

Entry Of Women In Sabarimala Temple

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INTRODUCTION

India being a secular country has tolerance for all religion and has been reflected from the judgment of judiciary from time to time. In India everybody has freedom to follow and propagate religion listed in article 25 of Indian constitution. Modern India came into existence in 1947 and the Indian constitution's preamble was amended in 1976 to state that India is a secular state. But having right is not sufficient. There have been numerous conflict between various religious groups and law making bodies which will be dealt in the respective case analysis. Restricting women's entry to places of religious worship has become a highly contentious issue of late. Though such practices have been existing form decades in India movements across the country have recently espoused these concerns, leading to several petitions being filed in High Courts and in the Supreme Court of India.

In September, 2016, in a landmark decision, the Bombay High Court, for instance, ruled that the inner sanctum of the Shani Shingnapur temple in Ahmednagar, Maharashtra be opened to women, as it is the fundamental right of women. In August, 2016, in a landmark decision, The Bombay high court allowed women to enter the inner precincts (mazaar) of the famous Haji Ali Dargah. The court upheld a petition filed by Bharatiya Muslim Mahila Andolan (BMMA), which had challenged the decision of the Haji Ali Dargah Trust to bar women from stepping inside the inner sanctum though they could enter the main premises of the Dargah in the Arabian Sea.

FACT

The Sabarimala Temple, considered the abode of Lord Ayyappa, is located in the Periyar Tiger Reserve in the Western Ghat mountain ranges pathanamitta District, Kerala. It prohibits the entry of women in their 'menstruating years' (between the ages of 10 to 50), on the grounds that it is a place of worship.

In 2006, India Young Lawyers Association filed a public interest litigation petition before the supreme court challenging the Sabarimala Temple's custom of excluding women. The Association argued that the custom violates the rights to equality under Article 14 and freedom of religion under Article 25 of female worshippers.

The state contended that the temple's priests have the final authority in this matter. The Travancore Devaswom Board has the legal authority to manage the Sabarimala temple's administration. Article 26 of the constitution, guarantees a religious denomination the right to manage its own internal religious affairs. Furthermore, the Sabarimala custom was protected by rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 ("Public Worship Rules"). The rule allowed the exclusion of women from public places of worship, if the exclusion was based on 'custom'.

In 1991, the exclusion had been challenged before the Kerala High Court in S. Mahendran v. The Secretary, Travancore. The Court ruled that the exclusion was a long-standing custom prevailing since time immemorial.

On 18th August 2006, the Supreme Court issued notice to the parties. On 7th March 2008, the matter was referred to a three-judge Bench. It came up for hearing seven years later, on 11th January 2016. On 20th February 2017, the Court expressed its inclination to refer the case to a Constitution Bench, Finally on 13th October 2017, a Bench comprising of Chief Justice Dipak Mishra, Justice R. Banumathi, and Justice Ashok Bhushan ordered a Constitution Bench to pass judgement on the case. On 28th September 2018, the Constitution Bench delivered its judgement.

In a 4:1 majority, the court ruled that Sabarimala's exclusion of women violated the fundamental rights of women between the ages of 10-50 years and Rule 3(b) of the Public Worship Rules was unconstitutional. Justice Indu Malhotra delivered a dissenting opinion observing that in a secular polity, it was not for the Courts to interfere in matters of religion and the same must be left to those practicing the religion.

ISSUES RAISED

Prohibiting entry of women from 10 to 50 amounts to untouchability: Senior counsel Indira Jaisingh stated that prohibition of women entry is a form of untouchability. "The sole basis of restriction is menstruation of women. To keep away menstruating women is a form of untouchability. Menstruating women are seen as polluted."

Restriction to entry not connected to religious practice: The petitioners argued that restriction on the entry of women in the Sabarimala temple is nowhere connected with the religious practices performed there. The question of it being the essence of the said religious denomination does not arise at all.

Sabarimala Temple not a separate religious denomination: It was argued that the Lord Ayyappa temple was not a separate religious denomination for the purpose of Article 26 because the religious practices performed in Sabarimala Temple at the time of 'Puja and other religious ceremonies are not distinct and are akin to any other practice performed in any Hindu Temple.

How did Travancore Devaswom Board justify the ban?

Lord Ayyappa was a celibate for life, a 'NaishtikaBrahmacharya': Senior Advocate Abhishek Manu Singhvi, who argued for the Devaswom Board, justified the impugned practice as being a bonafide one, one originating from the character of the deity at the Sabarimala Temple. Lord Ayyappa was a celibate for life, a 'NaishtikaBrahmacharya', and the practise was firmly rooted on this belief of hordes of devotees.

Woman cannot complete 41 days of penances: Observance of 41 days of penances was essential for undertaking a pilgrimage to Sabarimala. It was an essential religious practice. It was not physiologically feasible for women to complete the 41 days of penances.

Chief of temple decides the custom: The exclusive authority of the 'Thanthri' of the Sabarimala Temple to decide all religious, ritualistic and spiritual controversies pertaining to the denominational temple was submitted.

The ban on women entry was not misogynistic: A case was made that women in Kerala are socially advanced, owing to their education, and most of them are not opposed to the practises followed in Sabarimala. It was also stated that Hindu communities in Kerala followed matrilineal practises, and thus the contention that they were being subjugated was not proper.

Lord Ayappa is a legal person: Singhvi had argued that upon the establishment of an idol, life is infused into it, which flourishes with the continuous offering of prayers in the manner stipulated in the 'Shastras' or religious authorities. It was stated that every idol possesses a unique nature, a special character, which has its roots in the religion, and each temple accordingly observes distinct traditions and rituals, which are respected and followed by reasonable devotees.

God has right to remain celibate: It was argued that Lord Ayyappa's right to maintain his 'perpetual celibate' status was covered under the right to privacy under Article 21..

JUDGEMENT

Four judges on the bench ruled in favour of lifting the ban on women entering Sabarimala temple. CJI Dipak Misra and Justices Khanwilkar, Nariman and Chandrachud found the practice discriminatory in nature and that it violates Hindu women's right to pray.

- CJI said devotion cannot be subjected to discrimination. "Patriarchal rules have to change. Patriarchy in religion cannot be allowed to trump right to pray and practise religion", he said. Justice Khanwilkar concurred with the CJI's verdict.

- Justice Nariman: "To exclude women of the age group 10-50 from the temple is to deny dignity to women. To treat women as children of lesser god is to blink at the Constitution"

- Justice Chandrachud: "Religion cannot be used as cover to deny rights of worship to women and it is also against human dignity." "Prohibition on women is due to non-religious reasons and it is a grim shadow of discrimination going on for centuries."

- All judges ruled that devotees of Lord Ayyappa do not constitute a separate religious denomination.

INTERPRETATION**HARMONIOUS INTERPRETATION OF CONSTITUTIONAL PROVISIONS ARTICLES 14, 15, 25 and ARTICLE 26 OF THE CONSTITUTION**

It is submitted that a cardinal principle of interpretation of Constitution is that all provisions of the Constitution must be harmoniously construed so that there is no conflict between them. It is therefore submitted that Articles 14, 15, 25 on one hand, and Article 26 on the other hand must be harmoniously construed with each other, to prevent discrimination against women and to give effect to the right of women to practice religion. When so construed, Article 26 does not enable the State to make any law excluding women from the right to worship in a public temple nor does it protect a custom that discriminates against women.

A five judge bench of this Hon'ble Court in Sri Venkataramana Devaru and others v. State of Mysore, 1958 SCR 895/ AIR 1958 SC 255 (Devaru case), while acknowledging that the right to restrict entry to the temple to Gowdas Saraswath Brahmins is a part of the right to manage religious affairs, held that the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Article 26 (b) of the Constitution is subject to Madras

Temple Entry Authorization Act, 1947 that throws open a Hindu public temple to all classes and sections of Hindus. It stated that the right to enter a temple and worship are matters of religion in Paras. 29, 32 in the following words:

“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). 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).”

A two judge bench of this Hon'ble Court in Adi Saiva Sivachariyargal NalaSangam and Ors. v. The Government of Tamil Nadu and Ors., AIR 2016 SC 209, while holding that appointments of Archakas will have to be made in accordance with the Agamas but subject to constitutional principles, also held in Paras 3 and 36 that Article 26 is subject to 25(2)(b) and constitutional legitimacy supersedes all religious beliefs

In any event, Article 26 does not permit discrimination between a class of Hindus based on sex. It is submitted that in any event, the right to worship for Hindu women has been abolished between the ages of 10 to 50 and hence there is a destruction of their right to practice religion guaranteed by article 25.

RIGHT OF WOMEN TO ENTER THE SABARIMAL TEMPLE UNDER ARTICLES 14 AND 15 WITHOUT ANY DISCRIMINATION BASED ON SEX – ANY CUSTOM WHICH VIOLATES ARTS. 14 AND 15 IS VOID U/ART 13.

What is custom?

It is submitted that the pleaded custom violates Arts. 14 and 15. It is also unreasonable. This Hon'ble Court in *Bhimsaya & Ors. v. Janabi (Smt) Alias Janawwa*, (2006) 13 SCC 627 in Paras 13, 21-26 while adjudicating the share of a person claiming to be an adopted son to the deceased by custom in ancestral property held that custom must be ancient, certain and reasonable and cannot be opposed to public policy, as follows:

“Under the old law, 'male issue' was indicated and it was held that it was to be taken in the wide sense peculiar to the term in Hindu Law to mean three direct descendants in the male line. (See *Mayne's Hindu Law and Usage* referred to above at page 334). Even if for the sake of argument in the instant case, it is accepted that a custom was prevalent authorizing adoption in the presence of a male issue, yet it being contrary to the very concept of adoption cannot be said to have any force. Adoption is made to ensure spiritual benefit for a man after his death. Public policy is not defined in the Act. However, it connotes some matter which concerns the public good or the public interest. No strait-jacket formula can be laid down to hold what is for the public good or for the public interest, or what would be injurious or harmful to the public good or public interest. What is public good must be in consonance with public conscience. Speaking about 'public policy', Lord Atkin said, 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds. (See *Fender v. St. John-Mildmay* 1938 AC 1). The observations were quoted with concurrence in *Gherulal v. Mahadeo Das* AIR 1959 SC 781. Though it cannot be disputed as a general proposition that a custom may be in derogation of Smriti law and may supersede that law where it is proved to exist, yet it is subject to the exception that it must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom or generally makes exception in favour of rules of customs. (See: *Mulla's Principles of Hindu Law*, Fifteenth Edition, at pages 67-68). Nothing has been shown to me that an exception of this nature existed in the old Hindu Law. The ancient texts provide for a custom, but imperate it not to be opposed to Dharma, that means as already pointed out it should not be immoral or opposed to public interest.

It is well established principle of law that though custom has the effect of overriding law which is purely personal, it cannot prevail against a statutory law unless it is thereby saved expressly or by necessary implication. (See *The Magistrate of Dunbar v. The Business of Roxburgha* (1835) 6 ER 1642, *Noble v. Durell* (1789) 100 ER 569. A custom may not be illegal or immoral; but it may, nevertheless, be invalid on the ground of its unreasonableness. A custom which any honest or right-minded man would deem to be unrighteous is bad as unreasonable. [See: *Paxton v. Courtney* (1860) 2 F&F 131.”

Equality under Article 14 and 15

The denial of entry between the ages of 10 to 50 is based on the fact of menstruation during that period alone and on other fact and is therefore based on biological factors of womanhood. It is therefore discrimination based on sex and not protected by the by Article 26.

It is submitted that women constitute a class of Hindus and they cannot be therefore be classified based on sex alone and treated differently from other Hindus and excluded from place of public worship.

It is submitted that the Impugned Rule, that restricts entry of women based on custom or usage, violates the right of women to equality and non-discrimination guaranteed under Article 14 and Article 15 and 25 of the Constitution of India and is not protected by Article 26 of the Constitution of India.

Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or equal protection of laws. It reads as:

“Equality before law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

It is submitted that the Impugned Rule by denying entry of women into places of public worship violates the right of women to equality before the law. The Impugned Rule makes an arbitrary classification

between Hindu men and Hindu women as such classification has no reasonable nexus with the object of the Act i.e., “to make better provisions for the entry of all classes and sections of Hindus into Place of public worship;”.

Further it is submitted that the Impugned Rule violates the right of women to equal protection of laws as Hindu women are not provided the protection against discrimination in regard to temple entry as opposed to Hindu men who are protected by virtue of Section 3 of the Act even though the Act applies equally to Hindu women.

CONCLUSION

In my personal views, in the end, it seems that in case where equality and secularism come into conflict, a democratic state should put equality first. And if the rights of citizens would come into conflict with the right of communities, the former should be given primacy. Using a “community” as a legal denomination will always remain problematic if the state want to secure equal right of all citizens, while the communities retain different customs. At the same time, however, an absolute realization of such attempts certainly does mean large scale interference of the state in the existence of conservative communities.

