

Sabarimala: The Scuffle between Faith and Equality

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ABSTRACT:

India is a pluralistic population of various religious and ethnic groups with different languages and culture. Out of the eight major religions, four have their origin in India. India is the home state of the largest number of Hindus, and of the second largest of Muslims, in entire world. And also being home to millions of the followers of the four other religions. In the pluralistic and multi- religious society of India, religious tolerance and religious values have always had, and continue to have a strong influence. In this article, I will examine the sabarimala judgment in three parts. Part one will provide a brief overview of the historical background of sabarimala case .part two will examine the issues framed by the hon'ble supreme court and analysis of each judge observation to these issues. In part three will examine the dissenting opinion of Indu Malhotra J.

Key words: Religion, Sabarimala judgment, Supreme Court

I. INTRODUCTION

John Article 25 of the Indian constitution guarantees freedom of religion to every individual. This includes the right to freedom of conscience and the right to freely profess, practice and propagate religion. The right to freedom of religion is also not an unqualified right. It is subject to public order, morality and health and to other provisions related to fundamental rights. Similarly, it also empowers the state to intervene in Hindu religious institutions.

II. BACKGROUND OF SABARIMALA CASE

In the early 1990s, In S. Mahendran v. the secretary, The Travancore Devasthan board, Thiruvananthapuram and Others. A petition filed by the S. Mahendran later it was converted into a PIL by the Kerala High Court and set out three questions that arose, as follows.

- i. Whether women of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple.
- ii. Whether the denial of entry of that class of women amounts to discrimination and is violative of article 15, 25, and 26 of the constitution of India, and
- iii. Whether directions can be issued by this court to the Devaswom Board and the Government of Kerala to restrict the entry of such women to the temple?

The Division Bench in its judgment observed thus:

The deity in Sabarimala temple is in the form of a Yogi or a Bramchari according to the Thanthri of the temple.

He stated that there are sasta temples at Anchankovil, Aryankavu, and Kulathupuzha, but the deities there are in different forms. Puthumana Narayan Namboodiri, a thanthrimukhya recognized by the Travancore Devaswom Board stated that God in Sabarimala is in the form of a NaisthiBrahmachari. That, according to him is the reason why young women are not permitted to offer prayers in the temple.

“Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women”. Thus the high court in its judgment referred to the “Vratham” and concluded that

- i. The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala shrine in accordance with the usage prevalent from time immemorial.
- ii. Such Restrictions imposed by the devaswom board is not violative of article 15, 25, and 26 of the constitution of India.
- iii. Such Restriction is also not vocative of the provisions of Hindu place of public worship (Authorization of entry) Act, 1965 since there is no restriction between one section and another class among the Hindus in the matter of entry to a temple whereas the prohibition is only in respect of women of a particular age group and not women as a class.

Thus, the Division Bench upheld the Kerala state’s ban on menstruating women from entering into the Sabarimala temple. That this Order of Kerala High court went unchallenged for 15 years. In 2006 a PIL against the High Court order was filed by the Indian Young Lawyer Association, contended that the Ban violated the constitutional rights of women. On March 7, 2008, a bench of Justice S.B Sinha and Justice V.S Sirpurkar referred the case to a Three-Judge Bench. The case came up for hearing after seven years on 11th January 2016. Finally, on 13th October 2017 a bench constituting Chief Justice Dipak Misra, Justice R. Banumathi, and Justice Ashok Bhushan ordered a Constitution Bench to pass the judgment on the case. Thus a Constitutional Bench led by Chief Justice Dipak Misra to hear the case was constituted.

The three judge's bench in Indian Young Lawyers Association and others v. State of Kerala and others framed the following questions for the purpose of refer to the constitutional bench:

- i. Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of articles 14, 15 and 17 and not protected by the "Morality" as used in article 25 and 26 of the constitution?

- ii. Whether the practice of excluding such women constitutes an “essential religious practice” under article 25 and whether a religious institution can assert a claim in that regard under the umbrella of the right to manage its own affairs in the matters of religion?
- iii. Whether the Ayyappa temple has a denominational character and, if so, is it permissible on the part of a “religious denomination” managed by a statutory board and financed under article 290-A of the constitution of India out of the consolidated fund of Kerala and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in article 14, 15(3), 39(a) and 51-A(e).
- iv. Whether rule 3 of the Kerala Hindu Places of Public worship (Authorization of entry) rules permit religious denomination to ban entry of women between the ages of 10 to 50 years? And if so, would it not play foul of articles 14 and 15(3) of the constitution by restricting entry of women on the ground of sex?
- v. Whether rule 3(b) of the Kerala Hindu places of public worship (Authorization of entry) rules, 1965 is Ultra Virus the Kerala Hindu places of public worship(Authorization of entry) act, 1965 and , if treated to be Intra Virus, whether it will be violative of the provisions of part III of the constitution?

The Constitution Bench of the Supreme Court by 4:1 Majority held that, the Sabarimala temple’s practice of barring entry to women between the ages of 10 to 50 was Unconstitutional. The majority verdict is based on the abstract notion of Equality, Dignity, Gender Justice, etc.

Taking into consideration of the question framed by the Supreme Court I would like to take each framed question and analyze the views observed by the judges with regard.

- i. Whether the Ayyappa temple or the followers of Lord Ayyappa constitute a religious denominational character.

Dipak Mishra, CJI delivered the judgment himself and also of A.M. Khanwilkar, J. held that the Followers of Lord Ayyappa do not constitute a religious denomination. He further observed that: "There is nothing on record to show that the devotees of Lord Ayyappa have any common religious tenets peculiar to themselves, which they regarded as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are just Hindus and do not constitute a separate religious denomination” (CJI Dipak Mishra, Para 96)

R. Nariman, J also agrees with Dipak Mishra, CJI and A.M. Khanwilkar, J. He observed that: “we are clearly of the view that there is no distinctive name given to the worshippers of Lord Ayyappa. There is no common faith in the sense of a belief common to a particular religion or section thereof or common organization of the

worshipper of the Sabarimala temple so as to constitute the said temple into a religious denomination. It is clear, therefore, that article 26 does not get attracted to the fact of this case” (R.Nariman J, Para 27)

D.Y. Chandrachud .J observed that: “the Sabarimala temple at which worship is carried out is dedicated to the public and represents truly, the plural character of the society. Everyone, irrespective of the religious belief, can worship the deity. The practices associated with the forms of worship do not constitute the devotees into religious denomination” (D.Y Chandracud J, Para 69)

Indu Malhotra. J Recognizes the followers of Lord Ayyappa as a religious denominational character. On the basis of the government notification dated 27-11-1956 Malhotra. J asserted that: "the worshippers of Lord Ayyappa at Sabarimala temple together constitute a religious denomination or sect thereof, as the case may be, fallow a common faith, and have common beliefs and practices" (Indu Malhotra j, Para 12.3) and on the basis of precedent Malhotra. J held that "if there is a clear attribute that there exists a sect, which is identified as being distinct by its belief and practices, and having a collection of the followers who follow the same faith, it would be identified as a religious denomination"(Para 12.8).

- ii. Whether the practice of excluding such women constitutes an "essential religious practice" under article 25. And whether rule 3 of the Kerala Hindu Places of Public worship (Authorization of entry) rules permit religious denomination to ban entry of women between the ages of 10 to 50 years.

The CJI Mishra and Khanwilkar J. While taking the note on “enforceability of fundamental right under article 25(1) against the Travancore Devaswom Board” held that The Sabarimala temple is a public temple by virtue of fact that section 15 of the 1950 act vests all powers of directions, control and supervision over it in the Travancore Devaswoms board which falls under the “other authority” within the meaning of article 12. Hence that article 25(1) is enforceable against the Travancore Devaswoms Board and other incorporated Devaswoms including the Sabarimala Temple (Para 97). And CJI Mishra and Khanwilkar J. further observed that “the exclusionary practice, which has given backing of subordinate legislation in the form of rule 3(b) of the rules, framed by the virtue of the 1965 act is neither an essential nor an integral part of the Hindu religion. (CJI Mishra, Para 123)

R. Nariman. J accept that, for the purpose of this case, “barring the entry of menstruating woman to the Sabarimala temple are considered by worshippers and thantriks alike, to be essential religious practice and therefore protected by article 25(1). And he further held that “even though barring the entry of menstruating woman to the Sabarimala temple is an essential part of thantris and worshipper faith, but this practice clearly hit by section 3 of the Kerala Hindu places of public worship (Authorisation of entry) act, 1965 hence struck down” (R.Nariman J, Para 25)

D.Y. Chandrachud J finds that: respondents have failed to establish that the exclusion of women between the ages of ten to fifty from Sabarimala temple is either an obligatory part of religion or has been consistently practicing over the years. The evidence does not establish that excluding the woman is a part of religious practice. Chandrachud. J notes that "the respondents submitted that, the deity at Sabarimala in the form of a Nasthika Brahmacharya: Lord Ayyappa is celibate. It was submitted that since celibacy is the foremost requirement for all the followers, woman between the ages of 10 and 50 must not allowed in Sabarimala. There is an assumption here, which cannot stand constitutional scrutiny. The assumption in such a claim is that a deviation from the celibacy and austerity observed by the followers would be caused by the presence of woman. Such a claim cannot be sustained as a constitutionally sustainable argument. Its effect is to impose the burden of man's celibacy on a woman and construct her as a cause for deviation from celibacy. This is then employed to deny access to spaces to which women are equally entitled. To suggest that women can't keep the vratham is to be stigmatizing them and stereotype them as being weak and lesser human beings. A constitutional court such as this one must refuse to recognize such claims" (D.Y Chandrachud J, Para 55) .the prohibiting the woman between the ages of ten to fifty, are ultra vires section 3 of the Kerala Hindu places of public worship (Authorisation of entry) act 1965 and even otherwise unconstitutional.(Para 119.5)

Indu Malhotra. J strongly relies upon the statements of the Sabarimala Thantris and the Travancore Devaswom Board to the effect that "the limited restriction on access of woman during the notified age of 10 to 50 years, is a religious practice which is central and integral to the tenets of this shrine, since the deity has manifested himself in the form of a Nasthik Brahmachari"(Para 13.7).

- iii. Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of articles 14, 15 and 17 and not protected by the "Morality" as used in article 25 and 26 of the constitution?

While taking the notion on the term "morality" occurring in the article 25(1) of the constitution The CJI Mishra and Khanwilkar J holds that the term "Morality" cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. The notion of public order, morality and health cannot be used as a colorable device to restrict the freedom to freely practice religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer prayers at Sabarimala temple.(CJI Dipak Mishra, Para 106& 111)

The CJI Mishra, Khanwilkar J., And Nariman J. did not agree that exclusionary practice violates article 17 of the constitution. And Malhotra J. rejects it on the ground that Untouchability is limited only to the Caste- Based Untouchability.(Para 14.2 &16.5)

D.Y. Chandrachud .J disagrees and held that the issue for entry in a temple is not so much about the right of menstruating women to practice their right to freedom of religion, as about freedom from societal oppression, which comes from a stigmatized understanding of menstruation, resulting in untouchability. Article 25, which is subject to part III provisions, is necessarily therefore subject to Article 17. To use the ideology of purity and pollution is a violation of the constitutional right against Untouchability(Para 82).

- iv. Whether rule 3(b) of the Kerala Hindu places of public worship (Authorization of entry) rules, 1965 is Ultra Virus the Kerala Hindu places of public worship(Authorisation of entry) act, 1965 and , if treated to be Intra Virus, whether it will be violative of the provisions of part III of the constitution?

And insofar as rule 3(b) is concerned Mishra CJI and Khanwilkar J. hold- section 3(b) is ultra-vires the parent Act (Para 144.xii), and therefore must fall. Nariman J. holds it directly contrary to Article 15(1) and strikes it down (Nariman J,Para 29) D.Y. Chandrachud .J. holds that the broad and liberal object of the act cannot be shackled by the exclusion of women. Rule 3(b) is Ultra-vires(Para 119.6) While Malhotra J. holds that, Rule 3(b) of the 1965 Rules is not Ultra-vires to section 3 of the 1965 Act.(Para 16.6) of Indu Malhotra, J.)

III. CRITICAL ANALYSIS OF DISSENTING OPINION OF INDU MALHOTRA.J

Justice Indu Malhotra J. dissent on Maintainability, on essential religious practices, and on constitutional pluralism are powerful and I believed that her observations are correct especially on maintainability. Malhotra J. holds that “the right to move the Supreme Court under article 32 for violation of fundamental rights, must be based on a pleading that the petitioner’s personal right to worship in this temple have been violated. The petitioner does not claim to be devotees of the Sabarimala temple. And further held that, to determine the validity of long-standing religious customs and usages of a sect, at the instance of association who are “involved in social developmental activities especially related to upliftment of women and helping them become aware of their rights” would require this court to decide religious questions at the behest of persons who do not subscribe to this faith(Para 7.2) One thing which distinguished Indu malhotra J. minority judgment from the majority judgment that, Indu Malhotra J. has been given more emphasis on the old age doctrine of Locus Standi over the PIL’s

Indu Malhotra J. also made a good observation that "In a pluralistic society comprising of people with diverse faiths, beliefs, and traditions, to entertained PILs challenging religious practices followed by any group, sect or denomination, could cause serious damage to the constitutional and secular fabric of this nation"(last unnumbered Para of 7.7)

IV. CONCLUSION

India is one of the most populous countries in the world. The people inhabiting this vast land profess different

religions and speak different languages. It is a mosaic of different religions, languages, and cultures. Each of them has made a mark on Indian polity and India today represents a synthesis of them all. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. In the final analysis after all things considered, I am totally agreed with the dissentient judgment of Indu Malhotra J. that, the country like India religious customs and practice cannot be solely tested on the touchstone of the article 14.