
(1985) 03 KL CK 0007

In the High Court Of Kerala

Case No : O.P. No's. 9651, 9692 and 9718 of 1984

K. Krishnankutty, M.L.A. and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 05-03-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 213, 25, 26

Travancore-Cochin Hindu Religious Institutions Act, 1950 — Section 4, 5

Citation : AIR 1985 Ker 148

Hon'ble Judges : Varghese Kalliat, J;V. Bhaskaran Nambiar, J;P.C. Balakrishna Menon, J

Bench : Full Bench

Advocate : P.N.K. Achan, S. Narayanan Poti and T.C.N. Menon, for the Appellant; A.G. and Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran Nambiar, J.—Some of the Hindu Members of the Kerala Legislative Assembly challenge "The Travancore Cochin Hindu Religious Institutions (Amendment) Ordinance, 1984" -- in short the Ordinance -- under which every Hindu member of the Legislative Assembly of this State who intends to participate in the election of one member to the Travancore Devaswom Board is compelled to file a declaration signed by him "to the effect that he believes in God and professes the Hindu religion."

2. The Travancore Cochin Hindu Religious Institutions Act, 1950 (Act XV of 1950) was enacted to make provision "for the administration, supervision and control of incorporated and unincorporated Devaswom and other Hindu Religious Endowments and Funds", of the Travancore, Cochin areas. The Act provides for the vesting of the administration of the Devaswoms in Devaswom Boards, one for the Travancore and another for the Cochin areas and the provisions in respect of the two Devaswoms are practically the same. We are here concerned only with Travancore Devaswom Board, in short, the Board. u/s 3 of the Act:

"The administration of incorporated and unincorporated Devaswoms and of Hindu Religious Endowments and all their properties and funds as well as the funds constituted under the Devaswom Proclamation, 1097 M.E. and the Surplus Fund constituted under the Devaswom (Amendment) Proclamation, 1122 M.E. which were under the management of the Ruler of Travancore prior to the first day of July 1949, except the Sree Padmanabhaswamy temple, Sree Pandaravaga properties and all other properties and funds of the said temple, and the management of all institutions which were under the Devaswom Department shall vest in the Travancore Devaswom Board".

3. Section 4(1) of the Act, prior to its amendment by the Ordinance read thus : --

"The Board referred to in Section 3 shall consist of three Hindu members, two of whom shall be nominated by the Hindus among the Council of Ministers and one elected by the Hindus among the members of the Legislative Assembly of the State of Kerala."

4. The Ordinance substituted this subsection and added Sub-section (1A) with a Explanation reading thus : --

"(1 A) Of the three members of the Board specified in Sub-section (1), two members shall be nominated by the Hindus among the Council of Ministers and one member shall be elected by the Hindus among the members of the Legislative Assembly of the State of Kerala.

Explanation. -- For the purposes of this subsection, "Hindu" means a person who believes in God and professes the Hindu religion".

5. The Board continues to be a body corporate having perpetual succession and a common seal with power to hold and acquire properties for and on behalf of the Devaswoms. The Board exercises supervision and control over the acts and proceedings of all officers and servants of the Board and the Devaswom Department. The Board can make rules, not inconsistent with the Act for carrying out all or any of the purposes of the Act.

6. Procedure for the election of a member to the Board was originally provided in Section 5 which read thus : --

"5. Procedure for the election of member to the Board.-- A meeting of the Hindus among the members of the Legislative Assembly of the State of Kerala shall be summoned under the authority of the Governor of Kerala by any person authorised in this behalf by the Governor of Kerala to meet at such time and place and on such date as may be fixed by him in this behalf for the election of a member to the Board. The election shall be held in accordance with the rules specified in Schedule II by the person commissioned by the Governor of Kerala to preside over the meeting."

This Section 5 was substituted by the Ordinance which reads thus : --

"5. Procedure for the election of member to the Board.-- (1) A meeting of the

Hindus among the members of the Legislative Assembly of the State of Kerala shall be summoned under the authority of the Governor of Kerala, by any person authorised in this behalf by the Governor of Kerala, to meet at such time and place and on such date as may be fixed by him in this behalf, for the election of a member to the Board.

(2) Every Hindu member of the Legislative Assembly of the State of Kerala who intends to participate in the election at the meeting summoned under Sub-section (1) shall, before participating in the election, deliver to the person commissioned by the Governor of Kerala to preside over the meeting, a declaration signed by him to the effect that he believes in God and professes the Hindu religion.

(3) The election shall be held in accordance with the rules specified in Schedule II, by the person commissioned by the Governor of Kerala to preside over the meeting."

7. In fact there was an earlier Ordinance 72 of 1984 promulgated on 10th October, 1984. It was not however laid before the Legislative Assembly when it assembled on 22nd October, 1984. This Assembly was adjourned-sine die on 5th November, 1984 and later prorogued on Seventeenth November, 1984. This Ordinance, 86 of 1984, which is challenged, was promulgated on the 29th of November, 1984, and deemed to have come into force on the 10th day of October, 1984, repeals the earlier Ordinance and saves anything done or any action taken under the previous repealed Ordinance.

8. Admittedly the Board shall consist of three Hindu members, two to be nominated and one to be elected. The vacancy for the elected representative on the Board arose on 22-4-1984. The election has to be held and the procedure for election is contained in the Ordinance and Schedule II of the Act.

9. The Ordinance insists that the members of the Board shall be persons;

(a) who believe in God;

(b) professes the Hindu religion and (c) believe in temple worship.

There is no challenge before us to the qualifications so insisted. The counsel in all the petitions agreed that belief in temple worship is a relevant qualification for membership on the Board when its main function is to administer the temples and thus belief in God cannot also be said to be irrelevant.

10. Just as in the parent Act, so also in the Ordinance, provision is made (1) for nominating two members by the Hindus among the Council of Ministers and (2) for election of one member by the Hindus among the members of the Legislative Assembly. This method of constitution of the Board is also not in challenge before us. It is said that the Hindu Council of Ministers have already nominated Sri M, Bhaikaran Nair to the Board and that nomination is also not challenged.

11. Shri K. Chandrasekharan appearing for the petitioner in O. P. No. 9651 of

1984 submitted that every Hindu member of the Assembly was entitled to vote for electing one member to the Board and when the Ordinance directs that only an Hindu who is a believer in God can participate in the election, there is a "classification among Hindus themselves" which was plainly arbitrary violating Article 14 of the Constitution. He proceeded to state that the members of the Board are trustees for a denomination and there cannot be a classification of this denomination as based on the belief in God or otherwise. He submitted there was violation of Article 26 of the Constitution as well.

12. Shri T. C. N. Menon appearing for the petitioner in O. P. No. 9718 of 1984, on the other hand, while not fully supporting Shri K. Chandrasekharan, in view of the Full Bench decision of this Court in Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others, submitted that the insistence of filing a declaration only for election without a similar statutory directive to the Hindu Council of Ministers when they nominate is naked discrimination attracting Article 14.

13. Shri Section Narayanan Poti, appearing for the petitioner in O. P. No. 9692 of 1984, * directed his attack mainly on the explanation added to section 4 and submitted that when the Ordinance stated that a Hindu means a person who believes in God, it was a qualification which could not be subjected to an objective test, it was vague and indefinite, incapable of proof, unidentifiable and thus has no rational nexus to the object sought to be achieved. When the explanation thus makes no sense, a statutory prescription for filing a declaration u/s 5(2) becomes unnecessary and unconstitutional.

14. All the counsel stressed before us that the Act has stood the test of time from 1950, several nominations and elections have taken place during the period; it was never felt that there should be a definition of Hindu or a statutory explanation for that expression and thus the present attempt to narrow down the concept of Hindu was only to prevent the majority of the Hindu members of the Left Democratic Front, the outnumber the Hindu member of the ruling united Democratic Front from participating in the election.

15. We shall now consider these aspects.

16. The validity of the Parent Act of 1950 was itself challenged before a Full Bench of the Travancore-Cochin High Court and the decision is reported in Nambudripad v. C. D. Board AIR 1956 Tra 19.

17. In that Full Bench decision, Mr. Justice M. Section Menon (as His Lordship then was) speaking for the Bench was considering the question whether the provision conferring the vote to the Hindus among the Council of Ministers and the Legislative Assembly violated Articles 14 and 26 of the Constitution and held thus : --

"It is not possible to accept this contention. What Section 63 has done is to create two electoral colleges, one consisting of the Hindus from among the

Council of Ministers and the other from among the Hindu members of the Legislative Assembly and considering the nature and functions of the Board the restriction of the membership of the electoral colleges to members of the Hindu faith appears to be eminently reasonable.

Whether the voting should be by all the adults professing the Hindu faith or by an electoral college is but a matter of policy. So also are the qualifications which the members of an electoral college should possess and there is apparently nothing wrong in saying that the members of the college shall be not merely Hindus but also Members of the Cabinet or of the Legislative Assembly thus emphasising the ability and aptitudes implicit in the membership of such democratic institutions.

In imposing such a qualification, no wedge is being driven between the Hindu members of the Council of Ministers and the Legislative Assembly, and those who do not follow the Hindu faith.

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"Religion in its broadest sense includes all forms of faith and worship, all the varieties of man's belief in a Superior Being or a Moral Law transcending the things that are Caesar's and demanding his affection and obedience.

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"There is nothing in Sections 63 and 64 which can be considered as an Interference with the right of the Hindu to manage their own attain in matter of religion. We are also not prepared to say that the provision violate! the right of the Hindus to administer according to law the property of their religious institutions and in the light of what is stated above our conclusion is that the restrictions imposed by Sections 63 and 64 in the choice of the members of the Cochin Devaswom Board do not violate the provisions of any of the Articles specified in this issue, namely, Articles 14, 15(1), 19(1)(f) and (g) and 26."

18. There is a decision of a Full Bench of 5 Judges of this Court in Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others,) in what is known as the Guruvayoor Devaswom case, where the Guruvayur Devaswom Act of 1971 was challenged. Mr. Justice Balakrishna Eradi (as His Lordship then was) in an elaborate discussion with reference to all relevant decisions, spoke for a unanimous Bench, on the power of nomination of the members of the Managing Committee of the Guruvayoor Devaswom thus (at pp. 92 and 93 of AIR) : --

"Under Section 4(1) of the Act the legislature has conferred on the State Government the power of nomination of the members of the Managing Committee without sufficient guidelines, thereby rendering it possible for the Government to completely bypass the denomination and appoint a Committee consisting largely or even wholly of persons who may not have any faith at all in temple worship.

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The purpose of ensuring efficient and proper administration of the Devaswom would undoubtedly be better served by a compact committee consisting of persons having faith in the deity and real interest in the affairs of the constitution.

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The right to administer the Temple being vested in the denomination any statutory provision which completely ignores the denomination in the matter of setting up the Committee to administer the religious institution belonging to the denomination will necessarily be violative of Article 26 of the Constitution."

"We find there is considerable force in the contention of the petitioner that a person who "professes" Hindu religion need not be a believer. In temple worship and that on the other hand he may be completely opposed to the practice of idol worship. It is well known that there are sections of Hindus whose schools of thought and philosophy do not consider idol worship, rituals and ceremonials as necessary or even conducive to the spiritual progress of man. There are also political creeds or social theories which openly condemn such forms of worship as being based on mere superstition and ignorance. Many persons, who are born Hindus and who may be said to profess Hinduism solely because they have not openly renounced the Hindu faith by any recognised process, may ardently believe in such political or social ideologies which do not view temple worship with favour. There is nothing in Section 4 which precludes the Government from nominating such persons to be members of the Managing Committee under Clause (g) of Sub-section (1) of Section 4. While apart from the serious prejudice and peril that will be caused to the interests of the institution by reason of such a step, it will not be possible to say that such a Committee constituted with members belonging to the aforementioned types of philosophical or political persuasion represents the religious denomination consisting of the section of the Hindu public having faith in temple worship. We have already referred to the definition of the expression "person having interest" contained in Section 9(9) of the Madras Hindu Religious Endowments Act, 1926. The identical definition is also contained in Section 6(ii) of the Madras Hindu Religious and Charitable Endowments Act, 1951 and it furnishes a useful guideline as to who alone can be considered as a member of the religious denomination in relation to a temple".

19. The counter-affidavit of the Government therefore proceeded to state thus :
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"I state that there was a lot of complaints and criticism about the constitution of the Board and the mode of constitution of the Board and there was also criticism that the persons who elect a member have no faith in God or temple worship and those persons who are unfit to be electors should not be allowed to choose a member to manage the affairs of the Board. Moreover there were certain observations in the Guruvayur Devaswom case, in Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others, , though the

observation therein related to the members of the Board, it was felt that for the proper administration of the Devaswom Board a certain amount of qualifications for the electors should also be made so as to get the affairs of the Devaswom managed by persons who sincerely believe in God and temple worship.

I state that the Government took into consideration of these grievances and complaints voiced by the Hindu public and wanted that those persons who besides professing Hindu religion, believe in God should become an elector so as not to make the election a mockery. The object is to get members of the Board who are really believers in God and temple worships and to achieve that end only electors who profess Hindu religion and believe in God will be in a better position to exercise their franchise properly and in favour of a proper person. The Government thought that to realise the above objectives and in giving effect to this policy the right to participate in the election by the M.L.As. belonging to Hindu Religion should also be regulated so as to have purity in the whole process of election. I state that confining the right to such Hindu members it is not with a view to single out any Hindu M.L.A. The right to be an elector by Hindu M.L.A. was qualified by defining a Hindu as one who professes Hindu religion and believes in God. The mere fact that a person was born of a Hindu does not entitle him to administer the religious institution or gives him a right to participate in the election and choose his own nominee irrespective of his eligibility to participate in the election".

20. On behalf of the State, Sri N. N. Venkatachallam, Senior Government Pleader, has submitted that the right to elect a member is a statutory right and it was therefore well within the power of the statutory authority either to take away that right or to restrict that right by an amendment; that in any case, there was no violation of Article 26 when belief in God is insisted as necessary qualification for an elector under the Act and that there is no violation of Article 14 either.

21. We are afraid that the contention of the petitioners stand on slender thread and in the light of the decision of the Supreme Court and the earlier larger Full Bench ruling of this Court in Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others,) which are binding on us, the contentions will have to be rejected.

22. We shall first deal with the contention based on Articles 25 and 26(b) of the Constitution and we shall take note of mainly three decisions of the Supreme Court. The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., , Ratilal Panachand Gandhi Vs. The State of Bombay and Others, and Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others,) and the Full Bench ruling in the Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others,) :

23. In Ratilal Panachand Gandhi Vs. The State of Bombay and Others, Justice B. K. Mukherjea (as his Lordship then was) observed at page 392 as follows :

"Religious practices or performances of acts in pursuance of religious belief are

as much a part of religion as faith or belief in particular doctrines. 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 those 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.

Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property; belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides."

The same Judge made practically the same observation in the *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, judgment of which was delivered two days earlier.

24. Referring to Article 26(b), the Supreme Court in *Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others*, held thus (Paras 63 and 61):-

"It relates to affairs in matters of religion such as the performance of the religious rites or ceremonies or the observance of religious festivals and the like; it does not refer to the administration of the property at all".

"The right to manage the properties is a purely secular matter and it cannot in our opinion be regarded as a religious practice so as to fall under Article 25(1) or as amounting to affairs in matter of religion".

We are, of course, aware of certain American decisions on the scope and content of Article I introduced by the First Amendment to the American Constitution which, relevant for our purpose, reads thus : --

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

25. On this Article. Thomas Jefferson noted :

"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to

man all his natural rights, convinced he has no natural right in opposition to his social duties."

(Works of Thomas Jefferson)

26. In one of the of quoted paragraphs in *Everson v. Board of Education* (1946) 330 US 1 at pages 15, 16 in one of the extensive discussion of the "Establishment" clause, Justice Black wrote : --

"The "establishment of religion" clause of the First Amendment means at least this" Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force her influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment or religion by law was intended to erect "a wall of separation between church and State"."

27. In *Mc Gowan v. Maryland* (1961) 366 US 420 : 6 L E 2 393 the issue in that case was concerned with the validity of Maryland criminal statutes commonly known as Sunday closing laws or Sunday blue laws which prescribed all labour, business and other commercial activities (except the excepted varieties) on Sundry. Delivering the opinion of the Court. Chief Justice Warren proceeded to state :

"The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State".

"Moreover, it is common knowledge that the first day of the week has come to have a special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainment, for dining out, and the like. "Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer.." 308 Parliamentary Debates, Common 2159. Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most

persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion", and finally cautioned thus :-

"We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose -- evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect -- is to use the State's coercive power to aid religion".

The other Sunday retail sale cases in the same volume are -- From Harrison-Allentown v. Me Ginley (1961) 366 US 582 : 6 Law Ed 2d 551 and Braunfeld v. Brown (1961) 366 US 599 : 6 Law ed 2d 563. In this decision Chief Justice Warren announcing the judgment of the Court and an opinion in which Mr. Justice Black, Mr. Justice Clark and Mr. Justice Shittaker concurred said thus : --

"To strike down, without the most critical scrutiny, legislation which imposed only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."

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"If the purpose or effect of a law is to impede the observance of one or all religious or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden".

28. In *Torcaso v. Watkins* (1961) 367 US 488 : 6 Law ed 2d 982 *Torcaso* was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God. The action was brought to compel the issuance of his commission. Mr. Justice Black delivering the opinion of the Court, noted that when the American Constitution was adopted the desire to put the people "securely beyond the reach" of religious test oaths brought about the inclusion in Article 6 of the Constitution of the United States, a provision "no religious test shall ever be required as a qualification to any office or public trust under the United States". It was held that "there could not be a State imposed criteria forbidden by the Constitution".

29. We need not go thus far for, we have a recent illuminating decision of the Supreme Court in *Section P. Mittal v. Union of India* : AIR 1983 SC 1 (Paras 125 and 135) where Mr. Justice Misra speaking for Chief Justice Chandrachud, Bhagwati and Balakrishna Eradi, JJ. also, has dealt at length on the implication of the word "religion", on the content of religious denomination, and on the ambit

and scope of Articles 25 and 26 of the Constitution. It was held that the Auroville (Emergency Provisions) Act (59 of 1980)

"does not stand in the way of the Society establishing and maintaining institutions for religious and charitable purposes. It also does not stand in the way of the Society to manage its affairs in matters of religion. It has only taken over the management of the Auroville by the Society in respect of the secular matters. The position before the Present Constitution came into force was that the State did not interfere in matters of religion in its doctrinal and ritualistic aspects treating it as a private purpose, but it did exercise control over the administration of property endowed for religious institutions (dedicated to the public) treating it as a public purpose, and this position has not changed even under the present Constitution. ILR (1955) Mad 355 ; Kidangazhi Manakkal Narayanan Nambudiripad and Others Vs. State of Madras and Another, ".

"On an analysis of the aforesaid cases it is evidence that even assuming that the Society or Auroville was a religious denomination, Clause (b) of Article 26 guarantees to a religious denomination a right to manage its own affairs in matters of religion. It will be seen that besides the right to manage its own affairs in matters of religion, which is given by Clause (b) the next two clauses of Article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to a religious group or institution are not matters of religion to which Clause (b) of the article applies. The impugned Act had not taken away the right of Management in matters of religion of a religious denomination, if the Society or Auroville is a religious denomination at all, rather it has taken away the right of management of the property of Auroville".

30. We may also note that the Full Bench decision of this Court in Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others, was cited with approval in the above case.

31. On the scope of Article 26(b), the Full Bench in Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others, observed thus : --

"As already noticed, religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Under Article 26(b) a religious denomination enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion and no outside authority has any jurisdiction to interfere in such matters."

32. Matters of religion form the core of guarantee under Articles 25 and 26(b) of

the Constitution. While both the Articles are subject to public order, morality and health, the freedom of conscience and the right freely to profess, practice and propagate religion guaranteed under Article 25 are subject to other provisions in Part III; however, the right guaranteed under Article 26(b) to manage its own affairs in matters of religion in favour of religious denomination or any section thereof is more absolute in its terms and beyond the pale of any legislative interference.

33. Religious practices have thus constitutional protection under these two Articles and "a practice in regard to a matter which is purely secular and has no element of religion associated with it" remains positively outside this constitutional enclosure of Article 26(b). Right to manage the devaswom fund of the temple properties is a purely secular matter outside the purview of Articles 25 and 26(b).

34. Article 26(d) guarantees to the religious denomination or any section thereof, the right to administer the property and institutions for religious and charitable purposes in accordance with law. The Ordinance as a legislative exercise by the Governor under Article 213 of the Constitution is law. This law has provided for the constitution of a Board to manage and supervise the temples and their properties. There is no case that the Ordinance has taken away the right of administration altogether from the religious denomination or vested it in any other secular authority. There is thus no violation of Article 26(d). But the law so made is amenable to challenge as violating any other provision in Part III of the Constitution. If it offends Article 14, as is contended in this case, that law is liable to be struck down on that ground. We shall therefore proceed to consider the next challenge made under Article 14.

35. Article 14 is violated, according to Shri Chandrasekharan, as there is a Sub-classification of a denomination, a classification among Hindus themselves and this is plainly arbitrary. It is in this context that we have to remember that the Ordinance promulgated in the wake of the Full Bench ruling in the Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others, . This Court took note of the fact that a person who professes Hindu religion need not be a believer in temple worship and he may be completely opposed to the practice of idol worship. The Full Bench therefore continued "that serious prejudice and peril" would be caused if the management of temple is entrusted to persons who have no faith in temple worship; and constitution of a committee with those unbelievers in God and temple worship will not be a representative of the denomination "consisting of the section of the Hindu public having faith in temple worship"

36. Bound as we are by the Full Bench ruling of five Judges, we have no hesitation in holding in these cases that the denomination in question is the Hindu public having belief in God and faith in temple worship. Representatives of this denomination in the legislative assembly can elect one member to the Board and that member also has to fulfil these qualifications, namely, belief in God and

belief in temple worship. There is no question of Sub-classification of a denomination and a favoured treatment to one class and a hostile discrimination against the rest attracting Article 14 of the Constitution. The only contention raised by Shri K. Chandrasekharan in O.P. No. 9651 of 1984 based on Article 14 has thus to be rejected.

37. Article 14 is pressed into service also on the ground that the Hindu members of the legislative assembly are alone required to file a declaration that they believe in God and profess the Hindu religion, while no such declaration is insisted from the Hindu Council of Ministers when nominating two members to the Board. The Act fixes the qualifications of the members of the electoral college. The person who is commissioned by the Governor to preside over the meeting virtually functions, as the returning officer. He is an outside authority. He has to be satisfied that the members participating in the election have the qualification prescribed. For that purpose alone a declaration is demanded. The declaration prescribed under the Ordinance is a legislative formality to identify the Hindu members of the Assembly who are entitled to participate in the election. The declaration is a passport to vote at the election. It is no authority to the Presiding Officer to test the veracity of the statements made in the declaration. In fact he has no such power conferred under the statute. If a declaration prescribed by the Ordinance is handed over to him, he is bound to accept the same and proceed with the election process.

38. The Act and the Ordinance contemplate both nomination and election for constituting the Board. The power of nomination is virtually a power of appointment conferred on the Hindu members among the Council of Ministers. The power conferred on the Hindu members of the Assembly is the power to elect. The fact therefore a declaration is not insisted from the Hindus among the Council of Ministers before they exercise the power of nomination cannot invalidate the provision in respect of another class belonging to an electoral college where a declaration is insisted. The Hindus among Council of Ministers, as long as they are members of the legislature, can also participate in the election. If they so participate, they are also bound to file the declaration. They can claim no exemption on the ground that they are Ministers and Ordinance does not give them any favoured treatment for participating in the election.

39. It is significant to note that in view of the explanation added to Section 4 of the Act, even the Hindus among the Council of Ministers shall also be believers in God and profess the Hindu religion. A Hindu Minister, a non believer in God, cannot participate in the process of nomination. As to how the Hindu Minister will satisfy his counterparts in the Ministry whether he is a believer in God is a matter of procedure which those Ministers can prescribe administratively and absence of a statutory provision cannot invalidate the other independent provision relating to election.

40. When the Ordinance insists that the Hindu member of the assembly should be a believer in God, an open assertion by him by way of a declaration is the

most significant visible indication of his belief and that alone is the statutory demand. It is relevant to note in this connection that in *Ganpat v. Presiding Officer* AIR 1975 SC 42 (at pp. 424 and 425), the Supreme Court observed as follows : --

"Hinduism is so tolerant and Hindu religious practices so varied and eclectic that one would find it difficult to say whether one is practising or professing Hindu religion or not.

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Religion is essentially a highly personal matter and there the open assertion by a person especially an educated member of the society about the religion he professes should be given considerable weight over the interested testimony of others based on stray instances".

There is thus no violation of Article 14, even on this basis, the only ground urged in O.P. No. 9718 of 1984.

41. Article 14 is also invoked on a slightly different basis in O.P. No. 9692 of 1984 where the explanation to section 4 is itself challenged. It is contended that the qualification, belief in God is not capable of objective proof, that it is vague and has no relation to the object sought to be achieved. When belief in temple worship is a necessary pre-requisite for temple administration, it postulates belief in God also. There is no challenge and rightly too, to the prescription of this qualification for the members to be nominated or elected. If so, [he prescription of this qualification for the electorate promises to realise the object sought to be achieved. The earlier Full Bench decision in *Tharamel Krishnan Vs. Guruvayoor Devaswom Managing Committee and Others*,) has in unmistakable terms held that the administration of a temple cannot be entrusted to non-beliveres in God who have no faith in temple worship. They may destroy the institution from within, and pose real and grave danger to the smooth administration of the religious institution. This ground, the only one raised in this O.P. has also to be rejected.

42. We also see considerable force in the plea of the learned Senior Government Pleader that the right to elect a member is a statutory right, not a fundamental right, which can be impaired, curtailed or even destroyed by the statute provision itself. He relies on the decision in *Jumuna Prasad Mukhariya and Others Vs. Lachhi Ram and Others*, (at p. 688) for this purpose. Referring to the representation of the People Act, the Supreme Court observed thus : --

"The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute. The appellants have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. If they prefer to exercise their right of free speech

outside these rules, the impugned sections do not stop them. We hold that these sections are "intra vires".

43. In this case also, the right to elect a member to the Board is a right created by statute and not a fundamental right. In the exercise of the right conferred by the Statute, conditions prescribed by the statute have also to be followed. The right to elect is thus subject to the conditions so imposed. In this view also, the contention of the petitioner based on an alleged violation of a fundamental right cannot be accepted.

44. There was a faint argument by Sri K. Chandrasakharan that successive Ordinances are not contemplated under the Constitution and the Ordinance is a fraud on the powers conferred under Article 213. He relied on the decision in *Tamizuddin Ahmad v. Province of East Bengal* AIR 1949 Dacca 33 and submitted that the decision of the Palna High Court in *Mathura Prasad Singh and Others Vs. The State of Bihar and Others*, does not lay down the correct law.

45. The power of the Governor to promulgate ordinance is contained in Article 213 of the Constitution. It is an exercise of legislative power during recess of the legislature. The Governor has to be satisfied "that circumstances exist which render it necessary for him to take immediate action". The Ordinance shall have the same force and effect as an Act of the legislature of the State. It has to be laid before the legislative Assembly of the State and shall cease to operate at the expiration of six weeks from the reassembly of the legislature, or earlier, if disapproved by the Assembly. The Governor may also withdraw the Ordinance at any time. This, in brief, is the content of the power under Article 213 of the Constitution.

46. The Constitution limits the duration of the Ordinance but does not limit the number of times the power can be exercised by the Governor on the same subject. However, it is useful to remember the caution administered by Chief Justice Chandrachud in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, at p. 721) in these words :

"The Constituent Assembly therefore conferred upon the executive the power to legislate, not of course intending that the said power should be used recklessly or by imagining a state of affairs to exist when, in fact, it did not exist, nor, indeed, intending that it should be used mala fide in order to prevent the people's elected representatives from passing or rejecting a Bill after a free and open discussion, which is of the essence of democratic process. Having conferred upon the executive the power to legislate by ordinances, if the circumstances were such as to make the exercise of that power necessary, the Constituent Assembly subjected that power to the self-same restraints to which a law passed by the legislature is subject. That is the compromise which they made between the powers of the Government and the liberties of the people.

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An ordinance issued by the President or the Governor is as much law as an Act passed by the Parliament and is, fortunately and unquestionably, subject to the same inhibitions. In those inhibitions lies the safety of the people. The debates of the Constituent Assembly (Vol. 8, Part V, Chapter III, pp. 201 to 217) would show that the power to issue ordinances was regarded as a necessary evil. That power was to be used to meet extraordinary situations and not perverted to serve political ends. The Constituent Assembly held forth, as it were, an assurance to the people that an extraordinary power shall not be used in order to perpetuate a fraud on the Constitution which is conceived with so much faith and vision. That assurance must in all events be made good and the balance struck by the founding fathers between the powers of the Government and the liberties of the people not disturbed or destroyed."

47. It may be that the subjective satisfaction of the Governor to promulgate an Ordinance is not justiciable. But when the Ordinance is not laid before the Assembly at any time as enjoined under Article 213, and successive Ordinances are promulgated while the Assembly is not in session and the Assembly is prevented from approving or rejecting the Bill, an occasion may then arise for a consideration whether the said exercise of the power is not a fraud on the Constitution.

48. In the present case, the Ordinance was promulgated when the earlier ordinance was in force and it repealed the same and it was given retrospective effect also. The Assembly is to meet soon, and we have no doubt it will be laid before the next Assembly. It cannot be said that the promulgation of this Ordinance is a fraud on the Constitution and at any rate, there is no factual foundation to come to any such conclusion.

49. In *Tamizuddin Ahmad v. Province of East Bengal* AIR 1949 Dac 33 the Preventive Detention (Continuance) Ordinance, 1949 was challenged. It was rightly held by the Court that the Governor had no power to continue its life by another ordinance and the life of the ordinance was limited by the provision in the Government of India Act. That court did not consider the power of the Governor to promulgate a fresh ordinance on the same subject after the expiry of the first ordinance.

50. In *Mathura Prasad Singh and Others Vs. The State of Bihar and Others*, the court held that "it is not for the Court to declare an ordinance ultra vires on the score of Rule by successive ordinances. It is for the Legislature of the State to disapprove it, if the State is sought to be ruled by successive ordinances as and when it meets, or for the electorate to disapprove of the conduct of its accredited representatives at the next poll". We have got considerable doubts whether the court cannot in such a case interfere when it is clearly shown that the issuance of successive ordinances was in fraud of the constitution and the exercise of the power. We, however, do not express any final opinion in this case, as it does not arise for decision now. No other points raised.

In the result, the challenge made to the Travancore Cochin Hindu Religious Institutions (Amendment) Ordinance, 1984, does not stand and the Original Petitions are dismissed. In the circumstances of the case, the parties are directed to bear their costs.