IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
PUBLIC INTEREST LITIGATION NO. 106 OF 2014

1. Dr. Noorjehan Safia Niaz,
Age : 44 years, Occ: Social Activist,
Father's name : Niaz Ahmed Peerzada,
Residing at 35-B, Royal Hill Society,
NNP 1 & 2, New MHADA Colony,
Goregaon (E), Mumbai – 400 063
Mobile No. 9833072690
Email id : noorjehan.sn@gmail.com
PAN No. AVFPS88689B

2. Zakia Soman,
Age : 48 years; Occ.: Social Activist,
Father's name : Gulam Mohiuddin Nizami,
Residing at D4 Shantinath Apts,
behind Medilink Hospital,
Shyamlal Char Rasta,
Satellite, Ahmedabad 380 055
Mobile No. 9913333620
Email id : zakiasoman@gmail.com
PAN No. ABMPJ055A ...Petitioners

Versus

1. State of Maharashtra
Through Secretary,
Minority Development Department,
Mantralaya, Mumbai – 400 032

2. Haji Ali Dargah Trust
Having its office at Above Kinara Masjid,
Haji Ali, Lala Lajpat Rai Marg,
Mumbai 400 026.
Tel : 022-23529082; Fax : 022-23524221
Email : mgt@hajialidargah.in

Through its BOARD OF TRUSTEES :

- Mr. Abdul Sattar Merchant,
  Chairman & Managing Trustee
- Mr. Rafique A. Latif Dada, Trustee
- Mr. Moinuddin T. Sony, Trustee
- Mr. Usman Shakoor Vanjara, Trustee
- Mr. Masood Hasham Dada, Trustee

Additional Trustees :

- Mr. Suhail Yacoob Khandwani, Trustee
- Mr. Rizwan Merchant, Trustee

3. Charity Commissioner,
   Maharashtra State,
   Worli, Mumbai – 400 050 ...Respondents

Mr. Raju Z. Moray with Mr. Sagar Rane and Mr. Dhishan Kukreja for the Petitioners

Mr. Shrihari Aney, Advocate General with Mr. Milind More, A.G.P for the Respondent Nos. 1 and 3 - State

Mr. Shoaib I. Memon for the Respondent No. 2

Mr. S. M. Gorwadkar with Ms. Sana Yusuf Baugwala for the Intervener

CORAM : V. M. KANADE &
REVATI MOHITE DERE, JJ.
RESERVED ON : 9th JUNE, 2016
PRONOUNCED ON : 26th AUGUST, 2016

JUDGMENT (Per Revati Mohite Dere, J.) :

1. Heard learned Counsel for the parties.

2. Rule. Rule made returnable forthwith, by consent. Learned Counsel waive notice for the respective respondents.

3. Petition is taken up for final disposal forthwith, by consent.

4. By this PIL, filed under Article 226 of the Constitution of India, the petitioners, who are social activists, have alleged gender discrimination and arbitrary denial of access to women in the sanctum sanctorum at the Haji Ali Dargah.

5. The petitioners state that they are the office bearers of `Bharatiya Muslim Mahila Andolan' – a national secular autonomous mass movement of Muslim Women with over 50,000 members in 15 States. According to the petitioners, since their childhood, they were visiting the Haji Ali Dargah, the Dargah of Pir Haji Ali Shah Bukhari (R.A.), the patron

saint and during their visits, were permitted to enter the sanctum sanctorum where the saint lied buried, through a separate entry earmarked only for women to enable them to offer prayers. They have stated that in March, 2011, when the petitioner No. 1 along with other activists, visited the Haji Ali Dargah, they were permitted to enter the sanctum sanctorum to offer prayers. According to the petitioners, in June, 2012 when the petitioner No. 1 revisited the Dargah to offer prayers, she discovered a steel barricade put up at the entry of the sanctum sanctorum, thus preventing the entry of women devotees in the sanctum sanctorum of the Haji Ali Dargah. Pursuant to the said restriction imposed on women devotees, the petitioners approached the authorities of the respondent No. 2 Trust and sought answers for imposing such a ban/rule. It is stated that the President of the Haji Ali Dargah Trust disclosed that the reasons for imposing such a ban/rule were – (i) women wearing blouses with wide necks bend on the *Mazaar,* thus showing their breasts; (ii) for the safety and security of women; and (iii) that earlier they were not aware of the provisions of Shariat and had made a mistake and therefore had taken steps to rectify the same.

6. Pursuant to the aforesaid, the petitioners approached various State Authorities including, the State Minority Commission and requested them to intervene in the said matter. The petitioners also sent letters to several Authorities registering their protest and seeking their support and intervention in the matter of prevention of entry of women in the inner sanctum sanctorum of the Haji Ali Dargah. Letters were sent to the State Minority Commission, National Commission for Women, State Commission for Women, Chief Minister of Maharashtra, Trustee of Makhdoom Shah Baba Trust and a few Ministers. It is stated that the State Minorities Development Department arranged a joint meeting of the petitioners and the Haji Ali Dargah Trustees along with Islamic Scholar Dr. Zeenat Shaukatali and other Government Officers, with a view to discuss and resolve the matter amicably. However, the Trustees of the respondent No. 2 Trust, did not turn up for the said meeting. Thereafter, the petitioners again made several representations to various authorities but the said representations went unheard. According to the petitioners, in January, 2013, a letter was sent by the Solicitors of the Haji Ali Dargah Trust to the said Minorities Development Department explaining their position in the said matter. In the said letter, it was stated that the Holy Shrine was open to

all persons regardless of gender, caste, creed, etc. It was also stated that to maintain sanctity, discipline, decorum, peace and to avoid chaos, they had earmarked separate entries for men and women devotees and visitors. According to the petitioners, the said letter was clearly contrary to the issue raised and the actual realities faced by the petitioners i.e. women were not being allowed in the sanctum sanctorum of the Haji Ali Dargah. The petitioners thereafter, again requested the respondent No. 2 Trust to discuss the issue and come to a consensus and also requested the then State Minister of Women and Child and the State Minority Commission to facilitate a dialogue and to amicably resolve the said issue. The petitioners surveyed several dargahs which allowed entry of women in the sanctum sanctorum and have annexed to the petition, a list of the said dargahs. The petitioners have stated that they had received a letter from the State Minority Commission on 14th March, 2014 wherein, the Commission stated that the matter was beyond its jurisdiction. The petitioners again visited the dargah on 5th April, 2014 and noticed that nothing was done pursuant to the protest and representation and that the women continued to be barred from entering the sanctum sanctorum of the Dargah. The petitioners also filed a complaint in the office of the respondent No. 3, Charity Commissioner, against the

respondent No. 2 Trust stating, that the activities of the Trust violated the Constitution of India. Aggrieved by the fact, that their representations were not considered, the petitioners filed the aforesaid PIL seeking, amongst other reliefs, an appropriate writ, order or direction in the nature of writ of mandamus and to declare that female devotees have an equal right of entry and access to all parts including the sanctum sanctorum (*mazaar)* of the Haji Ali Dargah on par with the male devotees. They have also prayed for an order directing the respondent No. 2-Trust, to restore status quo ante, by permitting female devotees to enter the sanctum sanctorum of the Haji Ali Dargah on par with the male devotees.

7. The respondent No. 1 is the State of Maharashtra; the respondent No. 2 is the Haji Ali Dargah Trust, a public charitable Trust registered under the provisions of the Bombay Public Trusts Act, 1950 and the respondent No. 3 is the Charity Commissioner, Maharashtra State, Mumbai.

8. When the aforesaid petition came up before this Court on 28th January, 2015, this Court had formulated eights questions. However,

subsequently, vide order dated 10th July, 2015, this Court observed in para 4 that since the principal issue urged by the petitioners in this case was regarding access of women to the sanctum sanctorum (mazaar), it was not necessary to go into the issues which were framed earlier by the Division Bench. It was also observed in para 7 of the said order dated 10th July, 2015 as under :

> *"…..... Similarly we have also made observations by our order dated 1st April, 2015 that the Respondents have not contested the question of maintainability of the petition and we have fixed the main petition for hearing on the main issue."*

Pursuant to which, this Court took up the aforesaid PIL for hearing at the stage of admission itself, with the consent of the parties.

9. Learned Advocate General for the State of Maharashtra was called upon to address this Court on the issue raised in the PIL i.e. of entry of women in the sanctum sanctorum of the Dargah in the light of the constitutional provisions relevant in the facts of this case. The respondent No. 2 Trust also filed its affidavit-in-reply contesting the reliefs sought for by the petitioner.

10. Mr. Raju Moray, learned Counsel for the petitioners submitted that the petitioners have filed the aforesaid petition after exhausting all the alternate remedies available to them, which fact, is not seriously disputed by any of the parties. He further submitted that the Haji Ali Dargah Trust is governed by a Scheme framed by this Court vide order dated 6th June, 1934 passed in Suit No. 1337 of 1916. According to Mr. Raju Moray, learned Counsel for the petitioners, the Scheme framed nowhere authorizes the Trustees to impose a ban on the entry of women in the sanctum sanctorum of the Haji Ali Dargah. According to him, the acts of the Trustees banning the entry of the women in the sanctum sanctorum is ex-facie contrary to the Scheme framed by this Court and contrary to the Constitution of India. He submitted that the land on which the Haji Ali Dargah is situated has been leased out by the Government (the then Secretary of the State for India) to the Trust vide a Lease Deed dated 28th November, 1931 and that the occupation of the said land by the Trust is subject to the terms and conditions specified in the said Lease Deed. He submitted that it is thus evident that the Government has control over the Haji Ali Dargah Trust. He further submitted that the Trustees of the Haji Ali Dargah are to be appointed only with the permission of the Advocate General, in terms of the

Scheme, framed by this Court. According to the learned Counsel, this clearly indicates the absence of autonomy of Haji Ali Dargah Trust, in matters of selection of its Managing Trustees and shows that the Government had retained control over the said Trust, which is a public charitable Trust. He submitted that in view of the aforesaid, the respondent No. 2 Trust is amenable to the writ jurisdiction, under Article 226 of the Constitution of India and as such, the PIL is maintainable. Mr. Moray further submitted that the women devotees were permitted to enter the sanctum sanctorum (*mazaar*) prior to 2011-2012 and it is only some time in 2011-2012, that the said restriction came to be imposed by the Trustees, without any justification. He submitted that the said ban is clearly contrary to Articles 14 and 15 of the Constitution of India and as such the said ban ought to be lifted and status-quo ante be restored. He further submitted that under Article 26 of the Constitution of India, the respondent No. 2 Trust can only manage the affairs of the Trust and cannot regulate the same by imposing conditions or rules contrary to the Constitution of India. He further submitted that there is nothing brought on record by the respondent No. 2 Trust to show that the banning of entry of women `is an essential and integral part of the religion' so as to come within the purview of Article 26

of the Constitution of India. According to the learned Counsel, there is nothing in the Qur'an which prohibits the entry of women in mosques/dargahs. He submitted that Islam believes in gender equality and as such banning the women devotees from entering the sanctum sanctorum was uncalled for. Mr. Moray submitted that the facts in the present case are peculiar and distinct, from the facts in the case of Sabarimala and Shani Shingnapur, inasmuch as, in the present case, women were permitted entry in the sanctum sanctorum right upto 2011-2012 and that the entry was restricted only as recently i.e. in 2011-2012.

11. Mr. Shoaib Memon appearing for the respondent No. 2 Trust opposed the grant of any relief in the aforesaid PIL. Respondent No. 2 has also filed an affidavit in reply on behalf of the respondent No. 2 Trust. The respondent No. 2 Trust in their affidavit have not questioned the maintainability of the said PIL, however, have disputed the issues raised in the PIL. According to Mr. Memon, Islam discourages free mixing between men and women and that the intention of the said restriction is to keep interaction at a modest level between men and women. He relied on certain verses from Qur'an and Hadith in support of his submission. He

further submitted that Prophet Mohammed had ordered that mosques should have separate doors for women and men, so that, the men and women, should not be obliged to go and come through the same door. He further submitted that respondent No. 2 Trust had received several complaints that men were indulging in eve teasing and that belongings of women were being stolen. He further submitted that it was also noticed that some perverted men would come close to women and touch them inappropriately and hence on the advise of Muslim Scholars and also acting under the directions of the Apex Court that sexual harassment of women should be prevented in places of worship, that the Trust thought it fit to segregate the women from men, in order to protect them. He also relied on the guidelines laid down by the Apex Court in the case of ***The Deputy General of Police & Anr. v. S. Samuthiam***[1]**,** for imposition of the said ban. He further submitted that the Trustees of the respondent No. 2 Trust, therefore thought it fit to protect the women from possible sexual acts, which is now being termed by the petitioners as gender discrimination. Mr. Memon submitted that menstruating women were unclean and impure in Islam and hence, could not offer prayers or visit the Dargah/mosque. Mr. Memon submitted in the course of arguments, that Islam forbids women

1 (2013) 1 SCC 598 (dated 30.11.2012)

from entering a graveyard and hence, the ban was justified. He submitted that the ban is not an absolute ban, inasmuch as, women are permitted to enter the Dargah, but are stopped at a point. According to him, the ban imposed by them is well within the scope of their fundamental right guaranteed to them under Articles 25 and 26 of the Constitution of India. According to him, the petitioners have adopted the said remedy only to gain publicity and that the present PIL has been filed for their own vested interest. He submitted that under Article 26, the respondent No. 2 Trust, has a right to manage its own affairs in matters of religion and hence prayed that the PIL being misconceived, ought to be dismissed with exemplary costs.

12. Mr. Aney, the learned Advocate General submitted that it is the duty of the State to uphold the Constitution of India, so far it extends to upholding the citizens fundamental right to equality under Articles 14 and 15 and right to practice religion under Article 25. He submitted that in the present case, what needs to be examined is, whether there is any conflict between Articles 14 and 15 on the one hand and Article 26 on the other. He submitted that unless the impugned ban is shown to be an essential or integral practice of Islam, it cannot be set up as permissible abridgment of

the fundamental rights guaranteed under Articles 14 and 15 of the Constitution. He further submitted that distinction must also be made between custom and usage that has been established as law within the meaning of Article 13, and that mere custom or usage cannot be considered as law nor can be considered an essential practice of religion. According to Mr. Aney, while determining whether something is essential or an integral part of Islam, it would be necessary to distinguish between such practice which is integral and other practices which are peripheral or merely matters of tradition or custom. He submitted that the test to be followed should be whether the practice is such that without it, the essential character of the religion would stand destroyed or its theology rendered irrelevant. According to Mr. Aney, the respondent No. 2 Trust's contention that they have a fundamental right under Article 26 to manage the religious affairs is restricted to management of the Trust and not to its regulation. In other words, he submitted that the right to manage cannot override the right to practice religion itself, as Article 26 cannot be seen to abridge or abrogate the right under Article 25 of the Constitution. He submitted that if the impugned practice is found not to be essential or integral part of Islam, then it cannot be permitted, as it would be in violation of not only Articles 14

and 15 but also of Article 25 of the Constitution, and then, the State would be under a Constitutional obligation to uphold the rights of the petitioners and of all those, whose fundamental rights are violated. He submitted that in interpreting the Constitution, it is necessary to adopt the doctrine of harmonious construction and that no part of the Constitution can be interpreted in such a manner, as would result in curtailing/destroying any part of the Constitution. The interpretation should be such as would uphold the fundamental rights of its citizens. He submitted that Courts have always leaned towards harmonious interpretation of the Constitutional provisions. Mr. Aney relied on the following decisions of the Apex Court in support of his submissions; ***C. Masilamani Mudliar v. Idol of Shri Swaminathaswami Thirukoil***[2] ***The Durgah Committee, Ajmer v. Syed Hussain Ali***[3]***; Commissioner of Police v. Acharya Jagdishwarananda Avadhuta***[4] ***Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt***[5]***; Syedna Taher Saifuddin Saheb v. State of Bombay***[6]***; Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan***[7]***; Dr. Subramanium Swamy v. State of Tamil Nadu and Others***[8]***; A. S.***

2 AIR 1996 SC 1697
3 AIR 1961 SC 1402
4 (2004) 12 SCC 770
5 AIR 1954 SC 282
6 AIR 1962 SC 853
7 AIR 1963 SC 1638
8 (2014) 5 SCC 75

Narayana Deekhshitutlu vs. State of Andhra Pradesh[9] ***Indira Dattaram Patil v. Executive Officer, Shree Siddhi Vinayak Ganpati Temple Trust Management Committee***[10].

13. Learned Counsel for the intervener supported the submissions advanced by the petitioners and claimed that the ban imposed by the respondent No. 2 Trust was clearly contrary to the constitutional mandate. Mr. Gorwadkar relied on the judgment of the Apex Court in the case of ***Vishwa Lochan Madan vs. Union of India & Ors.***[11]**,** to show that no institution which derives its strength from religion or sanctioned by religious or personal law, may act or issue directions or opinions (such as fatwa) in violation of basic human rights.

14. The Haji Ali Dargah is one of the most popular religious places in Mumbai, visited by people of all religions and is also one of India's most famous and prestigious landmarks situated about 500 yards from the Mumbai shoreline in the middle of the Arabian Sea, off Lala Lajpatrai Marg. The said Dargah was erected on a set of high rising rocks and is a

9 AIR 1996 SC 1765
10 (2005) 3 Bom. C.R 1
11 (2014) 7 SCC 707

complex housing the tomb of the Muslim Saint Pir Haji Ali Shah Bukhari (R.A.). Along with the tomb, there is also a Masjid at Haji Ali and this monument has been sentinel to the shores of Mumbai since a long time. The said Haji Ali Dargah has white domes and minarets reminiscent with the Mughal architecture of the period and is a renowned pilgrimage site amongst the Muslims. The Dargah is visited not only by Muslims but even non-Muslims. About 30 to 40 thousand people are stated to visit the said Dargah daily, and the number of visitors increases to 50 to 60 thousand, on Thursdays, Fridays and Sundays. People from all over the world, irrespective of caste, creed and religion visit the Dargah to offer their prayers and to seek fulfillment of their wishes with the blessings of the Saint Pir Haji Ali Shah Bukhari (R.A.).

15. At the outset, we may note that as far as the question of maintainability of the PIL is concerned, neither of the respondents have raised an objection with regard to the maintainability of the said petition nor have they disputed the powers of the Court to entertain this petition, and therefore, we need not delve into the said issue. In the facts, we are of the opinion that the said petition is clearly maintainable and that the law in

regard to the powers of the Court to issue a writ under Article 226 of the Constitution is well settled in the case of ***Shri Anandi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v. V. R. Rudani & Ors.***[12] and several other judgments of the Apex Court, including the recent decision rendered in the case of ***Board of Control for Cricket v. Cricket Association of Bihar & Ors.***[13] and hence, proceed to consider the prayers sought for by the petitioners in the aforesaid PIL. We are also in agreement with the learned Counsel for the petitioners that the facts of this case are distinct from the facts of the case in Sabarimala, inasmuch as, in the present case, women were being permitted to enter the sanctum sanctorum of the Haji Ali Dargah upto 2011-2012 and that the entry was restricted only now i.e. in 2011-2012 and hence, do not feel the need to await the decision of the Apex Court in that case.

16. Having noted the facts, the contentions and the issues raised in this petition, the constitutional provisions with which we are concerned, in order to determine the respective rights and obligations of the parties, are Articles 25 and 26 vis-a-vis the rights of the petitioners, as asserted under Articles 14 and 15 of the Constitution of India.

12 AIR 1989 SC 1607
13 (2016) SCC 709 SC

17. We would first like to consider, whether the respondent No. 2 has relied on any custom/usage, pursuant to which, the ban was imposed, restricting the entry of women in the sanctum sanctorum of the Haji Ali Dargah. The relevant constitutional provision that gives recognition to customs/usages is Article 13 of the Constitution, which reads thus :

> ***"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 usage having in the territory of India the force of law;***
>
> *(b) "laws in force" includes laws passed or made by a 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."

(emphasis supplied)

A plain reading of the Article 13 makes it clear that the said Article provides that all laws insofar as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. The definition of the term "law" includes custom or usage having the force of law in the territory of India under Article 13(3)(a).

18. In the context of Article 13(3)(a), if a custom or usage has the force of "law", then the State is under a Constitutional obligation to ensure proper implementation thereof. However, if there is no material in the context of the constitutional provisions with which we are concerned, then, the natural corollary is that the State cannot deprive its citizens of the constitutional rights guaranteed under Articles 14 and 15. It would then be the Constitutional responsibility of the State to ensure that the principles enshrined in the Articles 14 and 15 of the Constitution are upheld. Article 14 of the Constitution guarantees that `the State shall not deny any person equality before the law or the equal protection of the law within the territory of India' and Article 15 guarantees `the State shall not discriminate against

any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The State would then be under a constitutional obligation to extent equal protection of law to the petitioners to the extent, that it will have to ensure that there is no gender discrimination.

19. It is pertinent to note, that the respondent No. 2 Trust has neither pleaded nor urged before us, that there exists a custom/usage, pursuant to which women have been restrained from entering the sanctum sanctorum of the Haji Ali Dargah and therefore, we are not required to examine the ban in the light of Article 13(3)(a).

20. We now proceed to examine the facts of the present case and deal with each of the issues raised before us.

21. At the outset, we may note here, that pursuant to an order dated 5th August, 2015 passed by this Court asking the respondent No. 2 Trust to reconsider the ban imposed by them, the Trustees of the respondent No. 2 unanimously passed a resolution. The extract of the Minutes of the Meeting held on 6th August, 2015 are reproduced hereunder :

"Extract for the Minutes of the Meeting held on 06-08-2015

As per the order dated 05-08-2015, of The High Court at Bombay for the Public Interest Litigation no. 106 of 2014, a meeting has been conveyed to consider whether the women may be permitted to enter the inner sanctum of the Tomb.

The Trustees are unanimous on the point that entry of women in close proximity to the grave of Male Muslim Saint is a grievous SIN, as per the Islam and as such the Trust is governed by the Constitution Law and particularly Article 26 of the Constitution of India which confers upon the Trust a Fundamental Right to manage its own affairs in matters of religion and as such interference is uncalled for by any Third Agency.

The existing arrangement for Women provides a Secure Place to them to offer prayers. This has been decided in the interest of safety and security of the women and they are close to the inner sanctorum of the Tomb as possible, considering the rush of Men, this arrangement has been welcomed by the women Pilgrims.

Hence the trustees unanimously, hold that at no point of time were women allowed to enter near the close proximity of the tomb of the saint and infact the current arrangement at a Separate Entrance for women is more proximate to the Tomb than it earlier was.

For Haji Ali Dargah Trust
Sd/-
Trustees"

22. From the extract of the Minutes of the Meeting, four things emerge for justifying the ban - (i) that the entry of women in close

proximity to the grave of male Muslim Saint was a grievous SIN, as per Islam; (ii) that Article 26 of the Constitution of India confers upon the Trust a fundamental right to manage its own affairs in the matters of religion; (iii) that it is in the interest of safety and security of women; and (iv) at no point of time women were allowed to enter the close proximity of the Tomb. The respondent No. 2 Trust's arguments also revolved around the said issues.

23. We would first like to deal with the 4th issue raised in the Minutes of the Meeting, wherein, it is stated that at no point of time, women were allowed to enter the close proximity of the Tomb of the Saint. The said fact is clearly contrary to the affidavit filed by the respondent No. 2 Trust. It is pertinent to note here, that it was not seriously disputed by the respondent No. 2 Trust, that women were permitted to enter the sanctum sanctorum of the Dargah, prior to 2011-2012. The petitioners have specifically averred this fact in the petition, that they were permitted to enter the sanctum sanctorum of the Dargah prior to 2011-2012 and have also enclosed photographs in support of the same to show that women were permitted to enter the sanctum sanctorum of the Dargah, prior to 2011-2012. In the affidavit filed by the respondent No. 2 Trust, the aforesaid fact

is neither disputed nor denied. Infact, in the affidavit filed by the respondent No. 2 Trust dated 20th January, 2015, more particularly, in para 5, it is specifically stated as under :

> ***"5. I state that earlier in the sanctum sanctorum of the Dargah women were allowed however when the Trustees of the Respondent No. 2 were made to realize through various Muslim Clergy's and Teachers that the act of allowing the women inside the sanctum of the Dargah is a sin, the Trustees of the Respondent No. 2 sought it right to prevent the women to go inside the sanctum of the Dargah, however made parallel arrangements wherein the prayers of the women before the Dargah would not be disturbed. I state that the Trustees of the Respondent No. 2 after going through various aspects restricted the entry of the women to the sanctum sanctorum of the Dargah."***
>
> *(emphasis supplied)*

It is thus apparent that women were being permitted to enter the sanctum sanctorum of the Dargah and only after the Trustees were made to realise through some Muslim clergies, that the act of allowing women in the Dargah was a sin, that the Trustees of the respondent No. 2 decided to prevent women from entering the sanctum sanctorum and made parallel arrangements, from where women could offer prayers before the Dargah and would not be disturbed. Once, the respondent No. 2, on oath, has set out the above position, then it becomes very clear that women were being permitted to enter the sanctum sanctorum of the Haji Ali Dargah.

24. The question then arises is, whether the respondent No. 2 Trust has been able to show whether the entry of women in close proximity to the grave of male Muslim Saint was sin in Islam?

25. The respondent No. 2-Trust placed reliance on certain Qur'anic verses, sayings of Prophet Mohammed and the Hadiths, in their affidavit in support of their submissions that close proximity to the grave of male Muslim Saint was sin in Islam, for justifying the imposition of the ban. Mr. Memon vehemently contended that menstruating women were unclean and impure in Islam and hence, could not offer prayers or visit the Dargah/Mosque; and that Islam refers to the issue of separation of men and boys from women and girls in social settings in Holy places. The following are the Qur'anic verses on which reliance was placed, which address the interaction of men and women in social context :

> *"a. Tell the believing men to lower their gaze and to be mindful of their chastity: this will be most conducive to their purity – (and) verily, Allah is aware of all that they do. And tell the believing women to lower their gaze and to be mindful of their chastity, and not to display their charms beyond what may be apparent thereof; hence let them draw their veils over their bosoms."* *- Qur'an, Sura 24 (An-Nur), ayat 30-31*

b. O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garments. That is more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful. - Qur'an, Sura 23 (Al-Ahzab), ayat 59

c. Prophet Muhammad (peace be upon him) specifically admonished the men not to keep their wives from going to the mosques: -Ibn Omar reported

The following are verses from the Hadiths :

"I know that you women love to pray with me, but praying in your inner rooms is better for you than praying in your house, and praying in your house is better for you that praying in your courtyard, and praying in your courtyard is better for you than praying in your local mosque, and praying in your local mosque is better for you than praying in my mosque." - Abu Dawud in al-Sunan

"The best places of prayer for women are the innermost apartments of their houses."

"So, if a woman is at her period, she has to stop praying and fasting, and if her period is over, she has to get back to them and if Ramadan ends, then she has to fast what she had missed." - [Ibn Jabreen : al lolo al-makeen]

"The majority of the Muslim scholars (among them the four Imams) are agreed that the menstruating woman should not stay in the mosque or the dargah even if her purpose is to study or teach the Qur'an or other Sharia sciences. I state that Allah says (interpretation of meaning) :

> "{nor when you are in a state of Janaba, (i.e. in a state of sexual impurity and have not yet taken a bath} [4:43]. I state that Menstruation is like

> Janaba (ritual impurity) in this rule."
>
> "Abu Dawood narrated from Aisha that she said: "The Prophet said:
>
> > "I do not make the mosque lawful to the Junub (who is in the state of ritual impurity) or the menstruating woman."
>
> Muslim also narrated that Aisha said that The Messenger of Allah (peace be upon him) said to me:
>
> > "Get me the mat from the mosque. I said: I am menstruating. Upon this he remarked: Your menstruation is not in your hand."

26. According to Mr. Memon, some schools of thought have interpreted these hadiths to mean, that women should be encouraged to pray at home rather than a mosque. It was also urged that Prophet Mohammad ordered that mosques have separate doors for men and women, so that, men and women are not obliged to go through the same door and that after the `Isha' (evening prayer), women be allowed to leave the mosque first, so that they do not mix with men. Reliance placed on the aforesaid verses would not assist the respondent No. 2 Trust in any way or throw light on `how close proximity of the women to the grave of a male Muslim Saint was sinful in Islam'. As far as segregation of women and men is concerned, it was contended by the learned Counsel for the petitioners, that there were

always separate queues and separate entrances for men and women, and as such, only on this count, entry of women in the sanctum sanctorum cannot be banned. We also feel that the respondent No. 2 cannot derive an absolute proposition as is being canvassed on the basis of the aforesaid verses cited. Infact, some of the verses run contrary to what is being contended. Simply making the aforesaid statement and quoting verses is not sufficient, more particularly, when women were being permitted to enter the sanctum sanctorum upto 2011-2012. There is nothing in any of the aforesaid verses which shows, that Islam does not permit entry of women at all, into a Dargah/Mosque and that their entry was sinful in Islam. Per contra, learned Counsel for the petitioners also relied on several Qur'anic verses and Hadiths in support of their contention, that Islam believes in gender equality and that the ban was uncalled for. We need not reproduce the said verses, for the simple reason that the respondent No. 2 on its own showing, has not shown how entry of women in the sanctum sanctorum of the Haji Ali Dargah was sinful in Islam, on the basis of the verses relied upon by them, and reproduced in para 25.

27. It is next contended by the respondent No. 2 Trust, that the act

of restricting the entry of women in the sanctum sanctorum of the Dargah is `an essential and integral part of Islam' and that such a restriction is permissible under Articles 25 and 26 of the Constitution of India. The respondent No. 2 Trust also sought protection for its practice under Article 26(b) of the Constitution of India on this count. It is, in this context, that respondent No. 2 would urge that banning the entry of women in the sanctum sanctorum of the Dargah is `an essential and integral part of the said religion'. It is, therefore, necessary to consider what constitutes "matters of religion" and whether the practice is essential and an integral part of Islam and whether, if women were permitted to enter the sanctum sanctorum, the very nature of its religion would change.

28. Before we proceed to consider the aforesaid, it would be apposite to refer to the relevant constitutional provisions i.e. Articles 25 and 26 and consider the law in this regard. Articles 25 and 26 read thus :

> ***"Article 25 - 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.

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 be construed accordingly."

***"Article 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."

29. The Apex Court (7 Judges' Bench) in the case of ***Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri***

Shirur Mutt (supra) has laid down the essential function test, which states that only those practices which are "integral to the faith" can get exemption from State intervention. It was observed that, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. It was also observed that the use of the phrase "of its own affairs in matters of religion" suggests that there could be other affairs of a religious denomination or section, which are not strictly matters of religion and to such affairs, the rights guaranteed by Article 26(b) will not apply.

In ***The Durgah Committee, Ajmer v. Syed Hussain Ali (supra),*** the Apex Court in Paras 32 and 33 has observed as under :

> *"32. The challenge to the vires of the Act rests broadly on two principal grounds. It is urged that its impugned provisions are inconsistent with Art. 26 (b), (c), (d) of the Constitution and thereby violate the right to freedom of religion and to manage denominational institutions guaranteed by the said article. It is also argued that some of its provisions are violative of the respondents' fundamental right guaranteed under Art. 19(1)(f) and (g). It would be convenient to deal with these two principal grounds of attack before examining the other arguments urged against the validity of different sections.*
>
> ***33.*** *We will first take the argument about the infringement of the fundamental right to freedom of religion. Articles 25 and 26 together safeguard the citizen's right to freedom of religion. Under Art. 25 (1), subject to public order, morality and health*

and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and their right freely to profess, practise and propagate religion. This freedom guarantees to every citizen not only the right to entertain such religious beliefs as may appeal to his conscience but also affords him the right to exhibit his belief in his conduct by such outward acts as may appear to him proper in order to spread his ideas for the benefit of others. Article 26 provides that 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.

The four clauses of this article constitute the fundamental freedom guaranteed to every religious denomination or any section thereof to manage its own affairs. It is entitled to establish institutions for religious purposes, it is entitled to manage its own affairs in the matters of religion, it is entitled to own and acquire movable and immovable property and to administer such property in accordance with law. What the expression "religious denomination" means has been considered by this Court in Commr., Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar, 1954 SCR 1005: (AIR 1954 SC 282). Mukherjea, J., as he then was, who spoke for the Court, has quoted with approval the dictionary meaning of the word "denomination" which says that a "denomination" is "a collection of individuals classed together under the same name, a religious sect or body having a common faith and organization and designated by a distinctive name." The learned Judge has added that Art. 26 contemplates not merely a religious denomination but also a section thereof. Dealing with the questions as to what are the matters of religion, the learned Judge observed that the word "religion" has not been defined in the Constitution, and it is a term which is hardly susceptible of any rigid definition. Religion, according to him, is a matter of faith with individuals or communities and, it is not necessarily

theistic. It undoubtedly has its basis in a system of pleas or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it is not correct to say that religion is nothing else but a doctrine or 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 (pp. 1023, 1024) (of SCR) : (p. 290 of AIR). Dealing with the same topic, though in another context, in Venkataramna Devaru v. State of Mysore, 1958 SCR 895 : (AIR 1958 SC 255), Venkatarama Aiyar, J. spoke for the Court in the same vein and observed that it was settled that matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion. And in support of this statement the learned Judge referred to the observations of Mukherjea, J., which we have already cited. ***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 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 Art. 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 Art. 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****."***

(emphasis supplied)

In the case of ***Commissioner of Police v. Acharya Jagdishwarananda Avadhuta (supra),*** the majority decision of the Apex

Court in para 9, has stated as under :

> ***"9.*** *The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion.* ***What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion****. (See generally the Constitution Bench decisions in The Commissioner v. L. T. Swamiar of Shirur Mutt 1954 SCR 1005, SSTS Saheb v. State of Bombay 1962 (Supp) 2 SCR 496, and Seshammal v. State of Tamil Nadu, (1972) 2 SCC 11, regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.)* ***What is meant by `an essential part or practices of a religion' is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution****. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the `core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices."*

(emphasis supplied)

In ***Syedna Taher Saifuddin Saheb v. State of Bombay (supra),*** the Supreme Court has observed that in order to determine whether a particular act constitutes an essential religious function or not, reliance needs to be placed on the doctrines and religious texts of that particular religion.

In the case of ***A. S. Narayana Deekhshitutlu vs. State of Andhra Pradesh (supra),*** the Apex Court has observed that non-essential religious practices do not have protection under Articles 25 and 26 and the same are considered secular in nature and can be "regulated" by the State. It is thus evident that the right to manage claimed under Article 26 is subject to the rights of the State to regulate secular activities without interfering with the religious activities. In paras 90, 91 and 93, the Apex Court observed as under :

> *"90. 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 Budhism 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 Zorastianism; Sikhs in Gurugranth Sahib and teachings of Gurunanak Devji, its founder, which is a facet of Hinduism like Brahamos, Aryasamaj etc."

"91. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principle regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amenity, fraternity and equality of all persons which find their foot-hold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice."

> *"93. The Court, therefore, while interpreting Articles 25 and 26 strikes a careful balance between the freedom of the individual or the group in regard to religion, matters of religion, religious belief, faith or worship, religious practice or custom which are essential and integral part and those which are not essential and integral and the need for the State to regulate or control in the interest of the community."*

What can be culled out from the aforesaid decisions is that, what constitutes `an integral or essential part of the religion' is to be determined with reference to is doctrines, practices, tenets, historical background, etc. The religious practice has to constitute the very essence of that religion, and should be such, that if permitted, it will change its fundamental character. It is such permanent essential practices which are protected by the Constitution. It is also evident that immunity under Article 26(b) is provided not only to matters of doctrines or belief, but extends to acts done in furtherance of religion such as rituals, observances, ceremonies, modes of worship, which are considered to be fundamental parts of the religious practices. What is required is, that the such religious practices should be an essential and integral part of it and no other.

30. In the present case, reference must be made to the Qur'an, the fundamental Islamic text, to determine whether a practice is essential to

Islam. Essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. According to the `essential functions test', the test to determine whether a part or a practice is essential to the religion, in this case, Islam, to find out whether the nature of religion will change, without that part or practice; and whether the alteration, will change the very essence of Islam and its fundamental character. As is noted in the judgments referred hereinabove, what is protected by the Constitution are only such permanent essential parts, where the very essence of the religion is altered.

31. In the facts, we find that the respondent No. 2 has not been able to justify the ban legally or otherwise, restricting the entry in the sanctum sanctorum. The verses cited by the respondent No. 2 Trust have been reproduced in para 25. The verses cited do not in any way show, that Islam does not permit entry of women at all, in Dargahs/Mosques. It therefore cannot be said that the said prohibition `is an essential and integral part of Islam' and fundamental to follow the religious belief; and if taking away that part of the practice, would result in a fundamental change in the

character of that religion or its belief. The aforesaid will also have to be tested in the light of the fact, that women were being permitted to enter the sanctum sanctorum of the Haji Ali Dargah till about 2011-2012. What cannot be ignored is the fact, that women were permitted entry in the sanctum sanctorum till about 2011-2012 and the same has not been denied by the respondent No. 2 Trust in its affidavit. The explanation offered by respondent No. 2 in its affidavit, in para 5, is that the entry of women was prevented when the Trustees of respondent No. 2 were made to realise through various Muslim clergies and teachers, that the act of allowing women in the sanctum sanctorum of the Dargah is, a sin and that after considering `various aspects' restricted the entry. What were these `various aspects' have not been spelt out by the respondent No.2-Trust, in its affidavit, but we have culled out the same from the respondent No. 2 Trust's affidavit, the arguments as well as the Resolution passed by the respondent No. 2 Trust and have accordingly dealt with the same.

32. The other justification given for supporting the ban is on the basis of the fundamental right of the respondent No. 2 Trust `to manage its own affairs' as conferred under Article 26 of the Constitution. The question

is whether the protection sought by the respondent No. 2 Trust under Article 26 of the Constitution can withstand the rigors of Articles 14, 15 and 25?

33. The respondent No. 2 Trust is indisputably a public charitable Trust, registered under the provisions of the Bombay Public Trust Act, 1950. The land on which the Haji Ali Dargah is situated, has been leased out by the Government (the then Secretary of State for India) to the Trust vide a Lease Deed dated 28th November, 1931. It is pertinent to note that a Suit was filed in 1916 by the Hon'ble The Advocate General of Bombay against Abdulkarim Haji Essa Haji Fadla and Another, bearing Suit No. 1337 of 1916 in this Court. It appears that in the said Suit, a consent decretal order of reference dated 28th August, 1917 was passed, interalia, ordering that the Suit be referred to the Commissioner of this Court for taking accounts to frame a Scheme for the management and administration of the Haji Ali Dargah and the properties appertaining thereto, referred to in the plaint and to ascertain and report to the Court the names of two fit proper persons to be appointed as Trustees of the said Dargah and the properties thereto. Pursuant to the report submitted by the Commissioner, this Court (Coram : Macleod, J.) with the consent of the parties, sanctioned

the Scheme as framed by the Commissioner, vide order dated 6th June, 1934, for the management of the Charitable Trust created by Haji Essa Haji Fadla in or about 1865 in respect of the Dargah erected by him at Worli over the grave of Haji Ali, a Mohammedan Pir, now known as Haji Ali Dargah and the mosque and other properties appertaining thereto. The Charitable Trust was to be designated and known by the name of Haji Ali Dargah Trust. The said Dargah and the properties appertaining thereto, and more particularly specified in the Schedule annexed to the Scheme and all other endowments of the said charities were to be administered and managed by the Trustees under the Scheme, subject to and in conformity with the provisions of the Scheme. A perusal of the said Scheme shows that the Scheme was essentially for the appointments of the Trustees, the management of the charities, the preparation of the minute books and books of accounts, management of the charities and conducting of their business including summoning of meetings, drawing of cheques, etc. All the immovable properties appertaining to the said charities were also to be managed by the Trustees. The Trustees were to ensure that all the buildings appertaining to the charities were kept in good and substantial repair; the trustees could collect, get in, receive and take the rent issues, profits,

income and dividends of the Trust properties - movable and immovable. A perusal of the said Scheme shows that the Trust was entrusted with the management and affairs of regulating the Trust and properties appertaining thereto including all charities.

34. The respondent No. 2's claim of protection under Article 26 of the Constitution, as noted aforesaid, would have to be considered in the background of the constitutional provisions asserted in this behalf and the judicial pronouncements rendered by the Apex Court in this regard.

The Apex Court in the case of ***Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (supra)*** has observed in paras 15 to 20, as under :

> *"15. As regards Art. 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 the same name: a religious sect or body having a common faith and organization and designated by a distinctive name". It is well known that the practice of setting up Maths as centres of theological teaching was started 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 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 Art. 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 in regard to Art. 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 cl. (b), the next two clauses of Art. 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 cl. (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. Beason', (1888) 133 US 333 at p. 342 (G), 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 `cultus' 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 Art. 44(2), 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 or 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 religion and this is made clear by the use of the expression "practice of religion" in Art. 25. Latham, C.J. of the High Court of Australia while dealing with the provision of S. 116, 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 CLR 116 at p. 127 (H) :*

> *"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 S. 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".*

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 Arts. 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Art. 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-cl. (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 cl. (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.

19. 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 Art. 26(b)***.

What Art. 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 organized throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the 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 S. 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations - `Vide 67 CLR 16 at p. 127 (H)'. These were undoubtedly political activities though arising out of religious belief entertained by a particular community.

In such cases, as Latham, C. J. 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."

20. The Courts 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 a daily ceremony of saluting the national flat, while reciting in union a pledge of allegiance to it in certain set formula. The question arose in --- `Minersville School District, Board of Education, etc. v. Gobitis' (1939) 310 US 586 (I). 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 flat 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 flat was forbidden by the scripture.

The point for discussion by the Supreme Court was whether the requirement of participation in such a ceremony exacted from a child, who refused upon sincere religious grounds 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. Barrette', 1942 – 319 US 624 (J). 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 flat and pledge allegiance constituted a violation of the First and Fourteenth Amendments. This difference in judicial opinion brings about forcibly the difficult task which a court has to perform in cases of this type where the freedom of 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."

(emphasis supplied)

It would also be apposite to note the 5 Judges' Bench Judgment of the Apex Court in the case of ***Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan (supra).*** Paras 59 and 60 of the said judgment read as under :

"*59. In this connection, it cannot be ignored that what is protected under Arts. 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 affairs which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Art. 25 (1) or Art. 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 matter of religion, then, of course, the right guaranteed by Art. 25(1) and Article 26 (b) cannot be contravened.

60. 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 Arts. 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 v. Commonwealth, 1943-67 Com-WLR 116 at p. 123 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 Art. 25(1) and Art. 26(b) cannot be***

> ***extended to secular practices and affairs in regard to denominational matters which are not matters 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 Art. 25(1) or Art. 26(b). This aspect of the matter must be borne in mind in dealing with true scope and effect of Art. 25(1) and Art. 26(b).”***
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> *(emphasis supplied)*

It thus appears, that whenever a claim is made on behalf of a denomination, that the fundamental right guaranteed to it, to manage its own affairs in matters of religion is contravened, it would be necessary to consider whether the practice in question, is religious or whether the affairs in respect of which the right of management is alleged to have been contravened, are affairs in matters of religion.

The Full Bench of the Allahabad High Court in the case of ***Mohd. Wasi & Anr. vs. Bachchan Sahib & Ors.***[14] has also observed that a public place of worship (mosque) cannot be reserved for a particular sect or class of people.

14 AIR 1955 All. 68 (Full Bench)

The judgment rendered by the Apex Court in ***Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan (supra),*** clearly shows that the rights of religious denomination under Article 26 of the Constitution is subject to public order, morality and health and other rights under Chapter III, and that the State has the power to "regulate" the affairs if the same affects the fundamental rights of any person guaranteed under Chapter III of the Constitution. The State has the power to regulate secular activities without interfering with the religious activities. Similarly, as noted earlier, in the case of ***A. S. Narayana Deekhshitutlu vs. State of Andhra Pradesh (supra),*** it has been held that non-essential religious practices do not have protection under Articles 25 and 26 and the same can be considered secular in nature and can be "regulated" by the State. Article 26(b) relates to affairs in matters of religion such as the performance of religious rites and ceremonies, observance of religious festivals and the like and it does not refer to the administration of the property at all. The Apex Court has held that if the clause "affairs in matters of religion" were to include affairs in regard to all matters, whether religious or not, the provisions under Article 26(d) for legislative regulation of the administration of the denomination

property would be rendered illusory. The language of Article 26(b) and Article 26(d) brings out the difference between the two. With 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. But, on the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it undoubtedly has the right to administer such property only in accordance with law.

35. In the facts of the present case, first and foremost the respondent No. 2 Trust, even under the Scheme, cannot enforce a ban which is contrary to Part III of the Constitution of India. The aims, objects and activities of the Haji Ali Dargah Trust as set out in the Scheme are not governed by any custom, tradition/usage. The objects of the Haji Ali Dargah Trust are in respect of purely secular activities of a non-religious nature, such as giving loans, education, medical facilities, etc. Neither the objects nor the Scheme vest any power in the trustees to determine matters of religion, on the basis of which entry of woman is being restricted. Matters relating to administration of property, by the respondent No. 2 are not matters of religion to which clause (b) of Article 26 applies. The Trust

has no power to alter or modify the mode or manner of religious practices of any individual or any group.

36. Admittedly, the Haji Ali Dargah Trust is a public charitable trust. It is open to people all over the world, irrespective of their caste, creed or sex, etc. Once a public character is attached to a place of worship, all the rigors of Articles 14, 15 and 25 would come into play and the respondent No. 2 Trust cannot justify its decision solely based on a misreading of Article 26. The respondent No. 2 Trust has no right to discriminate entry of women into a public place of worship under the guise of `managing the affairs of religion' under Article 26 and as such, the State will have to ensure protection of rights of all its citizens guaranteed under Part III of the Constitution, including Articles 14 and 15, to protect against discrimination based on gender. Infact, the right to manage the Trust cannot override the right to practice religion itself, as Article 26 cannot be seen to abridge or abrogate the right guaranteed under Article 25 of the Constitution. We may also note, that it is also not the respondent No. 2 Trust's claim that they are an independent religious denomination or a section thereof, having complete autonomy under Article 26. Thus, even

considering the said fact, the protection claimed under Article 26 is clearly misconceived.

37. The other justification given by the respondent No. 2 Trust for imposing the ban was the safety and security of the women, in particular, to prevent sexual harassment of women at places of worship. It is stated that the said ban is in keeping with the decision of the Apex Court, wherein stringent directions have been issued to ensure that there is no sexual harassment to women at places of worship. We may note, that the said submission is completely misplaced and misconceived and reliance placed on the judgment of the Apex Court in the case of ***The Deputy General of Police & Anr. v. S. Samuthiam (supra)*** (dated 30th November, 2012) is completely out of context, inasmuch as, the directions were issued when the Protection of Women from Sexual Harassment at Work Place Bill, 2010 was under consideration and as the provisions of that Bill were not sufficient to curb eve-teasing. It is in these circumstances, certain directions were issued by the Apex Court and directions were given to the State Governments to take effective and appropriate measures to curb instances of eve-teasing. It is also pertinent to note, that at that time, there were no suitable provisions

to curb eve-teasing. The said judgment was also prior to the Criminal Law (Amendment) Act, 2013. Reliance placed on this Judgment is clearly misconceived and cannot justify the ban imposed by the respondent No. 2 Trust. The respondent No. 2, under the guise of providing security and ensuring safety of women from sexual harassment, cannot justify the ban and prevent women from entering the sanctum sanctorum of the Haji Ali Dargah. The respondent No. 2 Trust is always at liberty to take steps to prevent sexual harassment of women, not by banning their entry in the sanctum sanctorum, but by taking effective steps and making provisions for their safety and security e.g. by having separate queues for men and women, as was done earlier. It is also the duty of the State to ensure the safety and security of the women at such places. The State is equally under an obligation to ensure that the fundamental rights guaranteed under Articles 14, 15 and 25 of the Constitution are protected and that the right of access into the sanctum sanctorum of the Haji Ali Dargah is not denied to women.

38. Accordingly, the petition must succeed and is allowed. We hold that the ban imposed by the respondent No. 2 Trust, prohibiting women from entering the sanctum sanctorum of the Haji Ali Dargah

contravenes Articles 14, 15 and 25 of the Constitution, and as such restore status-quo ante i.e. women be permitted to enter the sanctum sanctorum at par with men. The State and the respondent No. 2 Trust to take effective steps to ensure the safety and security of women at the said place of worship.

39. Rule is made absolute on the aforesaid terms.

REVATI MOHITE DERE, J. ***V. M. KANADE, J.***