

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

**Division Bench : HON'BLE MR. JUSTICE S. C. SHARMA AND
HON'BLE MR. JUSTICE SHAILENDRA SHUKLA**

Writ Petition No.8310/2019 (PIL)

Aarsh Marg Seva Trust and Another

Versus

State of Madhya Pradesh and Others

- Counsel for the Parties** : Mr. Ashish S. Sharma, learned counsel for the petitioners.
Mr. Abhishek Tugnawat, learned Government Advocate for the respondents / State.
Mr. Veer Kumar Jain, learned Senior Counsel with Ms. Vaishali Jain, learned counsel for the respondent No.6.
- Whether approved for reporting** : Yes
- Law laid down** : 1) *Terapanthi* is a sect of *Jain* religion, which carries out *Jalabhishek* to *Jin Pratima*, which is being performed since time immemorial by men in respect of idol of *Bawangajaji (Tirthankar)* only to ensure that the Rules of *Brahmcharya* are followed. The practice is integral to the temple and it is "essential religious practice" of the temple and in no way amounts to discrimination keeping in view Article 25 and 26 of the Constitution of India, which guarantees protection of the cherished liberties of faith, belief and worship to persons belonging to all religions in a secular polity.
- 2) Judicial review of religious practices ought not be undertaken, as the Court cannot impose its morality or rationality with respect to the form of worship of a deity. Doing so would negate the

freedom to practice one's religion according to one's faith and beliefs. It would amount to rationalising religion, faith and beliefs, which is outside the ken of Courts.

Significant paragraph numbers : 45 to 72

O R D E R

(Delivered on this 01st day of November, 2019)

Per : S. C. Sharma, J.

The petitioners before this Court have filed this present petition stating that the petitioner No.1 Aarsh Marg Sewa Trust is a Trust established on 18/04/2018 and registered on 28/01/2019 for the purposes of preaching Jain religion. The petitioner No.2 is Executive Member of the petitioner No.1 Trust. The petitioners have filed present stating that the petition has been filed for securing the fundamental, constitutional and religious rights of the women devotees of *Digambar Jain* religion.

02- The petitioners' contention is that the respondent No.6 – *Bawangaja Siddha Kshetra Trust Committee*, which is again a Trust is creating obstacles for women devotees and the women devotees who are *Digambar Jain* are not being allowed to perform *Abhishek* in respect of idol of the god *Bawangajaji*.

03- The petitioners' have stated that they are believers of *Jainism* and have a deep belief in offering *Panchamrat Abhishek*

and for performing the *Pooja by Ashtdravya*. It has been stated that *Shri Bawangaja Siddha Kshetra* is a holy place for *Digambar Jain* devotees and after every 12 years, *Mahamastakabhishek* takes place at *Bawangaja Siddha Kshetra*. It has been further stated that as per the custom, which is in vogue, *Digambar Jain* men and women devotees do perform *Abhishek* and *Pooja* and the practice is going on at *Bawangaja Siddha Kshetra*.

04- It has been further stated that *Digambar Jain* holy books have given permission to worship the various *Tirthankar and Arihant* idols, which are placed in *Digambar Jain* Temples and holy places, and also known as *Jin Pratima* and equal rights of worshiping have been conferred upon men and women. The petitioners have enclosed copy of some ancient *Digambar Jain* holy books containing 32 parts of *Abhishek* to *Jin Pratima* by women as Annex.- A/1. It has been further contended that in various temples situated in the country belonging to *Digambar Jain* sect, women are being permitted to offer *Panchamrat Abhishek* to *Jin Pratima*. The petitioners have enclosed as many as 82 photographs to support the averment that *Abhishek* is being performed by women disciples also.

05- The petitioners have further stated that in the year 2008, *Sant Guptisagarji* during *Mahamastakabhishek* at *Bawangaja*

created obstacles in the matter of customary practice and the same was published in *Bawangaja* Special Edition of *Jain Tirth Vandana* and the so-called publication is also on record. It has been stated that till 2008, there was no dispute. *Panchamrat Abhishek* was being performed by *Jain* women in the same manner it is being done at *Digambar Jain Temple at Gommeteshwar Bahubali* situated in *Karnataka*, however, after 2008 the Managing Committee has stopped women from performing *Abhishek*.

06- It has also been stated that the respondent No.6 has ensured that no *Panchamrat Abhishek* is carried out at *Bawangaja Temple* by women and women have been debarred from doing *Panchamrat Abhishek / Abhishek*. It has been further stated that on 03/02/2019, the respondent No.6 Trust organized a *Mastakabhishek* and the petitioners made a request to perform *Abhishek*, however, the petitioners were denied permission to perform *Jinabhishek* and the petitioners were told that females are not being permitted to carry out *Abhishek*.

07- The petitioner No.2 has stated that on 03/02/2019 a sum of Rs.11,000,- was deposited by her, however, she was informed by one Mr. Vinay Jain that only males are allowed to perform *Abhishek* and she cannot be permitted to perform *Abhishek* and question of performing *Panchamrat Abhishek* does not arise.

The communication between the petitioner No.2 and one Mr. Vinay Jain on Whats App has also been brought on record as Annex.-P/5.

08- The petitioners have further stated that an e-mail was sent by husband of the petitioner No.2 to Mr. Anil Kumar Jain requesting the officials of *Bawangaja* Trust to permit women to carry out *Abhishek*, however, no action was taken in respect of the e-mail. It has been further stated that other devotees and husband of petitioner No.2 wrote and sent letters requesting the official of Bawangaja Trust to permit women to do *Abhishek* and they were not permitted to do so.

09- It has been further stated that there is a trust deed also in respect of *Bawangaja* Trust and Clause 3.3 of the Trust Deed provides that females are not permitted to carry out *Jalabhishek* keeping in view the religious factor, which is continuing since time immemorial. The petitioners have further stated that Trust has also put up hoardings in the premises of *Bawangaja* temple restraining the female devotees to carry out *Abhishek* and *Panchamrat Abhishek* is also prohibited and it cannot be done by anyone.

10- The petitioners' contention is that action of the Trust in not permitting entry, *Pooja* and *Abhishek* by women in respect of *Bawangajaji Tirth* is violative of Article 14 and 15 of the Constitution of India. It has also been stated that the action of the respondent is

violative of Article 21 and 25 of the Constitution of India and no one can be deprived to perform *Pooja* in the manner and method it is being done by the respondents.

11- The petitioners have raised various grounds before this Court and their contention is that in other temples *Panchamrat Abhishek* is being permitted to be carried out to *Jin Pratima* of *Acharyas* of *Digambar Jain* religion and various saints have permitted *Panchamrat Abhishek* and therefore, the practice which is being followed at *Bawangajaji Tirth Kshetra*, is contrary to the religious practices and tradition which is prevalent in *Jainism*.

12- The petitioners have also raised a ground that denial of equal right of worship and offerings to female devotees in the *Digambar Jain* temple situated at *Bawangaja*, District Barwani (Madhya Pradesh) is *per se* illegal and arbitrary. In a temple situated in *Karnataka* namely *Gommeteshwar Bahubali*, *Panchamrat Abhishek* is performed by devotees including *Jain* women and therefore, there can be no discrimination between man and woman as has been done in the present case.

13- The petitioners have given reference to the preaching of various *Acharyas* and have enclosed various photographs and their contention is that earlier in the past *Panchamrat Abhishek* was being performed by women devotees at *Bawangaja Tirth*, District

Barwani and even in the year 1991 and 2008 *Panchamrat Abhishek* took place and women devotees were permitted to carry out *Panchamrat Abhishek*.

14- The petitioners have placed reliance upon a judgment delivered by the Hon'ble Supreme Court in the case of **Syedna Taher Saifuddin Saheb Vs. State of Bombay** reported in **1962 (Supp) 2 SCR 496** and their contention is that by no stretch of imagination discrimination can be done in respect of female devotees.

15- Reliance has also been placed upon a judgment delivered in the case of **Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** reported in **1954 SCR 1055** and it has been argued that *Abhishek* is an essential practice and fulfill the essential practice test and therefore, in light of Article 25(1) of the Constitution of India. No one can stop the women devotees to carryout *Panchamrat Abhishek*.

16- Reliance has also been placed upon a judgment delivered in the case of **Ratilal Panachand Gandhi Vs. The State of Bombay & Ors.** reported in **1954 SC 388** and it has been argued that *Panchamrat Abhishek* is an “essential religious practice” and women cannot be stopped from carrying out *Panchamrat Abhishek*.

The petitioners have also made an attempt to take shelter of Article 51-A(e) and Article 13 of the Constitution of India and their contention is that by no stretch of imagination a woman devotee can be restrained from carrying out *Panchamrat Abhishek*.

17- Lastly reliance has been placed upon a judgment delivered by the Hon'ble Supreme Court in the case of **Indian Young Lawyers Association vs The State Of Kerala reported in 2018 SCC OnLine SC 1690** (Writ Petition (Civil) No.373 of 2006, decided on 28/09/2018) and the contention of the petitioner is that in respect of *Sabrimala* temple earlier there was a ban on entry of women between the age of 10 to 50 years. The apex Court has allowed the writ petition and now on account of judgment delivered by the apex Court, women of any age can enter the temple and it has been held that such restriction is violative of Article 14 and 15(3) of the Constitution of India.

18- The petitioners have prayed for the following reliefs:-

- “11.1 That, the Hon'ble court should seek to protect the fundamental rights of women granted under the Indian Constitution.
- 11.2 That, to allow women to do *abhishek* of *Bawangaja Tirth* without any discrimination.
- 11.3 That, to give receipts of donation and *kalash* booking in the name of women devotees and remove any obstructions creating hurdles in this process.
- 11.4 That, to give equal representations of women in Bawangaja Trust.
- 11.5 That, to remove hoardings depicting restrictions on women to do *abhishek* in *Bawangaja Tirth* and to put new

hoardings depicting equality in doing *abhishek* by both men and women devotees.

- 11.6 That, to give equal rights to women devotees as men in *pratishta, panchkalyanak, poojan vidhan, varshik mela* and all other religious programmes organized in all temples of *Bawangaja ji Siddhkshetra*.
- 11.7 That, direction must be given to respondent authorities to give needed protection and security to women devotees.
- 11.8 Any other order or direction as this Hon'ble Court may deem fit in the favour of the petitioner.
- 11.9 Cost of the writ petition shall be awarded to petitioner against Respondents.”

19- The responded trust (respondent no. 6) has filed a reply raising preliminary objections and the following oral and written contentions have been made before this court:-

- i) The respondent No.6 has contended that the present petition has been filed with a *malafide* intention just to create a dispute and to create hatred between two 'Sects'. The petitioner Trust has been formed by few followers of *Digambar Jain Beespanth* Sect just before filing of this petition with an unholy intention to disturb the peaceful worshipping and religious functions of other sect i.e. *Digambar Jain 'Terapanth'*.
- ii) It has been contended that the petitioners have deliberately and intentionally concealed the very material fact that admittedly there are two major sects in Digambar Jain namely '*Terapanth* (also known as *Mool Panth* or *Suddh Panth*)' and '*Beespanth*'. It has also been deliberately concealed that the mode of worship and other beliefs of the above two sects are totally different. The religious places, institutions, organizations, etc. of the above two sects are separate

and independent of each other.

- iii) The respondent has further contended the *Acharyas* and scholars of each sect have written several literature/*Granth*s according to their own belief and following. Hence, reference of literature/*Granth*s of one sect is totally irrelevant so far as other sect is concerned.
- iv) The respondent has submitted that it is undisputed that in both sects, Saints and idols of *Tirthankars* are *Digambar* i.e without cloths and both are following *Mahavrat* (i.e. ultimate Rules) and one of which is "*Brahmcharya*". It has been further contended that there are 18000 rules of *Brahmcharya*, which includes maintaining distance between Male saints from females and between female saints from males. Even touching pictures, photos, etc. of females by males saint and of males by females saint is totally prohibited. Hence, these rules are based on strong principles of the religion and there is no question of any kind of any discrimination, much less gender discrimination.
- v) The respondent has further submitted that '*Panchamrat Abhishek* or *Abhishek of Digambar* Idol by females/women is a custom of '*Beespanth Sect*' of *Digambar Jain* and admittedly is not a custom of '*Terapanth*' sect of *Digambar Jain*. It has been further contended that the petition is a planned and unholy attempt to takeover and impose faith, belief, practices and following of one sect on another sect.
- vi) The respondent has *inter-alia* stated that there has

been no custom or tradition or practice of doing '*Panchamrat Abhishek* or *Abhishek* by women at the religious place i.e. '*Bawangaja*'. The incident of 2008 is denied and even if it has happened it was illegal and forcible. It has been further stated that except for the averment made by *Beespanthis* regarding *Abhishek* by women there had been no such mode, custom or practice of such type of '*Abhishek*' at *Bawangaja*.

- vii) The respondent has submitted that even otherwise the mode of worship and faith, belief, religious practices can never be a subject matter of judicial adjudication and interference. It has been further contended that in case, there is a dispute with regard to established prevailing custom and tradition of religious practices and mode of worship, which are being continuously followed is concerned, that being a highly disputed question of fact is required to be proved in a regular trial and can never be a subject matter of a writ petition, much less of a PIL.
- viii) The respondent No.6 has further contended that a false statement has been made in the writ petition stating that either in the place namely '*Bawangaja*' or any other religious place of '*Terapanth*', the entry of women is prohibited and they have been restrained from worshipping. On the contrary entry for all women and men is fully and freely open and certain practices and rituals are jointly performed and done jointly by men and women and certain rituals are to be done independently by men and women. There is no question of any kind of discrimination or gender discrimination between men

and women. There is no question of violation of fundamental or religious rights of any person.

- ix) The respondent No.6 has further contended that there is an Act namely The Places of Worship (Special Provisions) Act, 1991, which prescribes that there shall be no conversion of any religious place or its practices from the practices prevailing as on 15/08/1947. Any attempt or abatement is punishable. There is no evidence that on 15/08/1947 the alleged practice was followed according to the "*Beespanth*" sect, which is even evident from the material placed on record by the petitioner and also from the Trust Deed. It is also significant to note that at the same place there are 22 other temples and it is not the claim of the petitioner that in the said temple at any point of time '*Abhishek* or '*Pooja*' is or has been done according to the practice of '*Beespanth-sect*'. It appears that in 2008 for the first time that too after the ceremony was over, some persons did '*Panchamrat* or '*Stri Abhishek*', which was a matter of serious dispute between the above two sects. It has been further contended that the *Bawangaja* Temple belongs to '*Terapanth-sect*' and they are entitled to perform all religious practices and mode of worship accordingly and other sect has no right to interfere therein.
- x) The respondent No.6 has further contended that the broad differences with regard to mode of worship and practices between the said two sects i.e. '*Mool Amnay/Terapanth*' and '*Beespanth*' can be illustrated as

under:-

S. No.	Practice/Mode of worship	Terapanth	Beespanth
01.	Abhishek	Only by Pure (Prasuk) Water	Panchamrit (Milk, Curd, sugarcane juice, Ghee, Chandan. Some time other substances are also used.
02.	Worship Material	Ashta Dravya (Water, rice, dry Coconut, dry fruits.	Apart from other green fruits, cooked food, etc.
03.	Participation	Since the Sadhus and Tirthankars are digambar, therefore, female do not touch them or digambar idols, however, male and female equally participate in worship and there is no van on entry of female in a temple. Similarly male do not touch Female Sadhvies.	Allows female to touch digambar Idols and digambar Sadhus and males are allowed to touch female Sadhvies and idols of Devies.
04.	Worshipability	Only Parmeshti Panch	Same but also worships Grahasth Guard Devtas & Devies

20- It has been further argued by Senior Counsel Shri V. K. Jain, learned counsel for the respondent No.6 that there are many other fundamental / substantial and other differences in the followings / practices, mode of worship, *Abhishek*, etc. of above two sects. Both sects are age old and are operating since centuries. It is also clear that entry of women in temples in both sects is not prohibited. However, in "*Terapanth*" sect certain practices are performed separately by male and females and certain jointly

according to the tenets, doctrines, principles, etc. having cogent and strong reasons. There has been no inter-sect disputes between the above two sects, however, some elements have been trying to create disputes, therefore, to put an end to the same, all national level organizations of the above two sects have called a joint meeting, which had the support of all *Acharyas/ Sadhus* and it was unanimously decided that at all Temples and *Kshetras* only such practices and mode of worship shall be continued to be followed as is being followed previously and no person shall interfere therein nor shall attempt or insist to change the same (Annexure-R-6/A).

21- Learned counsel for respondent No.6 has also thrown some light on the Jain religion and its different sects. It has been argued that the discussion is based on some Jain literature and material available on various public web portals. He has further contended that Jainism traditionally known as Jain Dharma, is an ancient Indian religion. Followers of Jainism are called "*Jains*", a word derived from the Sanskrit word *jina* (victor) referring to the path of victory in crossing over life's stream of rebirths by destroying karma through an ethical and spiritual life. Jains trace their spiritual ideas and history through a succession of twenty-four victorious saviours and teachers known as *Tirthankaras*, with the first being *Rishabhanatha*, who according to Jain tradition lived millions of

years ago, the twenty-third being *Parshvanatha* in 900 BCE, and the twenty-fourth being the *Mahāvīra* around 500 BCE. Devout *Jains* take five main vows: *ahimsā* (non-violence), *satya* (truth), *asteya* (non-stealing), *brahmacharya* (celibacy or chastity or sexual continence), and *aparigraha* (non-attachment). These principles have affected Jain culture in many ways, such as leading to a predominantly vegetarian lifestyle that avoids harm to animals and their life cycles. *Parasparopagraho Jīvānām* (the function of souls is to help one another) is the motto of Jainism. *Namōkāra mantra* is the most common and basic prayer in Jainism.

22- It has been further contended that according to Jainism, every individual soul, by its nature, is pure and perfect, with infirm perception, knowledge power and bliss. But from eternity, it is associated with Karmic matter and has therefore become subject to birth and rebirth in numerous forms of existence. The supreme object of religion is to show the way for liberation of the soul from the bondage of Karma. The true path of liberation lies in the attainment of Right Faith, Right Knowledge and Right conduct in complete union and harmony.

23- It has been further contended that all Jain renunciants must exercise the three *guptis* (care in thought, speech, and action) and the five *samitis* (types of vigilance over conduct). Essential to

regular monastic ritual are the six “obligatory actions” (*avashyaka*), practiced daily and at important times of the ritual calendar: equanimity (*samayika*, a form of contemplative activity, which, in theory operates throughout the monk’s entire career); praise of the *Tirthankaras*; obeisance to the *Tirthankaras*, teachers, and scriptures; confession; resolution to avoid sinful activities; and “abandonment of the body” (standing or sitting in a meditative posture).

24- It has been further contended that Jainism has two major ancient sub-traditions, *Digambaras* and *Svetambaras*; and several smaller sub-traditions that emerged subsequently. Jain mendicants are found in all Jain sub-traditions except *Kanji Panth* sub-tradition, with laypersons (*śrāvakas*) supporting the mendicants’ spiritual pursuits with resources. Thereafter, the sect namely “*Shwetambar*” was further divided into two semi-major sects i.e. (1) *Murtipujak* and (2) *Sthanakvasi*. It may also be mentioned that these two major sects are further divided into various sects, which are independently and separately operating according to their own faith and practices, which are different from each other.

25- It has been further stated that “*Digambar Sect*” has been further divided in to two sects known as *Terapanth*, who also claimed themselves as “*Mool-Amnay* (the original) or *Suddh*

Amnay” and the other one is known as “*Beespanth*” to which the petitioner belongs. It may also be mentioned thereafter two more sects came into existence namely “*Taran Panthi*”, who do not worship idols and other was “*Kanji Panth*”. The above mainly four sects are independently and separately operating according to their own faith, belief and practices, which are fundamentally different from each other.

26- The learned counsel has prayed for dismissal of the writ petition. His contention is that the question of interference by this Court in the essential religious practice of *Terapanthi Sect* does not arise.

27- Heard learned counsel for the parties at length and perused the record. The writ petition is being disposed of at motion hearing stage itself with the consent of the parties.

28- In order to resolve the controversy involved in the present writ petition, a brief history of Jainism has to be looked into.

The Jainism believes in *Kalchakra* and the same reads as under:-

“KALCHAKRA

Jains believe that time is infinite, without any beginning or end. Time is divided into infinite equal time cycles (*Kalchakras*). Every time cycle is further sub-divided in two equal halves. The first half is the progressive cycle or ascending order, called *Utsarpini*. The other half is the regressive cycle or the descending order, called *Avasarpini*.

Every *Utsarpini* and *Avasarpini* is divided into six unequal periods called *Kalp Kaal*. During the *Utsarpini* half cycle, progress, development, happiness, strength, age, body,

religious trends, etc. go from the worst conditions to the best. During the Avasarpini half cycle, progress, development, happiness, strength, age, body, religious trends, etc. go from the best conditions to the worst. Presently, we are in the fifth Ara of the Avasarpini phase. When the Avasarpini phase ends the Utsarpini phase begins. This Kalchakra repeats again and continues forever.

The six aras are:

- (1) Sukham Sukham Kal (very good).
- (2) Sukham Kal (good).
- (3) Sukham Dukham Kal (good bad).
- (4) Dukham Sukham Kal (bad good).
- (5) Dukham Kal (bad).
- (6) Dukham Dukham Kal (very bad).

1) Sukham Sukham Kal:

This is a time of absolute happiness. During this phase people are very tall and live for a very long period of time. Children are born as twins, a boy and a girl. All the needs and desires of the people are fulfilled by ten different kinds of Kalpavriksha (wish-giving trees). The trees provide places to live, clothes, pots and pans, good food, fruits and sweets, harmonious music, jewellery, beautiful flowers, radiant lamps, and a bright light at night. There is no killing, crime, or vice.

2) Sukham Kal - This is the phase of happiness, but it is not absolute. The wish-giving trees still continue to provide for the people's needs, but the people are not as tall and do not live as long.

3) Sukham Dukham Kal - This is a phase consisting of more happiness than misery. During this period the kalpvrikshas do not consistently provide what is desired. Towards the end of this period in the current time cycle Rushabhdev became the first Tirthankara. He realized that things were going to get worse. So he taught the people useful arts including, sewing, farming, and cooking which will enable them to depend upon themselves. He also introduced a political system and became the first king. This era came to an end three years and eight months after the nirvana of Rushabhdev. The first Chakravarti Bharat, Bahubali also known for his strength, and Brahmi who devised eighteen different alphabets were Rushabhdeva's children.

4) Dukham Sukham Kal - This is a phase of more misery, sorrow, and suffering than happiness. The other twenty-three Tirthankaras and eleven Chakravarties were born during this era which came to an end three years and eight months after Lord Mahavir's Nirvan.

5) Dukham Kal - This ara is currently prevailing. It is an ara of unhappiness which began a little over 2,500 years ago and

will last for a total of 21,000 years. No one born during this period will gain salvation in their present life, because no one will observe true religion.

6) Dukham Dukham Kal - This is a time of absolute misery and unhappiness. During this time people will experience nothing but suffering. There will be no trace of religious activities. The life spans of people will be very short, exceeding no more than twenty years. Most people will be non-vegetarian and the social structure will be destroyed. The weather will become extreme, the days will be very hot, and the nights will be very cold. At the end of this ara, a period of Utsarpini will start and the time wheel will take an upward swing. There will be days of rain which will provide nourishment so that seeds can once again grow. Miseries will diminish and happiness will increase until absolute happiness is once again reached.

Tirthankara

In Jainism, a tirthankara (Sanskrit: tīrthāṅkara; English: literally a 'ford-maker') is a saviour and spiritual teacher of the dharma (righteous path). The word tirthankara signifies the founder of a tirtha, which is a fordable passage across the sea of interminable births and deaths, the saṃsāra. According to Jains, a tirthankara is a rare individual who has conquered the saṃsāra, the cycle of death and rebirth, on their own, and made a path for others to follow. After understanding the true nature of the Self or soul, the Tirthāṅkara attains Kevala Jnana (omniscience), and the first Tirthankara refounds Jainism. Tirthankara provides a bridge for others to follow the new teacher from saṃsāra to moksha (liberation).

Tirthankara shri Māllīnātha is believed to be a woman named Malli bai by Svetambara Jains while the Digambara sect believes all 24 tirthankara to be men including Māllīnātha. Digambara tradition believes a woman can reach to the 16th heaven and can attain liberation only being reborn as a man.

In Jain cosmology, the wheel of time is divided in two halves, Utsarpiṇī or ascending time cycle and avasarpiṇī, the descending time cycle (said to be current now). In each half of the cosmic time cycle, exactly twenty-four tirthankaras grace this part of the universe. There have been an infinite number of tirthankaras in the past time periods.[5] The first tirthankara in this present time cycle was Rishabhanatha, who is credited for formulating and organising humans to live in a society harmoniously. The 24th and last tirthankara of present half-cycle was Mahavira (599–527 BC). History records the existence of Mahavira and his predecessor, Parshvanath, the twenty-third tirthankara.

A tirthankara organises the sangha, a fourfold order of male

and female monastics, srāvakas (male followers) and śrāvikās (female followers).

The tirthankara's teachings form the basis for the Jain canons. The inner knowledge of tirthankara is believed to be perfect and identical in every respect and their teachings do not contradict one another. However, the degree of elaboration varies according to the spiritual advancement and purity of the society during their period of leadership. The higher the spiritual advancement and purity of mind of the society, the lower the elaboration required.

While tirthankaras are documented and revered by Jains, their grace is said to be available to all living beings, regardless of religious orientation.

Tirthankaras are arihants who after attaining kevalajñāna (pure infinite knowledge) preach the true dharma. An Arihant is also called Jina (victor), that is one who has conquered inner enemies such as anger, attachment, pride and greed. They dwell exclusively within the realm of their Soul, and are entirely free of kashayas, inner passions, and personal desires. As a result of this, unlimited siddhis, or spiritual powers, are readily available to them – which they use exclusively for the spiritual elevation of living beings. Through darśana, divine vision, and deshna, divine speech, they help others in attaining kevalajñāna, and moksha (final liberation) to anyone seeking it sincerely.

PAST, PRESENT AND FUTURE TIRTHANKARS

The Past Tirthankaras are

1. SHREE NIRVAN JI
2. SHREE SAGAR JI
3. SHREE MAHASADHU JI
4. SHREE VIMAL PRABH JI
5. SHREE SHUDHABH DEV JI
6. SHREE SHREEDHAR JI
7. SHREE DATT JI
8. SHREE SIDHABH DEV JI
9. SHREE AMAL PRABH JI
10. SHREE UDHAR DEV JI
11. SHREE AGNI DEV JI
12. SHREE SAYYAM JI
13. SHREE SHIV JI
14. SHREE UTSAH JI
15. SHREE GYANESHWAR JI
16. SHREE PARMESHWAR JI
17. SHREE VIMALESHWAR JI
18. SHREE YASHODHAR JI
19. SHREE KRISHNA MATI JI
20. SHREE GYAN MATI JI

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- 21.SHREE SHUDHH MATI JI
- 22.SHREE BHADRA JI
- 23.SHREE ATI KRANT JI
- 24.SHREE SHANT JI

The Present Tirthankaras are:

1. SHREE RISHABH DEVJI
2. SHREE AJIT NATHJI
3. SHREE SAMBHAV NATHJI
4. SHREE ABHINANDAN SWAMIJI
5. SHREE SUMTI NATHJI
6. SHREE PADMA PRABHU JI
7. SHREE SUPARSHVA NATHJI
8. SHREE CHANDRA PRABHUJI
9. SHREE SUVIDHI NATHJI
- 10.SHREE SHITAL NATHJI
- 11.SHREE SHREYANSH NATHJI
- 12.SHREE VASUPOJYA NATHJI
- 13.SHREE VIMAL NATHJI
- 14.SHREE ANANT NATHJI
- 15.SHREE DHARAM NATHJI
- 16.SHREE SHANTI NATHJI
- 17.SHREE KUNTHU NATHJI
- 18.SHREE ARNATHJI
- 19.SHREE MALLI NATHJI
- 20.SHREE MUNISUVRAT NATHJI
- 21.SHREE NAMI NATHJI
- 22.SHREE NEMI NATHJI
- 23.SHREE PARSHVA NATHJI
- 24.SHREE MAHAVIR SWAMIJI

The Future Tirthankaras are:

1. SHREE MAHA PADM JI
2. SHREE SURDEV JI
3. SHREE SUPARSHVA JI
4. SHREE SWAYAMPRABH JI
5. SHREE SARVATAMBHUT JI
6. SHREE DEVPUTR JI
7. SHREE KUL PUTR JI
8. SHREE UDNAGAK JI
9. SHREE PORSHTHIL JI
- 10.SHREE JAY KIRTI JI
- 11.SHREE MUNI SUVRAT JI
- 12.SHREE ARR JI
- 13.SHREE NISHPAAP JI
- 14.SHREE NISHKASHAY JI
- 15.SHREE VIPUL IJI
- 16.SHREE NIRMAL JI
- 17.SHREE CHITRAGUPTA JI

- 18.SHREE SAMADHIGUPT JI
- 19.SHREE SWAYAMBHOO JI
- 20.SHREE ANIVARTAK JI
- 21.SHREE JAY JI
- 22.SHREE VIMAL JI
- 23.SHREE DEVPAL JI
- 24.SHREE ANANT VIRYE JI

Jains trace their history through 24 Tirthankaras and revere Rishabhath (Adinath) as the first Tirthankara (in the present time cycle).

The last two Tirthankara, the twenty third Tirthankara Parshavnath, BC- 8th – 7th Century and 24th Tirthankara Mahaveer (C 599 – C.527 BCE) are considered historical figures. Mahaveera was the elder contemporary of the Buddha. According to Jain texts the Twenty Second Tirthankara Arshth- Nemi lived about 85,000 years ago and was cousin of Hindu God Krishna. Jains consider their religion eternal. The two main sects of Jainism are –the Digambara and the Shwetambara Sect, likely started forming about the third century BCE and the schisms was complete by about 5th Century CE.

Though both sects are followers of 24 Tirthankaras, however mode of worship and practices are different. Digamber Sadhu's do not wear clothes and do not keep anything except "*Kamanda*" and "*More Picchhi*" whereas Swetamber Sadhus wear white clothes.

The Shwetamber Sect was further divided into sub sects i.e. Murti Pujak and Sthanak Vasi. They were further divided into many other sub-sects namely Teerapanthi etc.

The monks of Murtipujaka sect are divided into six orders or *Gaccha*. These are:[27]

- Kharatara Gaccha (1023 CE)
- Ancala Gaccha (1156 CE)
- Tristutik Gaccha (1193 CE)
- Tapa Gaccha (1228 CE)
- Vimala Gaccha (1495 CE)
- Parsvacandra Gaccha (1515 CE)

The Digamber Sect is also divided into sub-sects namely Terapanth (*Mul Amnaye*), Bees Panth and Taran Panth. Taran Panthi don't worship idol and in their temples they only worship *Shastras*.

It is pleaded that at Gomateshwar, Panchamrat Abhishek is performed on Bhahubali Bhagwan and therefore Panchamrat Abhishek be permitted to be performed on Adinath Bhagwan (Bawangaja).

The Bhahubali is a much revered figure among Jains was the son of Bhagwan Adinath the first Tirthankar of Jainism and the younger brother of Bharat Chakravarti. He is said to have meditated motionless for 12 years in a standing posture and that during this time, climbing plants (climbers) grew on this body. Bhagwan Bhaubali statue was built in 981 A.D. is a seventy meter tall free standing monolithis statue of the Jain deity. The statue was built by Ganga dynasty minister and commander of Chavundaraya. From the very beginning the Panchamrat Abhishek is performed on this idol of Bhagwan Bhahubali as per the traditions of Bees Panthi Sect whereas at Bawangaja idol, from the times immemorial the Abhishek is being performed by *Prasukh Jal* (Jala Abhishek) only as per the traditions of Terapanth.

Q. As to why “Panchamrat Abhishek” is prohibited in Terapanth ?

First let us understand what is *Panchamrat*. *Panchamrat* is a term which collectively means and contains 5 items namely Milk, Curd, Ghee, Saffron, powdered Sugar (*burra*) or Sugarcane Juice.

In *Terapanth* it is observed that if these five elements are used for Abhishek purpose upon idol then some microscopic organisms develop in the remains of these which gets struck upon the idols and if they are not properly taken care of then ants and other microscopic organisms develop and harm the idol itself. After preforming the Abhishek, the idol is to be dried with a soft cloth and the Jala of Abhishek is used for *Gandodak* purposes. *Gandodak* is a holy water which is collected after the Jala Abhishek of the idol. The water is securely collected in pot and kept for the devotees for some time and then the water is poured into the well or into the plants. After Panchamarat Abhishek the insects and other organisms develop and they gets killed unknowingly by the act of drying the idol by cloth and hence *Terapanth* believes that only pure luke warm water is to be used for Abhishek purposes.

In Jain Dharma even the care has been taken that those idols which are very old and are deteriorating then their *Jala Abhishek* is also not performed so as to prevent further deterioration.

Q. Whether there is any infringement of legal or constitutional right of women?

No. The *Abhishek* is not an essential part of offering of God. There is no restriction on women in entering into temple and perform Puja. It is also alleged that in other Siddha Kshetras

women are permitted to perform *Abhishek* on idol, but no such proof is on record. Even every man is not allowed to perform *Abhishek*, it is only those man who after taking bath have put on *Dhoti* and *Dupatta* can perform *Abhishek*.”

29- In present Writ Petition the subject matter is *Abhishek* or *Panchamrat Abhishek* and *Abhishek* by women followers on idol of Jain *Tirthankar* situated at Bawangaja, Barwani, Madhya Pradesh. *Bawangaja* (meaning 52 yards) is a famous *Jain* pilgrim center in the Barwani district of southwestern Madhya Pradesh. Located about 6 kilometers south of River *Narmada*, its main attraction is the world's second largest megalithic statue (carved out of mountain) of Lord *Rishabhadeva* (largest being Statue of *Ahimsa*, the first *Jain Tirthankar*. The statue is 84 feet (26 m) high. It was created early in the 12th Century. The *Chulgiri* temple, also situated on the hilltop, contains two inscription. The *Indrajit*, *Kumbhakarna* & various other scholars attained emancipation through the self-meditation. The 3 ancient foot images of *Indrajit*, *Kumbhakarna* & the other are present in this temple. Except foot images, the two idols of Lord *Māllīnātha* & *Chandraprabha* are installed in the main altar. Moreover, the several idols are installed on both sides in the main assembly hall. There are twenty three other temple of *Jain* followers situated at Bawangaja. (Source: *Wikipedia*)

30- According to *Digambar Jain* followers, it is believed that the idols of *Tirthankara's* are living being as the ritual of

“*Pranprithista*” in respect of these idols has taken place. These *Tirthankars* (God) are possessed with 18 thousand *Sheel* (purity). They maintained strictest celibacy (*Brahmchariye*) and the celibacy is one of the main principal of Jainism. The rule of celibacy is taken very seriously in thought and action by follower of Jain religion while performing their rituals of worship.

31- The counsel of respondent no. 6 *inter-alia* stated that there is no restriction in respect of entry and for any kind of worships for women in *Digambar Terapanth* sect of *Jainism* in temples or other places of worship. Women are essential in rituals and practices of *Digambar Jain Terapanth* sect and participate in almost every kind of worships. Even some of the rituals have been defined to be performed by only female member of sect and which cannot be performed by the male members of the sect. Counsel for the respondent No.6 has submitted that only Women member of this sect can do the ritual of *Vedi Shuddhi* (cleanliness of Sitting place of idols of *Tirthankars*) and similarly only women can perform the work of establishing *Kalsha* of various *Vidhan* performed by the *Digambar Jain Terapanth* sect. The counsel for respondents has stated that concept of *Indra* and *Indrani* is in existence in this sect and male and female perform their respective role. There are large number of rituals and practices which are being followed by this sect

and they cannot be performed without participation of female or female partner.

32- Learned Senior Advocate for respondent No.6 submitted that the restriction for *Abhishek* by women is an integral part of the essential practice of this *Terapanth* sect which is necessary to observe 18 thousands of *Sheel* (Purity) and celibacy of Naked idol of *Jain Tirthankars*. It is certainly intended to maintain strict celibacy of naked idol of *Jain Tirthankars* and in all respects for the successful practice of the spiritual self-discipline. The limited restriction in respect of *Abhishek* by women is a matter of 'religion' and 'religious faith and practice'. The counsel for respondent with respect to the contention of the petitioner that the custom is violative of women's right to gender equality has rightly argued that in case women as a class were prohibited from participation, it would amount to social discrimination. However, it is not so in the present case. There is no restriction on women to enter inside the temple, and there is no restriction of any kind of worship, prayer or touch & reading of any holy book of the sect. Women can freely enter the Temple, and can worship. All female members of the sect and others can access any part of temples and holy places of Digambar Terapanth sect.

33- Learned Senior counsel for the respondent has rightly

submitted that religion is a matter of faith. Religious beliefs are held to be sacred by those who have faith. Religion does not merely lay down a code of ethical rules for its followers to accept, but also includes rituals and observances, ceremonies and modes of worship which are regarded as integral parts of the religion.

34- The main question which is arising in the present case is that whether the restriction is only in respect of Abhishek or any kind of touch by female member of this sect to the idols of *Tirthankars*. Here is the need to know the supreme object and role of Abhishek to achieve this supreme object of this religious sect. The supreme object of this sect and all other sect of Jainism is to show the way for liberation of the soul from the bondage of Karma and the devout *Jains* take five main vows: *ahimsā* (non-violence), *satya* (truth), *asteya* (not stealing), *brahmacharya* (celibacy or chastity or sexual continence), and *aparigraha* (non-attachment). Celibacy is one of the strict principal of *Jainism* and all sect believe on it. According to the *Terapanth* sect of *Digambar Jain* sect, their idols of *Tirthankars* and their male monk are not bearing clothes and live naked. They follow strict celibacy and as per followers of *Terapanth* sect of *Digambar Jain* their *Tirthankars* have possessed 18 thousands of *Sheel* (Purity) and all *Tirthankars* are male and their idols are in naked condition. Hence a very minor restriction of

not touching the naked Jain idol and Monks is being followed by the women followers of this *Digambar Jain Terapanth* sect as per their religious belief and tradition. The male followers are also not supposed to touch women *Sadhvis* (Monk) and are requested to maintain reasonable physical distance from them.

35- As per followers of *Jainism*, the *Abhishek* (bathing the idol of the *Tirthankar*) is a rituals in which touching of God is essentially required. During *Abhishek*, act of *Parimarjan* (cleaning by dry clothes), *Abhishek* and *Prakshal* (cleaning of wet idol by clothes) are being performed and it is also believed that the continuous flow of water from the pot to idol is one kind of touch to the idol of *Tirthankars*. This restriction is limited to the extent of touching the Jain idols but women are allowed to participate in worship, they are free to watch *Abhishek Aarti* and all other activities performed during this ritual of *Abhishek*.

36- *Abhishek* is not an integral and basic tenet of the Jain religion. In fact, in the initially written books, there is no mention of *Abhishek* till as late as 7th century AD. *Abhishek* is not a compulsory and an essential practice/act in *Jain* religion i.e. without which, *Jain* religion cannot be followed. It is also pertinent to mention here that *Jain Monks/Munis* do not practice *Abhishek* as per *Aagams* and *Jain Monks* follow *Gyan & Dhyan* and only after *Gyan & Dhyan* one

can reach ultimate Salvation. As per *Jain Aagam's* Holy Book "*Khsatkadam*", *Jain Shravak* (follower) has to perform donation, worship, celibacy and fasting, which are the four basic things to be practiced. Therefore, the performance of *Abhishek* is not of great importance to practice the Jain religion.

37- In all the holy scriptures of *Jain* religion worshipping has been mentioned but there is no mention of performing of *Abhishek* while worshipping the *Tirthankaras*, for example, *Jain Saint Kund-Kund*, who claimed to be main spiritual master of Jain religion, in his treatise *Charitrapahud*, does not mention *Abhishek*. Similarly, the following spiritual master of *Jain* religion / Religious *Pundits* have not mentioned about ritual of *Abhishek* as one of the essential practice or essential deed:-

- (i) Uma Swamy's "Tatvarthsutra" (1st Century),
- (ii) Samanthbhadra's Book "Ratnakaran Sharwakachar" (2nd Century),
- (iii) Shri Kumar's book "Kartikeyanupreksha" (2nd Century),
- (iv) Shri Amrit Chandra's book "Purusharthsiddhupaay" (10th Century),
- (v) Shri Amitgati' book "Amitgati Sharwakachar" (11th Century),
- (vi) Shri Padamnandi "Upasak Sanskar" (12th Century),
- (vii) Shri Gunbhushan "Shrawakachar" (12th Century),
- (viii) Shri Padamnandi's book "Shrawakachar Sarodwar" (14th Century),
- (ix) Pandit Govind's Book "Purusharthanushashan" (16th Century),
- (x) Pandit Rajmal's book "Lati Sanhita" (17th Century)."

Therefore, on the basis of spiritual scriptures of *Digambar Jain* it is evident and clear that after 1200 years of Lord Mahavira's Salvation, there is not a single mention of *Abhishek* or

Panchamrat Abhishek. Hence, it can be easily inferred that *Abhishek* is not an integral and basic tenet to profess the Jain religion.

38- The respondent No.6 has categorically asserted that the devotee of *Digambar Terapanth* constitute a religious denomination or Sect who have their set of beliefs and faith, having distinct practices. The practice of *Abhishek* at *Bawangajaji* temple is continuing since time immemorial and it is integral to the temple.

39- With respect to Article 25(1), it can be safely gathered that the worshipers of *Digambar Jain Terapanth* sect are entitled to the freedom of conscience, and the right to profess, practice and propagate their religion. As contended by the respondent, the right to profess their faith by worshiping at the Lord *Adinath* at *Bawangaja* Temple, can be guaranteed only if the character celibacy and 18000 *Sheel* (Purity) are preserved. If women touch and do *Abhishek* of idol, it would result in changing the very character/nature of the *Tirthankar*, which would certainly infringe upon the right of the devotees to practice their religion guaranteed by Article 25(1) of the Constitution.

40- The right of the devotees under Article 25(1) cannot be made subject to the claim of the Petitioners to change the method of particular mode of worship under Articles 14 and 15 of the

Constitution, since they do not profess faith in practices followed by Terapanth sect of *Digambar Jain* in this Temple, but claim merely to be followed by other sect (*Beespanth*).

41- Article 25(2)(b) provides that nothing in Article 25(1) shall prevent the State from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The 'throwing open' to 'all classes and sections of Hindus' was intended to redress caste based prejudices and injustices in society. Article 25(2)(b) cannot be interpreted to mean that customs and usages forming an essential part of the religion, are to be overridden. Article 25(2)(b) would have no application in the present case as there is no ban, but only a limited restriction during the notified period, based on faith, custom and belief, which is being observed since time immemorial.

42- The issues raised in the present Writ Petition is having far-reaching ramifications and implications, not only for the *Bawangaja* Temple, but for all places of worship maintained by different sect of Jain religion, which have their own beliefs, practices, customs and usages, which may be considered to be exclusionary in nature. In a secular polity, issues which are matters of deep religious faith and sentiment, must not ordinarily be

interfered with by Courts. The right to practice one's religion is a Fundamental Right guaranteed by Part III of the Constitution, without reference to whether religion or the religious practices are rational or not. Religious practices are Constitutionally protected under Articles 25 and 26(b). Courts normally do not delve into issues of religious practices. In a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain such a writ petition challenging religious practices followed by any group, sect or denomination, would cause serious damage to the Constitutional and secular fabric of this country.

43- Religious customs and practices cannot be solely tested on the touchstone of Article 14 and the principles of rationality embedded therein. Article 25 specifically provides the equal entitlement of every individual to freely practice their religion. Equal treatment under Article 25 is subject to the essential beliefs and practices of any religion. Equality in matters of religion must be viewed in the context of the worshipers of the same faith. The twin-test for determining the validity of a classification under Article 14 is: First, The classification must be founded on an intelligible differentia; and secondly, It must have a rational nexus with the object sought to be achieved by the impugned law. The difficulty lies in applying the tests under Article 14 to religious practices which are

also protected as Fundamental Rights under our Constitution. The right to equality claimed by the Petitioners under Article 14 & 15 is directly in conflict with the rights of the worshipers of the shrine in question, which is also a Fundamental Right guaranteed by Articles 25, and 26 of the Constitution. It would compel the Court to undertake judicial review under Article 14 to delineate the rationality of the religious beliefs or practices, which would be outside the ken of the Courts. It is not for the courts to determine which of these practices of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil.

44- The submissions made by the Counsel for the Petitioners are premised on the view that this practice constitutes gender discrimination against women. On the other hand, the respondent No.6 has submitted that the present case deals with only *Abhishek* of naked idol of *Tirthankar Aadinath* which is related to celibacy and 18 thousands of *Sheel* of *Tirthankar Aadinath*. This celibacy is very essential part of this *Terapanth* sect and its not at all discriminatory as women are allowed to perform all other activities related to *Abhishek* and other forms of worship. The respondent No.6 has rightly submitted that the present case deals with the right of the devotees of this denomination or sect, as the case may be, to practice their religion in accordance with the tenets and beliefs,

which are considered to be “essential” religious practices of this Temple and this particular sect.

45- India is a country comprising of diverse religions, creeds, sects and each of them have their faiths, beliefs, and distinctive practices. Secular polity would comprehend the freedom of every individual, group, sect, or denomination to practice their religion in accordance with their beliefs, and practices.

46- The Preamble to the Constitution secures to all citizens of this country liberty of thought, expression, belief, faith and worship. Article 25 in Part III of the Constitution make freedom of conscience a Fundamental Right guaranteed to all persons who are equally entitled to the right to freely profess, practice and propagate their respective religion. This freedom is subject to public order, morality.

47- Article 26 guarantees the freedom to every religious denomination, or any sect thereof, the right to establish and maintain institutions for religious purposes, manage its own affairs in matters of religion, own and acquire movable and immovable property, and to administer such property in accordance with law. This right is subject to public order, morality and health. The right under Article 26 is not subject to Part III of the Constitution and health, and to the other provisions of Part III of the Constitution.

48- The framers of the Constitution were aware of the rich history and heritage of this country being a secular polity, with diverse religions and faiths, which were protected within the fold of Articles 25 and 26. State interference was not permissible, except as provided by Article 25(2)(b) of the Constitution, where the State may make law providing for social welfare and reform. Article 26 of the Constitution guarantees the freedom to every religious denomination, or sect thereof, the right to establish and maintain institutions for religious or charitable purposes, and to manage their own affairs in matters of religion. The right conferred under Article 26 is subject to public order, morality and health, and not to any other provisions in Part III of the Constitution. A religious denomination or organization enjoys complete autonomy in matters of deciding what rites and ceremonies are essential according to the tenets of that religion. The only restriction imposed is on the exercise of the right being subject to public order, morality and health under Article 26. The respondent No.6 has rightly contended that the devotees of the *Terapanth* sect of *Jain* religion constitute a religious denomination, or a sect thereof, and are entitled to claim protection under Article 26 of the Constitution. Respondent No.6 has rightly contended that the followers of the *Terapanth* sect of *Jain* constitute a religious denomination having a distinct faith, well-

identified practices, being followed since time immemorial.

49- Discussion on the religious denomination becomes relevant here. Article 26 refers not only to religious denominations, but also to sects thereof. Article 26 guarantees that every religious denomination, or sect thereof, shall have the right *inter-alia* to manage its own affairs in matters of religion. This right is made subject to public order, morality, and health. The expression “religious denomination” as interpreted in **Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** reported in (1954 AIR 282 : 1954 SCR 1005) was “a collection of individuals classed together under the same name : a religious sect or body having a common faith and organisation and designated by a distinctive name”. The Court held that each of the sects or sub-sects of the Hindu religion could be called a religious denomination, as such sects or sub-sects, had a distinctive name.

50- In **S.P. Mittal v. Union of India & Ors.** (1983 AIR 1 : 1983 SCC (1) 51), the Supreme Court, while relying upon the judgment in the case of **Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Swamiar Thirtha Swamiar of Shirur Mutt** (supra), held that the words ‘religious denomination’ in Article 26 of the Constitution must take their colour

from the word 'religion', and if this be so, the expression 'religious denomination' must satisfy three conditions:

- (1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;
- (2) common organisation; and
- (3) designation by a distinctive name

If there are clear attributes that there exists a sect, which is identifiable as being distinct by its beliefs and practices, and having a collection of followers who follow the same faith, it would be identified as a 'religious denomination'.

51- The worshipers of *Terapanth* together constitute a religious denomination, or sect thereof, as the case maybe, follow a common faith, and have common beliefs and practices. These beliefs and practices are based on the belief that their Tirthankars have possessed 18 thousand Sheel (Purity of celibacy) and followed strict celibacy and are living being after *Pranpristha*. The celibacy is claimed to be an integral and essential part of *Digambar Jain Terapanth* sect. Admittedly, the celibacy is one main principal out of five, the five principals are *ahimsa* (non-violence), *satya* (truth), *asteya* (non-stealing), *Brahmcharya* (celibacy or chastity or sexual continence), and *aparigraha* (non-attachment). The practices followed by different sects for achievement of Absolute goal of Liberation may differ from each other but practices of one sect

followed in particular temple cannot be interfered. The *Terapanth* sect of *Digambar Jain* have got every right to maintain their beliefs and practices followed on the basis of their religious tradition.

52- It is noteworthy to mention that the *Abhishek* is not considered essential for the purpose of ultimate goal of liberation in *Jain* religion or this sect but the celibacy is essential and integral part of Jain religion.

53- Before concluding the matter, the essential practice of particular religion test needs to be applied. The 'essential practices' test was formulated in **Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.** (Supra) by the Supreme Court. Before articulating the test, the Supreme Court drew on the words "practice of religion" in Article 25(1) to hold that the Constitution protects not only the freedom of religious belief, but also acts done in pursuance of a religion. In doing so, it relied on an extract from the decision of Latham, C.J. of the High Court of Australia in *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth*. The original extract relied upon has been reproduced herein below:-

"5. It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It

appears to me to be difficult to maintain this distinction as relevant to the interpretation of s. 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.

The Supreme Court then went on to formulate the 'essential practices test' in the following words:

"20...what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion...all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)..."

...23. Under Article 26(b), therefore, a religious denomination or organization 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."

The 'essential practices test' was reiterated by the Supreme Court in **Ratilal Panachand Gandhi v. The State of Bombay & Ors.** reported in **(1954) SCR 1055: AIR 1954 SC 388**, where the narrow definition of "religion" given by the Bombay High Court was discarded. It was held that all religious practices or performances of acts in pursuance of religious beliefs were as much a part of religion, as faith or belief in particular doctrines. The Supreme Court re-iterated the 'essential practices test' in the following words:-

“13...Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate...We may refer in this connection to the observation of Davar, J. in the case of Jamshed ji v. Soonabai and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktrad bag, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid and charitable gifts, the observations, we think, are quite appropriate for our present purpose. If this is the belief of the community thus observed the learned judge, and it is proved undoubtedly to be the belief of the Zoroastrian community, - a secular judge is bound to accept that belief – it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of the religion and the welfare of his community or mankind. These observations do in our opinion afford an indication of the measure of protection that is given by Article 26(b) of our Constitution.”

In Durgah Committee, Ajmer & Anr. v. Syed Hussain

Ali & Ors. reported in **1961 AIR 1402 : 1962 SCR 383** the ‘essential practices test’ was discussed by a Constitution Bench in the following words:

“33...Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of 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.”

The Supreme Court affirmed the ‘essential practices test’ as laid in the previous decisions in **Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** (supra), and **Ratilal Panachand Gandhi v. The State of Bombay & Ors.** (supra) insofar as it emphasised on the autonomy of religions to identify essential or integral practices.

54- Reference is required to be made to the doctrines and tenets of a religion, its historical background, and the scriptural texts to ascertain the ‘essentiality’ of religious practices.

55- The ‘essential practices test’ in its application would have to be determined by the tenets of the religion itself. The practices and beliefs which are considered to be integral by the religious community are to be regarded as “essential”, and enjoys protection under Article 25.

56- The only way to determine the essential practices test would be with reference to the practices followed since time immemorial, which may have been scripted in the religious texts of this temple. If any practice in a particular mode of worship can be traced to antiquity, and is integral to the sect, it must be taken to be an essential religious practice of that sect.

57- The petitioners are free to follow their religious practices as per their belief in their place of worship but they are not allowed to impose their faith, belief and practices on other sect.

58- The petitioners have cited two examples of 1991 & 2008 of *Mahamastakabhishek* and claimed that there has been a tradition of *Panchamrat Abhishek* or *Abhishek* by women on religious place like *Bawangaja*. In this context, the respondent No.6 has submitted that there are 22 other temples where the petitioners have not claimed that the practice of *Panchamrat Abhishek* or *Abhishek* by women was followed. These two alleged incidents cited by petitioner cannot be said to be the concluding evidence and no other evidence of such claimed practices has been brought on record.

59- The Hon'ble Supreme Court in the case of Indian Young Lawyers Association (supra) by 4 : 1 majority has held that the practice of *Sabrimala* Temple of prohibition of entry of women of menstruating age as illegal and unconstitutional. The aforesaid case was a case wherein, there was a complete ban in respect of entry of women belonging to a particular age group.

60- There are thousand of temple, mosque and gurudwara in India following different rituals and different religious practices. There are large number of restrictions placed upon man as well as on women. The restriction depends upon essential religious

practices. The Hon'ble Supreme Court in the case of Indian Young Lawyers Association (supra) in paragraphs – 7 and 144 has held as under :- [Dipak Mishra, C.J. & A.M. Khanwilkar, J.]

“7. After recording the submissions advanced by the learned counsel for the petitioners, the respondents as well as by the learned Amici Curiae, the three-Judge Bench considered the questions formulated by the counsel for the parties and, thereafter, framed the following questions for the purpose of reference to the Constitution Bench:

“1. Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by „morality" as used in Articles 25 and 26 of the Constitution?

2. Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?

3. Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?

4. Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex?

5. Whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and, if treated to be intra vires, whether it will be violative of the provisions of Part III of the Constitution?”

144. In view of our aforesaid analysis, we record our conclusions in seriatim:

(i) In view of the law laid down by this Court in Shirur Mutt (supra) and S.P. Mittal (supra), the devotees of Lord Ayyappa do not constitute a separate religious denomination. They do not have common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are exclusively Hindus and do not constitute a separate religious denomination.

(ii) Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors specifically attributable to women.

(iii) The exclusionary practice being followed at the Sabrimala temple by virtue of Rule 3(b) of the 1965 Rules violates the right of Hindu women to freely practise their religion and exhibit their devotion towards Lord Ayyappa. This denial denudes them of their right to worship. The right to practise religion under Article 25(1) is equally available to both men and women of all age groups professing the same religion.

(iv) The impugned Rule 3(b) of the 1965 Rules, framed under the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of Hindu women to practise their religious beliefs which, in consequence, makes their fundamental right of religion under Article 25(1) a dead letter.

(v) The term 'morality' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. Since the Constitution has been adopted and given by the people of this country to themselves, the term public morality in Article 25 has to be appositely understood as being synonymous with constitutional morality.

(vi) The notions of public order, morality and

health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple.

(vii) The practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple cannot be regarded as an essential part as claimed by the respondent Board.

(viii) In view of the law laid down by this Court in the second Ananda Marga case, the exclusionary practice being followed at the Sabarimala Temple cannot be designated as one, the non-observance of which will change or alter the nature of Hindu religion. Besides, the exclusionary practice has not been observed with unhindered continuity as the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conducted poojas in every month for five days for the first rice feeding ceremony of their children.

(ix) The exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the religion.

(x) A careful reading of Rule 3(b) of the 1965 Rules makes it luculent that it is ultra vires both Section 3 as well as Section 4 of the 1965 Act, for the simon pure reason that Section 3 being a non-obstante provision clearly stipulates that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary.

(xi) Rule 3(b) is also ultra vires Section 4 of the 1965 Act as the proviso to Section 4(1) creates an exception to the effect that the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

(xii) The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act clearly indicate that custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would

annihilate the purpose of the 1965 Act and incrementally impair the fundamental right to practise religion guaranteed under Article 25(1). Therefore, we hold that Rule 3(b) of the 1965 Rules is ultra vires the 1965 Act.”

Paragraphs – 171 to 177 of the aforesaid judgment reads as under :- [R.F. Nariman, J. (concurrent)]

“171. The first question that arises is whether the Sabarimala temple can be said to be a religious denomination for the purpose of Article 26 of the Constitution. We have already seen with reference to the case law quoted above, that three things are necessary in order to establish that a particular temple belongs to a religious denomination. The temple must consist of persons who have a common faith, a common organization, and are designated by a distinct name. In answer to the question whether Thanthis and worshippers alike are designated by a distinct name, we were unable to find any answer. When asked whether all persons who visit the Sabarimala temple have a common faith, the answer given was that all persons, regardless of caste or religion, are worshippers at the said temple. From this, it is also clear that Hindus of all kinds, Muslims, Christians etc., all visit the temple as worshippers, without, in any manner, ceasing to be Hindus, Christians or Muslims. They can therefore be regarded, as has been held in Sri Adi Visheshwara (supra), as Hindus who worship the idol of Lord Ayyappa as part of the Hindu religious form of worship but not as denominational worshippers. The same goes for members of other religious communities. We may remember that in Durgah Committee (supra), this Court had held that since persons of all religious faiths visit the Durgah as a place of pilgrimage, it may not be easy to hold that they constitute a religious denomination or a section thereof. However, for the purpose of the appeal, they proposed to deal with the dispute between the parties on the basis that the Chishtia sect, whom the respondents represented, were a separate religious denomination, being a sub-sect of Soofies. We may hasten to add that we find no such thing here. We may also add that in S.P. Mittal (supra), the majority judgment did not hold, and therefore, assumed that —Aurobindoism|| was a religious denomination, given the fact that the Auroville Foundation Society claimed exemption from income tax on the footing that it was a charitable, and not a religious organization, and held itself out to be a non-religious organization. Also, the powerful argument addressed, noticed at paragraph 106 of the majority judgment, that persons who joined the Auroville Society did not give up their religion, also added great substance to the fact that the Auroville Society could not be regarded as a religious

denomination for the purpose of Article 26. Chinnappa Reddy, J. alone, in dissent, held the Auroville Society to be a religious denomination, without adverting to the fact that persons who are a part of the Society continued to adhere to their religion.

172. In these circumstances, we are clearly of the view that there is no distinctive name given to the worshippers of this particular temple; there is no common faith in the sense of a belief common to a particular religion or section thereof; or common organization of the worshippers of the Sabarimala temple so as to constitute the said temple into a religious denomination. Also, there are over a thousand other Ayyappa temples in which the deity is worshipped by practicing Hindus of all kinds. It is clear, therefore, that Article 26 does not get attracted to the facts of this case. ”

173. 28. This being the case, even if we assume that there is a custom or usage for keeping out women of the ages of 10 to 50 from entering the Sabarimala temple, and that this practice is an essential part of the Thanthris' as well as the worshippers' faith, this practice or usage is clearly hit by Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, which states as follows:

3. Places of public worship to be open to all section and classes of Hindus:— Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may enter, worship, pray or perform:

Provided that in the case of a public of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section, shall be subject to the right of that religious denomination or section as the case may be, to manage its own affairs in matters of religion.

Since the proviso to the Section is not attracted on the facts of this case, and since the said Act is clearly a measure enacted under Article 25(2)(b), any religious right claimed on the basis of custom and usage as an essential matter of religious practice

under Article 25(1), will be subject to the aforesaid law made under Article 25(2)(b). The said custom or usage must therefore, be held to be violative of Section 3 and hence, struck down.

174. Even otherwise, the fundamental right of women between the ages of 10 and 50 to enter the Sabarimala temple is undoubtedly recognized by Article 25(1). The fundamental right claimed by the Thanthris and worshippers of the institution, based on custom and usage under the selfsame Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa. The argument that all women are not prohibited from entering the temple can be of no avail, as women between the age group of 10 to 50 are excluded completely. Also, the argument that such women can worship at the other Ayyappa temples is no answer to the denial of their fundamental right to practice religion as they see it, which includes their right to worship at any temple of their choice. On this ground also, the right to practice religion, as claimed by the Thanthris and worshippers, must be balanced with and must yield to the fundamental right of women between the ages of 10 and 50, who are completely barred from entering the temple at Sabarimala, based on the biological ground of menstruation. Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 states as follows:

3. The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use of water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to place of public worship:

xxx xxx xxx

(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.

xxx xxx xxx

The abovementioned Rule is ultra vires of Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, and is hit by Article 25(1) and by Article 15(1) of the Constitution

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of India as this Rule discriminates against women on the basis of their sex only.

175. The learned counsel appearing on behalf of the Respondents stated that the present writ petition, which is in the nature of a PIL, is not maintainable inasmuch as no woman worshipper has come forward with a plea that she has been discriminated against by not allowing her entry into the temple as she is between the age of 10 to 50. A similar argument was raised in *Adi Saiva Sivachariyargal Nala Sangam* (supra) which was repelled in the following terms:

12. 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.

The present case raises grave issues relating to women generally, who happen to be between the ages of 10 to 50, and are not allowed entry into the temple at Sabarimala on the ground of a physiological or biological function which is common to all women between those ages. Since this matter raises far-reaching consequences relating to Articles 25 and 26 of the Constitution of India, we have found it necessary to decide this matter on merits. Consequently, this technical plea cannot stand in the way of a constitutional court applying constitutional principles to the case at hand.

176. A fervent plea was made by some of the counsels for the Respondents that the Court should not decide this case without any evidence being led on both sides. Evidence is very much there, in the form of the writ petition and the affidavits that have been filed in the writ petition, both by the Petitioners as well as by the Board, and by the Thanthri's affidavit referred to supra. It must not be forgotten that a writ petition filed under either Article 32 or Article 226 is itself not merely a pleading, but also evidence in the form of affidavits that are sworn. (See *Bharat Singh and Ors. v. State of Haryana and Ors.*, 1988 Supp (2) SCR 1050 at 1059).

177. The facts, as they emerge from the writ petition and the

aforesaid affidavits, are sufficient for us to dispose of this writ petition on the points raised before us. I, therefore, concur in the judgment of the learned Chief Justice of India in allowing the writ petition, and declare that the custom or usage of prohibiting women between the ages of 10 to 50 years from entering the Sabarimala temple is violative of Article 25(1), and violative of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 made under Article 25(2)(b) of the Constitution. Further, it is also declared that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is unconstitutional being violative of Article 25(1) and Article 15(1) of the Constitution of India.”

Paragraphs – 290 to 296 of the aforesaid judgment reads as under :- (Dr. D.Y. Chandrachid, J.)

“290. The Constitution embodies a vision of social transformation. It represents a break from a history marked by the indignation and discrimination attached to certain identities and serves as a bridge to a vision of a just and equal citizenship. In a deeply divided society marked by intermixing identities such as religion, race, caste, sex and personal characteristics as the sites of discrimination and oppression, the Constitution marks a perception of a new social order. This social order places the dignity of every individual at the heart of its endeavours. As the basic unit of the Constitution, the individual is the focal point through which the ideals of the Constitution are realized.

The framers had before them the task of ensuring a balance between individual rights and claims of a communitarian nature. The Constituent Assembly recognised that the recognition of a truly just social order situated the individual as the ‘backbone of the state, the pivot, the cardinal center of all social activity, whose happiness and satisfaction should be the goal of every social mechanism.’¹⁶⁶ In forming the base and the summit of the social pyramid, the dignity of every individual illuminates the constitutional order and its aspirations for a just social order. Existing structures of social discrimination must be evaluated through the prism of constitutional morality. The effect and endeavour is to produce a society marked by compassion for every individual.

291. The Constitution protects the equal entitlement of all persons to a freedom of conscience and to freely profess, protect and propagate religion. Inhering in the right to religious freedom, is the equal entitlement of all persons, without exception, to profess, practice and propagate religion. Equal participation of women in exercising their right to religious freedom is a recognition of this right. In protecting religious

freedom, the framers subjected the right to religious freedom to the overriding constitutional postulates of equality, liberty and personal freedom in Part III of the Constitution. The dignity of women cannot be disassociated from the exercise of religious freedom. In the constitutional order of priorities, the right to religious freedom is to be exercised in a manner consonant with the vision underlying the provisions of Part III. The equal participation of women in worship inheres in the constitutional vision of a just social order.”

292. The discourse of freedom in the Constitution cannot be denuded of its context by construing an Article in Part III detached from the part within which it is situated. Even the right of a religious denomination to manage its own affairs in matters of religion cannot be exercised in isolation from Part III of the Constitution. The primacy of the individual, is the thread that runs through the guarantee of rights. In being located in Part III of the Constitution, the exercise of denominational rights cannot override and render meaningless constitutional protections which are informed by the overarching values of a liberal Constitution.

293. The Constitution seeks to achieve a transformed society based on equality and justice to those who are victims of traditional belief systems founded in graded inequality. It reflects a guarantee to protect the dignity of all individuals who have faced systematic discrimination, prejudice and social exclusion. Construed in this context, the prohibition against untouchability marks a powerful guarantee to remedy the stigmatization and exclusion of individuals and groups based on hierarchies of the social structure. Notions of purity and pollution have been employed to perpetuate discrimination and prejudice against women. They have no place in a constitutional order. In acknowledging the inalienable dignity and worth of every individual, these notions are prohibited by the guarantee against untouchability and by the freedoms that underlie the Constitution.

In civic as in social life, women have been subjected to prejudice, stereotypes and social exclusion. In religious life, exclusionary traditional customs assert a claim to legitimacy which owes its origin to patriarchal structures. These forms of discrimination are not mutually exclusive. The intersection of identities in social and religious life produces a unique form of discrimination that denies women an equal citizenship under the Constitution. Recognizing these forms of intersectional discrimination is the first step towards extending constitutional protection against discrimination attached to intersecting identities.

294. In the dialogue between constitutional freedoms, rights are not isolated silos. In infusing each other with substantive content, they provide a cohesion and unity which militates

against practices that depart from the values that underlie the Constitution – justice, liberty, equality and fraternity. Substantive notions of equality require the recognition of and remedies for historical discrimination which has pervaded certain identities. Such a notion focuses on not only distributive questions, but on the structures of oppression and domination which exclude these identities from participation in an equal life. An indispensable facet of an equal life, is the equal participation of women in all spheres of social activity.

The case at hand asks important questions of our conversation with the Constitution. In a dialogue about our public spaces, it raises the question of the boundaries of religion under the Constitution. The quest for equality is denuded of its content if practices that exclude women are treated to be acceptable. The Constitution cannot allow practices, irrespective of their source, which are derogatory to women. Religion cannot become a cover to exclude and to deny the right of every woman to find fulfillment in worship. In his speech before the Constituent Assembly on 25 November 1949, Dr B R Ambedkar sought answers to these questions: 'How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?'¹⁶⁷ Sixty eight years after the advent of the Constitution, we have held that in providing equality in matters of faith and worship, the Constitution does not allow the exclusion of women.

295. Liberty in matters of belief, faith and worship, must produce a compassionate and humane society marked by the equality of status of all its citizens. The Indian Constitution sought to break the shackles of social hierarchies. In doing so, it sought to usher an era characterized by a commitment to freedom, equality and justice. The liberal values of the Constitution secure to each individual an equal citizenship. This recognizes that the Constitution exists not only to disenable entrenched structures of discrimination and prejudice, but to empower those who traditionally have been deprived of an equal citizenship. The equal participation of women in every sphere of the life of the nation subserves that premise.

296. 119 I hold and declare that:

- 1) The devotees of Lord Ayyappa do not satisfy the judicially enunciated requirements to constitute a religious denomination under Article 26 of the Constitution;
- 2) A claim for the exclusion of women from religious worship, even if it be founded in religious text, is subordinate to the constitutional values of liberty, dignity and equality. Exclusionary practices are contrary to constitutional morality;

3) In any event, the practice of excluding women from the temple at Sabarimala is not an essential religious practice. The Court must decline to grant constitutional legitimacy to practices which derogate from the dignity of women and to their entitlement to an equal citizenship;

4) The social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values. Notions of “purity and pollution”, which stigmatize individuals, have no place in a constitutional order;

5) The notifications dated 21 October 1955 and 27 November 1956 issued by the Devaswom Board, prohibiting the entry of women between the ages of ten and fifty, are ultra vires Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965 and are even otherwise unconstitutional; and

6) Hindu women constitute a ‘section or class’ of Hindus under clauses (b) and (c) of Section 2 of the 1965 Act. Rule 3(b) of the 1965 Rules enforces a custom contrary to Section 3 of the 1965 Act. This directly offends the right of temple entry established by Section 3. Rule 3(b) is ultra vires the 1965 Act.

Paragraphs – 313 and 314 of the aforesaid judgment reads as under:- (Indu Malhotra, J.)

“313. The summary of the aforesaid analysis is as follows:

(i) The Writ Petition does not deserve to be entertained for want of standing. The grievances raised are non-justiciable at the behest of the Petitioners and Intervenors involved herein.

(ii) The equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25 to every individual to freely profess, practise and propagate their faith, in accordance with the tenets of their religion.

(iii) Constitutional Morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practise is rational or logical.

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(iv) The Respondents and the Intervenors have made out a plausible case that the Ayyappans or worshippers of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof, which is entitled to the protection provided by Article 26. This is a mixed question of fact and law which ought to be decided before a competent court of civil jurisdiction.

(v) The limited restriction on the entry of women during the notified age- group does not fall within the purview of Article 17 of the Constitution. (vi) Rule 3(b) of the 1965 Rules is not ultra vires Section 3 of the 1965 Act, since the proviso carves out an exception in the case of public worship in a temple for the benefit of any religious denomination or sect thereof, to manage their affairs in matters of religion.

314. In light of the aforesaid discussion and analysis, the Writ Petition cannot be entertained on the grounds enumerated hereinabove. It is ordered accordingly.”

The Hon'ble Supreme Court in the aforesaid case was dealing with total ban of entry of women, whereas the facts of the present case are altogether distinguishable.

61- This Court is dealing with *Jainism* and as already stated earlier that two main sects of *Jainism* are the *Digambar* and the *Shwetambar* sects. Though, both the sects are followers of 24 *Tirthankars*, however, the mode of worship and practice are different. The *Shwetambar* sect is further divided into sub-sect i.e. *Murtipuja* and *Sthanakwasi* and they are further divided into many other sub-sects. The *Digambar* sect is also divided into sub-sect namely *Terapanth*, *Beespanth* and *Taran Panth*. *Taran Panthi* do not worship idol and in their temple, they only worship

Shastras. The *Terapanth* sect does not permit *Panchamrat Abhishek* for various reasons, like after performing *Panchamrat Abhishek*, various element like milk, curd, ghee etc. get struck to the idol, and thereafter, some microscopic organism develop. The microscopic organism and other insects like ant harm the idol and while cleaning the idol, it also results in death of those microscopic organism as well as small insects. They get killed unknowingly and killing, whether it is of insects or microscopic organism, is certainly prohibited in *Jainism* and for this particular reason *Terapanthi* never performed *Panchamrat Abhishek*.

62- The saints (*Munees*) of *Digambar* sect (*Terapanthi*) do not wear cloth and a female devotee is not supposed to touch a male saint and a male devotee is also not permitted to touch a female saint. The Idols of saints are also not covered and as they are idol of male *Tirthankaras*, they are not supposed to be touched by females.

63- Much has been argued that *Abhishek / Panchamrat Abhishek* be permitted to be performed on *Aadinath Bhagwan (Bawangaja)*, the place in dispute and since time immemorial, only *Abhishek* is being performed by *Prasukh Jal* as per the tradition of *Terapanth*. *Terapanth* believes that the only pure lukewarm water is to be used for *Abhishek* purposes.

64- In *Jain Dharma*, even the care has been taken in respect of very old idols, which are deteriorating and in respect of some of the idols, even *Jal Abhishek* is not performed so as to prevent further deterioration. The *Abhishek* is not an essential part of offering to god. There is no restriction on women to enter into the temple and to perform the *Pooja*, however, as per the essential religious practice, only men are permitted to perform *Abhishek* and to touch the idol as it is an idol of male *Tirthankar*.

65- Another important aspect of the case is that even every man is not allowed to perform the *Abhishek* and it is only those man, who after taking bath put on *Dhoti* and *Dupatta*, can perform *Abhishek*.

66- The essential religious practice doctrine was propounded by the Hon'ble Supreme Court in the *Shriur Matt* case and it was held that what constitutes an essential religious practice, shall be determined by the tenets of the religion itself.

67- In the case of *Sabrimala* temple, the majority had held that Rule 3 B of the Rules of 1965 is in clear violation of rights of a Hindu women to practice religion under Article 5 and that Ayyappa devotees do not form a separate denomination. Therefore, it was held by the majority that custom of barring entry of women into *Sabrimala* temple is violative of Article 21 of the Constitution of

India.

68- The practice of performing *Jalabhishek* is continuing since time immemorial and we have got no right to interfere with the old age religious practice, as prayed by the petitioners, especially in light of the fact that there is no ban in respect of entry of women of any age in the temple.

69- This Court is dealing with the *Abhishek* ritual which is being performed by *Digambar (Terapanth)*. It is being performed since time immemorial by *Digambar (Terapanth)* sect. The *Digambar (Terapanth)* sect and *Digambar (Beespanth)* sect have their independent temple and the entry of women is not at all restricted. Even in the Terapanth sect temple, they allow women to enter and perform *Pooja*, however, men are allowed to perform *Jal Abhishek* after taking bath and after wearing *Dhoti* and *Dupatta*. It is an essential religious practice and in no way can be termed as discrimination as argued by learned counsel.

70- The Courts are certainly not meant to write the religious text, however, they are under an obligation to follow the religious text in the matter of cases dealing with religious dispute and to follow the old practices which are prevalent in religion so long as they do not violate constitutional rights of an individual.

71- In the present case by no stretch of imagination, it can

be presumed that the essential religious practice, which is in vogue, is violative of the constitutional right guaranteed to women devotees. The essential religious practice, which is continuing since time immemorial is a method followed by the devotees for achieving the spiritual upliftment and it is not a practice which has been recently introduced.

72- This Court is not a theological wizard and shall be transgressing its role as a constitutionist authority by interfering with the essential religious practice, which is certainly not at all opposed to public order, morality, health or any other fundamental right. Resultantly, no case for interference is made out in the matter and the writ petition is accordingly dismissed.

Certified copy as per rules.

(S. C. SHARMA)
J U D G E

(SHAIENDRA SHUKLA)
J U D G E

Tej / Ravi