
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

SC JUDGEMENT ON SRI SABRIMALA TEMPLE ISSUE: A CRITICAL ANALYSIS- Dr. Rajesh Kumar Dube¹**ABSTRACT**

We, the people of *Bharat* have its great civilizational identity with cultural and *Dharmik* diversity while having great privileges as a fundamental right to freedom of conscience and right freely to practice *Dharma*. The *Dharmik* diversity is characterized by the its uniqueness having distinct oldest Sarswati-Shindu civilization in *Jambu Dwipe-Bharat Khande- Aryavarte* which is situated at south of Himalaya range mountain but north to Hind Ocean. Sri Sabrimala Ayyappa Temple is situated on the mountain ranges of the Western Ghats in Kerala. The Ayyappans have distinct culture and *Dharmik* practices, are devotees of Lord Ayyappa. The specific character of the deity Lord Ayyappa, who has manifested himself and exist in the particular form and nature of deity as a '*Naishtik Brahmachari*'. The Ayyappans has established customs which restrict the entry of women between 10 to 50 years, since time immemorial due to specific nature of the deity. The devotees of Lord Ayyappa strictly follow such customs without any objection. A writ petition was filled by a woman belonging to different faith, before the Supreme Court of India challenging the Constitutional validity of such customs. There were various issues in that case. The Supreme Court allowed the petition. The researcher with great humility and high regards to our apex Court, would like to raise certain concerns through constructive and critical analysis that due to erroneous interpretations of the words 'Dharma' and 'Religion' as well as expression '*Dharmik Sampradaya*' and 'Religious denominations' by our Hon'ble Supreme Court, there is serious and irreparable miscarriage of justice in a case decided by the Supreme Court in Sri Sabrimala Ayyappa Temple issue.²

¹ Associate Professor, Department of Law, D.A.V. (P.G.) College, Dehradun

² Indian Young Lawyers Association & Others v. State of Kerala & others; Writ Petition (Civil) No. 373 of 2006.

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INTRODUCTION AND CRITICAL ANALYSIS OF THE JUDGEMENT

On 28th September 2018, the Supreme Court by a Constitution Bench allowed by majority the Writ Petition (Civil) No. 373/2006 and held that the custom or usage of restricting women between 10 to 50 years from entering the Sabrimala Ayyappa temple is violative of Article 25 and the Court also held that the Rule 3(b) of the Kerala Hindu Places of Public worship (Authorisation of Entry) Rule, 1965 made under the Act³ was also violative of Article 25(1) and 15(1) of the Constitution.

In this regard, it is submitted by the respondents⁴ that the restriction of the women entry in the Sri Sabrimala Ayyappa temple is not absolute rather such usage and custom are due to specific character of the deity Lord Ayyappa who has manifested himself and exist in the particular form and nature of deity as a '*Naishtik Brahmachari*' i.e. Severest form of celibacy.⁵ Such classification of women between 10 to 50 years and men of the same age group, has a reasonable nexus with the objective to preserve the identity and such manifestation in particular form and nature of the deity. There are no such restrictions of women in the other temples of Lord Ayyappa, where the deity exists in the '*Dharma Sasth*' form. The male devotees of the deity of the Sabrimala Ayyappa are known as '*Ayyappans*' and female devotees who are below 10 years and above 50 years are known as '*Malikapurams*'. The devotees of the Lord Ayyappa have to abide by the customs and usage of the Sri Sabrimala Ayyappa temple by keeping in mind the specific particular form of manifestation of the deity in order to preserve such specific identity and nature of the particular deity. Such '*Dharmik*' practices are essential and integral form of the devotees of Lord Ayyappa. The issue is neither related to culture, nor related with gender, nor related with misogyny but related with tradition which has its origin since time immemorial and has been crystalised as a valid custom of the Ayyappans. Such devotees are equally entitled to the freedom conscience and right freely to profess, practice and propagate '*Dharma*' under Article 25(1) of the Constitution. This fundamental right is subject to other fundamental rights under part III of the Constitution.

CRITICAL ANALYSIS OF THE PHRASE '*DHARMIK SAMPRADAYA*' UNDER ARTICLE 26 OF THE CONSTITUTION

³ The Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965.

⁴Supra Note 1, Para 5, Submissions made by respondents; Indu Malhotra J page 10.

⁵ Id.

The majority view has not accepted the contentions of the respondent that the group of the devotees of Lord Ayyappa do constitute a '*Dharmik Sampradaya*' within the provisions of the Article 26 of the Constitution which confers right to manage its own affairs in the matter relating to the '*Dharma*'.⁶ The majority judgement factually and legally, ignored the diverse practices and traditions of various schools of the Hindu '*Dharma*' in order to testify the essential condition to constitute a '*Dharmik Sampradaya*' or any section thereof. It appears that the majority view regarding the claim as a '*Dharmik Sampradaya*' had testified under the gloss of Abrahamic tenets of such religions which absolutely differs from the diverse characteristics of the Hindu '*Dharma*.' In effect the majority judgement has Abrahamized the core concept of Hindu '*Dharma*.' There should be just, fair and reasonable standard for evaluating different theological tenets with objectivity and substance. We cannot evaluate the diverse characteristics of the Hindu '*Dharma*' by applying the ordinary jurisprudential tools and techniques for evaluating the same as it is applied for Abrahamic Religions. Unlike Abrahamic Religions the *Dharmik* tenets of Hindu *Dharma* has not been codified because it is dynamic and naturally evolving spiritual and philosophical aspect of the life. The tenets of the Hindu *Dharma* are based on inquiry and observations which has very expansive dimensions and amplitude and it is very difficult to cribbed, cabined and codified the diverse attributes and characteristics of the Hindu *Dharma* within doctrinaire limits.

The devotees of the Lord Ayyappa are called as *Ayyappans*. They undertake certain rigorous '*Dharmik*' practice known as known as 41- days '*Vritham*' (vows) before taking pilgrimage and due worship of Lord Ayyappa.⁷ This is ancient custom since time immemorial, which is observance of '*Sathvic*' lifestyle and '*Brahmacharya*' with a view to keep the body and mind pure.⁸ Such '*Vritham*' includes certain mandatory conducts which has to be observed by the devotee which are as follows: the devotee will have to abstain from any kind of physical relation with his/her spouse; strict prohibition of alcoholic, intoxicating and '*tamasic*' foods substances; living in isolation from family members; strictly refraining from interacting with young women even with his own daughter, if the devotee is male; wearing black '*mundu*' and upper clothes; taking only one meal a day and walking barefoot.⁹ After observing 41- days '*Vritham*', the devotee takes the '*irimudi*' and then start his final stage of '*Dharmik*' practice, by taking about 13 kilometres walk, after taking holy dip in the

⁶ Para 112, Deepak Mishra, J.

⁷ Supra note 14, page 11.

⁸ Id.

⁹ Id.

river Pampa and about 3000 feet climbing (the ascending of the 18 sacred steps), the 'Ayyappans' reaches to 'Sannidhanam' (the sanctum sanctorum) for *darshan* (worship) of Lord Ayyappa.¹⁰ Such an essential and integral 'Dharmik' practices of *Ayyappans* should be taken under consideration with special reference to the identity, nature and character of the Lord Ayyappa for determination of question regarding 'Dharmik Sampradaya.'

The majority view has not taken into consideration of aforesaid essential and integral 'Dharmik' practices of 'Ayyappans' with specific reference to the identity of the deity of the Sri Sabarimala Ayyappa temple¹¹ rather the Court has erroneously widened the scope with reference to Hindu 'Dharma'.¹² Such diverse practices of the 'Ayyappans' differentiate distinctively. Such specific characteristics of the 'Ayyappans' are intelligible from the generalized essential practices of the Hindu *Dharma*. The expression 'Dharmik Sampradaya' was interpreted by the Supreme Court in *Shirur Mutt* case¹³, held that "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by distinctive name"¹⁴ The 'Ayyappans' fulfil the aforesaid criteria for being treated as distinct 'Dharmik Sampradaya' with distinct name and therefore, they may be treated as sect of Hindu *Dharma* as a 'Dharmik Sampradaya.'

The majority judgement has erroneously concluded that there is no documentary evidence in support of the essential and integral practices of the 'Ayyappans' of the Sri Sabarimala Ayyappa temple. The scriptural text named as '*BhoothanathaUpakhyanam*', which is dealt with the history and traditions of the Sri Sabarimala Ayyappa temple was adduced as evidence before the Hon'ble Court by the respondent.¹⁵ But the Court did not consider the aforesaid scriptural text for appreciation of evidence regarding the existence of essential and integral practices of the 'Ayyappans' of the Sri Sabarimala Ayyappa temple. If in a case the majority opinion in this judgement did feel that documentary evidences were not sufficient to establish the respondent's case, then the Court should receive oral evidence. Under rule 5 of

¹⁰ Id.

¹¹ Deepak Mishra, J. Para 112.

¹² Id. Para 122.

¹³ Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swaminar of Sri Shirur Mutt, 1954 SCR 1005.

¹⁴ Id. At para 15.

¹⁵ Review Petition filed by People for Dharma, para 5

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the Order XI of the Supreme Court Rules¹⁶, the Supreme Court may receive oral evidences of the Ayyappan devotees and further more documentary evidences may be taken by the Court.

The majority judgement relied on the plea taken by the Travancore Devasom Board before the High Court that “*the practice was mere custom with some aberrations*” which was factually and patently erroneous. The power and function of the Travancore Devasom Board, as empowered under Article 25 (2) (a) is to regulate secular activity associated with ‘*Dharmik*’ practices. The Chief ‘*Thanthri*’ of the Sri Sabrimala Ayyappa temple, is the sole authority relating to the ‘*Dharmik*’ matters as per established principles of the law propounded by the Hon’ble Court.¹⁷

RIGHT TO EQUALITY Vs RIGHT TO DHARMA

Article 14 of the constitution of the Bharat is dealt with right to equality and accordingly, the state shall not deny to any person equality before law or equal protection of the laws. Article 15(1) which is subsidiary provision under Article 14 which prohibits discrimination on the basis of sex but it is permissible to carry out reasonable classification based on intelligible differentia which should not be arbitrary, artificial or evasive and such differentia must have reasonable nexus with objective sought to be achieved by any law.¹⁸ Article 25(1) entitles, every person equally to freedom of conscience and right freely to practice *Dharma*. The right to equality shall apply on those persons who equally circumstanced i.e. the same should apply on such persons who are belonging to same faith. In the present case decided by the Supreme Court, the petitioner does not belong to same faith as that of Ayyappans, therefore, it is erroneous to allow petition by majority opinion.

HARMONIOUS CONSTRUCTION OF THE ARTICLES 14, 15, 25 (1) AND 26

Article 14, 15 of the Constitution prohibits discrimination but it permits reasonable classification subject to condition that such classification must be based on intelligible differentia and such differentia must have reasonable nexus sought to be achieved. Very simply, we may say that like should be treated alike but unlike may be treated as differently. There seems to be direct conflict with the rights claimed by petitioner under Article 14, 15 and rights of the devotees under Articles 25 (1) and 26. Individualism alone may not be sole

¹⁶ Under Order IX Rule 5 of the Supreme court Rules, the facts may be proved by affidavit by the deponent based on his personal knowledge but if he is unable to prove then the facts may be proved by oral and documentary evidences.

¹⁷Supra at note 15.

¹⁸*Luxmi Khandhari v. State of Uttar Pradesh*, AIR 1981 SC 873.

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basis for assessing the priority of any fundamental right to practice *Dharma* as there is differential characteristics of the *Dharma*. *Dharmik* practices are based on specific features particular *Dharmik* tenets which is compatible to the test of reasonable classification under Article 14. The rationality of any particular *Dharmik* practices cannot be questioned unless it affects the similarly circumstanced person. The Court cannot decide that what practices ought to be essential and integral to any '*Dharmik*' matters as such practices has been crystallised as a valid custom since time immemorial and also being continuously observed by the devotees of the Ayyappa community with full devotion, fervour and gaiety. In this case the petitioner is not devotee of the Lord Ayyappa and she would not have locus standi. The Courts should not interfere in such matters unless the petitioner's rights are directly affected. There is no violation of gender equality regarding offering worship to Lord Ayyappa as only limited restrictions are imposed by considering the manifested form of specific nature of deity as '*Naishtik Brahmchari*' and there is no restriction at all in other temples of Lord Ayyappa where the deity has been manifested in '*Dharma Sasth*' forms.

*"No citizen shall be subjected to any disability, liability, restriction or conditions regarding access to shops, public restaurants, hotels and places of public entertainment or use of wells, tanks, bathing ghats, roads and places of public resort maintained out of State fund or dedicated to the use of general public."*¹⁹

In the aforesaid quoted clause of Article 15 of the Constitution, there is no mention of word/expression like 'temples'²⁰ or 'place of worship,'²¹ as the proposed amendments for the insertion of these words/phrases were rejected by the Constituent assembly. The issue regarding violation of Article 15 of the Constitution by the petitioner shall also not be tenable as she is not entitled to make her entry in any place of worship or temple of the other community, where limited restrictions have been imposed on the other female members, who are devotees of Ayyappa community themselves, as per existing valid custom since time immemorial.

The majority opinion has laid over emphasis regarding fundamental rights of individuals under 14, 15 and 25 (1) than the same regarding *Dharmik* belief, faith and practices of the Ayyappans community. Their opinion seems to be treatment of unlike equally without recognising the differential characteristics of the belief and faith of the Ayyappans.

¹⁹ Article 15(2) of the Constitution of India.

²⁰ Constituent Assembly debates (29th November 1948) by Prof. K T. Shah.

²¹ Constituent Assembly debates (29th November 1948) by Vice- President.

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One's individual liberty cannot be allowed to supersede the freedom of conscience and *Dharmik* belief, faith and practices of other persons of the human society. The fundamental rights of the Ayyappans under Article 25 (1) are only subject to public order, morality, health and other fundamental rights under Part III of the Constitution. The individual's fundamental right under Article 14 and 15 cannot be allowed to subserve the individual's fundamental right under article 15 (1). The freedom conscience is one of the important aspects of dignified life of the *Bhartiya* person, who has fundamental right to preserve his/her cultural identity under Article 29 of the Constitution.²² Ayyappans as being a citizen of *Bharat* shall have right to conserve their cultural identity and right freely to practice *Dharma* as a fundamental right under our Constitution. The civilizational heritage of the Ayyappans must be honoured while interpreting Article 25 (1) of Constitution.

ISSUES REGARDING UNTOUCHABILITY UNDER ARTICLE 17 AND SOCIAL REFORM UNDER ARTICLE 25 (2) (b)

There is factual error, very much apparent on record of the majority judgement based on erroneous assumption that such restriction has been imposed on the notions of menstrual impurity. Such plea of the petitioner is factually wrong as the entry of the women of the reproductive age, have not been applicable in other Ayyappan's temple, except this single temple of the Sri Sabrimala Ayyappa Temple due to specific nature of the deity only. It was very well pleaded through cogent documentary evidences attached with reply against the petition, that the restriction of entry of women with reproductive capabilities of certain age group, was based on the specific nature of the deity who exist in the eternal celibate form and not on menstrual impurity as perceived by the petitioner but that was not taken under consideration by the majority opinion of the judgement.

Moreover, it has been held by the Court that the subject matter of Article 17 is not in literal or grammatical sense but in historical sense based on the practices evolved through period of time and the background to Article 17 was explained by the Supreme Court in a decided case.²³ The provision under Article 17 of the Constitution is meant only to restrict caste-based untouchability and not any other *Dharmik* practices of Ayyappans based on genders of the devotees due to very specific nature of deity, which is one of the special diverse features of the Hindu *Dharmik* practices. Such a construction is erroneous.

²² "Any section of Citizens having a distinct culture of its own shall have right to conserve the same.

²³ *Venkataramana Devaru Vs. State of Mysore*, AIR 1958 SC 255.

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In *Shirur Mut*²⁴case, Justice Ayyangar opined that the application of Article 25(2) (b) is regarding social welfare and reform only, but not to practising *Dharma*, as the Ayyappans perform their *Dharmik* practices with strict celibacy but majority opinion did not take as established precedent as the opinion of the Justice Ayyangar was not in concurrence with the other judges in the *Shirur Mut* case. In that case, there was no single view on which all the judges were unanimously agreed.

CONCLUSION

The opinion delivered by the minority²⁵ has rightly summarised her judgement and held as follows:

- a. The grievances of the petitioners as well as intervenors are non-justiciable.
- b. The right to equality under Article 14 of the Constitution does not override the right of any individual to freely to profess, practice and propagate their faith as per the tenets of the *Dharma*.
- c. The secular polity of the Bharat, the term morality under Article 25 should be interpreted so as to accommodate the right of every individual as well as religious denomination to practice *Dharma* as per tenets of their faith and belief.
- d. The Ayyappans, the devotee of the Sri Sabrimala Ayyappa temple, satisfy the test of *Dharmik Sampradaya* under Article 26 of the Constitution, therefore, they are entitled to manage its own affairs in the matter of *Dharma*.
- e. Untouchability under Article 17 of the Constitution is limited to caste based and not on the restricted entry of women in the Sabrimala temple.

²⁴Supra Note 12.

²⁵ Supra Note 1, para 16- Justice Indu Malhotra.

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