(2016) 2 Supreme Court Cases 725

(BEFORE RANJAN GOGOI AND N.V. RAMANA, JJ.)

ADI SAIVA SIVACHARIYARGAL NALA SANGAM AND OTHERS .. Petitioners;

Versus

GOVERNMENT OF TAMIL NADU AND ANOTHER .. Respondents.

Writ Petitions (C) No. 354 of 2006 with Nos. 355 and 383-84 of 2006, decided on December 16, 2015

A. **Constitution of India — Arts. 25, 26, 32 and 226 — Ecclesiastical jurisdiction — Primacy of the Constitution, fundamental/constitutional rights, values and principles — Whether a particular religious practice/belief forms essential part of religion and hence protected under Arts. 25 and 26 — Determination of this issue by constitutional courts, even in absence of specific ecclesiastical jurisdiction, not barred on ground of interference with "complete autonomy" of religious practices by "outside authority", such courts being arbiters of fundamental/constitutional rights and principles, which must supersede all religious beliefs or practices — Determination of such issue is a constitutional necessity and is not enjoined by virtue of any ecclesiastical jurisdiction conferred on constitutional courts**

B. **Constitution of India — Arts. 14, 15, 16, 17, 25 and 26 — Equality of opportunity for appointment as Archaka of any temple — Primacy of constitutional values — Held, exclusion of some and inclusion of a particular segment or denomination for appointment as Archakas within the Agamas (treatises pertaining to construction of temples, installation of idols and conduct of worship of deity by Hindus) concerned, would not violate Art. 14 only so long such inclusion/exclusion is not based on criteria of caste, birth or any other constitutionally unacceptable parameter — Appointments of Archakas will have to be made in accordance with the Agamas, subject to their due identification as well as their conformity with constitutional mandates and principles**

C. **Constitution of India — Arts. 17, 14 and 25 and 26 — Right against discrimination — Untouchability — It abolishes caste-based practices built on superstitions and beliefs that have no rationale or logic — If Agamas (treatises pertaining to construction of temples, installation of idols and conduct of worship of deity by Hindus) do not prohibit any group of citizens from being appointed as Archakas on basis of caste or class, Art. 17 or Protection of Civil Rights Act would not be violated — The exclusion of some and inclusion of a particular segment or denomination for appointment as Archakas would not violate Art. 14 only so long such inclusion/exclusion is not based on the criteria of caste, birth or any other constitutionally unacceptable parameter — Human and Civil Rights — Protection of Civil Rights Act, 1955**

D. **Constitution of India — Arts. 25, 26, 14, 16(5) and 17 — Temple — Right to priesthood — Appointment of Archakas — To be as per Agamas, subject to constitutional provisions and values — G.O. No. 118 dt. 23-5-2006 issued by Government of T.N., Department of Tamil Development, Culture and Endowments, ordaining that any Hindu possessing requisite qualification and training, can be appointed as Archakas in temples — (A) Whether amounts to State's interference with rights under Arts. 25 and 26 — (B) Whether any particular denomination of worshippers have exclusive right to be appointed as Archakas to perform pooja**

— Held, answer to both the questions above (A) and (B) would depend upon what is prescribed by one particular Agama or a set of Agamas (treatises pertaining to construction of temples, installation of idols and conduct of worship of deity by Hindus) for a solitary temple or a group of temples — Appointment of Archakas has to be made in accordance with Agamas, subject to their due identification as well as their conformity with constitutional mandates and principles

— However, exclusion of some and inclusion of a particular segment or denomination for appointment as Archakas would not violate Article 14 only so long such inclusion/exclusion is not based on criteria of caste, birth or any other constitutionally unacceptable parameter

— Art. 16(5) protects appointment of Archakas from a particular denomination, if so required to be made by Agamas governing particular temple — Particular denomination from which Archakas require to be appointed as per Agamas embodies long-standing belief/practice which constitutes essential part of religious practice — Protection under Arts. 25 and 26 extends to such religious practices which form essential part of religion — But identifying essential religious beliefs and practices without which religion itself would not survive, is task of constitutional courts in context of facts of particular case and limited role of State relating to religious freedoms — Validity of G.O. dt. 23-5-2006 would depend on facts of each case of appointment of Archaka — So long as prescription regarding appointment under any Agama/Agamas is not contrary to any constitutional mandate, G.O. would not be operative in that case — Trusts and Trustees — Religious and Charitable Endowments and Trusts — T.N. Hindu Religious and Charitable Endowments Act, 1959 (22 of 1959), Ss. 28 and 55(2)

E. **Constitution of India — Arts. 32 and 226 — Maintainability — Cause of action — Challenge to State action — Apprehension of harm, if well founded, can furnish cause of action even in absence of specific orders of Government being effective — Writ proceeding can be initiated in view of anticipated prejudice and adverse effect and consequences**

F. **Constitution of India — Arts. 32 and 226 — PIL — Maintainability — Questions raised relating to appointment in public office (Archaka in public temple) involving religious faith and practice of large number of citizens of the country and centuries-old traditions and usage having force of law — Writ petition maintainable**

G. **Constitution of India — Arts. 32 and 226 — Exercise of jurisdiction under — Pedantic and technical approach unwarranted — When writ petition raises grave issues having great social impact, question of applicability of bar of principle of res judicata or locus standi to bar adjudication on merits or non-maintainability of challenge to G.O. on ground of being a mere executive fiat in absence of legislative sanction, cannot by itself be determinative of invalidity of G.O.**

H. **Family and Personal Laws — Hindu Law — Hinduism — Concept of, discussed — Words and Phrases — "Hinduism"**

I. **Constitution of India — Arts. 25 and 26 — "Religion" — Meaning of — Words and Phrases — "Religion"**

Section 55 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 initially provided that in case where the office-holders or servants of a religious institution are required to be filled up on the principle of hereditary succession the person next-in-line of succession is entitled to succeed. Section 55 was amended along with other related provisions by the Amendment Act of 1970 which came into force on 8-1-1971. By the aforesaid amendment the principle of next-in-line of succession was abolished. The amendment came to be challenged before the Supreme Court in *Seshammal*, (1972) 2 SCC 11. The Constitution Bench therein while upholding the validity of the amendment, dealt with a further question, namely, though the principle of next-in-line was validly abolished, whether the appointment of office-bearers or servants of the temples is required to be made from a particular denomination/group/sect as mandated by the Agamas i.e. treatises pertaining to matters like construction of temples, installation of idols and conduct of worship of the deity. The Bench answered the question in the affirmative. No controversy arose thereafter until G.O. No. 118 dated 23-5-2006 was issued by the Government of Tamil Nadu, Department of Tamil Development, Cultural and Endowments to the effect that, "*Any person who is a Hindu and possessing the requisite qualification and training can be appointed as a Archaka in Hindu temples*." An Ordinance (5 of 2006) dated 14-7-2006 followed the aforesaid G.O. seeking to further amend sub-section (2) of Section 55 by providing that no person shall be entitled to appointment to any vacancy referred to in sub-section (1) on the ground that he is next in the line of succession to the last holder of office or on the ground of any custom or usage. The Ordinance was replaced by Tamil Nadu Act 15 of 2006 which received the assent of the Governor on 29-8-2006. The Act, however, did not contain the amendment to Section 55 as was made by the Ordinance. In other words, the said amendment brought by the Ordinance was dropped from the amending Act 15 of 2006.

The present writ petitions under Article 32 of the Constitution have been instituted by an Association of Archakas and individual Archakas of Sri Meenakshi Amman Temple of Madurai challenging aforesaid G.O. No. 118 dated 23-5-2006.

It was submitted that the issues in the present case are res judicata; the same having been decided inter partes in *Seshammal case*; the Archakas of the Agamas Temples and the respondent State both being parties to the said decision. Specifically, it was urged that in *Seshammal case* the Constitution Bench has unambiguously held that the appointment of an Archaka has to be as per the Agamas governing the particular temple and any deviation from the said age-old custom and usage would be an infringement of the freedom of religion and the rights of the religious denomination to manage its own affairs, as guaranteed, by Articles 25 and 26 of the Constitution. The impugned G.O., by its prescription, therefore, seeks to override the declaration of law made by the Constitution Bench in *Seshammal case*. It was further urged that curtailment of the freedoms guaranteed by Articles 25 and 26 of the Constitution can only be made by the legislature and even a legislative exercise in this regard is circumscribed by the limitations contained in both Articles 25 and 26. In the present case the amendment of Section 55 of the Tamil Nadu Act as made by Ordinance 5 of 2006 has not been continued by Amendment Act 15 of 2006. The impugned G.O. has, therefore, to necessarily lose its efficacy. It was further contended that the G.O. wrongly relies on the decision in *N. Adithayan*, (2002) 8 SCC 106 to justify its promulgation.

Preliminary objections as to maintainability of the writ petitions were raised on behalf of the respondents by urging that the present writ petitions have not been filed as public interest litigations and in the absence of any specific orders in implementation of the impugned G.O. dated 23-5-2006 the writ petitions are premature. It was further contended that even if the writ petitions are to be considered as PILs the same raise questions with regard to appointment in public office i.e. Archakas in public temples and therefore the writ petitions will also not be maintainable as public interest litigations. It was further urged that as and when the G.O. is given effect to by actual appointment of an Archaka or Archakas, as may be, it will be open for the petitioners to raise the issue and establish that there is a usage or custom or customary practice governing the temple in question which require the appointment of the Archaka to be made from a particular denomination.

It was further contended on behalf of the respondent that the decision of the Constitution Bench in *Seshammal case* upholding the constitutional validity of the Amendment Act of 1970 had opened the avenue to all qualified Hindus irrespective of caste, denominations, etc. to be appointed as Archakas. The respondent pointed out the lack of familiarity of even temple priests with the Agamas and their lack of knowledge of such Agamas and the practices of the temples as may be prescribed by the Agamas. It is submitted that not only the contents of the Agamas have become uncertain, even assuming otherwise, the same cannot be an authority to confer legitimacy to a practice which is inconsistent with and contrary to the provisions of the Constitution, especially those contained in Part III thereof. It is further submitted that the impugned G.O. is consistent with and in fact effectuates the fundamental right to equality and equal opportunity and no contrary practice overriding the said provisions of the Constitution would be legally acceptable. It

was further submitted that there is no conflict between the judgments in *Seshammal case* and *N. Adithayan case* and it is possible to read the law declared in both the cases in a manner consistent with the constitutional requirements and principles. An additional issue has been raised that the impugned G.O. needs to be upheld on the touchstone of the principle enshrined by Article 17 of the Constitution. The exclusive right of a particular group to enter the sanctum sanctorum of a temple and perform the rituals on the ground that performance of such rituals by any other person would defile the image is a thought and action which is prohibited by Article 17 of the Constitution. Violation and consequently commission of offences under the Protection of Civil Rights Act, 1955 has also been urged.

The issues arising and the arguments made centre around the true meaning, purport and effect of the Constitution Bench judgment in *Seshammal case* and in the above context the effect of the decision of the numerically smaller Bench in *N. Adithayan case*.

Disposing of the writ petitions, the Supreme Court

Held :

Religion incorporates the particular belief(s) that a group of people subscribe to. Hinduism, as a religion, incorporates all forms of belief without mandating the selection or elimination of any one single belief. It is a religion that has no single founder; no single scripture and no single set of teachings. It has been described as Sanatan Dharma, namely, eternal faith, as it is the collective wisdom and inspiration of the centuries that Hinduism seeks to preach and propagate. Hinduism encompasses wide expanse of beliefs, thoughts and forms of worship without any divergence or friction within itself or amongst its adherents. Image worship is a predominant feature of Hindu religion. (Paras 1, 35 and 36)

Shastri Yagnapurushdasji v. *Muldas Bhundardas Vaishya*, AIR 1966 SC 1119 : (1966) 3 SCR 242, *relied on*

Gopala Moopanar v. *Dharmakarta Subramaniya Iyer*, 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363, *approved*

In *Seshammal case* the Constitution Bench of the Supreme Court held that while the appointment of Archakas on the principle of next-in-line is a secular act the particular denomination from which Archakas are required to be appointed as per the Agamas embody a long-standing belief that has come to be firmly embedded in the practices immediately surrounding the worship of the image and therefore such beliefs/practice constitute an essential part of the religious practice which under Section 28 of the T.N. Hindu Religious and Charitable Endowments Act the trustee is bound to follow. The Bench also held that some of the Agamas do incorporate a fundamental religious belief of the necessity of performance of the poojas by Archakas belonging to a particular and distinct sect/group/denomination, failing which, there will be defilement of deity requiring purification ceremonies. But *Seshammal case* is not an authority for any proposition as to what an Agama or a set of Agamas governing a particular temple or group of temples lay down with regard to the question that confronts the Court, namely, whether any particular denomination of worshippers or believers have an exclusive right to be appointed as Archakas to perform the poojas. Much less, has the judgment taken note of

the particular class or caste to which the Archakas of a temple must belong as prescribed by the Agamas. (Paras 28 and 48)

Seshammal v. *State of T.N.*, (1972) 2 SCC 11, *explained* and *followed*

Article 16(5) protects the appointment of Archakas from a particular denomination, if so required to be made, by the Agamas holding the field. The debates in the Constituent Assembly disclose that the suggestion that the operation of Article 16(5) should be restricted to appointment in offices connected with administration of a religious institution was negatived. The exception in Article 16(5), therefore, would cover an office in a temple which also requires performance of religious functions. In fact, the above though not expressly stated could be one of the bases for the views expressed by the Constitution Bench in *Seshammal case*. (Para 45)

Surely, if the Agamas in question do not proscribe any group of citizens from being appointed as Archakas on the basis of caste or class, the sanctity of Article 17 or any other provision of Part III of the Constitution or even the Protection of Civil Rights Act, 1955 will not be violated. What has been said in *Seshammal case* is that if any prescription with regard to appointment of Archakas is made by the Agamas, Section 28 of the Tamil Nadu Act mandates the trustee to conduct the temple affairs in accordance with such custom or usage. (Para 48)

The issue of untouchability raised on the anvil of Article 17 of the Constitution stands at the extreme opposite end of the pendulum. Article 17 of the Constitution strikes at caste-based practices built on superstitions and beliefs that have no rationale or logic. The exposition of the Agamas made a century back by the Madras High Court in *Gopala Moopanar*, 1914 SCC OnLine Mad 104 that exclusion from the sanctum sanctorum and duties of performance of poojas extends even to Brahmins is significant. This has been echoed in the opinion of Shri Parthasarthy Bhattacharya as noted by the Constitution Bench in *Seshammal case*. Such exclusion is not on the basis of caste, birth or pedigree. The provisions of Article 17 and the Protection of Civil Rights Act, 1955, therefore, would not be of much significance for the present case. Similarly, the "offer" of the State in its affidavit to appoint Shaivite as Archakas in Shiva temples and Vaishnavas in Vaishnavite temples is too naïve an understanding of a denomination which is, to say the least, a far more sharply identified subgroup both in case of Shaivite and Vaishnavite followers. However, what cannot be ignored is the "admission" inbuilt in the said offer resulting in some flexibility in the impugned G.O. that the State itself has acknowledged. (Para 47)

Gopala Moopanar v. *Dharmakarta Subramaniya Iyer*, 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363, *referred to*

In *Adithayan case*, it was held that rights claimed solely on the basis of caste cannot enjoy the protection of Articles 25 and 26 and no earlier decision of the Supreme Court including *Seshammal case* supports the contention that even duly qualified persons can be barred from performing poojas on the sole ground that such a person is not a Brahmin by birth or pedigree. Exclusion solely on the basis of caste was not an issue in *Seshammal case* so as to understand the decision in *Adithayan case* to be, in any way, a departure from what has been held in *Seshammal case*. (Para 31)

N. Adithayan v. *Travancore Devaswom Board*, (2002) 8 SCC 106, *explained* and *followed*

Seshammal v. *State of T.N.*, (1972) 2 SCC 11, *explained* and *distinguished*

The freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also. Right of belief and practice is guaranteed by Article 25 subject to public order, morality and health and other provisions of Part III of the Constitution. Clause (2) is an exception and makes the right guaranteed by clause (1) subject to any existing law or to such law as may be enacted to, inter alia, provide for social welfare and reforms or throwing or proposing to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26(*b*) on the other hand guarantees to every religious denomination or section full freedom to manage its own affairs insofar as matters of religion are concerned, subject, once again, to public order, morality and health *and* as held by this Court subject to such laws as may be made under Article 25(2)(*b*). The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. (Para 43)

Sri Venkataramana Devaru v. *State of Mysore*, AIR 1958 SC 255; *Durgah Committee* v. *Syed Hussain Ali*, AIR 1961 SC 1402; *Commr. of Police* v. *Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770, *relied on*

Cantwell v. *Connecticut*, 1940 SCC OnLine US SC 89 : 84 L Ed 1213 : 310 US 296 (1940); *United States* v. *Ballard*, 1944 SCC OnLine US SC 73 : 88 L Ed 1148 : 322 US 78 (1944), *referred to*

Sankaralinga Nadan v. *Rajeswara Dorai*, 1908 SCC OnLine PC 10 : (1907-08) 35 IA 176, *cited*

The difficulty lies not in understanding or restating the constitutional values. There is not an iota of doubt on what they are. But to determine whether a claim of State action in furtherance thereof overrides the constitutional guarantees under Articles 25 and 26 may often involve a delicate and unenviable task of identifying essential religious beliefs and practices, sans which the religion itself does not survive. It is in the performance of this task that the absence of any exclusive ecclesiastical jurisdiction of the Supreme Court, if not other shortcomings and adequacies, that can be felt. Moreover, there is some amount of uncertainty with regard to the prescription contained in the Agamas. Coupled with the above is the lack of easy availability of established works and the declining numbers of acknowledged and undisputed scholars on the subject. (Para 49)

Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt v. *Commr., Hindu Religious Endowments*, 1951 SCC OnLine Mad 384 : AIR 1952 Mad 613, *referred to*

The Ecclesiastical jurisprudence in India, sans any specific Ecclesiastical jurisdiction, revolves around the exposition of the constitutional guarantees under Articles 25 and 26 as made from time to time. The development of this branch of jurisprudence primarily arises out of claimed rights of religious groups and denominations to complete autonomy and the prerogative of exclusive

determination of essential religious practices and principles on the bedrock of the constitutional guarantees under Articles 25 and 26 of the Constitution and the judicial understanding of the interplay between Articles 25(2)(*b*) and 26(*b*) of the Constitution in the context of such claims. In such a situation one is reminded of the observations, if not the caution note struck by Mukherjea, J. in *Shirur Mutt*, AIR 1954 SC 282 with regard to complete autonomy of a denomination to decide as to what constitutes an essential religious practice, a view that has also been subsequently echoed by the Supreme Court though as a "minority view". But no such view of the Court can be understood to be an indication of any bar to judicial determination of the issue as and when it arises. Any contrary opinion would give rise to large-scale conflicts of claims and usages as to what is an essential religious practice with no acceptable or adequate forum for resolution. That apart the "complete autonomy" contemplated in *Shirur Mutt case* and the meaning of "outside authority" must not be torn out of the context in which the views, came to be recorded (p. 1028). The exclusion of all "outside authorities" from deciding what is an essential religious practice must be viewed in the context of the limited role of the State in matters relating to religious freedom as envisaged by Articles 25 and 26 itself and not of the courts as the arbiter of constitutional rights and principles. (Paras 38 and 49)

Commr., Hindu Religious Endowments v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005, *explained* and *followed*

A decision on such claims becomes the duty of the constitutional court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right is in conformity with public order, morality and health and in accord with the indisputable and unquestionable notions of social welfare and reforms. A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained. The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. *The constitutional legitimacy, naturally, must supersede all religious beliefs or practices.* (Paras 43 and 48)

What then is the eventual result? The answer defies a straightforward resolution as the validity or otherwise of the impugned G.O. would depend on the facts of each case of appointment. What is found and held to be prescribed by one particular Agama or a set of Agamas for a solitary or a group of temples, as may be, would be determinative of the issue. In this regard it will be necessary to re-emphasise what has been already stated with regard to the purport and effect of

Article 16(5) of the Constitution, namely, that the exclusion of some and inclusion of a particular segment or denomination for appointment as Archakas would not violate Article 14 only so long such inclusion/exclusion is not based on the criteria of caste, birth or any other constitutionally unacceptable parameter. So long as the prescription(s) under a particular Agama or Agamas is not contrary to any constitutional mandate as discussed above, the impugned G.O. dated 23-5-2006 by its blanket fiat has the potential of falling foul of the dictum laid down in *Seshammal case*. As held in *Seshammal case*, appointments of Archakas will have to be made in accordance with the Agamas, subject to their due identification as well as their conformity with the constitutional mandates and principles as discussed above. A determination of the contours of a claimed custom or usage would be imperative and it is in that light that the validity of the impugned G.O. dated 23-5-2006 will have to be decided in each case of appointment of Archakas whenever and wherever the issue is raised. The necessity of seeking specific judicial verdicts in the future is inevitable and unavoidable. (Paras 50 and 51)

Having regard to the gravity of the issues arising and the perceptible magnitude of the impact thereof on Hindu society, it would be incorrect, if not self-defeating, to take too pedantic an approach at resolution either by holding the principle of res judicata or locus to bar an adjudication on merits or to strike down the impugned G.O. as an executive fiat that does not have legislative approval, made explicit by the fact that though what has been brought by the G.O. dated 23-5-2006 was also sought to be incorporated in the statute by the Ordinance, eventually, the amending Bill presented before the legislature specifically omitted the aforesaid inclusion. The significance of the aforesaid fact, however, cannot be underestimated. What is sought to be emphasised is that the same, by itself, cannot be determinative of the invalidity of the G.O. which will have to be tested on certain other premises and foundation treating the same to be an instance of exercise of executive power in an area not covered by any specific law. (Para 46)

Sanjeev Coke Mfg. Co. v. *Bharat Coking Coal Ltd.*, (1983) 1 SCC 147, *referred to*

It is difficult to accept the contentions with regard to the maintainability of the writ petitions on two counts. Firstly, it is difficult to appreciate as to why the petitioners should be non-suited at the threshold merely because G.O. dated 23-5-2006 has not been given effect to by actual orders of the State Government. The institution of a writ proceeding need not await actual prejudice and adverse effect and consequence. An apprehension of such harm, if the same is well founded, can furnish a cause of action for moving the Court. The argument that the present writ petition is founded on a cause relating to appointment in a public office and hence not entertainable as a public interest litigation would be too simplistic a solution to adopt to answer the issues that have been highlighted which concerns the religious faith and practice of a large number of citizens of the country and raises claims of century-old traditions and usage having the force of law. The above is the second ground, namely, the gravity of the issues that arise, that impel the Court to make an attempt to answer the issues raised and arising in the writ petitions for determination on the merits thereof. (Para 12)

R-D/56090/CV

Advocates who appeared in this case :

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2. (2002) 8 SCC 106, *N. Adithayan* v. *Travancore Devaswom Board* 738*e*, 738*e-f*, 739*e*, 739*g*, 743*f*, 743*f-g*, 744*a*, 744*b-c*, 744*e*
3. (1983) 1 SCC 147, *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.* 738*c-d*
4. (1972) 2 SCC 11, *Seshammal* v. *State of T.N.* 736*a-b*, 736*c*, 737*g-h*, 738*a*, 738*b*, 738*e-f*, 739*a*, 739*e*, 739*g*, 740*a*, 740*d-e*, 741*a-b*, 741*b-c*, 742*e-f*, 743*b-c*, 743*d-e*, 743*e*, 743*e-f*, 744*a-b*, 744*c*, 744*e*, 744*e-f*, 753*h*, 754*d-e*, 754*f*, 755*a-b*, 756*c-d*, 756*e*
5. AIR 1966 SC 1119 : (1966) 3 SCR 242, *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya* 744*f-g*, 745*b*
6. AIR 1961 SC 1402, *Durgah Committee* v. *Syed Hussain Ali* 751*f-g*, 751*g*
7. AIR 1958 SC 255, *Sri Venkataramana Devaru* v. *State of Mysore* 750*a-b*, 750*c-d*, 751*f-g*
8. AIR 1954 SC 282 : 1954 SCR 1005, *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* 748*g*, 749*b*, 752*c*, 755*e*, 755*f-g*
9. 1951 SCC OnLine Mad 384 : AIR 1952 Mad 613, *Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt* v. *Commr., Hindu Religious Endowments* 749*c*
10. 1944 SCC OnLine US SC 73 : 88 L Ed 1148 : 322 US 78 (1944), *United States* v. *Ballard* 752*c-d*, 752*f*
11. 1940 SCC OnLine US SC 89 : 84 L Ed 1213 : 310 US 296 (1940), *Cantwell* v. *Connecticut* 752*c-d*, 752*f*
12. 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363, *Gopala Moopanar* v. *Dharmakarta Subramaniya Iyer* 747*f*, 748*a*, 748*a-b*, 748*c-d*, 750*g-h*, 751*b-c*, 754*c-d*, 754*d-e*
13. 1908 SCC OnLine PC 10 : (1907-08) 35 IA 176, *Sankaralinga Nadan* v. *Rajeswara Dorai* 751*b-c*

The Judgment of the Court was delivered by

RANJAN GOGOI, J.— Religion incorporates the particular belief(s) that a group of people subscribe to. Hinduism, as a religion, incorporates all forms of belief without mandating the selection or elimination of any one single belief. It is a religion that has no single founder; no single scripture and no single set of teachings. It has been described as Sanatan Dharma, namely, eternal faith, as it is the collective wisdom and inspiration of the centuries that Hinduism seeks to preach and propagate. It is keeping in mind the above precepts that we will proceed further.

2. Before highlighting the issues that confront the Court in the present case, the relevant constitutional provisions in Part III of the Constitution may be taken note of. Article 13, in clear and unequivocal terms, lays down that all laws including pre-Constitution laws which are inconsistent with or in derogation of the fundamental rights guaranteed by Part III are void. Article 13(3) brings within the fold of laws, all rules, regulations, notification, custom and usage having the force of law. While the several provisions of Part III would hardly need to be re-emphasised, specific notice must be had of, in the context of the present case, the provisions contained in Articles 25 and 26 of the Constitution.

3. While Article 25 makes the freedom of conscience and the right to profess, practice and propagate the religion to which a person may subscribe, a fundamental right, the exercise of such right has been made subject to public order, morality and health and also to the other provisions of Part III. Article 25(2)(*b*) makes it clear that the main part of the provisions contained in Article 25 will not come in the way of the operation of any existing law or prevent the State from making any law which provides for social welfare and reform or for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Similarly, Article 26 while conferring the right on every religious denomination to manage its own affairs makes it clear that the right to manage the affairs of any religious denomination is restricted to matters of religion only.

4. The provisions of Part III, as noted above, therefore make it amply clear that while the right to freedom of religion and to manage the religious affairs of any denomination is undoubtedly a fundamental right, the same is subject to public order, morality and health and further that the inclusion of such rights in Part III of the Constitution will not prevent the State from acting in an appropriate manner, in the larger public interest, as mandated by the main part of both Articles 25 and 26. Besides, the freedom of religion being subject to the other provisions of Part III, undoubtedly, Articles 25 and 26 of the Constitution have to be harmoniously construed with the other provisions contained in Part III.

5. The necessary facts may now be noticed. In order to amend and consolidate the law relating to administration and governance of Hindu religious and charitable institutions in the State of Tamil Nadu, the State Legislature has enacted the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as "the Tamil Nadu Act"). A passing reference may be made, at this stage, to Section 55 of the Tamil Nadu Act which provided that in case where the office-holders or servants of a religious institution are required to be filled up on the principle of hereditary succession the person next-in-line of succession is entitled to succeed. There were some exceptions to the above rule i.e. where the person next-in-line is a minor or suffers from some incapacity.

6. The aforesaid provision (Section 55) was amended along with other related provisions by the Amendment Act of 1970 which came into force on 8-1-1971. By the aforesaid amendment the principle of next-in-line of succession was abolished. The amendment came to be challenged before this Court, which challenge was considered by a Constitution Bench of the Court. In its judgment in *Seshammal* v. *State of T.N.*[1] the Constitution Bench, while upholding the validity of the amendment, dealt with a further question, namely, though the principle of next-in-line was validly abolished, whether the appointment of office-bearers or servants of the temples is required to be made from a particular denomination/group/sect as mandated by the Agamas i.e. treatises pertaining to matters like construction of temples; installation of idols and conduct of worship of the deity. The Constitution Bench after an elaborate consideration of the matter, details of which will be noticed subsequently, seems to have answered the aforesaid question in the affirmative.

7. No controversy surfaced after the Constitution Bench judgment in *Seshammal*[1] until a G.O. No. 118 dated 23-5-2006 was issued by the Government of Tamil Nadu, Department of Tamil Development, Cultural and Endowments to the effect that,

> "*Any person who is a Hindu and possessing the requisite qualification and training can be appointed as a Archaka in Hindu temples.*" (emphasis supplied)

An Ordinance (No. 5 of 2006) dated 14-7-2006 followed the aforesaid G.O. seeking to further amend sub-section (2) of Section 55 of the Tamil Nadu Act. The said provision of the Act i.e. Section 55(2), by virtue of the 1971 Amendment referred to above and the 2006 Ordinance, read as follows:

> "**55. (2)** *No person shall be entitled to appointment to any vacancy referred to in sub-section (1) merely on the ground that he is next in the line of succession to the last holder of office.*" *[Change brought about by amendment of Section 55(2)]*
>
> "*or on the ground of any custom or usage.*" *(Change brought about by Ordinance No. 5 of 2006)* (emphasis supplied)

8. The explanatory statement to the Ordinance in Para 4 indicated the purpose behind further amendment of Section 55(2) in the following terms:

> "Archakas of the temples are to be appointed without any discrimination of caste and creed. Custom or usage cannot be a hindrance to this. It is considered that the position is clarified in the Act itself and accordingly, it has been decided to amend Section 55 of the said Act suitably."

9. The Ordinance was replaced by Tamil Nadu Act 15 of 2006 which received the assent of the Governor on 29-8-2006. The Act, however, did not contain the amendment to Section 55 as was made by the Ordinance. In other words, the said amendment brought by the Ordinance was dropped from the amending Act 15 of 2006.

1 (1972) 2 SCC 11

10. The present writ petitions under Article 32 of the Constitution have been instituted by an Association of Archakas and individual Archakas of Sri Meenakshi Amman Temple of Madurai. The writ petitions were filed challenging G.O. No. 118 dated 23-5-2006 and Ordinance No. 5 of 2006 (at that point of time the amending Act of 2006 had not come into effect). As the amendment of Section 55(2) made by the Ordinance had not been continued by the amending Act 15 of 2006 the said part of the challenge (as against the Ordinance) made in the writ petitions became redundant leaving the legality and validity of G.O. dated 23-5-2006 as the sole issue for consideration in the present writ petitions.

11. Preliminary objections have been raised to the maintainability of the writ petitions by Shri P.P. Rao and Shri Colin Gonsalves, learned Senior Counsel appearing for the respondents. It has been urged that the present writ petitions have not been filed as public interest litigations and in the absence of any specific orders in implementation of the impugned G.O. dated 23-5-2006 the writ petitions are premature. It is further contended that even if the writ petitions are to be considered as PILs the same raise questions with regard to appointment in public office i.e. Archakas in public temples and therefore the writ petitions will also not be maintainable as public interest litigations. It is further urged that as and when the G.O. is given effect to by actual appointment of an Archaka or Archakas, as may be, it will be open for the petitioners to raise the issue and establish that there is a usage or custom or customary practice governing the temple in question which require the appointment of the Archaka to be made from a particular denomination.

12. It is difficult for us to accept the contentions advanced on behalf of the respondents with regard to the maintainability of writ petitions on two counts. Firstly, it is difficult to appreciate as to why the petitioners should be non-suited at the threshold merely because G.O. dated 23-5-2006 has not been given effect to by actual orders of the State Government. The institution of a writ proceeding need not await actual prejudice and adverse effect and consequence. An apprehension of such harm, if the same is well founded, can furnish a cause of action for moving the Court. The argument that the present writ petition is founded on a cause relating to appointment in a public office and hence not entertainable as a public interest litigation would be too simplistic a solution to adopt to answer the issues that have been highlighted which concerns the religious faith and practice of a large number of citizens of the country and raises claims of century-old traditions and usage having the force of law. The above is the second ground, namely, the gravity of the issues that arise, that impel us to make an attempt to answer the issues raised and arising in the writ petitions for determination on the merits thereof.

13. Shri K. Parasaran, learned Senior Counsel appearing for the petitioners has submitted that the issues arising in the case stand squarely covered by the pronouncement of the Constitution Bench judgment in *Seshammal*[1]. In fact, according to the learned Senior Counsel, the issues in the present case are

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11

res judicata; the same having been decided inter partes in *Seshammal*[1]; the Archakas of the Agamas Temples and the respondent State both being parties to the said decision. Specifically, Shri Parasaran has urged that in *Seshammal*[1] the Constitution Bench has unambiguously held that the appointment of an Archaka has to be as per the Agamas governing the particular temple and any deviation from the said age-old custom and usage would be an infringement of the freedom of religion and the rights of the religious denomination to manage its own affairs, as guaranteed, by Articles 25 and 26 of the Constitution. The impugned G.O., by its prescription, as noted, therefore, seeks to override the declaration of law made by the Constitution Bench in *Seshammal*[1].

14. Shri Parasaran has further urged that curtailment of the freedoms guaranteed by Articles 25 and 26 of the Constitution can only be made by the legislature and even a legislative exercise in this regard is circumscribed by the limitations contained in both Articles 25 and 26. In the present case the amendment of Section 55 of the Tamil Nadu Act as made by Ordinance No. 5 of 2006 has not been continued by Amendment Act 15 of 2006 (as already noted). The impugned G.O. has, therefore, to necessarily lose its efficacy. Reliance herein is placed on the following passage from the Report in *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.*[2]: (SCC p. 172, para 25)

> "*25.* … The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for Parliament. No one may speak for Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what Parliament meant to say. None else. Once a statute leaves Parliament House, the court is the only authentic voice which may echo (interpret) Parliament."

15. It was further contended that the G.O. wrongly relies on the decision in *N. Adithayan* v. *Travancore Devaswom Board*[3] to justify its promulgation. The reliance placed on *Adithayan*[3], in the face of the law laid down in *Seshammal*[1], is wholly misplaced. Shri Parasaran has further argued that the impugned G.O. has to be read on its own terms and the validity thereof cannot be saved by what appears to be a "concession" made by the State in Para 51 of the counter-affidavit to the effect that the State would respect the distinction between Shaiva and Vaishnava temples and the Archakas in each of such temples shall be appointed from either the Shaivas or Vaishnavas, as may be, taking into account the indoctrination of the Archakas concerned in the Agamas. According to Shri Parasaran, neither all Shaivas nor all Vaishnavas are ipso facto denominational. Only a Shaiva who satisfies the eligibility under the Sivagama and a Vaishnava satisfying the eligibility under the pancharatna or vaikhanasa can be referred to as denominations. A person who is a member of such denomination alone can be appointed as a Archaka of a Shaiva or a Vaishnava temple, as the case may be.

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11
2 (1983) 1 SCC 147
3 (2002) 8 SCC 106

16. On the other hand, Shri P.P. Rao and Shri Colin Gonsalves, learned Senior Counsel appearing for the respondents have contended that the decision of the Constitution Bench in *Seshammal*[1] upholding the constitutional validity of the Amendment Act of 1970 had opened the avenue to all qualified Hindus irrespective of caste, denominations, etc. to be appointed as Archakas. It is contended that once the hereditary principle was held to be flexible, the exclusive right of a particular group to appointment necessarily stood negated and it is qualification coupled with merit and eligibility that has to be the crucial test for appointment, consistent with Articles 14 and 16 of the Constitution.

17. The learned counsel have specifically referred to Government Order No. 1 of 2007 and in this regard the recommendation of the High-Powered Committee appointed for making recommendations for effective implementation of the impugned G.O. dated 23-5-2006. It is contended, by referring to the report of the High-Powered Committee, that the same demonstrates the lack of familiarity of even temple priests with the Agamas and their lack of knowledge of such Agamas and the practices of the temples as may be prescribed by the Agamas. It is submitted that not only the contents of the Agamas have become uncertain, even assuming otherwise, the same cannot be an authority to confer legitimacy to a practice which is inconsistent with and contrary to the provisions of the Constitution, specially those contained in Part III thereof. It is further submitted that the impugned G.O. is consistent with and in fact effectuates the fundamental right of equality and equal opportunity and no contrary practice overriding the said provisions of the Constitution would be legally acceptable. The learned counsel have further submitted that there is no conflict between the judgments in *Seshammal*[1] and *N. Adithayan*[3] and it is possible to read the law declared in both the cases in a manner consistent with the constitutional requirements and principles.

18. An additional issue has been struck by Shri Gonsalves, learned Senior Counsel, that the impugned G.O. needs to be upheld on the touchstone of the principle enshrined by Article 17 of the Constitution. The exclusive right of a particular group to enter the sanctum sanctorum of a temple and perform the rituals on the ground that performance of such rituals by any other person would defile the image is a thought and action which is prohibited by Article 17 of the Constitution. Violation and consequently commission of offences under the Protection of Civil Rights Act, 1955 has also been urged.

19. The issues arising and the arguments made centre around the true meaning, purport and effect of the Constitution Bench judgment in *Seshammal*[1] and in the above context the effect of the decision of the numerically smaller Bench in *N. Adithayan*[3]. We will therefore proceed to understand the above position at the outset.

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11
3 *N. Adithayan* v. *Travancore Devaswom Board*, (2002) 8 SCC 106

20. The contours of the challenge in *Seshammal*[1] have already been noticed. To repeat, it is the validity of the Amendment Act of 1970 which sought to amend, inter alia, Section 55 of the Tamil Nadu Act that was questioned in *Seshammal*[1]. The Statement of Objects and Reasons for the Amendment Act of 1970 is stated as follows:

> "In the year 1969 the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes has suggested in its report that the hereditary priesthood in the Hindu Society should be abolished, that the system can be replaced by an ecclesiastical organisation of men possessing the requisite educational qualifications who may be trained in recognised institutions in priesthood *and that the line should be open to all candidates irrespective of caste, creed or race*. In Tamil Nadu Archakas, Gurukkals and Poojaries are all Ulthurai servants in Hindu temples. The duties of 'Ulthurai servants' relate mainly to the performance of poojas, rituals and other services to the deity, the recitation of mantras, Vedas, prabandas, thevarams and similar invocations and the performance of duties connected with such performance and recitations. Sections 55 and 56 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959), provide for appointment of office-holders and servants in the religious institutions by the trustees by applying the rule of hereditary succession also. As a step towards social reform Hindu temples have already been thrown open to all Hindus irrespective of caste…."[3a] (emphasis supplied)

21. The arguments in support of the challenge were threefold, namely: (*Seshammal case*[1], SCC p. 18, para 10)

> "(*a*) The freedom of hereditary succession to the office of Archaka is abolished although succession to it is an essential and integral part of the faith of the Shaivite and Vaishnavite worshippers.
>
> (*b*) It is left to the Government in power to prescribe or not to prescribe such qualifications as they may choose to adopt for applicants to this religious office while the Act itself gives no indication whatever of the principles on which the qualifications should be based. The Statement of Objects and Reasons which is adopted in the counter-affidavit on behalf of the State makes it clear that not only the scope but the object of the Amendment Act is to override the exclusive right of the denomination to manage their own affairs in the matter of religion by appointing Archakas belonging to a specific denomination for the purpose of worship.
>
> (*c*) The Amendment Act gives the right of appointment for the first time to the trustee who is under the control of the Government under the provisions of the principal Act and this is the very negation of freedom of religion and the principle of non-interference by the State as regards the practice of religion and the right of a denomination to manage its own affairs in the matter of religion."

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11
3a *Seshammal case*, (1972) 2 SCC 11, p. 17, para 6

22. In the course of a very lengthy discourse and after considering the works of learned scholars in the field; the law laid down by this Court in respect of Articles 25 and 26 till date and particularly the efficacy of the Agamas the Constitution Bench in *Seshammal*[1] came to the following conclusion: (SCC p. 21, para 12)

> "*12.* … Any State action which permits the defilement or pollution of the image by the touch of an Archaka not authorised by the Agamas would violently interfere with the religious faith and practices of the Hindu worshipper in a vital respect, and would, therefore, be prima facie invalid under Article 25(1) of the Constitution."

23. Thereafter, the Constitution Bench in *Seshammal*[1] by referring to several earlier pronouncements of this Court specifically mentioned in para 13 of the Report identified the main principles underlying the provisions of Articles 25 and 26 of the Constitution in the following manner: (SCC p. 21)

> "*13.* … '… The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.'*"

24. Applying the aforesaid principles to the facts before it the Constitution Bench identified the main thrust of the arguments made in support of the challenge to the amendment to be with regard to the vesting of powers and authority in the temple trustee to appoint any person as an Archaka so long as he was holding a fitness certificate from one of the institutions referred to in Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964. The said Rule 12 required that an Archaka should be proficient in mantras, Vedas, prabandams, etc., namely, that such a person is fit and qualified for performing puja and having knowledge of the rituals and other services. The Constitution Bench was told that the above position admits a situation where the requirement of Rule 12 can very well be dispensed with (by a subsequent amendment of the Rules) thereby resulting in conferment of virtually unguided and unbridled powers to the trustee to appoint any person as an Archaka notwithstanding the fact that worship of the deity by a person other than one belonging to a particular denomination may have the effect of defiling the deity. As the temple trustee is to function under the control of the State under Section 27 of the Tamil Nadu Act the question highlighted before the Constitution Bench was whether by virtue of the amendment the

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11

* **Ed.**: As observed in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*, AIR 1962 SC 853, p. 868, para 34

State had gained a right to step into and control the sanctum sanctorum of a temple through the agency of the trustee and the Archaka thereby transgressing the rights granted to a religious denomination by Articles 25 and 26 of the Constitution.

25. The Constitution Bench noticed that to counter the above situation the Advocate General of the State of Tamil Nadu had contended that the power given to the trustee by virtue of the amendment to Section 55 was not an unqualified power but was subject to the provisions of Section 28 of the Act which is in the following terms:

> "**28.** ***Care required of trustee and his powers***.—(1) Subject to the provisions of the Tamil Nadu Temple Entry Authorisation Act, 1947, the trustee of every religious institution is bound to administer its affairs and to apply its funds and properties in accordance with the terms of the trust, *the usage of the institution* and all lawful directions which a competent authority may issue in respect thereof and as carefully as a man of ordinary prudence would deal with such affairs, funds and properties if they were his own." (emphasis supplied)

26. In this regard the Advocate General had virtually admitted that if the usage or practice of the institution required the Archaka of a temple to be of a particular denomination the said usage would be binding on the trustee and he would be bound to make appointment under Section 55 in accordance with such usage. The usage, practice or custom requiring an Archaka to be of a particular denomination, according to the Advocate General, was founded on religious beliefs and practices whereas the next-in-line principle, if is to be regarded as a usage, was a merely secular usage on which a legislation would be competent under Article 25(2)(*a*) of the Constitution. It was, alternatively, contended that if the hereditary principle is to be understood as a religious practice, alteration thereof can also be made by a legislation under Article 25(2)(*b*), such legislation being for the purpose of social welfare and reform.

27. The Constitution Bench in *Seshammal*[1] answered the question by holding that the hereditary principle which was of long usage was a secular principle and therefore a legislation to alter the said usage i.e. the Amendment Act of 1970, was competent under Article 25(2)(*a*). However, the Constitution Bench was quick to add that it is to the limited extent of the above exception alone, namely, the liberty to make the appointment from persons beyond next-in-line to the last holder that the trustee is released from the obligation imposed on him by Section 28 of the Tamil Nadu Act which otherwise requires the trustee to administer the affairs of the temple in accordance with the usage governing the temple. Para 22 of the Constitution Bench judgment wherein the aforesaid view finds mention may be noticed verbatim: (SCC p. 25)

> "22. In view of sub-section (2) of Section 55, as it now stands amended, the choice of the trustee in the matter of appointment of an Archaka is no longer limited by the operation of the rule of next-in-line of succession

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11

in temples where the usage was to appoint the Archaka on the hereditary principle. The trustee is not bound to make the appointment on the sole ground that the candidate, is the next-in-line of succession to the last holder of office. *To that extent, and to that extent alone*, the trustee is released from the obligation imposed on him by Section 28 of the principal Act to administer the affairs in accordance with that part of the usage of a temple which enjoined hereditary appointments. The legislation in this respect, as we have shown, does not interfere with any religious practice or matter of religion and, therefore, is not invalid." (emphasis supplied)

28. A reading of the judgment of the Constitution Bench in *Seshammal*[1] shows that the Bench considered the expanse of the Agamas both in Shaivite and Vaishnavite temples to hold that the said treatises restricted the appointment of Archakas to a particular religious denomination(s) and further that worship of the deity by persons who do not belong to the particular denomination(s) may have the effect of even defiling the idol requiring purification ceremonies to be performed. The Constitution Bench further held that while the appointment of Archakas on the principle of next-in-line is a secular act the particular denomination from which Archakas are required to be appointed as per the Agamas embody a long-standing belief that has come to be firmly embedded in the practices immediately surrounding the worship of the image and therefore such beliefs/practice constitute an essential part of the religious practice which under Section 28 of the Act (extracted above) the trustee is bound to follow. The above, which the petitioners contend to be the true ratio of the law laid down by the Constitution Bench in *Seshammal*[1], has been questioned by the respondents who argue that *Seshammal*[1] is but the expression of an agreement of the Constitution Bench to what was a concession made before it by the Advocate General of the State. According to the respondents, in *Seshammal*[1] the Constitution Bench had no occasion to deal with the issue arising herein, the challenge before it being confined to the validity of the Amendment Act of 1970.

29. The answers to the above will be dealt with a little later and for the present what has to engage the attention of the Court is the true ratio of the law laid down by the numerically smaller Bench in *Adithayan*[3].

30. The facts confronting the Court in *Adithayan*[3] may now be noticed. The challenge therein was by a Namboodri Brahmin to the appointment of a non-Namboodri Brahmin who was otherwise well qualified to be appointed as a priest in the temple in question. The challenge was sought to be based on the ground that it has been a long-standing practice and usage in the temple that its priests are appointed exclusively from Namboodri Brahmins and any departure therefrom is in violation of the rights of Namboodri Brahmins under Articles 25 and 26 of the Constitution.

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11
3 *N. Adithayan* v. *Travancore Devaswom Board*, (2002) 8 SCC 106

31. Upon a consideration of the various earlier decisions of this Court specifically referred to in *Adithayan*[3], details of which need not again be noticed herein (such details are being separately noticed later, though in a different context) including the decision in *Seshammal*[1] it was held that rights claimed solely on the basis of caste cannot enjoy the protection of Articles 25 and 26 and no earlier decision of this Court including *Seshammal*[1] would support the contention that even duly-qualified persons can be barred from performing poojas on the sole ground that such a person is not a Brahmin by birth or pedigree. After expounding the law in the above manner, it was held in *Adithayan*[3] that even proof of any such practice since the pre-constitutional days (which in any case was not forthcoming) cannot sustain such a claim as the same would be in derogation of constitutional values and opposed to public policy or social decency. We do not see how the above view of this Court in any way strikes a discordant note with the views expressed in any earlier decision including *Seshammal*[1]. The issues in *Seshammal*[1] were entirely different and the discussions therein (para 12) proceed on the basis that entry to the sanctum sanctorum for a particular denomination is without any reference to caste or social status. The reference to the opinion of Shri R. Parthasarathy Bhattacharya who has been referred to in the above Para 12 of the Report as an undisputed scholar on the subject was cited to show that apart from the followers of the 4 (four) traditions, so far as Vaishnava temples are concerned: (SCC p. 20)

> "*12. … None others, however, high placed in society as pontiffs or Acharyas, or even other Brahmins could touch the idol, do puja or even enter the Garbha Griha.*" (emphasis supplied)

Exclusion solely on the basis of caste was not an issue in *Seshammal*[1] so as to understand the decision in *Adithayan*[3] to be, in any way, a departure from what has been held in *Seshammal*[1].

32. Before we go on to deliberate on the validity of the impugned G.O. dated 23-5-2006 it will be useful to try to understand what is Hinduism? A broad answer is to be found in the preface to this Report but, perhaps, we should delve a little deeper into the issue. The subject has received an in-depth consideration of the country's philosopher President Dr S. Radhakrishnan in the celebrated work *The Hindu View of Life*. The said work has been exhaustively considered in *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*[4] in the context of the question as to whether Swaminarayan sect is a religion distinguishable and separate from the Hindu religion and consequently the temples belonging to the said sect fell outside the scope of Section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956. The aforesaid Section 3 of the Act inter alia provided that every temple to which the Act applied shall be open to the excluded classes for worship in the same manner and to the same extent as other Hindus in general. While the eventual

3 *N. Adithayan* v. *Travancore Devaswom Board*, (2002) 8 SCC 106
1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11
4 AIR 1966 SC 1119 : (1966) 3 SCR 242

decision of the Court which answered the question raised is in the negative, namely, that the sect in question was not a distinguishable and different religion, it is the very learned discourse that is to be found in the Report with regard to the true tenets of Hinduism that would be of interest so far the present case is concerned.

33. The following passages from the Report are truly worthy of reproduction both for the purpose of recapitulation and illumination: (*Shastri Yagnapurushdasji case*[4], AIR pp. 1128-31, paras 29-33, 36-37 & 40)

> "*29.* When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.
>
> *30.* The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practiced different rites (*Kurma Purana*). (*The Hindu View of Life* by Dr Radhakrishnan, p. 12.)
>
> *31.* … It presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary rivers and rivulets, spreading itself over an ever-increasing area of country, and finally resolving itself into an intricate delta of tortuous streams and jungly marshes…. The *Hindu religion* is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds. (*Religious Thought and Life in India* by Monier Williams, p. 57.)
>
> *32.* … The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets. Truth is one but wise men describe it differently*. The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the interrelation between the individual and the universal soul. 'If we can abstract from the variety of opinion', says Dr Radhakrishnan, 'and observe the general spirit of Indian thought, we shall find that it has a disposition

4 *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*, AIR 1966 SC 1119 : (1966) 3 SCR 242

* एवं संविप्रा बहुधा पदन्ति

to interpret life and nature in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings'. (*Indian Philosophy* by Dr Radhakrishnan, Vol. 1, p. 32.)

33. ... Though philosophic concepts and principles evolved by different Hindu thinkers and philosophers varied in many ways and even appeared to conflict with each other in some particulars, they all had reverence for the past and accepted the Vedas as sole foundation of the Hindu philosophy. Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. ...

* * *

36. Do the Hindus worship at their temples the same set or number of gods? That is another question which can be asked in this connection; and the answer to this question again has to be in the negative. Indeed, there are certain sections of the Hindu community which do not believe in the worship of idols; and as regards those sections of the Hindu community which believe in the worship of idols, their idols differ from community to community and it cannot be said that one definite idol or a definite number of idols are worshipped by all the Hindus in general. In the Hindu Pantheon the first gods that were worshipped in Vedic times were mainly Indra, Varuna, Vayu and Agni. Later, Brahma, Vishnu and Mahesh came to be worshipped. In course of time, Rama and Krishna secured a place of pride in the Hindu Pantheon, and gradually as different philosophic concepts held sway in different sects and in different sections of the Hindu community, a large number of gods were added, with the result that today, the Hindu Pantheon presents the spectacle of a very large number of gods who are worshipped by different sections of the Hindus.

37. The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavir founded Jainism; Basava became the founder of Lingayat religion, Dhyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.

* * *

40. Tilak faced this complex and difficult problem of defining or at least describing adequately Hindu religion and he evolved a working

formula which may be regarded as fairly adequate and satisfactory. Said Tilak: 'Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion'*. This definition brings out succinctly the broad distinctive features of Hindu religion. It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: 'When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions on ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary' (*The Present day Experiment in Western Civilisation* by Toynbee, pp. 48-49.)." (emphasis supplied)

34. The fact that reference to Hindus in the Constitution includes persons professing the Sikh, Jain and Buddhist religions and the statutory enactments like the Hindu Marriage Act, the Hindu Succession Act, etc. also embraces Sikhs, Jains and Buddhists within the ambit of the said enactments is another significant fact that was highlighted and needs to be specially taken note of.

35. What is sought to be emphasised is that all the above would show the wide expanse of beliefs, thoughts and forms of worship that Hinduism encompasses without any divergence or friction within itself or amongst its adherents. It is in the backdrop of the above response to the question posed earlier "What is Hinduism"? that we have to proceed further in the matter.

36. Image worship is a predominant feature of Hindu religion. The origins of image worship is interesting and a learned discourse on the subject is available in a century-old judgment of the Madras High Court in *Gopala Moopanar* v. *Dharmakarta Subramaniya Iyer*[5]. In the said Report the learned Judge (Sadasiva Aiyar, J.) on the basis of accepted texts and a study thereof had found that in the "first stage" of existence of mankind God was worshipped as immanent in the heart of everything and worship consisted solely in service to ones fellow creatures. In the second stage, the spirit of universal brotherhood lost its initial efficacy and notions of inferiority and superiority amongst men surfaced leading to a situation where the inferior man was asked to worship the superior man who was considered as a manifestation of God. Disputes arose about the relative superiority and inferiority which were resolved by the wise sages by introducing image worship to enable all men to worship God without squabbles about their relative superiorities. With passage of time there emerged

* प्रामाण्यबुद्धिर्वेदेषु साधनानाममेकता।
उपास्यानामनियमश्चैतल्लक्षणम्।।

5 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363

rules regulating worship in temples which came to be laid down in the treatises known as Agamas and the Thantras. Specifically in *Gopala Moopanar*[5], it was noticed that the Agamas prescribed rules as regards "what caused pollution to a temple and as regards the ceremonies for removing pollution when caused".

37. In the said judgment in *Gopala Moopanar*[5] it is further mentioned that: (SCC OnLine Mad)

> "… There are, it is well known Thanthries in Malabar who are specialists in these matters of pollution. *As the temple priests have got the special Saivite initiation or dheeksha which entitles them to touch the innermost image, and as the touch of the persons who have got no such initiation, even though they be Brahmins, was supposed to pollute the image, even Brahmins other than the temple priest Brahmins were in many temples not allowed to go into the garbhagraham*." (emphasis supplied)

The Agamas also contain other prescriptions including who is entitled to worship from which portion of the temple: (*Gopala Moopanar case*[5], SCC OnLine Mad)

> "… In one of the Agamas, it is said (as freely translated) thus: 'Saivite Brahmin priests are entitled to worship in the antharala portion. Brahmins learned in the Vedas are entitled to worship in the arthamantabha, other Brahmins in the front Mantabha, Kings and Vaisyas in the dwaramantabha, initiated Sudras in the Bahir Mantapa' and so on."

The legal effect of the above prescriptions need not detain us and it is the portion underlined (herein italicised)* which is of particular importance as the discussions that follow would reveal.

38. The Ecclesiastical jurisprudence in India, sans any specific Ecclesiastical jurisdiction, revolves around the exposition of the constitutional guarantees under Articles 25 and 26 as made from time to time. The development of this branch of jurisprudence primarily arises out of claimed rights of religious groups and denominations to complete autonomy and the prerogative of exclusive determination of essential religious practices and principles on the bedrock of the constitutional guarantees under Articles 25 and 26 of the Constitution and the judicial understanding of the interplay between Articles 25(2)(*b*) and 26(*b*) of the Constitution in the context of such claims. In *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[6] (*Shirur Mutt*) while dealing with the issue of autonomy of a religious denomination to determine what rites and ceremonies are essential according to the tenets of its religion it has been stated that: (AIR p. 291, para 22)

5 *Gopala Moopanar* v. *Dharmakarta Subramaniya Iyer*, 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363

* **Ed.**: Herein italicised.

6 AIR 1954 SC 282 : 1954 SCR 1005

"22. … Under Article 26(*b*), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters." (SCR pp. 1028-29)

39. Besides the above, recognition of the aforesaid principle is also to be found in the fact that in *Shirur Mutt*[6], though the eventual conclusion of the Court upholds the validity of the Act (the Madras Hindu Religious and Charitable Endowments Act, 1951) certain specific provisions i.e. Section 21 which empowered the Commissioner and his subordinates to enter the premises of any religious institution at any time for performance of duties enjoined under the Act has been struck down indicating consistency with the principle extracted above. The relevant part of the Report (SCR pp. 1030-31) will require a specific notice and therefore is extracted below: (AIR p. 292, para 25)

"25. We agree, however, with the High Court[7] in the view taken by it about Section 21. This section empowers the Commissioner and his subordinate officers and also persons authorised by them to enter the premises of any religious institution or place of worship for the purpose of exercising any power conferred or any duty imposed by or under the Act. It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed.

Section 21, it is to be noted, does not confine the right of entry to the outer portion of the premises; it does not even exclude the inner sanctuary 'The Holy of Holies' as it is said, the sanctity of which is zealously preserved. It does not say that the entry may be made after due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution. We think that as the section stands, it interferes with the fundamental rights of the Mathadhipati and the denomination of which he is head guaranteed under Articles 25 and 26 of the Constitution.

Our attention has been drawn in this connection to Section 91 of the Act which, it is said, provides a sufficient safeguard against any abuse of power under Section 21. We cannot agree with this contention. Clause (*a*) of Section 91 excepts from the saving clause all express provisions of the Act within which the provision of Section 21 would have to be included.

6 *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005

7 *Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt* v. *Commr., Hindu Religious Endowments*, 1951 SCC OnLine Mad 384 : AIR 1952 Mad 613

Clause (*b*) again does not say anything about custom or usage obtaining in an institution and it does not indicate by whom and in what manner the question of interference with the religious and spiritual functions of the Math would be decided in case of any dispute arising regarding it. In our opinion, Section 21 has been rightly held to be invalid."

40. The decision of this Court in *Sri Venkataramana Devaru* v. *State of Mysore*[8] may now be considered. In the said case this Court was called upon to answer as to whether Section 3 of the Madras Temple Entry Authorisation Act violated the guarantee under Article 26(*b*) insofar as Gaura Saraswati Brahmins are concerned by making provisions to the effect that Shri Venkataramana Temple at Moolky was to be open to all excluded classes of Hindus. It was the contention of the aforesaid sect that the temple in question was founded for the exclusive use and benefit of Gaura Saraswati Brahmins. This Court in its report elaborately discussed the practice of idol/image worship; regulation thereof by the Agamas and the efficacy and enforceability of such Agamas. Paras 17 and 18 of the Report in *Sri Venkataramana Devaru*[8] which deals with the above aspect may be usefully extracted below: (AIR pp. 264-65)

"*17.* … The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation. These injunctions have had such a powerful hold over the minds of the people that daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu. It was during this period that temples were constructed all over the country dedicated to Vishnu, Rudra, Devi, Skanda, Ganesha and so forth, and worship in the temple can be said to have become the practical religion of all sections of the Hindus ever since. With the growth in importance of temples and of worship therein, more and more attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of worship of the deity, and numerous are the treatises that came to be written for its exposition. These are known as Agamas, and there are as many as 28 of them relating to the Shaiva temples, the most important of them being the Kamikagama, the Karanagama and the Suprabedagama, while the Vikhanasa and the Pancharatra are the chief Agamas of the Vaishnavas. These Agamas, contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other Devatas are to be installed and where the several classes of worshippers are to stand and worship. The following passage from the judgment of Sadasiva Aiyar, J. in *Gopala Moopanar* v. *Dharmakarta Subramaniya Iyer*[5], gives a summary of the prescription contained in one of the Agamas: (SCC OnLine Mad)

'… In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbagriham, Brahmins from the ante chamber or Sabah

8 AIR 1958 SC 255
5 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363

Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram.'

The other Agamas also contain similar rules.

18. According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as Samprokshana) have to be performed for restoring the sanctity of the shrine (vide judgment of Sadasiva Aiyar, J. in *Gopala Moopanar* v. *Dharmakarta Subramaniya Iyer*[5]). In *Sankaralinga Nadan* v. *Rajeswara Dorai*[9], it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. *The conclusion is also implicit in Article 25 which after declaring that all persons are entitled freely to profess, practise and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism. We must accordingly hold that if the rights of the appellants have to be determined solely with reference to Article 26(b), then Section 3, of Act 5 of 1947, should be held to be bad as infringing it.*" (emphasis supplied)

Eventually, this Court went on to hold that the provisions of Article 26(*b*) are also subject to those contained in Article 25(2)(*b*) and accordingly dismissed the plea set up by the Gaura Saraswati Brahmins in the suit out of which the proceedings arose.

41. The explicit reiteration of the Court's power to decide on what constitutes an essential religious practice in *Sri Venkataramana Devaru*[8] again found manifestation in *Durgah Committee* v. *Syed Hussain Ali*[10]. Gajendragadkar, J. (as His Lordship then was) was of the view: (*Durgah case*[10], AIR p. 1415, para 33)

"*33.* … 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

5 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363
9 1908 SCC OnLine PC 10 : (1907-08) 35 IA 176
8 *Sri Venkataramana Devaru* v. *State of Mysore*, AIR 1958 SC 255
10 AIR 1961 SC 1402

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 Article 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 Article 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."

42. Almost half a century later, we find a reiteration of the same view in the majority judgment rendered in *Commr. of Police* v. *Acharya Jagadishwarananda Avadhuta*[11] though the minority view in the said case preferred to take a contrary opinion relying, inter alia, on *Shirur Mutt*[6] and *Cantwell* v. *Connecticut*[12] and *United States* v. *Ballard*[13]. Para 57 of the minority opinion containing the discordant note would be worthy of reproduction: (*Acharya Jagadishwarananda case*[11], SCC pp. 798-99)

"*57.* The exercise of the freedom to act and practise in pursuance of religious beliefs is as much important as the freedom of believing in a religion. In fact to persons believing in religious faith, there are some forms of practising the religion by outward actions which are as much part of religion as the faith itself. The freedom to act and practise can be subject to regulations. In our Constitution, subject to public order, health and morality and to other provisions in Part III of the Constitution. However, in every case the power of regulation must be so exercised with the consciousness that the subject of regulation is the fundamental right of religion, and as not to unduly infringe the protection given by the Constitution. *Further, in the exercise of the power to regulate, the authorities cannot sit in judgment over the professed views of the adherents of the religion and to determine whether the practice is warranted by the religion or not. That is not their function.* (See *Cantwell* v. *Connecticut*[12], L Ed at pp. 1213-18, *United States* v. *Ballard*[13], L Ed at pp. 1153, 1154.)" (emphasis supplied)

43. That the freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also would hardly require reiteration. Right of belief and practice is guaranteed by Article 25 subject to public order, morality and health and other provisions of Part III of the Constitution. Clause (2) is an exception and makes the right guaranteed by clause (1) subject to any existing law or to such law as may be enacted to, inter alia, provide for social welfare and reforms or

11 (2004) 12 SCC 770
6 *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005
12 1940 SCC OnLine US SC 89 : 84 L Ed 1213 : 310 US 296 (1940)
13 1944 SCC OnLine US SC 73 : 88 L Ed 1148 : 322 US 78 (1944)

throwing or proposing to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26(*b*) on the other hand guarantees to every religious denomination or section full freedom to manage its own affairs insofar as matters of religion are concerned, subject, once again, to public order, morality and health *and* as held by this Court subject to such laws as may be made under Article 25(2)(*b*). The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the constitutional court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right is in conformity with public order, morality and health and in accord with the indisputable and unquestionable notions of social welfare and reforms. A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained.

44. Article 16(5) which has virtually gone unnoticed till date and, therefore, may now be seen is in the following terms:

> "**16. (5)** Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

45. A plain reading of the aforesaid provision i.e. Article 16(5), fortified by the debates that had taken place in the Constituent Assembly, according to us, protects the appointment of Archakas from a particular denomination, if so required to be made, by the Agamas holding the field. The debates in the Constituent Assembly referred to disclose that the suggestion that the operation of Article 16(5) should be restricted to appointment in offices connected with administration of a religious institution was negatived. The exception in Article 16(5), therefore, would cover an office in a temple which also requires performance of religious functions. In fact, the above though not expressly stated could be one of the bases for the views expressed by the Constitution Bench in *Seshammal*[1].

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11

46. The preceding discussion indicates the gravity of the issues arising and the perceptible magnitude of the impact thereof on Hindu society. It would be, therefore, incorrect, if not self defeating, to take too pedantic an approach at resolution either by holding the principle of res judicata or locus to bar an adjudication on merits or to strike down the impugned G.O. as an executive fiat that does not have legislative approval, made explicit by the fact that though what has been brought by the G.O. dated 23-5-2006 was also sought to be incorporated in the statute by the Ordinance, eventually, the amending Bill presented before the legislature specifically omitted the aforesaid inclusion. The significance of the aforesaid fact, however, cannot be underestimated. What is sought to be emphasised is that the same, by itself, cannot be determinative of the invalidity of the G.O. which will have to be tested on certain other premises and foundation treating the same to be an instance of exercise of executive power in an area not covered by any specific law.

47. The issue of untouchability raised on the anvil of Article 17 of the Constitution stands at the extreme opposite end of the pendulum. Article 17 of the Constitution strikes at caste-based practices built on superstitions and beliefs that have no rationale or logic. The exposition of the Agamas made a century back by the Madras High Court in *Gopala Moopanar*[5] that exclusion from the sanctum sanctorum and duties of performance of poojas extends even to Brahmins is significant. The prescription with regard to the exclusion of even Brahmins in *Gopala Moopanar*[5] has been echoed in the opinion of Shri Parthasarthy Bhattacharya as noted by the Constitution Bench in *Seshammal*[1]. Such exclusion is not on the basis of caste, birth or pedigree. The provisions of Article 17 and the Protection of Civil Rights Act, 1955, therefore, would not be of much significance for the present case. Similarly, the "offer" of the State in its affidavit to appoint Shaivite as Archakas in Shiva temples and Vaishnavas in Vaishnavite temples is too naïve an understanding of a denomination which is, to say the least, a far more sharply identified subgroup both in case of Shaivite and Vaishnavite followers. However, what cannot be ignored is the "admission" inbuilt in the said offer resulting in some flexibility in the impugned G.O. that the State itself has acknowledged.

48. *Seshammal*[1] is not an authority for any proposition as to what an Agama or a set of Agamas governing a particular or group of temples lay down with regard to the question that confronts the court, namely, whether any particular denomination of worshippers or believers have an exclusive right to be appointed as Archakas to perform the poojas. Much less, has the judgment taken note of the particular class or caste to which the Archakas of a temple must belong as prescribed by the Agamas. All that it does and says is that some of the Agamas do incorporate a fundamental religious belief of the necessity of performance of the poojas by Archakas belonging to a particular and distinct sect/group/denomination, failing which, there will be

5 *Gopala Moopanar* v. *Dharmakarta Subramaniya Iyer*, 1914 SCC OnLine Mad 104 : AIR 1915 Mad 363

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11

defilement of deity requiring purification ceremonies. Surely, if the Agamas in question do not proscribe any group of citizens from being appointed as Archakas on the basis of caste or class the sanctity of Article 17 or any other provision of Part III of the Constitution or even the Protection of Civil Rights Act, 1955 will not be violated. What has been said in *Seshammal*[1] (supra) is that if any prescription with regard to appointment of Archakas is made by the Agamas, Section 28 of the Tamil Nadu Act mandates the trustee to conduct the temple affairs in accordance with such custom or usage. The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. *The constitutional legitimacy, naturally, must supersede all religious beliefs or practices.*

49. The difficulty lies not in understanding or restating the constitutional values. There is not an iota of doubt on what they are. But to determine whether a claim of State action in furtherance thereof overrides the constitutional guarantees under Articles 25 and 26 may often involve what has already been referred to as a delicate and unenviable task of identifying essential religious beliefs and practices, sans which the religion itself does not survive. It is in the performance of this task that the absence of any exclusive ecclesiastical jurisdiction of this Court, if not other shortcomings and adequacies, that can be felt. Moreover, there is some amount of uncertainty with regard to the prescription contained in the Agamas. Coupled with the above is the lack of easy availability of established works and the declining numbers of acknowledged and undisputed scholars on the subject. In such a situation one is reminded of the observations, if not the caution note struck by Mukherjea, J. in *Shirur Mutt*[6] with regard to complete autonomy of a denomination to decide as to what constitutes an essential religious practice, a view that has also been subsequently echoed by this Court though as a "minority view". But we must hasten to clarify that no such view of the Court can be understood to be an indication of any bar to judicial determination of the issue as and when it arises. Any contrary opinion would give rise to large-scale conflicts of claims and usages as to what is an essential religious practice with no acceptable or adequate forum for resolution. That apart the "complete autonomy" contemplated in *Shirur Mutt*[6] and the meaning of "outside authority" must not be torn out of the context in which the views, already extracted, came to be recorded (p. 1028). The exclusion of all "outside authorities" from deciding what is an essential religious practice must be viewed in the context of the limited role of the State in matters relating to religious freedom as envisaged by Articles 25 and 26 itself and not of the courts as the arbiter of constitutional rights and principles.

1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11
6 *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005

50. What then is the eventual result? The answer defies a straightforward resolution and it is the considered view of the Court that the validity or otherwise of the impugned G.O. would depend on the facts of each case of appointment. What is found and held to be prescribed by one particular or a set of Agamas for a solitary or a group of temples, as may be, would be determinative of the issue. In this regard it will be necessary to re-emphasise what has been already stated with regard to the purport and effect of Article 16(5) of the Constitution, namely, that the exclusion of some and inclusion of a particular segment or denomination for appointment as Archakas would not violate Article 14 so long as such inclusion/exclusion is not based on the criteria of caste, birth or any other constitutionally unacceptable parameter. So long as the prescription(s) under a particular Agama or Agamas is not contrary to any constitutional mandate as discussed above, the impugned G.O. dated 23-5-2006 by its blanket fiat to the effect that, "*Any person who is a Hindu and possessing the requisite qualification and training can be appointed as a Archaka in Hindu temples*" has the potential of falling foul of the dictum laid down in *Seshammal*[1]. A determination of the contours of a claimed custom or usage would be imperative and it is in that light that the validity of the impugned G.O. dated 23-5-2006 will have to be decided in each case of appointment of Archakas whenever and wherever the issue is raised. The necessity of seeking specific judicial verdicts in the future is inevitable and unavoidable; the contours of the present case and the issues arising being what has been discussed.

51. Consequently and in the light of the aforesaid discussion, we dispose of all the writ petitions in terms of our findings, observations and directions made above reiterating that as held in *Seshammal*[1], appointments of Archakas will have to be made in accordance with the Agamas, subject to their due identification as well as their conformity with the constitutional mandates and principles as discussed above.

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1 *Seshammal* v. *State of T.N.*, (1972) 2 SCC 11