 26 of the Constitution. There are a few further matters which were not in controversy on the basis of which the contentions urged in support of the petition have to be viewed. These might now be briefly stated :

(1) It was the accepted tenet of the Dawoodi Bohra faith that God always had and still has a representative on earth through whom His commands are conveyed to His people. That representative was the Imam. The Dai was the representative of the Imam and conveyed God's message to His people. The powers of the Dai were approximated to those of the Imam. When the Imam came out of seclusion, the powers of the Dai would cease. The chain of intercession with the Almighty was as follows : The Dai - the Imam - the Holy Prophet - and the one God (See Per Marten J. in Advocate General of Bombay v. Yusufalli Ebrahim 24 Bom. L.R. 1060].

(2) The position and status of the petitioner as the Dai-ul-Mutlaq was not contested since the same had been upheld by the Privy Council the decision reported as Hasanali v. Mansoorali I.L.R. [1947] IndAp 1.

(3) It was not in dispute that subject to certain limitations and to the

observance of particular formalities which were pointed out by the Privy Council in the decision just referred to, that the Dai-ul-Mutlaq has the power of excommunication and indeed, as observed by Lord Porter in that judgment, "the right of excommunication by a Dai-ul-Mutlaq was not so strenuously contested as were the limits within which it is confined."

(4) The Dai-ul-Mutlaq was not merely a religious leader - the religious head of the denomination but was the trustee of the property of the community.

(5) The previous history of the community shows that excommunicated persons were deprived of the exercise of religious rights. It was contended before the Privy Council that the effect of an excommunication was in the nature merely of social ostracism but this was rejected and it was held to have a larger effect as involving an exclusion from the right to the enjoyment of property dedicated for the benefit of the denomination and or worship in places of worship similarly dedicated or set apart.

55. The validity of Bombay Act 42 of 1949 (which I shall hereafter refer to as the impugned Act) has to be judged in the light of these admitted premises. Articles 25 and 26, which are urged as violated by the impugned Act run :

"25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I. - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II. - In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall construed accordingly.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

56. I would add that these Articles embody the principle of religious toleration that has been the characteristic feature of Indian civilization from the start of history, the instances and periods when this feature was absent being merely temporary aberrations. Besides, they serve to emphasize the secular nature of Indian Democracy which the founding fathers considered should be the very basis of the Constitution.

57. I now proceed to the details of the provisions of the impugned Act which are stated to infringe the rights guaranteed by these two Articles. The preamble to the impugned Act recites :

> "Whereas it has come to the notice of Government that the practice prevailing in certain communities of excommunicating its members is often followed in a manner which results in the deprivation of legitimate rights and privileges of its members;

And whereas in keeping with the spirit of changing times and in the public interest, it is expedient to stop the practice; it is hereby enacted as follows :-"

Section 3 is the operative provision which enacts :

> "3. Notwithstanding anything contained in any law, custom or usage for the time being in force to the contrary, no excommunication of a member of any community shall be valid and shall be of any effect."

58. Section 4 penalises any person who does "any act which amounts to or is in furtherance of the excommunication" and subjects him to criminal proceedings as regards which provision is made in Sections 5 and 6. Section 2 contains two definitions :

(1) of the word "community" which would include the religious denomination of Dawoodi Bohras, and

(2) of "excommunication" as meaning :

"the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of civil nature by him or on his behalf as such members;

Explanation. - For the purposes of clause a right legally enforceable by a suit of civil nature shall include the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such right depends entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community."

59. The question to consider is whether a law which penalises excommunication by a religious denomination or by its head whether or not the excommunication be for non-conformity to the basic essentials of the religion of that denomination and effects the nullification of such excommunication as regards the rights of the person excommunicated would or would not infringe the rights guaranteed by Arts. 25 and 26.

60. First as to Art. 25, as regards clause (1) it was not in dispute that the guarantee under it protected not merely freedom to entertain religious beliefs but also acts done in pursuance of that religion, this being made clear by the use of the expression "practice of religion". No doubt, the right to freedom of conscience and the right to profess, practise and propagate religion are all subject to "public order, morality or health and to

the other provisions of this Part" but it was not suggested that (subject to an argument about the matter being a measure of social reform) the practice of excommunication offended public order, morality or health or any other part of the Constitution.

61. Here is a religious denomination within Art. 26. The Dai-ul-Mutlaq is its spiritual leader, the religious head of the denomination and in accordance with the tenets of that denomination he had invested in him the power to excommunicate dissidents. Pausing here, it is necessary to examine the rational basis of the excommunication of persons who dissent from the fundamental tenets of a faith. 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. As Smith B. said in Dill v. Watson (1836) 2 JR 48, in a passage quoted by Lord Halsbury in Free Church of Scotland v. Overtoun [1904] A.C. 515 :

> "In the absence of conformity to essentials, the denomination would not be an entity cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension." A denomination within Art. 26 and persons who are members of that denomination are under Art. 25 entitled to ensure the continuity of the denomination and such continuity is possible only by maintaining the bond of religious discipline which would secure the continued adherence of its members to certain essentials like faith, doctrine, tenets and practices. The right to such continued existence involves the right to maintain discipline by taking suitable action inter alia of excommunicating those who deny the fundamental bases of the religion. The consequences of the exercise of that power vested in the denomination or in its head - a power which is essential for maintaining the existence and unity of denomination must necessarily be the exclusion of the person excommunicated from participation in the religious life of the denomination, which would include the use of places of worship or consecrated places for burial dedicated for the use of the members of the denomination and which are vested in the religious head as a trustee for the denomination.

62. The learned Attorney-General who appeared for the respondent submitted three points : (1) Assuming that excommunication was part of the religious practice of the denomination, still there was no averment in the petition that the civil results flowing from excommunication in the shape of exclusion from the beneficial use of denominational property was itself a matter of religion. In other words, there was no pleading that the deprivation of the civil rights of a person excommunicated was a matter of religion or of religious practice. (2) The "excommunication" defined by the Act deals with rights of civil nature as distinguished from religious or social rights or obligations and a law dealing with the civil consequence of an excommunication does not violate the freedom protected by Art. 25 or Art. 26. (3) Even on the basis that the civil consequences of an excommunication are a matter of religion, still it is a measure of social reform and as such the legislation would be saved by the words in Art. 25(2) (b).

63. I am unable to accept any of the these contentions as correct. (1) First I do not agree that the pleadings do not sufficiently raise the point that if excommunication was

part of the "practice of a religion" the consequences that flow therefrom were not also part of the "practice of religion". The position of the Dai as the religious head of the denomination not being disputed and his power to excommunicate also not being in dispute and it also being admitted that places of worship and burial grounds were dedicated for the use of the members of the denomination, it appears to me that the consequence of the deprivation of the use of these properties by persons excommunicated would be logical and would flow from the order of excommunication. It could not be contested that the consequence of a valid order of excommunication was that the person excommunicated would cease to be entitled to the benefits of the trusts created or founded for the denomination or to the beneficial use or enjoyment of denominational property. If the property belongs to a community and if a person by excommunication ceased to be a member of that community, it is a little difficult to see how his right to the enjoyment of the denominational property could be divorced from the religious practice which resulted in his ceasing to be a member of the community. When once it is conceded that the right guaranteed by Art. 25(1) is not confined to freedom of conscience in the sense of the right to hold a belief and to propagate that belief, but includes the right to the practice of religion, the consequences of that practice must also bear the same complexion and be the subject of a like guarantee.

(2) I shall reserve for later consideration the point about the legislation being saved as a matter of social reform under Art. 25(2)(b), and continue to deal with the argument that the impugned enactment was valid since it dealt only with the consequences on the civil rights, of persons excommunicated. It has, however, to be pointed out that though in the definition of "excommunication" under s. 2(b) of the impugned Act the consequences on the civil rights of the excommunicated persons is set out, that is for the purpose of defining an "excommunication". What I desire to point out is that it is not as if the impugned enactment saves only the civil consequences of an excommunication not interfering with other consequences of an excommunication falling within the definition. Taking the case of the Dawoodi Bohra community, if the Dai excommunicated a person on the ground of forswearing the basic tenets of that religious community the Dai would be committing an offence under s. 4, because the consequences according to the law of that religious denomination would be the exclusion from civil rights of the excommunicated person. The learned Attorney-General is therefore not right in the submission that the Act is concerned only with the civil rights of the excommunicated person. On the other hand, it would be correct to say that the Act is concerned with excommunications which might have religious significance but which also operate to deprive persons of their civil rights.

64. Article 26 confers on every religious denomination two rights which are relevant in the present context, by clause (b) - "to manage its own affairs in matters of religion" - and by the last clause - clause (d) - "to administer such property" which the denomination owns or has acquired (vide clause (c)) "in accordance with law." In considering the scope of Art. 26 one has to bear in mind two basic postulates : First that a religious denomination is possessed of property which is dedicated for definite uses and which under Art. 26(d) the religious denomination has the right to administer. From this it would follow that subject to any law grounded on public order, morality or health the limitations with which Art. 26 opens, the denomination has a right to have the property used for the purposes for which it was dedicated. So far as the present case is concerned, the management of the property and the right and the duty to ensure the proper application of that property is admittedly vested in the Dai as the religious head of the denomination. Article 26(d) speaks of the administration of the property being in accordance with law and the learned Attorney-General suggested that a valid law could be enacted which would permit the diversion of those funds to purposes

which the legislature in its wisdom thought it fit to appropriate. I feel wholly unable to accept this argument. A law which provides for or permits the diversion of the property for the use of persons who have been excluded from the denomination would not be "a law" contemplated by Art. 26(d). Leaving aside for the moment the right of excommunicated person to the enjoyment of property dedicated for the use of a denomination let me take the case of a person who has renounced that religion, and in passing it might be observed that even in cases of an apostate according to the principles governing the Dawoodi Bohra denomination there is no ipso facto loss of rights, only apostasy is a ground for excommunication which however could take place without service of notice or an enquiry. It could not be contended that an apostate would be entitled to the beneficial use of property, dedicated to the Dawoodi Bohra community be it the mosque where worship goes on or other types of property like consecrated burial grounds etc. It would be obvious that if the Dai permitted the use of the property by an apostate without excommunicating him he would be committing a dereliction of his duty as the supreme head of the religion - in fact an act of sacrilege besides being guilty of a breach of trust. I consider that it hardly needs any argument to show that if a law permitted or enjoined the use of the property belonging to the denomination by an apostate it would be a wholly unauthorised diversion which would be a violation of Art. 26(d) and also of Art. 26(c), not to speak of Art. 25(1). The other postulate is the position of the Dai as the head of the religious denomination and as the medium through which spiritual grace is brought to the community and that this is the central part of the religion as well as one of the principal articles of that faith. Any denial of this position is virtually tantamount to a denial of the very foundation of the faith of the religious denomination.

65. The attack on the constitutionality of the Act has to be judged on the basis of these two fundamental points. The practice of excommunication is of ancient origin. History records the existence of that practice from Pagan times and Aeschyles records "The exclusion from purification with holy water of an offender whose hands were defiled with bloodshed." Later the Druids are said to have claimed the right of excluding offenders from sacrifice. Such customary exclusions are stated to have obtained in primitive semitic tribes but it is hardly necessary to deal in detail with this point, because so far as the Muslims, and particularly among the religious denomination with which this petition is concerned, enough material has been set out in the judgment of the Privy Council already referred.

66. Pausing here, it might be mentioned that excommunication might bear two aspects : (1) as a punishment for crimes which the religious community justifies putting one out of its fold. In this connection it may be pointed out that in a theocratic State the punitive aspect of excommunication might get emphasized and might almost take the form of a general administration by religious dignitaries of ordinary civil law. But there is another aspect which is of real relevance to the point now under consideration. From this point of view excommunication might be defined as the judicial exclusion from the right and privileges of the religious community to whom the offender belongs. Here it is not so much as a punishment that excommunication is inflicted but is used as a measure of discipline for the maintenance of the integrity of the community, for in the ultimate analysis the binding force which holds together a religious community and imparts to it a unity which makes it a denomination is a common faith, common belief and a belief in a common creed, doctrines and dogma. A community has a right to insist that those who claim to be within its fold are those who believe in the essentials of its creed and that one who asserts that he is a member of the denomination does not, at least, openly denounce the essentials of the creed, for if everyone were at liberty to deny these essentials, the community as a group would soon cease to exist. It is in this

sense that it is matter of the very life of a denomination that it exercises discipline over its members for the purpose of preserving unity of faith, at least so far as the basic creed of doctrines are concerned. The impugned enactment by depriving the head of the power and the right to excommunicate and penalising the exercise of the power, strikes at the very life of the community by rendering it impotent to protect itself against dissidents and schismatics. It is thus a violation of the right to practise religion guaranteed by Art. 25(1) and is also violative of Art. 26 in that it interferes with the rights of the Dai as the trustee of the property of the denomination to so administer it as to exclude dissidents and excommunicated persons from the beneficial use of such property.

67. It is admitted however in the present case that the Dai as the head of the denomination has vested in him the power, subject to the procedural requirements indicated in the judgment of the Privy Council, to excommunicate such of the members of the community as do not adhere to the basic essentials of the faith and in particular those who repudiate him as the head of the denomination and as a medium through which the community derives spiritual satisfaction or efficiency mediately from the God-head. It might be that if the enactment had confined itself to dealing with excommunication as a punishment for secular offences merely and not as an instrument for the self preservation of a religious denomination the position would have been different and in such an event the question as to whether Arts. 25 and 26 would be sufficient to render such legislation unconstitutional might require serious consideration. That is not the position here. The Act is not confined in its operation to the eventualities just now mentioned but even excommunication with a view to the preservation of the identity of the community and to prevent what might be schism in the denomination is also brought within the mischief of the enactment. It is not possible, in the definition of excommunication which the Act carries, to read down the Act so as to confine excommunication as a punishment of offences which are unrelated to the practice of the religion which do not touch and concern the very existence of the faith of the denomination as such. Such an exclusion cannot be achieved except by rewriting the section.

68. The next question is whether the impugned enactment could be sustained as a measure of social welfare and reform under Art. 25(2)(b). The learned Attorney-General is, no doubt, right in his submission that on the decision of this Court in the Mulki Temple case - (Venkataramana Devaru v. State of Mysore MANU/SC/0026/1957 : [1958]1SCR895 , the right guaranteed under Art. 26(b) is subject to a law protected by Art. 25(2)(b) The question then before the Court related to the validity of a law which threw open all public temples, even those belonging to "a religious denomination" to "every community of Hindus including 'untouchables'" and it was held that, notwithstanding that the exclusion of these communities from worship is such a temple was an essential part of the "practice of religion" of the denomination, the constitutionality of the law was saved by the second part of the provision in Art. 25(2)(b) reading : "the throwing open of Hindu religious institutions of a public character to all classes and section of Hindus". The learned Attorney-General sought support from this ruling for the proposition that Art. 25(2)(b) could be invoked to protect the validity of a law which was "a measure of social welfare and reform" notwithstanding that it involved an abrogation of the whole or part of the essentials of a religious belief or of a religious practice. I feel unable to accept the deduction as flowing from the Mulki Temple case. That decision proceeded on two bases : (1) As regards the position of "untouchables", Art. 17 had made express provision stating :

> "'Untouchability' is abolished and its practice in any form is forbidden. The

> enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

and that had to be recognised as a limitation on the rights of religious denominations however basic and essential the practice of the exclusion of untouchables might be in its tenets or creed. (2) There was a special saving as regards laws providing for "throwing open of public Hindu Religious Institutions to all classes and sections of Hindus" in Art. 25(2)(b), and effect had to be given to the wide language in which this provision was couched. In the face of the language used, no distinction could be drawn between beliefs that were basic to a religion, or religious practises that were considered to be essential by a religious sect, on the one hand, and on the other beliefs and practices that did not form the core of a religion or of the practices of that religion. The phraseology employed cut across and effaced these distinctions.

69. But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform". To start with, it has to be admitted that this phrase is, as contrasted with the second portion of Art. 25(2)(b), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Art. 25(1) and the saving would cover beliefs and practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Art. 25(1) for two reasons : (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom - a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare of reform". (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Art. 25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform.

70. 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).

71. 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 administration 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 has 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.

72. In my view the petitioner is entitled to the relief that he seeks and the petition will accordingly be allowed.

BY COURT : In accordance with the majority view of this Court, the petition is allowed. The petitioner is entitled to his costs.

73. Petition allowed.

Ext.R2(d)

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SANKARASUBBAN

&

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 14TH AUGUST 2002 / 23RD SRAVANA, 1924

OP.No. 19832 of 2002(J)

PETITIONER:

R.R.VARMA, S/O. C.D.P. NAMBOODIRI,
"SUBE.YA". PALACE SCHOOL LANE, TRIPUNITHURA.

BY ADV. SRI.SAJEEV KUMAR K.GOPAL
SRI.K.RADHAKRISHNAN (SR.)

RESPONDENTS:

1. THE TRAVANCORE DEVASWOM BOARD,
REPRESENTED BY ITS SECRETARY, NANTHANCODE,
THIRUVANANTHAPURAM.

2. THE SECRETARY,
TRAVANCORE DEVASWOM BOARD, NANTHANCODE,
THIRUVANANTHAPURAM.

Addl. 3 Kantaru Neelakantaru Thanthri, Senior Thanthri,
Sabarimala, Thazhamon Madom, Chengannur.

impleaded as per order on CMP 35307/02 in OP 19832/02 dated 14.8.2002:

BY ADV. SRI.S.GOPAKUMARAN NAIR
SRI.S.KRISHNAMOORTHY

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 12/08/2002, ALONG WITH OP NO. 6625 OF 2002 THE COURT ON 14/08/2002 DELIVERED THE FOLLOWING:

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S. SANKARASUBBAN
&
K.PADMANABHAN NAIR, JJ.

O.P. No. 19832 of 2002
&
O.P. No.6625 of 2002

Dated this the 14th day of August, 2002

JUDGMENT

Sankarasubban, J.

O.P.No.19832 of 2002

This Original Petition has been filed by one R.R. Varma, who is a member of the Pandalam Royal Family and an ardent devotee of Lord Sree Ayyappa of Sabarimala Sannidhanam. The Original Petition has been filed to quash Exts.P13 and P14 and to render appropriate orders for constituting an expert body for framing guidelines in the matter of selection of Melsanthi for Sabarimala Sree Dharmasastha Temple and Malikappuram Temple and to constitute selection panel inclusive of Pandalam Raja and for other reliefs.

2. Ext.P13 is a proceeding of the Travancore Devaswom Board. It is dated 27.6.2002 and Ext. P14 is the guidelines for selection of Melsanthis for Sabarimala and Malikappuram Temples. Ext.P13 order was passed pursuant to the direction of this Court in O.P. No.28670 of 2000 and Review Petition No.94 of 2002. By Ext.P13, the Board rejected the prayer of the

Ext R2(d)3

petitioner to include him or any member of the Pandalam Royal Family in the Selection Committee. Ext.P14 is the guideline for selection of Melsanthis for Sabarimala and Malikappuram Temples. The guidelines contain 18 conditions. So far as the constitution of Selection Committee is concerned, condition Nos. 10 and 11 are relevant. The President and members of the Travancore Devaswom Board from to time will be among the members of the Selection Committee. The President of the Travancore Devaswom Board shall be the Chairman of the Selection Committee. The Selection Committee shall consist of two members from Thazhamon family; the first being the seniormost member of the family and second member to be nominated by the seniormost member of the family. Regarding allotment of marks, it is stated that 1/3rd of the total marks will be for general knowledge and the President and members of the Board will assess the general knowledge, personality, etc. of the applicants. 2/3rd marks will be for knowledge in Sanskrit, Pooja, rites and Thantric rituals and other religious matters of the Temple and this will be assessed by the other two members of the Selection Committee. Condition No.14 says that nine persons from among the persons qualified in the interview for each post will be included in the lot for the selection of Melsanthis and the lot will be drawn in front of the sanctum sanctorum on the first day of Thulam in the presence of dignatories and others present. Persons selected as Melsanthi will have to furnish security deposit and the persons selecterd as Melsanthi will be "Purappada Santhi". Condition No.1 says that Malayala Brahmins

(Male) hailing from Kerala alone are eligible for appointment and condition No.2 prescribes the age limit of 35 – 50 years. The basic educational qualification is a pass in S.S.L.C. and knowledge in Sanskrit desirable. Ten years continuous service as Santhi in any of the important Temples in Kerala is compulsory.

3. A counter affidavit has been filed by the Travancore Devaswom Board. In the counter affidavit, the Devaswom Board has justified the exclusion of the member of the Pandalam Royal Family from the Selection Committee. It has been stated that guidelines are prepared properly and in accordance with the directions of this Court.

4. There is an impleading petition filed by one Kantaru Neelakantaru Thanthri of Thazhamon Illam. The impleading petition is allowed. According to him, it is a prerogative right of the Thanthri to select suitable candidate and no outsiders should be provided.

5. We heard learned counsel for the petitioner, learned counsel for the Travancore Devaswom Board and learned counsel for the impleading petitioner.

6. It is admitted by all parties that the selection of Melsanthi in the Sabarimala Sree Dharmasastha and Malikappuram Temples have to be

Ext. R2(d)5

transparent and only the most competent person should be selected. It is as per the directions of this Court previously that the Devaswom Board prepared the guidelines. We find from the files that the Devaswom Board issued questionnaire to many persons and Institutions and got their opinions. It is after that, the guidelines have been prepared. The first question to be decided is regarding the composition of Selection Committee. No doubt, members of the Travancore Devaswom Board, viz., Chairman and President and two members will be the members of the Selection Committee. It is made clear that since these members cannot be said to be expert regarding religious matters or the Thanthric rights, such persons can only put questions for ascertaining general knowledge, personality and other connected matters. It has been specifically stated in the guidelines that all of them together can award only marks not more than 1/3rd of the total marks. So far as the rests of the members are concerned, the Thanthri of Thazhamon Illam is of the view that, it is his prerogative right to select the Melsanthi. It is true that the Thanthri occupies an important position. The Thazhamon Illam has got Thanthric right with regard to Sabarimala Sree Dharmasastha Temple and it is necessary to consult them on religious matters. We don't find any authority or basis for stating that it is their prerogative right to select the Melsanthi.

7. So far as the Sabarimala Sree Dharmasastha Temple and the Malikappuram Temple are concerned, they belong to Travancore

Ext. R2(d)6

Devaswom Board and it cannot be said that the Board is fettered by any such right, which is claimed by Thazhamon Illam. According to us, the Thanthri of the Thazhamon Illam for this year will be one of the members of the Selection Committee. So far as the other members are concerned, after discussion at the Bar , we include two Thanthris and one Melsanthi to be the other members of the Committee. Thus the composition of the Selection Committee shall be 3 + 4 = 7. Three Thanthris and the Melsanthi shall put questions of religious matters. Marks will be given by the respective persons for the answers given to the questions asked by him. But we make it clear that the members shall not give separate marks for the questions put by another member. We further direct the Special Commissioner, Sabarimala Sri. Sreevallabhan to be an Observer when the selection process is going on and report this Court regarding the conduct of the interview. The Melsanthi shall be the person, who has acted as Melsanthi at least five years back from the period for which selection is made.

8. So far as the question of inclusion of Pandalam Raja is concerned, it is true that the Pandalam Royal Family is closely associated with Sabarimala Sree Dharmasastha Temple. But we don't think, any member of the family should be included in the Selection Committee. Regarding the other conditions, we make it clear that Santhikars belong to Malayala Brahmins hailing from Kerala will be eligible for appointment. So far as the basic qualification is concerned, the condition prescribes S.S.L.C. as basic

qualification and 10 years continuous service as Santhi in any of the important Temples in Kerala. According to us, the basic qualification, S.S.L.C., may not be insisted. All Santhis, who have continuous service of 10 years in any Temple in Kerala where Pooja is performed daily, will be eligible to apply. But if the Board finds that the total number of applicants is large and will be very difficult to interview all those persons, then the Board need invite for interview persons having only S.S.L.C. qualifications.

9. An argument was made to include more applicants in the lot for the selection of Melsanthi. We don't think, it is necessary to alter the guidelines. Condition No.14 of the guidelines is regarding the selection of nine persons and those persons shall be selected on the basis of the total marks obtained by them. Thus, going by Condition No.14 of the guidelines, the first 9 persons, who have obtained highest marks will be entitled to be included in the lot. No minimum marks for each question shall be insisted upon.

10. For the selection of Melsanthi for the year 1178, the Selection Committee shall consist of the following: Three members of the Travancore Devaswom Board, one representative of the Thazhamon Illam, for the present year, Thanthraratnam Azhakathu Sasthrusarman Namboodiripad, Kulapathi, Thanthra Vidya Peedom, Aluva, residing at "Kailas", Kozhikkottiri, Pattambi, Palakkad, Brahmasree Puthumana

Ext R2(d)8

Sreedharan Namboodiripad, Thanthri, Ambalappuzha Sree Krishnaswamy Temple and Thuravoor Mahakshethram and one Ex. Melsanthi, who had served as Melsanthi of the Sabarimala Sree Dharmasastha Temple nearly five years back. The Melsanthi shall be nominated by the Board.

O.P. No.6625 of 2002

11. This Original Petition has been filed by one N. Damodharan Potti for deletion of the basic qualification of S.S.L.C. for appointment of Melsanthi. Already we have stated in this judgment that the basic qualification of S.S.L.C. need not be insisted. Of course, the Devaswom has got freedom to limit the number of applicants for interview if the number exceeds uncontrollable.

Original Petitions are disposed of as above.

sd/-
S. Sankara Subba, Judl.

sd/-
K. Padmanabhan Nair, Ju

Ext R2(d)9
OP. 19832/02

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Appendix

Petitioer's Exts:

Ext.P1 True copy of the memorandum dt. 29.12.1998 submitted by the Pandalam Royal Family before the Respondents.

Ext.P2 True copy of the judgment dated 10.11.2000 in O.P.No.28670/2000.

Ext.P3 True copy of the judgment dated 19.9.2001 in O.P. No.26374/2001-M.

Ext.P4 True copy of the order dated 3.4.2002 in R.P.Nos.94/2002 and 117/2002.

Ext.P5 True copy of the representation dated 25.4.2002 submitted by the petitioner before the 2nd respondent.

Ext.P6 True copy of the paper publication issued by the respondents in the Trivandrum Edition of Mathrubhumi daily dated 10.5.2002.

Ext.P7 True copy of the questionnaire prepared by the Travancore Devaswom Board in the matter of selection of Melsanthi for Sabarimala Ayyappa Temple.

Ext.P8 True copy of the representatyion submitted by the petitioner on 4.6.2002 before the respondents.

Ext.P9 True copy of the representation dt. 8.6.2002 submitted by the petitioner before the 2ndi respondent.

Ext.P10. List of experts from whom the petitioner collected opinion regarding the selection of Melsanthi for Sabarimala Sree Ayyappa Temple.

Ext.P11 True copy of the opinion of experts collected by the petitioner in the matter of selection of Melsanthi at Sabarimala Ayyappa Temple.

Ext.P12 True copy of notice dt. 14.6.2002 issued by the 2nd respondent.

Ext.P13 True copy of the proceedings vide ROC.No.18259/2002/Sab.dt. 27.6.2002.

Ext.P14 True copy of the guidelines framed by the respondents for the selection of Melsanthi of Sabarimala and Malikappuram Devaswom.

Respondents' Exts:

Ext.R1(a) True copy of the publication in Mathrubhoomi and Kerala dt. 10th May, 2002.

This is true copy of the document marked as Ext.R- 2(d) referred to in the counter affidavit.

ADVOCATE

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Exhibit. R2(C)

GUIDELINES FOR SELECTION OF MELSANTHIES FOR SABARIMALA AND MALIKAPPURAM TEMPLES

(1) Malayali Brahamins (Male) hailing from Kerala alone are eligible for appointment.

(2) Age limit will be 35 to 60 years (as on 1st November of the concerned year).

(3) Basic educational qualification is pass in S.S.L.C. and knowledge in Sanskrit is desirable.

(4) Ten years continuous service as Santhi in any of the important temples in Kerala is compulsory.

(5) Separate applications in the prescribed form are to be submitted for appointment to Sabarimala and Malikappuram Devaswoms.

(6) Fee for applications will be fixed by the Board from time to time.

(7) The tenure of appointment will be for one year from 1st Vrichikam to 30th Thulam of the succeeding year.

(8) Persons who had worked as Melsanthi of Sabarimala and Malikappuram Devaswoms will not be eligible for further appointment in the respective devaswoms.

(9) Body structure, personality, conduct, character, loyalty to Hindu religion, faith in God and Temple worship, antecedents, tradition etc. will be considered.

(10) The president and members of the Travancore Devaswom Board from time to time will be among the members of the selection committee. The president of Travancore Devaswom Board shall be the Chairman of the Selection Committee.

(11) The selection Committee shall consists of two members from Thazhamon family . The first being the seniormost member of the family and second member to be nominated by the Seniomost member of the family.

(12) 1/3 of the total marks will be for general knowledge and the president and member of the Board will assess the general knowledge, personality etc. of the applicants.

(13) 2/3 marks will be for knowledge in Sanskrit, pooja, rites and Thantric rituals and other religious matters of the Temple and this will be assessed by the other two members of the selection Committee.

(14) Nine persons from among the persons qualified in the interview for each post i.e. for Sabarimala and for Malikappuram will be included in the lot for

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Exhibit. R 2(C)(2)

the selection of Melsanthies and the lot will be drawn in front of the sanctorum on the first day of Thulam in the presence of dignitaries and other present.

(15) Persons selected as Melsanthi will have to furnish security deposit fixed by the Board and to execute a Bond incorporating the conditions fixed by the Board for the purpose.

(16) The persons selected as Melsanthi will be "Purappada Santhi" during the period of appointment.

(17) Accommodation and other facilities, that deems necessary, will be provided by the Board..

(18) The Travancore Devaswom Board will be the appointing and disciplinary authority.

Date: 26.7.2002

Sd/-
Secretary

This is the true copy of the document marked as Exhibit.R2(C) referred to in the counter affidavit.

Advocate

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Ext. R2 (H)

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ITEM NO.117 COURT NO.6 SECTION XIA

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 2570 OF 2003

KANTARU NEELAKANTARU THANTHRI (D)THR LRS. Appellant (s)

VERSUS

TRAVANCORE DEVASWOM BOARD AND ORS. Respondent(s)

(With office report)

WITH Civil Appeal NO. 2571 of 2003
(With office report)

Date: 06/09/2011 These Appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE MARKANDEY KATJU
HON'BLE MR. JUSTICE CHANDRAMAULI KR. PRASAD

For Appellant(s)
Ms. V. Mohana, Adv.

Mr. Radhakrishnan, Sr. Adv.
Mr. Mohd. Asad Khan, Adv.
Mr. Ramesh Babu M.R., Adv.

For Respondent(s)
Mr. A. Raghunath, Adv.

Mr. Radhakrishnan, Sr. Adv.
Mr. Mohd. Asad Khan, Adv.
Mr. Ramesh Babu M.R., Adv

UPON hearing counsel the Court made the following

O R D E R

The Appeals are disposed of in Terms of Settlement arrived at between the parties.

(Rajesh Dham)
Court Master

(Indu Satija)
Court Master

(signed order is placed on the file)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 2570 OF 2003

KANTARU NEELAKANTARU THANTHRI (D)THR LRS. Appellant (s)

VERSUS

TRAVANCORE DEVASWOM BOARD AND ORS. Respondent(s)

WITH

Civil Appeal NO. 2571 of 2003

O R D E R

By order dated 15.11.2010 these matters were referred

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for mediation to Hon'ble Mr. Justice K.T. Thomas, a former Judge of this Court.

A report, along with an erratum note, has been received from His Lordship stating therein that the parties have entered into Terms of Settlement. The Terms of Settlement arrived at between the parties are annexed with the report. The report with the erratum note and the Terms of Settlement are on record.

The Appeals are disposed of in Terms of Settlement arrived at between the Parties. Decree be modified accordingly.

.....J.
(MARKANDEY KATJU)

NEW DELHI;
SEPTEMBER 06, 2011

.....J.
(CHANDRAMAULI KR. PRASAD)

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Ext R2(H)3

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Before the Supreme Court of India

In Civil Appeal No. 2570 – 2571 of 2003

The Report filed by Justice K.T. Thomas, Former Judge of the Supreme Court of India

Sub: Mediation between the parties in Civil Appeal No. 2570 – 2571 of 2003 for resolving the disputes in the appeal.

Ref: The Order of the Supreme Court dated 15.11.2010 in which he is appointed as Mediator, which reads thus:

"Learned counsel for the parties agree that these matters may be referred for mediation to Hon'ble Mr. Justice K.T. Thomas, a former Judge of this Court, who lives in Kottayam, Kerala. Hon'ble Mr. Justice K.T. Thomas has given his consent for the same. He may fix his own terms of emoluments, and other requirements including secretarial assistance, which will be provided by the parties.

The parties are directed to appear before Hon'ble Mr. Justice K.T. Thomas on 16.12.2010 with a copy of this Order at 11 a.m.

The Registry is directed to send forthwith the papers of these matters along with a copy of this Order to Hon'ble Mr. Justice K.T. Thomas"

In the mediation proceedings the following persons participated with their Advocates. (The parties were identified by me in three different units)

Unit - 1

i) M. Rajagopalan Nair, President, Travancore Devaswom Board
ii) N. Vasu, Travancore Devaswom Board Commissioner,
iii) K. Cicily, Member, Travancore Devaswom Board

Unit – 2

i) Kantararu Maheshwararu,
Senior Thantri,
Thazhamon Madom,
Chengannur.

ii) Kantararu Mohanararu,
Thazhamon Madom,
Chengannur.

Contd....

Ext R2(H)6 513

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iii) Kantararu Rajeevararu,
Thazhamon Madom,
Chengannur.

iv) Rahul Easwar.

Unit – 3

i) Raja Raja Varma - Pandalam Royal Family

ii) Ramesh Varma Raja, - -do-

iii) P.N. Narayana Varma, - -do-

Senior Advocates K Ramkumar, M.C. Sen , K. Radhakrishnan, & V. Giri, and Advocates S. Krishnamurthy, M.P. Sreekrishnan, C.S. Manilal, A. Reghunath, Sanjeev Kumar K. Gopal , C.R. Rakhesh Sharma and Ramaprasad Unni participated representing their clients.

After deliberations and discussions held between the above parties assisted by their advocates at eight sittings, the following terms of settlement have been arrived at:-

Contd....

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Terms of settlement

1) The composition of the Selection Committee (for interviewing and awarding marks for selecting "Melsanti" for both Sabarimala and Malikappuram temples) was one of the seriously contested issues. All parties, after detailed discussions, agreed to have the Selection Committee to consist of the following persons:

A. i) President of Travancore Devaswom Board ('TDB' for short)
   ii) The Member of the TDB
   iii) The remaining Member of the TDB.
   iv) The Commissioner of TDB.

B. i) The Senior Thantri of "Thazhamon Illam/ Madom"
   ii) The Junior Thantri of "Thazhamon Illam/ Madom"

C. The "Outside Thantri" selected in the process indicated in clause (a) of para 2 below:

2) The following modalities have been agreed upon by all as to the formation of the Selection Committee:

a. The Thazhamon Illam (hereinafter referred to as "the Illam" for short) will send up names of three persons whom they consider eminent Thantries to the Travancore Devaswom Board. Keeping those names in serious consideration, the TDB will draw up a list of ten persons who are eminent Thantries. That list will be forwarded to the Senior Raja of Pandalam Royal family (hereinafter referred to as "Senior Raja"). The latter will choose five names from the said list and forward such names to the Illam. The Senior Thantri of the Illam will choose one of them and communicate the same to the TDB. Thereupon, proceedings will be drawn up by TDB appointing the chosen person as the "Outside Thantri" to be on the selection panel. TDB will notify the same. This panel will be valid for one year. But the same procedure will be adopted for composition of the Selection

Contd....

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Committee thereafter also year after year, unless there is statutory intervention.

b. It is made clear that if Illam is not sending up the names to the TDB within one week of receipt of a requisition for that purpose made by the TDB, it is open to the TDB to prepare the panel of names and send it to the Senior Raja. Similarly, if Senior Raja is not sending the names chosen by him to the Illam, within one week of receipt of the panel from TDB, it is open to the TDB to request Thazhamon Illam to choose one name from the original panel prepared by the TDB.

c. If the Illam is not selecting one person from the panel sent by the Senior Raja (or by the TDB as the case may be) within a reasonable period, it is open to the TDB to choose one from the panel already formulated by them and notify him as the "Outside Thantri" to be on the Selection Committee.

The above is only for composition of the Selection Committee. The next task is to select the "Melsantis"

d. The TDB will make the names of all the applicants available on their web site, so that it is open to the Senior Raja to find out whether there is any blemish for any of the applicants and communicate that fact to the TDB and or to the Senior Thantri, well ahead of commencement of the selection process.

e. Next is the preparation of a list of selected candidates after holding the interview of the applicants by the members of the Selection Committee.

While interviewing candidates for "Melsantis" the members of the Selection Committee can award a total of 90 marks. Out of the 90 marks, 30 marks are set apart for the President, Members and Commissioner of TDB for putting such questions as are deemed necessary for eliciting general knowledge of each candidate and to test his personality. The remaining 60 marks are set apart for putting questions to elicit candidates' knowledge in Sanskrit, poojas, rites, Tantric Rituals and other religious matters. Questions in this regard shall be put by the remaining Members of the Selecting Committee formulated above. Out of the 60 marks thus set apart for eliciting the candidates' knowledge in Sanskrit, poojas etc. the Unit comprising of the Senior Thantri and Junior Thantri of Thazhamon Illam/ Madom together can award marks up to 30. The other Unit (the "Outside Thantri") can award marks up to 30

Contd....

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f) After the Selection Committee finalises the list of selected candidates for both Sabarimala and Malikappuram the final choice will be made by draw of lot. The Senior Raja agreed to depute a male child (not above the age of ten) for Sabarimala and a female child (not above the age of ten) for Malikappuram for the purpose of drawing the lot. If male/ female child for the above purpose is not deputed by the Senior Raja within a reasonable period, it is open to the TDB to arrange for draw of lot in such manner as they deem fit.

3) All parties agreed that the appeals can be disposed of in terms of the above settlement.

Justice K.T. Thomas.

List of documents appended:

1. Proceedings of the meeting presided over by the mediator on 16.12.2010
2. Proceedings of the meeting presided over by the mediator on 29.01.2011
3. Proceedings of the meeting presided over by the mediator on 22.03.2011
4. Proceedings of the meeting presided over by the mediator on 23.04.2011
5. Proceedings of the meeting presided over by the mediator on 07.05.2011
6. Proceedings of the meeting presided over by the mediator on 26.05.2011
7. Proceedings of the meeting presided over by the mediator on 04.06.2011
8. Proceedings of the meeting presided over by the mediator on 16.06.2011
9. Proceedings held by the mediator on 18.6.2011

Ext R2(H)8 517

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In the matter of mediation:

For the subject of appointment of "Melsanti" in Sabarimala & Malikappuram Temples

Justice K.T. Thomas,
Former Judge of the Supreme Court of India (Mediator)

Minutes of the proceedings of the 8th meeting held on 16th June 2011 at Sarovaram Hotel, Ernakulam

Persons present:

K. Ramkumar, Sr. Advocate for Kandararu Rajeevaru.
V. Giri, Senior Advocate instructed by Advocate A. Reghunath for TDB.
Rajagopalan Nair, President, Travancore Devaswom Board.
K. Cicily, Member, Travancore Devaswom Board
P.R. Anitha, Secretary, TDB

K. Radhakrishnan, Senior Advocate instructed by Advocate Sajeev Kumar K. Gopal for Raja Raja Varma, Ramesh Varma Raja and P.N. Narayana Varma.

Advocate S. Krishnamurthy for Kantararu Maheswararu,

Advocate C.S. Manilal for Kantararu Mohanararu.

Advocate C.R. Rakhesh Sharma for Kandararu Rajeevaru and Rahul Easwar

In the last meeting all parties agreed that regarding the ration of marks to be awarded by the members of the Selection Committee, they would abide by the suggestion chosen by the mediator – today.

I heard arguments addressed on the different suggestions put forwarded in the last meeting (Mr. V. Giri, Sr. Advocate did not pursue the suggestion which he alternatively put forward that the total marks may be reduced from 90 to 80) At the end of the arguments the mediator offered to choose one of the suggestions, and it will be acceptable to all parties in this case.

Contd....

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I greatly appreciate and express my gratitude to all the counsel and also the other individuals (who were heard by me) for reposing confidence in the Mediator in this appeal.

The above minutes were dictated in the presence of all persons shown above and they admitted the same as correctly recorded.

Justice K.T. Thomas

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In the matter of mediation:

For the subject of appointment of "Melsanti" in Sabarimala Temple

Justice K.T. Thomas,
Former Judge of the Supreme Court of India (Mediator)

Proceeding held by the Mediator on 18.6.2011 as agreed by all the contesting parties in the appeal as per minutes of the meeting held on 4.6.2011 empowering the mediator to make the choice regarding the ratio of marks to be awarded by the Selection Committee while interviewing the candidates for selecting the "Melsanti".

The choice of the Mediator

The total marks which could be awarded for the selection is 90. As the Selection Committee is comprised of three broad Units [(i) President and Members and Commissioner of Travencore Devaswom Board (ii) Two Thantries of Thazhamon Illam and (iii) the "Other Thantri"] each Unit can award up to 30 marks. In other words the choice is in favour of equal marks for each Unit.

Justice K.T. Thomas.

Kottayam
18.6.2011

This is true Copy of the document marked as Ext R2(H) referred to in the Counter affidavit.

Advocate

Subi clerk COPY

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Presented on: 16.9.2017

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(c) No. 26003 of 2017

Vishnu Narayanan : Petitioner

Vs

The Secretary,
Department of Revenue & Devaswom & others : Respondents

COUNTER AFFIDAVIT FILED ON BEHALF OF RESPONDENTS 2 AND 3

Adv. V. Krishna Menon (K-92)-K/873/90
(SC- 1702)

STANDING COUNSEL FOR TRAVANCORE DEVASWOM BOARD

MANU/PR/0057/1925

Equivalent Citation: AIR1925PC139

BEFORE THE PRIVY COUNCIL

Decided On: 25.04.1925

Appellants: **Pramatha Nath Mullick**
Vs.
Respondent: **Pradyumna Kumar Mullick and Ors.**

Hon'ble Judges/Coram:
Shaw, Blanesburgh, John Edge and Ameer Ali, JJ.

JUDGMENT

Shaw, J.

1. The questions raised by this appeal are of a wide and general importance. They have reference to the control and worship of a Hindu family idol. It may be explained that although one idol is referred to, called of course the Thakur, there were two others, the Thakurani, a female idol referred to in some of the papers as the consort of the Thakur, and there was also a third, a sacred or deified stone called the Salgram Sila. These three idols became the objects of the pious worship of the family of the founder, Mutty Lal Mullick, who originally installed them. But the points in the case can be more simply treated by referring to the one--namely, the principal idol the Thakur.

2. The appeal is from a decree dated April 10, 1923, made by the High Court in Calcutta in its Civil Appellate Jurisdiction reversing a decree dated June 1, 1922, made by the same Court in its Original Civil Jurisdiction.

3. The case was argued at great length, and a large mass of authorities was cited.

4. Before entering upon the legal questions which were debated, their Lordships think it not inadvisable to state the family history, in so far as it concerns the installation of this idol. It was established and consecrated many years ago by a wealthy Hindu inhabitant of Calcutta, Babu Mutty Lal Mullick, in his family dwelling-house, in a Thakur Ghar, or room therein, set apart for worship.

5. Mutty Lal Mullick died in 1846 leaving a widow, Ranganmoni, and an adopted son, Jadulal, then two years of age. He left a will dated August 17, 1846 (shortly before his death). He had for some time prior to his death set up and established and consecrated the idol, and no doubt is thrown upon the fact that the idol so installed became unquestionably the object of worship by himself and the family. The will provided that his widow should be the malik or proprietor and attorney, for the protection and care of the whole of his estate until his adopted son Jadulal attained the age of twenty, and the enumeration included the Sri Iswar Thakurs, Thakuranis, etc., established by him and ancestorial.

6. Upon the adopted son attaining twenty the property was to be made over to the son as his heir. There was a power to the widow in case the adopted son died without issue to adopt another. A gift was made to the widow of one lac of rupees, together with various jewels and silver, with right of residence in the family residence. With regard to the maintenance and worship of the idol certain funds, amounting to Rs. 600 a month,

were to be drawn by the widow and therewith she was to defray the expenses of the idol's sheba (or worship) and for religious festivals and ceremonies, " in the method that I have paid and defrayed the same hitherto." Upon the adopted son attaining twenty the widow was to "make over the whole of the property to him fully and he will in a like manner protect the whole of the property and effectuate the Kreah Karmas, or religious acts and ceremonies."

7. It seems accordingly clear that in Mutty Lal Mullick's lifetime the idol was, as already stated, established as a household god; and the pious founder, narrating his own upkeep and maintenance of the deity, gave funds in order that those should be continued; and he prescribed the duty of continuance to the widow during the adopted son's minority and upon the son thereafter during his life.

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 Chatterjee v. Kedar Nath Banerjee (1922) 36 C.L.J. 478, 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 flowers, 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, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."

10. The person founding a deity and becoming responsible for these duties is de facto and in common parlance called shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or--as in the case of Sudras, to which caste the parties belonged--by the employment of a Brahmin priest to do so on his behalf. Or the founder, any time before his death, or his successor likewise, may confer the office of shebait on another.

11. The testator Mutty Lal Mullick did not adopt the latter course, but he acted as shebait with the Brahmin assistance referred to. After his death his widow officiated similarly as the ministrant of the worship, and she used, as directed, the endowed funds specially destined for the upkeep and worship of the deity. After the adopted son Jadulal reached the age of twenty he then became de facto the person, charged with the same duties, to be performed as fully as his adoptive father and mother had performed them.

12. It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate persona. The position and rights of the deity must, in order to work this out both in

regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the shebait custodian of the idol and manager of its estate. And so, paying proper respect to the religious proprieties of the case, the father, mother and adopted son were successively and de facto ministrants and custodians of this idol.

13. The period during which this state of matters existed was in the narrative from anterior to 1846 till the year 1864. The widow's charge of the affairs of the idol had come to an end; and Jadulal the son's period of administration, he having reached the age of twenty, had begun. Jadulal died in the year 1894. What had happened during his period of administration was this : that in 1881 he enlarged the old family dwelling-house containing the thakurbari in which the household gods had hitherto resided and were worshipped. He had erected a puja dalan for the worship of all the family thakurs, including the three referred to, that is to say, instead of one house with its thakurbari for the family, two houses were erected on adjoining plots of ground and between these the puja dalan was erected, having a private entrance from each of the private dwellings so that the family worship was conducted with due decorum and propriety in what was practically an annexe to either house.

14. Two other events occurred which are important during this period of Jadulal's regime. In 1888 he executed a deed of trust providing particular premises for the location and worship of the deities in the puja dalan aforesaid. The terms of this deed are the centre of the contentions raised by the parties in the appeal and will be more particularly hereinafter referred to. The other fact affecting this period was that in the year 1891 Ranganmoni, the widow of Mutty Lal Mullick, died. She made a very large endowment in favour of the family idol, amounting to about one lac of rupees. By her will she appointed Jadulal her executor and trustee and she made a disposition of her property in these terms : "I give and devise my tenanted land, No. 129 Bowbazar Street in Calcutta, to my said trustee, his heirs and representatives to be held by him and them upon trust, to apply the rents and income thereof, after providing for the payment of taxes and other outgoings, in the performance of the daily and periodical worship of the idol, consecrated by my late husband, called Radha-Shamsunder, such worship to be performed by my said son and his descendants."

15. Jadulal died in 1894, leaving issue three sons and four daughters. The estates were large, and a suit for partition among the three sons ensued. Questions of importance were raised as to : (1.) The provisions of Jadulal's will; and (2.) The endowment by Ranganmoni.

16. On the former head the disputes and differences were submitted to the arbitration of the late Mr. W.C. Bonnerjee, who delivered an award in 1899. That award was made a rule of Court. In the partition proceedings, Mr. Bonnerjee declared that the three sons, as Jadulal's heirs, were entitled to the residue of the father's estate in three equal shares. He allotted one of the two houses to the first son, another to the third son, and, in regard to the second son, the present appellant, he was, so to speak, paid out in money in order that he might erect a desirable residence for himself. Among other trusts declared in Jadulal's will was the following--namely : " The trust for the worship of the said Jadulal Mullick's hereditary Goddess Sri Sri Singhabahini Debi and other family deities during his turn or pala of worship."

17. It is to be observed that, although the turn or pala of worship as amongst the three sons was recognized in that part of the award, the idols in question in this case were not named.

18. In a subsequent part of the award various turns of worship were given to the sons in order. As to the thakurbari, or puja dalan, plans were referred to, and it was declared to be the joint property of the three sons. Prohibition was made against the two sons vested in the adjoining properties raising any structure or building of any kind which might interfere with the joint property. The situation created by this deed accordingly was that, while the deities were not named, the joint property of the three sons in the house dedicated to the idol was declared and the system of worship by turn or pala was established.

19. With regard to Ranganmoni's estate and endowment, a suit was brought in 1904, and in June, 1905, it was decreed that a scheme should be framed for carrying on the varied trusts of the lady's will and, subject to provision being made therefor, her estate should be divided into three equal shares among the plaintiff and defendants in this suit. A commission was accordingly issued to Babu Bhupendra Nath Basu to frame a scheme of worship and to partition the residue. This was done by return to the commission, which appointed the worship of Thakur Sri Sri Radha Shamsunderji, the idols in question in this suit, in the following terms : "I direct that the sheba and worship of the Thakur Sri Sri Radha-Shamsun-derji and of the thakur located at Mahesh and Brindaban and the Ekodistha sradh will be performed by the parties and their heirs by turns of one year each, the first turn commencing from the 1st day of Baisakh in the Bengali year 1317 and such first turn shall devolve on the said Pradyumna Kumar Mullick and his heirs, the second turn commencing from first day of the month of Baisakh 1318 shall devolve on the said Pramatha Nath Mullick and his heirs, and the third turn commencing from the first day of the month of Baisakh 1319 shall devolve on the said Manmatha Nath Mullick and his heirs, and so on by rotation. On the demise of any one of the parties, his heirs will become entitled to his turn of worship, and the party having the turn of worship will perform such worship without any interference by any of the other parties."

20. The family very sensibly acted in accordance with the rules set down in these proceedings. The practical result was that the parties, now judicially separated, continued the worship of the idols. The idol was, of course, not removed by the parties during their period of worship or pala because in the building as constructed the idols were located as mentioned in a building adjoining their respective houses.

21. In the year 1910-11 the second son's establishment was set up. The idol was removed to his house in connection with certain festivals considered suitable for the occasion and, after these were concluded in February, 1911, was brought back to the puja dalan. In May, 1911, the second son's year of pala, or turn of worship, came round and the family idol was removed to the thakurbari of his house and family worship continued there for one year. In 1914 the same thing occurred, the first respondent being still an infant. It is not suggested in any part of the case that these temporary transfers of the location of the family idol (such temporary transfers on occasions of festivals are familiar in the community) were not conducted with complete reverence and propriety and without interruption of the ordinary daily services tendered to the idol or any of the rights connected with its worship. In short, the results of the partition suit, the interpretation of the wills of Jadulal and Ranganmoni, and the awards made therein, were so far worked out without defect or friction.

22. When the appellant's pala, however, again came round--namely in 1917, the transfer of the idol by him as before to his thakurbari was objected to by the first respondent, who had now attained majority (with whose objection the third son concurs); and the broad question in this appeal is whether that objection is well

founded in law.

23. In substance the objection is founded upon the deed executed in 1888 by Jadulal.

24. The argument in the appellate Court is thus recorded by Richardson J. : " The learned standing counsel, Mr. B.L. Mitter, founding on Mutty Lal's will, argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to Jadulal. When pushed, Mr. Mitter said that Jadulal might, if he had so pleased, have thrown them into the river."

25. The appellate Court rejected that proposition. And this Board can give no countenance to it. As is added in the judgment referred to : "The inclusion of the idols, however, among items of property, movable and immovable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property. The careful directions given later in the will show that the testator intended the worship of the ancestral deities and the deities he had established to be a charge upon his estate."

26. There may be, in the nature of things, difficulties in adjusting the legal status of the idol to the circumstances and requirements of its protection and location and there may no doubt also be a variety of other contacts of such a persona with mundane ideas. But an argument which would reduce a family idol to the position of a mere movable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principle. The Board does not find itself at variance with the views upon this subject taken in the appellate Court or with the analysis of the authorities there contained.

27. The appellate Court, it is true, felt itself constrained by the terms of the deed of 1888 to arrive at a conclusion adverse to the case of the appellant; but upon the main points in argument, both as to the contention that the household god was mere property, and as to Jadulal's right being absolute therein, this appeal was argued before the Board by the counsel for the respondents here on the footing that if the appellate Court's decree depended on the reasons given, it could not be defended. The Board is, on the contrary, of the opinion that, upon the two points they discussed, the reasoning and view of the High Court are sound.

28. Their Lordships would only add, on the subject of property, that the argument is said to be supported by the judgment of Banerjee J. in Khetter Chunder Ghose v. Hari Das Bundopadhya I.L.R. 17 C. 557. In that case the facts were that the household idol was made over to relatives, owing to the family, whose idol it was, being unable to carry on the worship on account of the paucity of profits of the endowed lands, and it was held that the transfer was justified in the interests of the idol. It was a proper and a pious act. The shebait, being charged fundamentally with the duty of seeing to the worship being carried on, and having the concurrence of the entire family to the transaction, did have power to carry through the transaction "for the purpose of performing its worship regularly through generation to generation." The members of the family were thereby deprived of no right of worship. The interests of worshippers and idol were conserved. Their Lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognized.

29. The argument as to property being thus displaced, their Lordships have now to

consider the position of Jadulal, the grantor of the deed of 1888.

30. Was he shebait of this idol in the narrower sense as the appellant contends or did he succeed by virtue of Mutty Lal's wilt to the rights and privileges possessed by the testator? In the deed of 1888, Jadulal declares as follows: " whereas the said Babu Mutti Lal Mullick, the father of the said Jadulal Mullick, established and consecrated the Thakur called Radha Shamsunderji." As has been seen, during his life Mutty Lal Mullick had de facto performed piously and regularly all the duties which the law would charge upon the custodians of the idol. It stands without question that Jadulal himself was fully performing similar duties and functions. As was said by Lord Hobhouse in Greedharreejee v. Rumanlolljee L.R. 16 I.A. 137, 144 : " According to Hindu law, when the worship of a thakur has been founded the shebaitship is held to be invested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

31. A similar principle appears also to have been implied in the judgments of Jagannaih Prasad Gupta v. Runjit Singh (1897) I.L.R. 25 C. 354; Sheoratan Kunwari v. Ram Pargash (1896) I.L.R. 18 A. 227; Jai Bansi v. Chattar Dhari Sing (1870) 5 Ben. L.R. 181.

32. To apply this law to the present case, Jadulal was the sole heir of his father and, by the general law of India, he thus stood vested with the right of custody of, and management of the trust for the family idol which his father had consecrated and set up. So far as the legal status and rights of Jadulal as grantor of the deed of 1888, the deed proceeds to narrate : " Whereas the said Jadulal Mullick is now desirous of dedicating the said premises to the said thakur in the manner hereinafter expressed." This is perfectly correct language in acknowledgment of the fact that the thakur existed and was the capable recipient in law of the property dedicated to it. The deed then proceeds to declare that certain premises, described in the schedule, " shall be for ever held by the said Jadulal Mullick his heirs executors administrators and representatives to and for the use of the said Thakur Radha Shamsunderji to the intent that the said thakur may be located and worshipped in the said premises and to and for no other use or intent whatsoever Provided always that if at any time hereafter it shall appear expedient to the said Jadulal Mullick his heirs executors administrators or representatives so to do it shall be lawful for him or them upon his or their providing and dedicating for the location and worship of the said thakur another suitable thakurbari of the same or greater value than the premises hereby dedicated to revoke the trusts hereinbefore contained and it is hereby declared that unless and until another thakurbari is provided and dedicated as aforesaid the said thakur shall not on any account be removed from the said premises and in the event of another thakurbari being provided and dedicated as aforesaid the said thakur shall be located therein but shall not similarly be removed therefrom on any account whatsoever."

33. This passage has been quoted in full so as to make clear the three propositions which seem to follow--namely, First, the recognition as mentioned of the idol as the dedicatee : Second, the conveyance in no respect whatever appears to be a conveyance of the idol, but is a conveyance of. the premises described in the schedule to and for the use of the idol and for no other use : Third, this use is not to be interfered with by Jadulal's heirs, executors, administrator or representatives except upon providing for the dedicatee another thakurbari of the same or a larger value. When that is done Jadulal's heirs, etc., could revoke the trusts of the premises affecting the present pujah dalan, and unless and until that is done the idol is not to be removed therefrom.

34. It is this last proposition which raises the real difficulty in the case and their Lordships express no surprise that the High Court should have felt it. Upon a full consideration their Lordships have come to the conclusion that this was not a dedication, in any sense of the word, of the idol as property, nor of the idol at all. It was a dedication of real estate in trust for the idol, recognized as a legal entity, to which such dedication might be made.

35. The true view of this is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the shebait, it be thought that a family idol should change its location the will of the idol itself, expressed through his guardian, must bo given effect to. This is in accordance with what would appear to be the sound principle of the position and it is further in accord with the authority on the subject. In the case already referred to so far did the decision go that it was expressly said by Lord Hobhouse in Greed-harreejee v. Rumanlolljee L.R. 16 I.A. 137: "The thakur dowjee, or those who speak for him on earth, need not take advantage of this gift."

36. A fortiori it is open to an idol acting through his guardian the shebait to conduct its worship in its own way at its own place, always on the assumption that the acts of the shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it.

37. A question was raised whether the right of worship of an idol can be made the subject of partition. Their Lordships have already referred to this point when dealing with the arbitration proceedings.

38. The point arose especially in the case of Mitta Kunth Audhicarry v. Neerunjun Audhicarry 14 Ben. L.R. 166, 169. The headnote is as follows : "The reasons for which one of several joint owners is entitled to a partition of the joint property, apply also to the case of a joint right of performing the worship of an idol. The joint owners of such a right are entitled to perform their worship by turns." And, in Sir Richard Couch's judgment, the following rule of law is referred to : " The suit is founded upon the right of the plaintiff, as property, to a partition. No doubt the plaintiff is entitled to that; and the decree of the first court was right in awarding it. But that decree has not made provision for the term that each of the three persons, the plaintiff and the two defendants, should have, and does not state whether the plaintiff is to have his turn first, or second, or third. We must therefore direct the Extra Assistant Commissioner to determine by lot in what order the plaintiff and the two defendants shall exercise the right to worship the idol. And having determined that, he should insert in his decree, so that it will be settled in what order they are to exercise the right of worship."

39. The sole objection made in these proceedings to the removal by one of the shebaits during his pala or turn of worship to his residence is founded upon the deed of 1888 already analysed. In para. 13 of the defence " this defendant admits that the plaintiff's turn of worship commenced on and from...April 14, 1917. On April 2, 1917, this defendant, who had attained majority on or about November 20, 1914,... objected." In the evidence of the first respondent, he deposed as follows : " Babu Bhupendra Nath Basu divided the turn of worship of 6 thakurs, and each of us have one year...my only objection is based on the deed of dedication; apart from the deed there would be objection to the removal because the thakur has its own house where arrangements are made for sheba. I have said that my only objection is on the deed of dedication." While, however, this is the only objection actually made by the objecting defendant, it has to be pointed out that the idol is not otherwise represented in the proceedings, though the

result might conceivably vitally affect its interests. In that sense the contest has related to the establishment of individual rights as between contesting she-baits. The interests of the female members of the family, especially in view of the fact that they are excluded from the managership of the idols, might need special protection. They are entitled to participate in the worship established by Mutty Lal Mullick without obstruction or inconvenience.

40. Their Lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court. The female members of the family should also be joined, and a scheme should be framed, for the regulation of the worship of the idols.

41. Their Lordships will therefore humbly advise His Majesty that the case should be remitted to the High Court to be dealt with in accordance with this report. It will be necessary in these circumstances to set aside the decrees of both the Courts below. The parties must bear their own costs in the Courts of India and before this Board; any costs paid under either of the decrees of the Courts below will be repaid.

MANU/SC/0252/1969

Equivalent Citation: AIR1969SC1089, (1969)1SCC555, [1969]3SCR742

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 690-694 of 1968

Assessment Year: 1950-1951;1951-1952

Decided On: 18.02.1969

Appellants:**Yogendra Nath Naskar**
Vs.
Respondent:**Commissioner of Income Tax, Calcutta**

Hon'ble Judges/Coram:
A.N. Grover, J.C. Shah and Vaidynathier Ramaswami, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: M.C. Chagla and B.P. Maheshwari, Advs

For Respondents/Defendant: M.C. Chagla, and B.P. Maheshwari, Advs.

JUDGMENT

1. These appeals are brought from the judgment of the Calcutta High Court dated 3rd, 4th and 5th April, 1965 in Income Tax Reference No. 50 of 1961 on a certificate granted Under Section 66A of the Indian Income Tax, Act, 1922 (hereinafter called the Act).

2. One Ram Kristo Naskar left a will dated 17th May, 1899 by which he left certain properties as debuttar to two deities Sri Sri Iswar Kubereswar Mahadeb Thakur and Sri Sri Ananda-moyee Kalimata in the land adjoining his residential house at 74/75 Beliaghata Main Road. He appointed his two adopted sons Hem Chandra Naskar (since deceased) and Yogendra Nath Naskar as the shebaits. Elaborate provision was made as to the manner in which the income from the property was to be spent. For a long time the income from the property was assessed in the hands of the shebaits as trustees. In respect of the assessment years 1950-51 and 1951-52, the two shebaits contended that there was no trust executed in the case and as such the income from the property did not attract liability to tax and particularly the assessments made in the name of Hem Chandra Naskar and his brother Yogendra Nath Naskar as trustees of the debuttar estate could not be sustained. The Appellate Assistant Commissioner accepted this contention on appeal and set aside the assessments. Finding that the assessments have been set aside on the footing that the status of the assessees had not been correctly determined the Income Tax Officer initiated proceedings for the assessment years 1952-53 and 1953-54 against Hem Chandra Naskar and Yogendra Nath Naskar, the shebaits of the two deities and completed the assessments on the deities in the status of an individual and through the shebaits. The claim for exemption under the proviso to Section 4(3)(i) of the Income Tax Act was rejected. On appeal the Appellate Assistant Commissioner upheld the assessment orders of the Income Tax Officer. The assessee appealed to the Appellate Tribunal and contended that the deities were not chargeable to tax Under Section 3 of the Act; that Section 41 of the Act did not apply to the facts of the case. Though the shebaits were the managers who could come under the ambit of Section 41,

they had not been appointed by or under any order of the court and therefore the assessments were invalid and should be set aside. It was also contended that the case of the trustee having been specifically given up it would not be open to the Income Tax Department to bring the shebaits under any of the categories A mentioned in Section 41. The departmental representative contended that the assessments had been made on the shabait not Under Section 41 as trustees or managers but that the deities had bean assessed as individuals and that Section 41 was a surplusage in making the assessments. The Tribunal held that though the shebaits were the managers for the purpose of Section 41, they were not so appointed by or under any order of the court, and, therefore, the second condition required by Section 41 was not fulfilled, and the shebaits could not be proceeded against. The Appellate Tribunal added that the specific provision which the Tribunal first relied was that of trustees Under Section 41, but that case having been given up the further attempt to assess the shebaits as managers Under Section 41 could not be upheld. At the instance of the Commissioner of Income Tax, the Appellate Tribunal referred the following question of law for the opinion of the High Court under Section 66(1) of the Act:

> Whether on the facts and in the circumstances of the case, the assessment on the deities through the shebaits under the provisions of Section 41 of the Indian Income Tax Act were in accordance with law ?

3. After having heard learned Counsel for both the parties we are satisfied that in the question referred by the Appellate Tribunal the words 'under the provisions of Section 41 of the Indian Income Tax Act' should be deleted as superfluous and the question should be modified in the following manner to bring out the question in real controversy between the parties :

> Whether on the facts and in the circumstances of the case, the assessments on the deities through the shebaits were in accordance with law.

4. The main question hence presented for determination in these appeals is whether a Hindu deity can be treated as a unit of assessment Under Section 3 and 4 of the Income Tax Act, 1922.

5. It is well established by high authorities that a Hindu idol is a juristic person in whom the dedicated property vests. fit Manohar Ganesh v. Lakshmiram I.L.R 12 Bom 247 called the Dakor temple case, West and Birdwood, JJ. state : The Hindu Law, like the Roman Law and those derived from it, recognises not only incorporate bodies with rights of property vested in the corporation apart from its individual members but also juridical persons called foundations. A Hindu who wishes to establish a religious or charitable institution may according to his law express his purpose and endow it and the ruler will give effect to the bounty or at least, protect it so far at any rate as is consistent with his own Dharma or conception or morality. A trust is not required for the purpose; the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English Law. In early law a gift placed as it was expressed on the altar of God, sufficed it to convey to the Church the lands thus dedicated. It is consistent wit the grants having been made to the juridical person symbolised or personified in the idol.

The same view has been expressed by the Madras High Court in Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami and Ors. I.L.R. Mad. 435 in which Mr. Justice Subrahmania Ayyar stated :

> It is to give due effect to such a sentiment, widespread and deep-rooted, as it

> has always been, with reference to something not capable of holding property as a natural person, that the laws of most countries have sanctioned the creation of a fictitious person in the matter as is implied in the felicitous observation made in the work already cited "Perhaps the oldest of all juristic persons is the God, hero or the saint" (Pollock and Maitland's History of English Law, Volume I, 481).
>
> That the consecrated idol in a Hindu temple is a juridical person has been expressly laid down in Manohar Ganesh's case, I.L.R. 12 Bom. 247 which Mr. Prannath Saraswati, the author of the 'Tagore Lectures on Endowments' rightly enough speaks of as one ranking as the leading case on the subject, and in which West J., discusses the whole matter with much erudition. And in more than one case, the decision of the Judicial Committee proceeds on precisely the same footing (Maharanee Shibessourec Dehia v. Mothocrapath Acharjo 13 M.I.A. 270 and Prosanna Kumari Debya v. Golab Chand Baboo L.R. 2 IndAp145 Such ascription of legal personality to an idol must however be incomplete unless it be linked of human guardians for them variously designated in Debya v. Golab Chand Baboo L.R. 2 IndAp145 the Judicial Committee observed thus : 'It is only in an ideal sense that property can be said to belong to an idol and the possession and management must in the nature of things be entrusted with some person as shebait or manager. It would seem to follow that the person so entrusted must be necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir'-words which seem to be almost on echo of what was said in relation to a church in a judgment of the days of Edward I: 'A church is always under age and is to be treated as an infant and it is not according to law that infants should be disinherited by the negligence of their guardians or be barred of an action in case they would complain of things wrongfully done by their guardians while they are under age' (Pollock and Maitland's 'History of English Law', Volume I, 483.

In Pramatha Nath Mullick v. Pradyumna Kumar Mullick and Ors. 52 I.A. 245 Lord Shaw observed:

> 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".

It should however be remembered that the juristic person in the idol is not the material image, and it is an exploded theory that the image itself develops into a legal person as soon as it is consecrated and vivified by the Pran Prarishta ceremony. It is not also correct that the supreme being of which the idol is a symbol or image is the recipient and owner of the dedicated property. This is clearly laid down in authoritative Sanskrit Texts. Thus, in his Bhashya on the Purva Mimamsa, Adhyaya 9, Pada I, Sabara Swami states :

nsoxzkeks] nso{ks=fefr] mipkjek=eA ;ks ;nfHkizsra
fofu;ksäeZgfr] rÜkL; LoeA u p xzkea {ks=a ok
;FkkfHkizk;a fofu;qäM nsork A rLeké laiz; PNkrhfrA
nsoifjpkj dk.kka rq rrks HkwfrHkZofr] norkeqfí'i ;r R;äe

"Words such as 'village of the Gods', 'land of the Gods' are used in a figurative sense. That is property which can be said to belong to a person, which he can make use of as he desires. God however does not make use of the village or lands, according to its desires". Likewise, Medhathithi in commenting on the expression 'Devaswam' in Manu, Chapter XI, Verse 26 writes :

nsokuqfN';] ;kxkfn fØ;kFkZ /kua ;nqRl`"Va]
risoLoe eq[;L; LoLokfelcaU/kL;] nsokuk vlaHkokrA

"Property of the Gods, Devaswam, means whatever is abandoned for Gods, for purposes of sacrifice and the like, because ownership in the primary sense, as showing the relationship between the owner and the property owned, is impossible of application to Gods". Thus, according to the texts, the Gods have no bener official enjoyment of the properties, and they can be described as their owners only in a figurative sense (Gaunartha). The correct legal position is that the idol as representing and embodying the spiritual purpose of the donor is the juristic person recognised by law and in this juristic person the dedicated property vests. As observed by Mr. Justice B. K. Mukherjea :

> With regard to Debutter, the position seems to be somewhat different. What is personified here is not the entire property which is dedicated to the deity but the deity itself which is the central part of the foundation and stands as the material symbol and embodiment of the pious purpose which the dedicator has in view. "The dedication to deity", said Sir Lawrence Jenkins in Bhupati v. Rantlal 10 C.L.J.355 "is nothing but a compendious expression of the pious purpose for which the dedication is designed". It is not only a compendious expression but a material embodiment of the pious purpose and though there is difficulty in holding that property can reside in the aim or purpose itself, it would be quite consistent with sound principles of Jurisprudence to say that a material object which represents or symbolises a particular purpose can be given the status of a legal person, and regarded as owner of the property which is dedicated to it.", Hindu Law of Religious & Charitable Trust by Mr. B.K. Mukberjce

6. The legal position is comparable in many respects to the development in Roman Law. So far as charitable endowment is concerned Roman Law as later developed recognised two kinds of juristic pann. One was a corporation or aggregate of persons which owed its juristic personality to State sanction. A private person might make over property by way of gift or legacy to a corporation already in existence and might at the same time prescribe the particular purpose for which the property was to be employed e.g. feeding the poor, or giving relief to the poor or distressed. The recipient corporation would be in a position of a trustee and would be legally bound to spend the funds for the particular purpose. The other alternative was for the donor to create an institution or foundation himself. This would be a new juristic person which depended for its origin upon nothing else but the will of the founder provided it was directed to a charitable purpose. The foundation would be the owner of the dedicated property in the eye of law and the administrators would be in the position of trustees bound to carry out the object of the foundation. As observed by Sohm:

During the later Empire-from the fifth century onwards-foundations created by private individuals came to be recognised as foundations in the true legal sense, but only if they took the form of a ipia cause' ('pium corpus') i.e. were devoted to 'pious uses', only in short, if they were charitable institutions. Wherever a person dedicated property-whether by gift inter vivos or by will-in favour of the poor, or the sick, or prisoners, orphans, or aged people, he thereby created ipso facto a new subject of legal rights-the poor-house, the hospital, and so forth-and the dedicated property became the sole property of this new subject; it became the sole property of the new juristic person whom the founder had called into being. Roman law, however, took the view that the endowments of charitable foundations were a species of Church property. Piae causae were subjected to the control of the Church, that is, of the bishop or the ecclesiastical administrator, as the case might be. A pia causa was regarded as an ecclesiastical, and consequently, as a public institution, and as such it shared that corporate capacity which belonged to all ecclesiastical institutions by virtue of a general rule of law. A pia causa did not require to have a juristic personality expressly conferred upon it. According to Roman law the act-whether a gift inter vivos or a testamentary disposition-whereby the founder dedicated property to charitable uses was sufficient, without more, to constitute the pia causa a foundation in the legal sense, to make it, in other words, a new subject of legal rights'", Institute of Roman Law, 3rd Edition pp. 197-198.

7. We should, in this context, make a distinction between the spiritual and the legal aspect of the Hindu idol which is installed and worshipped. From the spiritual standpoint the idol may be to the worshipper a symbol (pratika) of the Supreme Godhead intended to invoke a sense of the vast and intimate reality, and suggesting the essential truth of the Real that is beyond all name or form. It is basic postulate of Hindu religion that different images do not represent different divinities, they are really symbols of One Supreme Spirit and in whichever name or form the deity is invoked, the Hindu worshipper purports to worship the Supreme Spirit and nothing else.

bUnz fe=ka c#.ke vfXue vkgqju
,da ln foizk ogq/kk onfUrA
(Rig Veda I-164)

(They have spoken of Him as Agni, Mitra, Varuna, Indra; the one Existence the sages speak of in many). The Bhagavad Gita echoes this verse when it says :

ok;qj ieks·fXuj o#.k% 'kk'kkš
iztkifrl Roa izfirkeg'pA (Chap. XI. 39)

(Thou art Vayu and Yama, Agni, Varuna and Moon; Lord of creation art Thou, and Grandsire).

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 court 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 Section 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 MANU/SC/0067/1957 : [1957]32ITR615(SC) 6 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 beep 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.

8. On behalf of the appellant Mr. Chagla referred to Section 2 Sub-section (31) of the Income Tax Act, 1961 (Act No. 49 of 1961) which states:

> **2.** In this Act, unless the context otherwise requires-
>
> . . .
>
> (31) 'person' includes-
>
> (i) an individual,
>
> (ii) a Hindu undivided family,
>
> (iii) a company,
>
> (iv) a firm,
>
> (v) an association of persons or a body of individuals , whether incorporated or not,
>
> (vi) a local authority, and
>
> (vii) every artificial juridical person, not falling within any of the preceding Sub-clauses.

Counsel, also referred to Section 2(9) and Section 3 of the Income Tax Act 1922 which state:

> **2.** In this Act, unless there is anything repugnant in the subject or context-
>
> . . .

(9) 'person' includes Hindu undivided family and local authority".

"3. Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually.

On a comparison of the provisions of the two Acts counsel on behalf of the appellant contended that a restricted meaning should be given to the word 'individual' in Section 3 of the earlier Act. We see no justification for this argument. On the other hand, we are of the opinion that the language employed in 1961 Act may be relied upon as a Parliamentary exposition of the earlier Act even on the assumption that the language employed in Section 3 of the earlier Act is ambiguous. It is clear that the word 'individual' in Section 3 of the 1922 Act includes within its connotation all artificial juridical persons and this legal position is made explicit and beyond challenge in the 1961 Act In Cape Brandy Syndicate v. I.R.C.[1921] 2 K.B.403 Lord Sterndale M. R. said:

I think it is clearly established in Attorney General v. Clarkson [1900] 1 Q.B.156 that subsequent legislation may be looked at in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation if it proceeded on an erroneous construction of previous legislation cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation, then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier Act.

For the reasons expressed we hold that the question of law referred by the Income-tax Appellate Tribunal and as modified by us should be answered in the affirmative and in favour of the Commissioner of Income-tax. We accordingly dismiss these appeals, with costs. One hearing fee.