IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. No. 10/2016

IN

W.P.(C) 373/2006

IN THE MATTER OF:

Indian Young Lawyers Association (IYLA) **…Petitioners**

v.

State of Kerala and Ors. **…Respondents**

AND

IN THE MATTER OF:

Nikita Azad (Arora)

Daughter of Gulshan Rai **…Applicants/ Intervenor**

ADDITIONAL REJOINDER SUBMISSIONS ON BEHALF OF THE INTERVENOR BY SR. ADV. MS. INDIRA JAISING

THE RIGHTS OF THE DEITY AS A JURISTIC ENTITY ARE RESTRICTED TO CIVIL MATTERS

1. It is submitted that the deity as a legal person has rights vested in it, but the same are limited to maintenance of properties and the taxation matters related therein. This principle has been consistently maintained in the Indian legal jurisprudence since the time of Privy Council and the Judicial Committee decisions.

2. In **Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1925) 27 BOMLR 1064** and Others, 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 be 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."*

3. The Judicial Committee in the decision of **Maharaja Jagindranath Roy Bahadur v. Rani Hemanta Kumari Debi 1904 SCC OnLine PC 22,** the Privy Council stated the law thus:

> *"There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though **it is only in an ideal sense that property is so held**. And probably this is the true legal view when the dedication is of the completest kind known to the law.... Assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol."*

4. Moreover, it has been established in **Yogendra Nath Naskar v. CIT 1969 AIR SC 1089** that the actual management is done by the Shebait in the name of the idol or the deity. The Supreme Court in this case, agreed that the deity fell was covered under 'individual' under the Income Tax Act and was capable of being taxed through its Shebaits. It is pertinent to note that in this case, the statute had an explicit provision that included legal entities in the definition of "individual."

5. As has been mentioned above, that it is only in the "ideal sense" that the rights even for a property vest in an idol. The rights of the Shebaits, the trusts, and the denomination have been secured under Article 26. The pre-constitutional right now find a place in Article 26, that it is the right to manage a religious denomination and must be

interpreted in the light of the judgments of this Hon'ble Court as being subject to public order, health, and morality.

[Refer to:

1. *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282;*
2. *N. Adithayan v. Travancore Devaswom Board (2002) 8 SCC 106]*

RIGHTS UNDER ARTICLE 25(1) SOLELY RELATES TO THE INDIVIDUAL AND NOT A DENOMINATION

6. It is submitted that the right under Article 25(1) vests in the individual and is personal in nature. The Hon'ble Supreme Court has referred to that the right to worship the deity, in reference to the rituals, ceremonies, and other such matters relating to the deity are covered under Article 26(b) as management of religious affairs.

7. This Hon'ble Court in **Shri A.S. Narayana Deekshitulu vs State Of Andhra Pradesh1996 9 SCC 548,** held as follows:

> *"**85.** Articles 25 and 26 deal with and protect religious freedom. Religion as used in these articles must be construed in its strict and etymological sense. Religion is that which binds a man with his Cosmos, his Creator or super force. It is difficult and rather impossible to define or delimit the expressions 'religion' or "matters of religion" used in Articles 25 and 26. Essentially, religion is a matter of personal faith and belief of personal relations of an individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe. Religion is not necessarily theistic and in fact there are well-known religions in India itself like Buddhism and Jainism which do not believe in the existence of God. In India, Muslims believe in Allah and have faith in Islam; Christians in Christ and Christianity; Parsis in Zoroastrianism; Sikhs in Guru Granth Sahib and teachings of Guru Nanak Devji, its founder, which is a facet of Hinduism like Brahmo Samaj, Arya Samaj etc."*

8. Furthermore, in the case **Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (AIR 1954 SC 282)**, Justice Mukherjea while speaking for the Bench mentioned on the point of rights of denominations under Article 25(1) as follows:

> *"**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 "persons" 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 practise and propagate the religious tenets, 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 guaranteed to every person under Article 25. ***Institutions, as such cannot practise or propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenets 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 parlour meeting."***

[Emphasis Supplied]

9. Assuming without admitting that the deity has rights under Article 25(1), the same would be subject to public order, health, morality, and other rights under Part III of the Constitution, including the principle of constitutional morality. Therefore, these rights will also be subject to Article 14, 15, 17, and 21, and rights of the deity in so as they prohibit the entry of menstruating women from entering the temple will be discrimination based on sex alone and will violate Article 15 of the Constitution.

THE SCOPE OF ARTICLE 25(2)(b) IS WIDER THAN ENABLING LAWS FOR TEMPLE ENTRY FOR UNTOUCHABLES

10. It is submitted that Article 25(2)(b) cannot be interpreted as only being an enabling provision for making welfare and social reforms against untouchability solely on the ground that the second half of the provision is about throwing open of Hindu religious institutions. It is submitted that the first part of Article 25(2)(b) that provides for making social and welfare reforms is separated by the second part regarding throwing open of Hindu religious institutions with an "or", thereby making it clear that the social welfare reform could be of a wider scope than just throwing open of temples.

11. Moreover, the Hon'ble Supreme Court in the case of **J. Jayalalitha v. Union of India (1999) 5 SCC 138**, while discussing the powers of the government to appoint Special Judges expounded on the usage of the word "or" while interpreting a statute, and explained that "or" would mean either or both the things mentioned in the provision. The excerpt is as follows:

"9. ...*The dictionary meaning of the word "or" is "a particle used to connect words, phrases, or classes representing alternatives". The word "or", which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean "and" also. Alternatives need not always be mutually exclusive. Moreover, the word "or" does not stand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context of Section 3.* ***It is a matter of common knowledge that the word "or" is at times used to join terms when either one or***

the other or both are indicated. Section 3 is an empowering section and depending upon the necessity the Government has to appoint Special Judges for an area or areas or case or group of cases. Even in the same area where a Special Judge has already been appointed, a necessity may arise for appointing one more Special Judge for dealing with a particular case or group of cases because of some special features of that case or cases or for some other special reasons. We see no good reason to restrict the power of the Government in this behalf by giving a restricted meaning to the word "or". In our opinion, the word "or" as used in Section 3 would mean that the Government has the power to do either or both the things. Therefore, the first contention raised on behalf of the appellants has to be rejected."

[Emphasis Supplied]

12. Therefore, it is submitted that social or welfare legislations, not restricted to those for untouchables can be enacted under Article 25(2)(b) of the Constitution. Moreover, laws such as the Hindu Marriage Act, 1955, Hindu Succession Act, 1956 were enacted as social welfare legislation for Hindu women, to reform the Hindu religion.

THE JUDGMENT OF THE KERALA HIGH COURT IN S. MAHENDRAN RECORDS EVIDENCE OF THE SO CALLED CUSTOM, HENCE A PETITION UNDER ARTICLE 32 IS MAINTAINABLE. IN ANY EVENT, ASSUMING SUCH A CUSTOM EXISTS IT HAS TO MEET THE TEST OF "CONSTITUTIONAL LEGITIMACY"

13. It is submitted that even though the Kerala High Court recorded evidence and testimony to the effect of understanding the history and origin of the practice that disallowed women from the age of 10 to 50 to enter the temple, and upheld the custom, without going into the question of the Sabarimala temple being a denomination or not.

14. Moreover, the status of the Sabarimala temple being a denomination or not is separate from the questions framed for reference to the Constitution Bench which include the validity of the impugned rule challenged as violating Article 25(1) of the women prohibited from entering the temple.

15. The Supreme Court in **Sanjay Singh v. U.P. Public Service Commission (2007) 3 SCC 720** while upholding that where violation of a fundamental right of a citizen is alleged in a petition under Article 32, it cannot be dismissed, as not maintainable, merely because it seeks to distinguish or challenge the ratio decidendi of an earlier judgment. It observed as:

"10. The contention of the Commission also overlooks the fundamental difference between challenge to the final order forming part of the judgment and challenge to the ratio decidendi of the judgment. Broadly speaking, every judgment of superior courts has three segments, namely, (i) the facts and the point at issue; (ii) the reasons for the decision; and (iii) the final order containing the decision. The

reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a judgment of this Court, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment. This may happen either on account of any subsequent event or the need to mould the relief to do complete justice in the matter. It is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. The term "judgment" and "decision" are used, rather loosely, to refer to the entire judgment or the final order or the ratio decidendi of a judgment. Rupa Ashok Hurra [(2002) 4 SCC 388] is of course, an authority for the proposition that a petition under Article 32 would not be maintainable to challenge or set aside or quash the final order contained in a judgment of this Court. It does not lay down a proposition that the ratio decidendi of any earlier decision cannot be examined or differed in another case. ***Where violation of a fundamental right of a citizen is alleged in a petition under Article 32, it cannot be dismissed, as not maintainable, merely because it seeks to distinguish or challenge the ratio decidendi of an earlier judgment, except where it is between the same parties and in respect of the same cause of action. Where a legal issue raised in a petition under Article 32 is covered by a decision of this Court, the Court may dismiss the petition following the ratio decidendi of the earlier decision. Such dismissal is not on the ground of "maintainability" but on the ground that the issue raised is not tenable, in view of the law laid down in the earlier decision. But if the Court is satisfied that the issue raised in the later petition requires consideration and in that context the earlier decision requires re-examination, the Court can certainly proceed to examine the matter (or refer the matter to a larger Bench, if the earlier decision is not of a smaller Bench).*** *When the issue is re-examined and a view is taken different from the one taken earlier, a new ratio is laid down. When the ratio decidendi of the earlier decision undergoes such change, the final order of the earlier decision as applicable to the parties to the earlier decision, is in no way altered or disturbed. Therefore, the contention that a writ petition under Article 32 is barred or not maintainable with reference to an issue which is the subject-matter of an earlier decision, is rejected."*

[Emphasis Supplied]

16. It is therefore, submitted that the Kerala High Court judgment does not operate as *res judicata* and the present bench of the Supreme Court is competent to hear the arguments raised regarding the fundamental right to worship of women, and any ancillary issues that may arise regarding the denominational status of the Sabarimala temple.

17. The condition imposed namely that women cannot enter between the ages of 10 to 50 is an unconstitutional condition and hence it lacks constitutional legitimacy.

[Refer to:Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717; Para 158 to 173

158. *The doctrine of "unconstitutional condition" means any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right. This doctrine takes for granted that 'the petitioner has no right to be a policeman' but it emphasizes the right he is conceded to possess by reason of an explicit provision of the*

Constitution, namely, his right "to talk politics". The major requirement of the doctrine is that the person complaining of the condition must demonstrate that it is unreasonable in the special sense that it takes away or abridges the exercise of a right protected by an explicit provision of the Constitution (see William W. Van Alstyne: "The Demise of the Right-Privilege Distinction in Constitutional Law" [81 Harv Law Rev 1439])].