

(2015) 07 KL CK 0041

In the High Court Of Kerala

Case No : WP(C). Nos. 8010 of 2011 (A), 8388, 10040, 11343 of 2011 and 24154 of 2012

Krishna Das C. and Others

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 02-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 25, 25 (2), 25(1)
Kerala Panchayat Raj Act, 1994 — Section 116, 166, 166(1), 172, 191

Citation : (2015) 07 KL CK 0041

Hon'ble Judges : Ashok Bhushan, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : P.B. Krishnan, Geetha P. Menon and P.B. Subramanyan, for the Appellant; P. Jayasankar, Spl. Govt. Pleader, Advocates for the Respondent

Judgement

Ashok Bhushan, C.J—These five Writ Petitions raise inter related issues of facts and law, hence those are heard together and are being decided by this common judgment.

2. "Ivor Madom" located at Pampadi desom in Thiruvilwamala Grama Panchayat (for short, "the Panchayat") on the banks of river Bharathapuzha is believed as one of the sacred burning ghats in South India by Hindus. The main issue is as to whether the Panchayat can pass a Resolution restricting the use of the burning ghat only by persons within the territorial limits of the Panchayat.

3. The sequence of events and facts giving rise to the above Writ Petitions are:

4. W.P(C) No. 8010 of 2011 (Krishna Das C. and another v. State of Kerala and Others) has been filed by two petitioners. The 1st petitioner claims to be a resident of the Panchayat and the 2nd petitioner claims to be a permanent resident of the Kadukutty Grama Panchayat. Petitioners pleaded that Ivor Madom situated on the banks of river Bharathapuzha is one of the most sacred burning ghats in the country. It is recognized as "Dakshina Kasi" and one among the five

holy sites for cremation in the Country. It is pleaded that the five sites are Kasi on the banks of river Ganga, Swarga Dwar at Puri, Pushkar in Ajmer, Siddapur on the banks of Narmada and Ivor Madom on the banks of river Bharathapuzha. It is submitted that there is no similar sites for cremation in the State. Petitioners' case is that in view of the special status of Ivor Madom dead bodies from far and wide are cremated in that burning ghat. In the olden days dead bodies from the erstwhile Cochin State, Malabar and Venganad were cremated at Ivor Madom and that situation has remained the same after the advent of the Constitution. On 05.03.2011, a Resolution has been passed by the Panchayat that from 01.04.2011 onwards dead bodies from outside the Panchayat will not be permitted to be cremated at the burning ghat at Ivor Madom. Petitioners claimed that the decision has been objected by many quarters, in support of which a petition submitted by the Government Home for Physically Handicapped and aged, Koduvayur in March is annexed as Ext. P2. Another letter dated 11.03.2011 from Asrayam Charitable Society is annexed as Ext. P3. Both the petitioners challenged the decision of the Panchayat dated 05.03.2011 and has filed the Writ Petition praying for the following reliefs:

"(i) Issue a writ of certiorari or any other appropriate writ, order or direction quashing Ext. P1.

(ii) Issue a Writ of mandamus or any other writ, order or direction directing respondents 2 and 3 to consider and dispose of Exts. P2 to P4 petitions in accordance with law.

(iii) Grant the petitioners such other appropriate reliefs that this Hon'ble Court may deem fit to grant and

(iv) Award the petitioners the cost of this Writ Petition."

In the Writ Petition counter affidavit has been filed by the Panchayat, to which reply affidavit has also been filed by the petitioners.

5. W.P(C) No. 8388 of 2011 (K. Krishnakumar v. State of Kerala and Others) has been filed by the petitioner who is an Advocate practising in Ottappalam Bar. Petitioner pleads that all that is included between the periods when a human soul gets into the womb of a mother until the body ends in a crematorium freeing the soul, is decided in accordance with spiritual rights which is the basic concept of "Shodasha Samskar" as believed and followed by a Hindu. It is pleaded that in the five snana ghats on the banks of river Bharathapuzha cremation is done only in Thiruvilwamala. Petitioner further pleads that what is "manikarnika ghat in Varanasi is "Thiruvilwamala to Bharathapuzha." Petitioner challenges the Resolution, Ext. P1, passed by the Panchayat prohibiting cremation of dead bodies from outside the Panchayat from 01.04.2011. Counter affidavit has been filed by the Panchayat.

6. W.P(C) No. 10040 of 2011 (Thiruvilwamala Grama Panchayat v. State of Kerala and others) has been filed by the Panchayat in which it is pleaded that the

petitioner is maintaining a burial ground in compliance with the Kerala Panchayat Raj (Burial and Burning Grounds) Rules, 1998 (hereinafter referred to as "the 1998 Rules") which burial ground is situated in the banks of river Bharathapuzha. A Sree Krishna Temple is situated on the banks of river Bharathapuzha. It is submitted that when number of bodies brought for cremation started to increase, people in the locality started making complaints to the Panchayat. A mass petition dated 23.10.2010 was received by the Panchayat signed by more than 150 persons complaining foul smell and smoke due to large number of cremations done, then the Panchayat took up the issue. On the basis of the complaints of the residents, the District Medical Officer (Health), Thrissur on 25.10.2010 directed the Panchayat to implement certain decisions in order to alleviate the grievance of the local people. The matter was considered by the Panchayat at its meeting held on 14.02.2011 where the Panchayat decided to call for an all party meeting to decide the issue. All party meeting was held on 26.02.2011. The matter was thereafter considered by the Panchayat in its meeting dated 05.03.2011 where it is decided to prevent the entry of dead bodies from other places for cremation. It is pleaded that a person, namely, A.V. Sasi submitted a complaint before the State Government challenging the decision of the Panchayat dated 05.03.2011. Exercising the powers under Section 191(4) of the Kerala Panchayat Raj Act, 1994 (hereinafter referred to as "the 1994 Act") the Government stayed the operation of the resolution dated 05.03.2011. The Panchayat feeling aggrieved by the decision of the State Government dated 19.03.2011 has filed this Writ Petition praying for quashing the decision of the State Government, Ext. P11. Panchayat pleads that the decision dated 19.03.2011 is beyond the jurisdiction of the State Government.

7. W.P(C) No. 24154 of 2012 (Ramakrishnan Nair @ Chinnan Nair v. District Superintendent of Police (Rural), Thrissur and Othres) has been filed by the petitioner of Kanjuli Family claiming to be Head Karmi who has been conducting funeral rituals as per the Hindu rites at Ivor Madom on the banks of river Bharathapuzha. Petitioner claims that Kanjulli Family is the only family in the area belonging to the Nair Community who is engaged in performing the customary rituals for the last 60 years. It is pleaded that Ivor Madom located on the banks of river Bharathapuzha is one of the most sacred burning ghats in the country. As per the belief of Hindus Ivor Madom known as the "Dakshin Kashi" is the only site available for the Hindus in South India to have a holy burial. It is pleaded that the Panchayat at the instance of certain persons having vested interest passed the Resolution on 05.03.2011 where it was decided to allow dead bodies of persons belonging to the Panchayat alone to be cremated in the burning ghat. The State Government has stayed the Resolution by order dated 19.03.2011 and thereafter referred the matter to the Ombudsman for Local Self Government Institutions which is pending as O.P. No. 518 of 2011. Reference of W.P(C) Nos. 8010 and 8388 of 2011 filed in this Court against the Resolution has also been made. It is pleaded that when persons from outside come to the burning ghat along with the petitioner or other Karmis for performing the rituals,

respondents 4 to 10 abuse and obstruct them. Petitioner claims to have filed a complaint on 21.09.2012 seeking police protection for the conduct of the rituals. Other complaints were submitted before the 1st and 3rd respondents. Petitioner requested respondents 1 to 3 to extend sufficient protection for peaceful conduct of cremation of the dead at Ivor Madom. But since respondents 1 to 3 are not affording sufficient protection serious law and order situation has arisen in the area since people with corpses of their dear ones are prevented from entering the cremation site. Reference of certain crimes registered against persons for separate offences has also been referred to. Petitioner has prayed for a direction to respondents 1 to 3 to provide adequate and effective police protection for the life of the petitioner and his disciples and also for the peaceful conduct of cremation without any interference from respondents 4 to 10.

8. W.P(C) No. 11343 (PIL) (S. Murugesan and another v. State of Kerala and Others) has been filed by two petitioners who claimed to be residents of the Panchayat. Petitioners plead that there is a burial ground in the Panchayat which is constructed by the Panchayat for the purpose of cremating dead bodies of the people in the Panchayat. It is pleaded that there is a Sree Krishna Temple situated on the banks of river Bharathapuzha which belonged to one Mannur Nair Family, which family being not available to manage the affairs of the temple, the temple was entrusted to a person who created a Trust, namely, Ivor Madom Trust where he provided facilities for conducting the rites of the Hindus living in the area. It is pleaded that initially the bodies that used to be cremated in the Panchayat used to be around 1 body a day. However, as the name of Ivor Madom started to grow the number of dead bodies being brought for cremation started to increase. Dead bodies from Tamil Nadu, Andhra, etc., were also brought to the Panchayat for cremation. It is pleaded that at present approximately 70-80 dead bodies are cremated in open place every day. Roughly 300kgs of firewood is required to completely burn one dead body. The entire water of the Panchayat comes from river Bharathapuzha. There is no other water source for the Panchayat. Large amount of pollution is caused by this large scale burning/disposal of bodies and the water content in the river is contaminated. The dead bodies are usually accompanied by cloths, flowers, boxes, plastic materials, haystack, etc. In the election to the Panchayat the prevention of burning of corpses from outside was a major election issue. While the then ruling party was in favour of permitting the dead bodies from other place to be cremated in the Panchayat, the opposition UDF was against such large scale cremation on account of pollution. The results of the election saw the UDF coming to power in the Panchayat on this sole issue. Complaints were submitted by local residents and the Panchayat acting on the complaint Ext. P1 as well as on the election promise made by the present ruling party decided to call for an all party meeting to decide the issue. On the basis of the all party meeting held on 26.02.2011 the matter was considered and Resolution dated 05.03.2011 was passed. The State Government without notice to the Panchayat has passed Orders staying the Resolution of the Panchayat. Petitioners pray for a writ of certiorari quashing Ext.

P5 order issued by the State Government. It is prayed that a declaration be granted that the State Government does not have the authority to interfere or cancel Resolution of the Panchayat without complying with the principles of natural justice.

9. A statement has been filed on behalf of the 2nd respondent, Under Secretary, Local Self Government, Thiruvananthapuram. In the statement it is stated that a belief that the Pandavas, the mythological characters from Mahabharatha had performed the last rites of their parents at the above place is prevailing in the area and therefore it is considered as a holy place to conduct the last rites of departed ones, hence a large number of dead bodies from far and near are being brought to the above site for burning and burial to the crematorium of the Ivor Madom and Panchayat burial ground. After decision on 05.03.2011 of the Panchayat prohibiting bodies from outside the Panchayat, a State wide protest sparked from the Hindu Community since it was believed by a majority belonging to the above Community that by cremating their dear ones at the banks of Bharathapuzha their souls would achieve Moksha and that prevention of the same amounted to committing a wrong against the dead. The State Government justified its decision dated 19.03.2011 under Section 191(4) of the 1994 Act.

10. A petition for impleading has also been filed by the Pambady Smasana Samrakshana Janakeeya Samithi which claim to have been constituted for the purpose of protecting the environment against the pollution caused on account of increased burial of dead bodies at Ivor Madam.

11. We have heard Shri P.B. Krishnan, learned counsel for petitioner in W.P(C) No. 8010 of 2011, Shri P.K. Suresh Kumar in W.P(C) No. 8388 of 2011, Shri Binoy Vasudevan in W.P(C) No. 10040 of 2011, Shri Bechu Kurian Thomas in W.P(C) No. 24154 of 2011, Shri Rajit, learned counsel for the petitioner in W.P(C) No. 11343 of 2011, learned counsel for the 6th respondent in W.P(C) No. 8010 of 2011 and P. Jayashankar, learned Special Government Pleader for the State Government. Shri G. Sreekumar Chelur has appeared for the respondents in W.P(C) No. 24154 of 2012.

12. Shri P.B. Krishnan, learned counsel challenging the Resolution of the Panchayat dated 05.03.2011 submitted that the Resolution of the Panchayat is in violation of the fundamental rights of large number of Hindu Community which has faith and belief that by cremation at the banks of Bharathapuzha in Pampadi desom the deads will get Moksham. It is submitted that the burning ghat in question is regarded as one of the five sacred cremation grounds in the country and one of the most sacred burning ghats in South India. It is submitted that cremation of bodies from different States in South India has been coming for time immemorial. It is submitted that performance of certain rituals pertaining to the last rites is religious practice which is part of Religion, and prohibiting cremation of bodies from outside the Panchayat area is infringement of faith which right is protected by Article 25 of the Constitution of India. He further submitted that under the 1994 Act, 1998 Rules have been framed which provides

for a statutory procedure for closing down a crematorium. It is submitted that before closing down objections are to be invited and there has to be approval of Collector. It is submitted that the Panchayat cannot take a decision on 05.03.2011 for closure of the burning ghat for dead bodies of persons from outside the Panchayat area. It is submitted that the Panchayat has no jurisdiction to prohibit persons from outside the Panchayat to use the burning ghat. It is submitted that Panchayat is claiming its cremation ground only in 54 cents in Sy. Nos. 443/3, 444 and 446/6 of Pampadi Village whereas in the settlement register prepared in 1928 burning ghat of Thiruvilwamala Panchayat is situated in Sy. No. 443 in 2.41. acres It is submitted that the said area is recorded in the Survey Settlement Register prepared in 1928 of the Pampadi Village as Hindu Community cremation ground. It is submitted that Panchayat claims only an area of 54 cents in the above mentioned three plots and hence does not have any right to interfere with the area which is recorded as Hindu Community cremation ground. It is further submitted that the Panchayat cannot take a decision excluding persons outside the Panchayat area from using the burning ghat. Learned counsel for other petitioners who challenges the decision of the Panchayat made similar submissions objecting the resolution of the Panchayat.

13. Shri Bechu Kurian Thomas learned counsel appearing for the petitioner in W.P(C) No. 24154 of 2012 submitted that petitioner does not want any adjudication of the right of the petitioner except that adequate protection be provided for cremation of dead bodies coming from far and away so that, last rites of the dead can be peacefully performed. It is submitted that performance of last rites at the banks of river Bharathapuzha is in accordance with the faith and belief of Hindu Community which cannot be allowed to be interfered with by the Panchayat.

14. Learned counsel for the Panchayat supported the decision of the Panchayat dated 05.03.2011. It is submitted that Panchayat has taken a decision on account of the increasing pollution due to 70-80 dead bodies being cremated every day on the banks of river Bharathapuzha. It is submitted that due to smoke and foul smell inhabitants of the Panchayat area are suffering. It is submitted that a decision has been taken to mitigate the grievance of the residents of the Panchayat. It is submitted that there is no infringement of right of any person to cremate bodies at the banks of Bharathapuzha. It is further submitted that the Panchayat has full jurisdiction to pass a Resolution stopping cremation of dead body from 01.04.2011. Learned counsel for the Panchayat in support of the Writ Petition submitted that the decision of the Government is beyond the scope of jurisdiction of the State Government under Section 191 of the 1994 Act. It is submitted that the Government can exercise the power of cancellation and suspension of resolution on any of the grounds mentioned in Section 191(1) of the 1994 Act. It is submitted that reasons given on the order of the State Government dated 19.03.2011 is not covered by any of the grounds given in Section 191(1) of the 1994 Act hence the Government could not have exercised the power for staying resolution of the Panchayat.

15. Learned counsel for the petitioner in the Public Interest Litigation has also challenged the decision of the State Government dated 19.03.11 suspending the Resolution of the Panchayat. Learned counsel submitted that the decision of the Panchayat has been taken due to environmental pollution. He further contended that there is no basis for any such belief as submitted by the learned counsel for the petitioner that by cremation on the banks of the river Bharathapuzha Moksh is obtained. It is submitted that serious environmental pollution is caused by cremation of bodies by burning of firewood and other pollution materials brought along with the dead bodies.

16. Learned counsel for the parties have placed reliance on various judgments of the Apex Court and this Court which shall be referred to while considering the submissions in detail.

17. From the submissions of the learned counsel for the parties and the pleadings on record in the above Writ Petitions the following Issues arise for decision:

"I. Whether Article 25 of the Constitution of India protects the rights of the members of the Hindu Community situate outside the Panchayat area of Thiruvilwamala Grama Panchayat to perform the last rites in the burning ghat, Ivor Madom, Pampadi Village on the banks of the Bharathapuzha?

II. Whether the resolution of the Panchayat dated 05.03.2011 prohibiting the members of the Hindu Community situated outside the Panchayat area with effect from 01.04.2011 to use the burning ghat is not in accordance with the provisions of the 1994 Act and 1998 Rules?

III. Whether the order of the State Government dated 19.03.2011 is not in accordance with Section 191 of the Act and deserves to be set aside?

IV. Whether the Hindu Community burning ghat situated on the banks of Bharathapuzha situated in an area of 2.41 acres in Sy. No. 243 is in addition to and different from 54 cents of land claimed by the Grama Panchayat as burning ghat in Sy. No. 443/3, 444 and 444/6 of Pampadi Village?"

18. Existence of burning ghat at Pampadi desom in the Panchayat on the banks of river Bharathapuzha is an admitted fact. It is also not in dispute that the burning ghat is being used by the Hindu Community for the last several decades. In W.P(C) No. 8010 of 2011 a copy of Survey Settlement Register of Sy. Nos. 443, 444, 445 and 446 claimed to be prepared in 1928 is brought on record as Ext. P5 whereas in Sy. No. 443 Hindu cremation ground is recorded. Burning of bodies brought from far and away places on the banks of river Bharathapuzha is not in dispute. The dispute arose only after a resolution was passed by the Panchayat on 05.03.2011 providing that from 01.04.2011 onwards dead bodies from outside the Panchayat will not be cremated. It is useful to quote the resolution (Translated in English) 05.03.2011 which is to the following effect:

"Decision No. 6 taken at the ordinary meeting of Thiruvilwamala Grama

Panchayat held on 05.03.2011

The meeting considered the decision taken at the meeting held on 26.02.2011 of all parties and prominent citizens regarding the limiting of the use of public crematorium of the Thiruvalluvar Grama Panchayat to the residents of Thiruvalluvar. The opposition members wanted an alternative arrangement to be made. In the ensuing discussion it was decided that from 01.04.2011 onwards dead bodies from outside the Panchayat will not be permitted to be cremated. It was also decided by majority that conduct of obsequies can be encouraged. It was decided at the meeting that the information can be conveyed to the general public through flex board and the media.

Sd/- President

True copy Secretary"

Resolution dated 05.03.2011 although does not give any reason for the decision taken, but from the materials brought on record it does appear that the said decision was taken on complaints submitted by the residents of the Panchayat that by burning dead bodies environment is being polluted due to smoke and foul smell. The complaint refers to foul smell, smoke, environmental problems, etc., with regard to pollution on account of cloths, etc., attached on the dead bodies being thrown into the river. The Resolution dated 05.03.2011 thus has to be related to the issue of environmental pollution as pleaded on behalf of the respondents. The order passed by the State Government dated 19.03.2011 is claimed to be passed by the Government on account of wide spread protest by the Hindu Community on the resolution dated 05.03.2011 of the Panchayat. The statutory provisions governing the Panchayat which is in force at present is the 1994 Act. Under Section 254(1) the Government is empowered to make rules to carry out all or any purpose of the 1994 Act. Section 254(2) enumerates the subjects on which any particular rule can be framed. Section 254(1) and 254(2) (i) are quoted below:

"254. Power of Government to make rules.- (1) The Government may, by notification in the Gazette, make rules either prospectively or retrospectively to carry out all or any purposes of this Act.

(2) In Particular and without prejudice to the generality of the foregoing power, the Government may make rules.-

(i) as to the provision of burial and burning grounds, the licensing of private burial and burning grounds, the regulation of the use of all grounds so provided or licenced, the closing of any such grounds and the prohibition of the disposal of corpses except in such grounds or other permitted places."

19. In exercise of the power under Section 254 of the 1994 Act, 1998 Rules have been framed containing different provisions pertaining to providing of burial and burning grounds, registration of cemeteries, prohibition of cemeteries on the ground of danger to health, overcrowding, etc. Provisions and Rules shall be

referred to while considering the respective submissions.

20. Section 166 of the 1994 Act enumerates the powers, duties and functions of the Panchayat which is to the following effect:

"166. Powers, duties and functions of Village Panchayat.- (1) It shall be duty of the Village Panchayat to meet the requirements of the Village Panchayat area in respect of the matters enumerated in the Third Schedule.

Provided that it shall be the duty of the Village Panchayat to render services to the inhabitants of the Village Panchayat area in respect of the matters enumerated as mandatory functions in the Third Schedule.

(2) Subject to the other provisions of this Act and the guidelines and assistance financial, technical or otherwise, of the Government, the Village Panchayat shall have exclusive power to administer the matters enumerated in the Third Schedule and to prepare and implement schemes relating thereto for economic development and social justice.

(3) Village Panchayat shall also have powers to enhance employment facilities and to undertake developmental activities and to start manpower banks, under the leadership of the Village Panchayats.

(4) The Government, the District Panchayat and the Block Panchayat shall, subject to availability of resources, provide necessary financial, technical and other assistance to the Village Panchayats to enable them to discharge their functions.

(5) All grants-in-aid sanctioned by the Government in respect of the matters enumerated in the Third Schedule shall be distributed through the Village Panchayat concerned.

(6) The Government shall, as soon as may be after the commencement of this Act shall transfer all institutions, schemes and other properties, assets and liabilities connected with the matter referred to in the Third Schedule to the Village Panchayats and every institution so transferred shall be in the name of the said Village Panchayat and shall be known accordingly.

(7) The Village Panchayat shall administer the institutions and schemes transferred to it, subject to the guidelines and technical assistance of the Government and in accordance with the State and national policies.

(8) The Village Panchayat shall not have any power to sell, transfer, alienate or pledge the properties transferred to it."

21. The first Issue is as to Whether Article 25 of the Constitution of India protects the rights of the members of the Hindu Community situate outside the Panchayat area of Thiruvilwamala Grama Panchayat to perform the last rites in the burning ghat, Ivor Madom, Pampadi Village on the banks of the Bharathapuzha?

22. The pleadings in W.P(C) Nos. 8010, 8338 of 2011, 10040 of 2011 and other petitions in this context are relevant and to be noted. W.P(C) No. 8010 of 2011 has been filed by two petitioners who claims that Ivor Madom is one of the most sacred burning ghats in the country. In paragraphs 2 and 3 of the Writ Petition the following has been pleaded:

"2. Ivor Madom, located in Pampadi Desom of Thiruvallwamala Grama Panchayat on the banks of the Bharathapuzha, is one of the most sacred burning ghats in the country. It is recognized as Dakshina Kasi and on among the five holy sites for cremation in the country. The five sites are Kasi on the banks of the river Ganga, Swarga Dwar at Puri, Pushkar in Ajmeer, Siddapur on the banks of Narmada near Ahmedabad and Ivor Madom on the banks of the Bharathapuzha. There is no similar site for cremation in the State.

3. It is believed that the Pandavar (all five of them and hence the name Ivor) did cremation and Kriyas on behalf of those killed in the battle field at Kurukshetra at Thiruvallwamala. The atmas of the deceased had attained Moksha on the performance of Kriyas by the Pandavans at Thiruvallwamala. It is also believed that Lord Shri Krishna was present on the occasion. A temple dedicated to the Lord has been consecrated there. This temple is popularly known as the Ivor Madom Shri Krishna Swamy Temple."

Further in W.P(C) No. 8338 of 2011 in paragraphs 2, 6 and 7 the following are stated:

"2. Lord Parasurama created Kerala. All that were required for the inhabitants of Gods Own Country were provided by the Lord himself. The requisites of a living soul from its birth till it returns to the almighty after the physical body returns to soil were foreseen by Lord Parasumara and provided for by him. " which means all that is included between the periods when a human soul gets into the womb of a mother until the body ends in a crematorium, freeing the soul, is decided in accordance with spiritual rights. This is the basic concept of "Shodasha Samskara" followed by a Hindu.

6. It is also believed by the Hindu Community that the Pandavas did Udakakriyas to their near and dear ones who departed in Mahabaratha war at all these five places. The Hindu Community in Kerala believes that their soul would achieve mukthi or moksha if they are cremated at Thiruvallwamala in the place called Ivor Madom since the river is believed to be Akashaganga and ghat where the crematorium is situated is believed to be Manikarnika ghat.

7. It is common knowledge of any inhabitant in Gods Own Country that Ivor Madom Crematorium was in existence from time immemorial. The same is a consecrated place. Several eminent personalities from the length and width of Kerala had expressed their desire to be cremated at Ivaor Madom and their wishes were fulfilled by their heirs. Eminent personalities like Vuyloppilli, who died decades back, O.V. Vijayan etc., are some of them. Though none of these personalities had any direct connection with Thiruvallwamala, they expressed

their desire to be cremated at Ivor Madom solely on the strength of their belief based on the "Aithihya". Even today aged persons, when they start of thinking of their last days express their desire to be cremated at Ivor Madom. Several persons who had lost their life partner whose bodies were cremated at Ivor Madom expressed their desire to be cremated in the place where their life partner was cremated. Practically, the right to be cremated in Ivor Madom Crematorium is not just a custom to faith which is to be equated with ones faith in the Lord Almighty himself."

23. As noted above, the factum of existence of the burning ghat and the use of the burning ghat by Hindu Community not only from the State of Kerala but from other adjoining States is not denied. The State has filed a statement in the Public Interest Litigation, W.P(C) No. 11343 of 2011 where the following was pleaded in paragraphs 2 and 3:

"2. It is respectfully submitted that a trust namely Ivor Madom Trust is situated on the banks of Bharathapuzha which is considered to be a holy river. A belief that the Pandavas the mythological characters from Mahabaratha had performed the last rites of their parents at the above place is prevailing the area and therefore it is considered as a holy place to conduct the last rites of departed ones. Due to this, a large number of dead bodies from far and near are being brought to the above site for burning and burial to the crematorium of the Ivor Madom and Panchayat burial ground. This according to the Panchayat had exceeded the tolerable limit and the Grama Panchayat by its Resolution No. 6 dated 05.03.2011 resolved to enforce certain conditions and to prevent entry of dead bodies from other places to its burial ground for cremation. As per the above resolution, no dead bodies from outside the Panchayat would be buried or cremated in the Panchayat but relatives would be permitted to conduct the last rites at the banks of Bharathapuzha.

3. The above resolution by the Grama Panchayat sparked of statewide protest from the Hindu Community since it was believed by a majority belonging to the above community that by cremating their dear ones at the banks of Bharathapuzha their soul would achieve Moksha and that the prevention of the same amounted to committing a wrong against the dead. In the light of the above objections and on the basis of various complaints received by this respondent, it was decided to stay the operation of the above Resolution and refer the matter to the Ombudsman under Section 191(4) of the Kerala Panchayat Raj Act, 1994."

24. Rituals which are performed after the death of a person are part of one of the Samskars as propounded and accepted by Hindu Religion. The performance of last rites at Ivor Madom on the banks of Bharathapuzha is faith and belief of large number of Hindus who comes to perform the last rites on the above burning ghat. The rites and above practice has to be looked into in the context of Article 25 of the Constitution of India. Article 25 is contained in Part III of the Constitution of India, fundamental rights, which deals with right to freedom of

Religion. Article 25 is quoted below:

"25. Freedom of conscience and free profession, practice and propogation of religion.-(1) Subject to public order, morality and health and to the other provisions of this Part III, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

Article 25 proclaims that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate Religion which is subject to public order, morality and health. Article 25 (2) further provides that nothing in Article 25(1) shall prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. Extent and content of Article 25 of the Constitution of India came up for consideration in a large number of cases before the Apex Court. It has been held that Article 25 does not protect the freedom of Religion and conscience but also protect the practices and ceremonies connected with Religion which are regarded as essential parts of the Religion. Justice B.K. Mukherjea has elaborately considered the concept in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, AIR 1954 SC 282 : (1954) 20 CLT 250 : (1954) 1 SCR 1005 . It has been categorically laid down that a Religion may not only lay down a code or ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are integral parts of Religion. The following was laid down in paragraphs 17 and 18:

"17. It will be seen that besides the right to manage its own affairs in matters of religion which is given by cl. (b), the next two clauses of Art. 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no Legislature can take away, where as the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which cl. (b) of the Article applies.

What then are matters of religion? The word "religion" has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case --- -"Vide *Davis v. Beason*", (1888) 133 US 333

at p. 342 (G), it has been said :

"that the term "religion" has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with "cultus" of form or worship of a particular sect, but is distinguishable from the latter."

We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Art 44(2), Constitution of Eire and we have great doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution.

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

18. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Art. 25. Latham, C. J. of the High Court of Australia while dealing with the provision of S. 116, Australian Constitution which "inter alia" forbids the Commonwealth to prohibit the "free exercise of any religion" made the following weighty observations ---- "Vide *Adelaide Company v. The Commonwealth*", 67 CLR 116 at p. 127 (H) :

"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not, interfere with religious "opinions", it nevertheless may deal as it pleases with any "acts" which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of S. 116. The Section refers in express terms to the "exercise" of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the Section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion".

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Arts. 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Art. 25 reserves the right of the State to regulate or

restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-cl. (b).under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon cl (2) (a) of the Article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.:"

25. Again in *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, AIR 1954 SC 388 : (1954) 1 SCR 1055 where the Apex Court again came to consider the right of Religion as guaranteed under Articles 25 and 26 of the Constitution of India. The following was laid down in paragraphs 12 and 13:

"12. the moot point for consideration, therefore, is where is the line to be drawn between what are matters of religion and what are not? Our Constitution-makers have made no attempt to define what religion" is and it is certainly not possible to frame an exhaustive definition of the word" religion" which would be applicable to all classes of persons. As has been indicated in the Madras case referred to above, the definition of "religion" given by Fields, J. in the American case of - "Davis v. Beason", (1888) 133 US 333 (B), does not seem to us adequate or precise.

"The term "religion", thus observed the learned Judge in the case mentioned above, "has reference to one"s views of his relations to His Creator and to the obligations they impose of reverence for His Being and Character and of obedience to his will. It is often confounded with "cultus" or form of worship of a particular sect, but is distinguishable from the latter".

It may be noted that "religion" is not necessarily theistic and in fact there are well-known religions in India like Buddhism and Jainism which do not believe in the existence of God or of any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been suggested by one of the learned Judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well.

We may quote in this connection the observations of Latham, C. J. of the High Court of Australia in the case of - "Adelaide Co. v. The Commonwealth", 67 Com-W. L. R. 116 at p. 124 (C) where the extent of protection given to religious freedom by S. 116 of the Australian Constitution came up for consideration.

"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".

In our opinion, as we have already said in the Madras case, these observations apply fully to the provision regarding religious freedom that is embodied in our Constitution.

13. 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 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.

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. We may refer in this connection to the observation of Davar, J. in the case of - "Jamshed Ji. V. Soonabai", 33 Bom 122 (D), 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 Mukta bai. Vyezashni, etc. which are sanctioned by the Zoroastrian religion were valid 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 his 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 Art. 26(b) of our Constitution."

26. Again in Sri Venkataramana Devaru and Others Vs. The State of Mysore and Others, AIR 1958 SC 255 : (1958) 1 SCR 895 it was held that Religion is in terms of Hindu theology does not merely consists of its dhyanam but also its bakthi and karma kand. In the context of burning of dead bodies in consecrated places the

issue came up for consideration before this Court and this Court held that right to bury dead bodies at consecrated place is a fundamental right. It was so held in *Vareed Porinchukutty v. State of Kerala* (1971 KLT 204). The Court held in the said case that practices which are regarded by the community as part of its religion are also matters of religion. The following was laid down in paragraph 22:

"22. Practices which are regarded by the community as part of its religion are also matters of religion. Among most of the Hindus disposal of the dead is effected by cremation but among Muslims, Jews and Christians it is done by burial. Right to bury dead bodies in a particular manner with particular rites and ceremonies in consecrated places is part and parcel of the practice of certain religions. Among Christians while rites at the time of burial consist in services expressed in words ceremonies consist in gestures or acts preceding, accompanying or following those words. Catholics, it is admitted that members of the A Party are Catholics, believe in the immortality of the soul and resurrection of the body. The practice of burying dead bodies with certain rites and ceremonies is an integral part of the Catholic faith. In burying dead bodies in consecrated places they only exercise their fundamental right regarding practice of religion."

A Division Bench of the Madras High Court in *Mohamed Gani, Secretary Gani Beebi Darga Mosque Vs. The Superintendent of Police and Others*, AIR 2005 Mad 359 : (2005) 3 LW 289 had occasion to consider the right to take dead bodies for burial in the graveyard. Article 25 was considered where it was held that right to bury dead bodies in accordance with one's religious rites and custom is a part of Article 25 of the Constitution. The following was laid down in paragraphs 18, 21, 27, 28 and 29.

"18. In our opinion, the right to bury dead bodies in accordance with one's religious rites and customs is a part of Article 25 of the Constitution, and hence it is a fundamental right.

21. As already stated above, the right to practise one's religion freely is enshrined in our Constitution under Article 25(1). It is a fundamental right, and this includes the right to bury dead bodies in accordance with one's religious rites and customs.

27. In every religion there are rites and ceremonies performed on the death of a member of that religion, and these include the carrying or transporting the dead body to the cremation place or graveyard. In our opinion, these rites and ceremonies are an essential and integral part of that religion, and hence cannot be prohibited in a secular State.

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28. It may be mentioned that Articles 25 and 26 of the Constitution guarantee the right to practise one's religion not only in the matter of faith or belief but also all those rituals and observances which are regarded as integral parts of a religion by the followers of that religion, vide *Rev. Stainislaus Vs. State of Madhya Pradesh and Others*, AIR 1977 SC 908 : (1977) 43 CLT 382 : (1977) CriLJ 551 : (1977) 1 SCC 677 : (1977) 2 SCR 611 : (1977) 9 UJ 158

(paras 77 and 78), *Seshammal and Others, Vs. State of Tamil Nadu*, AIR 1972 SC 1586 : (1972) 2 SCC 11 : (1972) 3 SCR 815 ,

Sri Digyadarsan Rajendra Ramdassjivaru Vs. The State of Andhra Pradesh, AIR 1970 SC 181 : (1969) 1 SCC 844 : (1970) 1 SCR 103 ,

Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay, AIR 1962 SC 853 : (1962) 2 SCR 496 Supp , *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, AIR 1954 SC 282 : (1954) 20 CLT 250 : (1954) 1 SCR 1005 , etc.

29. In *Commissioner of Police and Others Vs. Acharya Jagadishwarananda Avadhuta and Another*, (2004) 2 CTC 690 : (2004) 3 JT 224 : (2004) 3 SCALE 146 : (2004) 12 SCC 770 : (2004) 2 SCR 1019 : (2004) AIRSCW 1887 : (2004) AIRSCW 4842 : (2004) 6 Supreme 361 : (2004) 2 Supreme 427 the Supreme Court observed (vide paragraph - 9):-"The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrine, practices, tenets, historical background, etc. of the given religion."

Another important judgment which needs to be considered is the judgment of the Apex Court which originated from the *Bijoe Emmanuel and Others Vs. State of Kerala and Others*, AIR 1987 SC 748 : (1986) CriLJ 1736 : (1986) 2 SCALE 217 : (1986) 3 SCC 615 : (1986) 3 SCR 518 . Appellants in the case were three children, faithful of Jehovah's Witnesses. They attended the school daily during the morning Assembly. When the National Anthem "Jana Gana Mana" is sung, they stand respectfully but they do not sing. They do not sing because, according to them, it is against the tenets of their religious faith not the words or the thoughts of the Anthem but the singing of it. Under the instruction of the Deputy Inspector of Schools, the Headmistress expelled the children from the School. Appellants filed Writ Petition which was dismissed. Thereafter the matter was taken to the Supreme Court. The appellants case was that they desist from singing National Antham because of their honest belief that their Religion does not permit them to join any prayer except to the prayer to Jehovah, their God. Believes held by witnesses was noted by the Apex Court and some details have been noted by the Apex Court in paragraph 5 which is quoted below:

"5. Some of the beliefs held by Jehovah's Witnesses are mentioned in a little

detail in the statement of case in *Adelaide Company of Jehovah's Witnesses v. Commonwealth* (1943) 67 CLR 116 a case decided by the Australian High Court. It is stated,

"Jehovah's Witnesses are an association of persons loosely organized throughout Australia and elsewhere who regard the literal interpretation of the Bible as Fundamental to proper religious beliefs.

"Jehovah's Witnesses believe that God, Jehovah, is the Supreme ruler of the universe. Satan or Lucifer was originally part of God's organisation and the perfect man was placed under him. He rebelled against God and set up his own organisation in challenge to God and through that organisation has ruled the world. He rules and controls the world through material agencies such as organised political, religious, and financial bodies. Christ, they believe, came to earth to redeem all men who would devote themselves entirely to serving God's will and purpose and He will come to earth again (His second coming has already begun) and will overthrow all the powers of evil.

"These beliefs lead Jehovah's Witnesses to proclaim and teach publicly both orally and by means of printed books and pamphlets that the British Empire and also other organised political bodies are organs of Satan, unrighteously governed and identifiable with the Beast in the thirteenth chapter of the Book of Revelation. Also that Jehovah's Witnesses are Christians entirely devoted to the Kingdom of God, which is "The Theocracy", that they have no part in the political affairs of the world and must not interfere in the least manner with war between nations. They must be entirely neutral and not interfere with the drafting of men of nations they go to war. And also that wherever there is a conflict between the laws of Almighty God and the Laws of man the Christian must always obey God's law in preference to man's law. All laws of men, however, in harmony with God's law the Christian obeys. God's law is expounded and taught by Jehovah's Witnesses. Accordingly they refuse to take an oath of allegiance to the King or other constituted human authority. "

The case of *Adelaide Company of Jehovah's Witnesses v. Commonwealth* (supra) arose out of an action to restrain the Commonwealth of Australia from enforcing the National Security (Subversive Associations) Regulations to the Jehovah's Witnesses."

In the above context, the Apex Court referred to Article 25 of the Constitution and held it to be Article of faith. In the above case the Apex Court further held that the question is not whether a particular religious belief or practice appeals our reason or sentiment, but whether the belief is genuinely and conscientiously held as part of profession or religion. In paragraph 19, the following was laid down.

"19. The meaning of the expression "Religion" in the context of the Fundamental Right to freedom of conscience and the right to profess, practise and propogate religion, guaranteed by Art. 25 of the Constitution, has been explained in the well

known cases of *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, AIR 1954 SC 282 : (1954) 20 CLT 250 : (1954) 1 SCR 1005 ; *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, AIR 1954 SC 388 : (1954) 1 SCR 1055 and *S.P. Mittal Vs. Union of India (UOI) and Others*, (1983) 1 SCC 51 . It is not necessary for our present purpose to refer to the exposition contained in these judgments except to say that in the first of these cases Mukherjea, J. made a reference to "Jehova"s Witnesses" and appeared to quote with approval the views of Latham, C. J. of the Australian High Court in *Adelaide Company v. The Commonwealth*, (1947-67 CLR 116) (supra) and those of the American Supreme Court in *West Virginia State Board of Education v. Barnette*, (1942-87 Law Ed 1628) (supra). In Ratilal"s case we also notice that Mukherjea, J. quoted as appropriate Davar, J."s following observations *Jamshedji v. Soonabai*, (1909) ILR 33 Bom 122 :

"If this is the belief of the Community 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 his religion and the welfare of his community or mankind."

We do endorse the view suggested by Davar J."s observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Art. 25 but subject, of course, to the inhibitions contained therein."

One more judgment of this Court which need to be noted is *Mary Thomas Attullil Vs. District Collector and Others*, AIR 2007 Ker 271 : (2007) 3 ILR (Ker) 524 : (2007) 3 KLJ 285 . In the above case burial ground was maintained by the Panchayat. Issue raised was that in the burial ground an extent of land be set apart for Latin Catholic Community to which the petitioner belong. In the above case the following was laid down in paragraph 14:

"14. Admittedly, the parcel is Government land. It was given to the Panchayat for a specific public purpose, viz., the formation of a burial ground. It is stated by the counsel appearing on all sides that before the burial ground in question came up in Thrikkakkara, dead bodies were brought from Thrikkakkara to the cremation ground in Pachalam in Ernakulam for being disposed of. The Kerala Panchayat Raj (Burial and Burning Ground) Rules, 1998 and its predecessor rules do not have any foundation for creating any classification among Indian citizens for the purpose of disposal of their dead bodies. The property of the State Government is a secular holding. When that is given to the Panchayat for a public purpose, it again continues to be a public holding which has a secular character. That secular character and nature of the holding cannot, in any manner, be interfered with or violated on any plea of any religious denomination. This is not

a case where the Government decided to give any parcel of property for the purpose of any cremation ground for any particular sect or community. It is for the purpose and benefit of the public at large."

From the proposition of law laid down in the above cases it is clear that a Community can claim right regarding performance of last rites of dead in accordance with its faith and belief. Faith and belief that by performance of last rites of a dead professing Hindu Religion at the banks of river Bharathapuzha salvation is achieved or it is a holy burning ground, the said practice can be held to be part of Religion and protection of Article 25 is extended to such faith and belief. Submission of the petitioner that prohibiting use of burning ghats to members of the Community situated outside the Panchayat area is violative of Article 25 has substance. However, as noted above, right to freely profess, practice and propogate Religion is subject to public order, morality and health as has been provided Article 25(1) of the Constitution of India. Furthermore, the State is fully empowered to make law regulating or restricting any financial, political or secular activities which may associate with religious practice. Thus even though petitioners claim right to bury their dead on the burning ghat in question, the State by making law can regulate or restrict any such religious practices. India which is a secular Country, the State does not have any Religion of its own. State, however, being a secular State has to respect all Religions, their faith and beliefs. Fundamental rights in modern State had to yield to other equally important rights that is why even the right under Article 25 is made subject to public order, morality and health. We thus conclude that members of Hindu Community who are situate outside the Panchayat area has also right to use the burning ghat for performance of their last rites of the dead.

27. Now we come to Issue No. II. The resolution dated 5.3.2011 of the Panchayat has already been extracted above. The resolution prohibits with effect from 1.4.2011 bodies from outside the Panchayat area to the burning ghats. Whether the resolution is in accordance with the provisions of the Kerala Panchayat Raj Act, 1994 and the Rules, 1998 is the question which has to be answered.

28. The Kerala Panchayat Raj Act, 1994 has been enacted with object to replace the then existing enactment by a comprehensive enactment to establish a three-tire Panchayar Raj system in the State in line with the Constitution 73rd Amendment 1992. In the present case we are concerned with the Village Panchayat. Chapter XV of the Act deals with "meetings, powers, functions, duties and property of Panchayats". Section 166 deals with the powers, duties and functions of Village Panchayat, which has already been quoted above. Section 166(1) enjoins power of the Panchayat to render services to the inhabitants of the Village Panchayat in respect of the matters enumerated as mandatory functions in the III schedule. Item No. 18 of the Third Schedule is to the following effect:

"18. Establishment and maintenance of burial and burning grounds."

29. Sub-section (7) of Section 166 of the Act has been added by Act 13 of 1999, which is to the following effect:

"166. Powers, duties and functions of Village Panchayat.-

xx xx xx

(7) The Village Panchayat shall administer the institutions and schemes transferred to it, subject to the guidelines and technical assistance of the Government and in accordance with the State and national policies."

One more provision, which needs to be noted is Section 284 of the Act, which deals with repeal and saving. Section 284(1) and (2)(a), which is relevant, reads as under:

"(1) In this section unless the context otherwise requires--

xx xx xx

(2) With effect on, and from the appointed day the Kerala Panchayats Act, 1960 (32 of 1960), the Kerala District Administration Act, 1979 (7 of 1980) and also the provisions relating to Panchayats contained in the Kerala Local Authorities (Constitution and Preparation of electoral Rolls) Act, 1994 (4 of 1994) shall stand repealed and the following consequences shall ensue, that is to say,--

(a) all property, movable and immovable, and all interests of whatsoever kind therein which vested, in an existing Panchayat or, as the case may be, vested in a district council immediately before the appointed day, shall be deemed to be transferred to, and shall vest in the successor Panchayat or as the case may be, in the government subject to all limitations, conditions and rights or interests of any person, body or authority in force or subsisting immediately before the appointed day;"

The above provision makes it clear that rights or interest of any person in any property, which was vested in existing Panchayat shall continue. The burning ghats, which is in issue, was handed over to the Panchayat, which was a property recorded as puramboke-cremation ground. The extract of the Survey Settlement Register of Villages prepared in 1928 has been brought on record by the petitioner in W.P(C). No. 8010 of 2011 as Exhibit P5.

30. The Panchayat has filed a detailed counter affidavit in W.P(C). No. 8010 of 2011, in which it has been pleaded in paragraph 4 that the burial ground situated in Sy. Nos. 444/3, 444 and 446/6 of Pampadi Village was handed over to the Panchayat with effect from 13.6.1971. Paragraph 4 of the counter affidavit is quoted as under:

"4. Since the factual matrix had been submitted in a distorted manner, it is highly necessary to state the real facts. Every local authority in the State is bound to maintain a burial ground as contemplated in the Kerala Panchayat Raj Act (Burial and Burning Grounds) Rules, 1998. The burial ground which belongs to

the respondent Panchayat is situated on the banks of river Bharathapuzha. The burial ground is situated in Sy. Nos. 444/3, 444 and 446/6 of Pampadi Village. True copy of the certificate issued by the Village Officer, Pampadi certifying that the properties are exclusively belonging to the Panchayat from 13.06.1971 is produced herewith and marked as Exhibit R3(a). True copy of the English translation of the certificate is produced herewith and marked as Exhibit R3(a) (1)."

31. Thus, the property belonged to the State and was handed over to the Grama Panchayat for management. Section 284(2)(a) as quoted above indicates that in the event any person was exercising any right, the same shall continue to be exercised as against the Panchayat in the property. The claim of the petitioner as noted above is of using the burning ghats from time immemorial, which is part and parcel of religious practice pertaining to last rite of a person included in "sixteen samskars".

32. Although it is true that the mandatory duty is to establish and maintain burning ground to render service to the inhabitants of the Village Panchayat area, but a burning ground, which was being used from time immemorial by persons within and outside the Panchayat or even persons from neighbouring States, whether such burning ground can be closed for persons outside the Panchayat area is the question to be answered.

33. In the Village Panchayat there are large number of properties/institutions, which have been established for public in general. Most important among those are schools and hospitals. There is a specific provision in Section 172 that public roads, markets, wells etc. are to be open to all. But, whether schools, hospitals and other facilities in the Village can be confined to only for the use of the residents in the Village? Can the Panchayat tomorrow take a resolution that because of large number of patients to the hospitals maintained by the Panchayat from future date no patient, who is outside the Panchayat area, shall be admitted in the hospital or to be treated? The answer would be obviously "no".

34. Section 219 of the Act itself indicates that in so far as Mosque, Temple, Church, Mutt etc. or any place of religious worship or institution or any place which is used for holding fairs or festivals or for other like purposes situated within a Village Panchayat area attracts throughout the year a large number of persons and special arrangements necessary for public health, safety or convenience, permanent or temporary, have to be made by the Village Panchayat. Although the provision of Section 219 of the Act empowers the Village Panchayat to take contribution from persons having control over places of pilgrimage etc. in lieu of providing different services, the above provision also indicates that there are places of religious worship which are visited by large number of populace throughout the year where the Panchayat has to make arrangements. The above situation is also fully applicable to any such institution under the control of the Panchayat, where large number of persons throughout the year or on a particular occasion arrive. Those places, which are of religious

importance are free to be accessed by all concerned. Similarly, the burning ghat, which is supposed to be one out of five holy sites for cremation in the country, which is the faith and belief held by a number of members of the Hindu community is also likely to be visited by large number of persons on the occasion of last rite.

35. India, the secular country, where the State has to show equal protection to all religions and faiths. Secularism is the basic feature of the Constitution. The Apex Court in *Dr M. Ismail Frauqui and Others Vs. Union of India (UOI) and Others*, AIR 1995 SC 605 : (1994) 6 JT 632 : (1994) 6 SCC 360 : (1994) 5 SCR 1 Supp laid down that the concept of secularism is a basic feature of the Constitution of India and the way of life adopted by the people of India as their abiding faith and creed. It is useful to quote paragraphs 33 and 34 of the judgment, which read as follows:

"33. The polity assured to the people of India by the Constitution is described in the Preamble wherein the word "secular" was added by the 42nd Amendment. It highlights the fundamental rights guaranteed in Art.25 to 28 that the State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion of their own choice, in brief, this is the concept of secularism as a basic feature of the Constitution of India and the way of life adopted by the people of India as their abiding faith and creed. M.C. Setalvad in Patel Memorial Lectures - 1985, on Secularism, referring to the Indian concept of secularism, stated thus :

"The coming of the partition emphasised the great importance of secularism, Notwithstanding the partition, a large Muslim minority, constituting a tenth of the population, continued to be the citizens of independent India. There were also other important minority groups of citizens. In the circumstances, a secular constitution for independent India, under which all religions could enjoy equal freedom and all citizens equal rights, and which could weld together into one nation the different religious communities, became inevitable."

(at pages 481-82)

The ideal, therefore, of a secular State in the sense of a State which treats all religions alike and displays a benevolent neutrality towards them is in a way more suited to the Indian environment and climate than that of a truly secular State.

(At page 485)

Secularism, in the Indian context, must be given the widest possible content. It should connote the eradication of all attitudes and practices derived from or connected with religion which impede our development and retard our growth into an integrated nation. A concerted and earnest endeavour, both by the State and citizen, towards secularisation in accordance with this wide concept alone lead to the stabilisation of our democratic state and the establishment of a true

and cohesive Indian nationhood."

(at pages 488-89)

34. A reference to the Address of the President of India, Dr. Shanker Dayal Sharma, as the then Vice President of India, on "Secularism in the Indian Ethos" while delivering Dr. Zakir Hussain Memorial Lecture of Vishva Bharati, Shantiniketan, on 29th April, 1989 is useful. Therein, he referred to the difference between our understanding of the word "secular" and that in the West or its dictionary meaning, and said :-

"We in India, however, understand secularism to denote "Sarva Dharma Samabhaav" an approach of tolerance and understanding of the equality of all religions."

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This philosophical approach of understanding, coexistence and tolerance is the very spirit of our ancient thought...."

xxx xxx xxx

The Yajurveda states :

"May all beings look on me with the eyes of a friend: May I look on all beings with the eyes of a friend, May we look on one another with the eyes of a friend."

A very significant manifestation of secular outlook is contained in the Prithvi Sukta in the Atharva Veda :

This Earth, which accommodates people of different persuasions and languages, as in a peaceful home - may it benefit all of us.

"Oh, Mother Earth, give to us, as your children the capacity to interact harmoniously; may we speak sweetly with one another."

And the Rg. Veda emphatically declares :

"All human beings are of one race."

Thus a philosophical and ethnological composite is provided by ancient Indian thought for developing Sarva Dharma Samabhaav or secular thought and outlook. This enlightenment is the true nucleus of what is now known as Hinduism.

Proceeding further, referring to the impact of other religions on the Indian ethos, he said :

"Two aspects in this regard are noteworthy. First, the initial appearance of Christianity or Islam or Zoroastrianism in India and their establishment on the mainland did not occur as a result of military conquest or threat of conquest. These religions were given a place by virtue of the attitude of accommodation

and coexistence displayed by local authorities including the main religious authorities. The second aspect is even more important: Christianity, Islam and Zoroastrianism brought with them spiritual and humanistic thought harmonious and, in fact, identical to the core ideas of the established religious thought in India as exemplified by the basic beliefs of Vedic, Vedantic, Buddhist and Jain philosophy."

The influence of saints and holy persons was indicated thus :

"..... There was natural interest, therefore, in Islam as a revealed religion brought forth by a Prophet of profound charisma who had faced adversities, and in Christianity, which spread the light of Jesus Christ who had suffered a terrible crucifixion for humanity's sake. The Quran moreover referred to great souls such as Abraham, Issac, Ishmael, Jacob, Moses mentioned in the Old Testament of the Christian faith, and Jasus, Al Fatiha or Fatiha Tu Alfatha which is also referred to as Ummul Quran or the essence of the Quran refers to "Allah" as Rab ul Alamin or Lord of the entire universe, it does not confine him to Muslims alone. The Second Surah in the Quran, titled "Al Baqurah" gives a warning, which is repeated throughout the Quran, that it is not mere professing of one's creed, but righteous conduct, that is true religion. Verses 44, 81 and 82 from this Surah make this absolutely clear."

36. The Panchayat in exercise of its function has also to carry on its affairs in a way as to help the faith and belief of large number of Hindu community. The fact that in places of worship, which are visited by large number of persons throughout the year the Panchayat has to make arrangement is equally true in the places of worship and importance which are in the management of the Panchayat. As noted above, the Panchayat in its discharge of duties by discharging its duties and functions has to act in accordance with the State and National policy. The State being a secular State, the State national policy cannot be other than those of tolerance and respect to faith and belief of large number of communities. The reason which has been given by the Panchayat in its counter affidavit to support the decision is the factum of environmental pollution caused by burning of large number of dead bodies everyday in the burning ghats. There cannot be any dispute that any right of a person to perform any religious practice on a sacred place is subject to health, morality and public order. The State is fully competent to prohibit religious practices which endanger health.

37. As noted above, the 1998 Rules have been framed by the State Government in exercise of power under sub-section (2)(1) of Section 254 of the Act, namely, the Kerala Panchayat Raj (Burial and Burning Grounds) Rules, 1998. Rule 3 empowers the Panchayat with the previous sanction of the District Collector to provide land to be used as burial or burning grounds, if sufficient provision does not exist. Under Rule 4, certain cemeteries existed at the commencement of the Rules and registered or deemed to have been registered under the Kerala Panchayat (Burial and Burning Grounds) Rules, 1967 shall be deemed to have been registered under the 1998 Rules. Rule 6 provides for issue of licence to

burial or burning grounds. Rule 7 provides registration of cemeteries. Rule 8 contains prohibition of use of ground not registered, licensed or provided to dispose of the corpse. However, there is a proviso to the said Rule, which recognises customary rites of burning in a private ground, which is not injurious to the public health. Rule 8 is quoted as below:

"8. Prohibition of use of ground not registered, licenced or provided to dispose of the corpse.- No person shall bury, burn or otherwise dispose of any corpse other than in any ground, which has been registered or has been deemed to be registered or for which licence has been given or provided under these rules:

Provided that in each particular case, any corpse can be buried, burned or otherwise disposed or under customary rite in private ground without being injurious to public health".

38. The above Rule indicates that the legislators are well aware about the customary rites of burial and burning. Rule 10, which is relevant in the present case, contains prohibition of cemeteries dangerous to health or overcrowded with graves. Rule 10 is quoted as below:

"10. Prohibition of cemeteries dangerous to health or overcrowded with graves.--
(1) If the Panchayat is satisfied,-

(a) that any ground for the burial or burning which is registered or for which licence has been issued is in such a state or condition as to endanger or likely to endanger the health of persons living in the neighbourhood thereof; or

(b) that any burial ground is overcrowded with graves, and in the case of a public place for burial or burning or otherwise disposing of the corpse and other place as aforesaid, or there exists or is provided another convenient place duly authorised for the disposal of the corpse for the persons who ordinarily use such place, the Panchayat may decide requiring to prohibit burial, burning or otherwise disposing of any corpse in such place.

(2) The decision under sub-rule (1) shall be forwarded to the District Medical Officer and the District Medical Officer shall after conducting necessary enquiries in the matter submit the decision of the Panchayat to the District Collector with his specific recommendations.

(3) If the Collector, on considering the decision of the Panchayat and the recommendations of the District Medical Officer is satisfied that such place shall not be used for the disposal of the corpse, may give a notice that it shall not be lawful after the period to be specified in such notice to bury, burn or otherwise dispose of any corpse in such place:

Provided that before giving notice, the person having control over such place shall be given a reasonable opportunity to file objections, if any, against such action.

(4) Every notice under sub-rule (3) shall be affixed on the notice board of the

Panchayat Office, in a conspicuous place in the constituency in which the cemetery is located and at the entrance of the cemetery.

(5) After the expiry of the period specified in such notice, no person shall bury, burn or otherwise dispose of the corpse at such place.

(6) Any person having complaint on the notice under sub-rule (3) may, within thirty days from the date of the notice, file an appeal to the Government.

Explanation.--The time required for obtaining copies of material records connected with the notice appealed against, shall be excluded in computing the above said thirty days.

(7) The Government may, after conducting such enquiries as they deem necessary, pass such orders on the appeal as they think fit."

39. In the present case, as noted above, the resolution of the Panchayat does not give any reason for prohibiting the burning ghats for persons situate outside the Panchayat area. However, in the counter affidavit filed in W.P(C). No. 8010 of 2011, detailed facts and reasons have been given, which compelled the Panchayat to take the decision. It is useful to quote paragraph 6 of the counter affidavit, which reads as under:

"6. The people who were living in and around the cremation ground had been complaining about the various problems relating to the pollution due to the heavy flow of dead bodies. Large number of people had developed various skin diseases. A mass representation was received on 23.10.2010 requesting the Panchayat to take urgent action in the matter. A perusal of the mass representation would go to show that the same had been signed by more than 150 persons and majority of them belonged to scheduled caste and scheduled tribes. True copy of the same is produced herewith and marked as Exhibit R3(c). True copy of the English translation of the mass representation is produced herewith and marked as Exhibit R3(c)(1). Similarly, on 10.11.2010, the Panchayat received another mass representation. True copy of the same is produced herewith and marked as Exhibit R3(d). True copy of the English translation of the mass representation is produced herewith and marked as Exhibit R3(d)(1)."

The main reason thus given by the Panchayat is "pollution due to the heavy flow of dead bodies".

40. The ground given by the Panchayat in its counter affidavit is the ground given under Rule 10 to take a decision for prohibiting the burial or burning ground by which the health of persons living in the neighbourhood is endangered. However, for taking a decision to prohibit burning or burial ground, a procedure is prescribed in which there are two mandatory steps; firstly, after the Panchayat decides to prohibit the burial or burning ground, the said decision has to be forwarded to the District Medical Officer and the District Medical Officer, after conducting necessary enquiries, submit the decision of the Panchayat to the

District Collector with specific recommendation; and secondly, the District Collector, after considering the decision of the Panchayat and recommendation of the District Medical Officer, if satisfied that the place shall not be used for the disposal of the corpses can give notice to that effect. In the present case, the Panchayat itself has referred to a report of the District Medical Officer dated 25.10.2010, which report was sent to the Grama Panchayat on a complaint received against the public crematorium. The District Medical Officer noted that a complaint has been received regarding environmental pollution created by the public crematorium, where the District Medical Officer made the following remedial measures (Translated to English)):

"Hence the following remedial measures are suggested:

1. Panchayat should take the control of the cremation ground.
2. Modern facilities should be provided for cremating/burning dead bodies.
3. Putting the waste brought along with the dead bodies to the river should be prevented strictly."

41. In the present case the District Medical Officer has suggested the remedial measures to mitigate the environmental pollution. The remedial measure suggested by the District Medical Officer is to provide modern facilities for cremating/burying dead bodies. The suggestion made by the District Medical Officer for adopting modern facilities is in accordance with the need of time. Electric crematoriums have proved to be more environment friendly and suitable for abating the environmental pollution for the burning of dead bodies. The last rite of dead bodies, according to Hindu rites and customs, is the right which cannot be denied to the community, but burning ghats/cematries have to come up with the modern scientific measures to avoid the environmental pollution.

42. The second step for closure as contemplated by the statutory Rules is consideration of District Medical Officer's report and decision of the District Collector. In the present case, there is no report of the Medical Officer to close or partially close the burning ghats, nor there is any decision of the District Collector to that effect. The Panchayat has taken a decision of its own to prohibit the use of burning ghats by the persons outside the Panchayat area. The submission, which have been much pressed by Sri. P.B. Krishnan is that the burning ghat has been virtually closed for persons outside the Panchayat area. Hence, the Panchayat was required to adhere to the statutory requirement as contemplated in Rule 10. Learned counsel for the Panchayat, in reply to the said submission, submitted that since the burning ghat has not been closed, there was no requirement in following the procedure prescribed.

43. When the statutory scheme as delineated by Rule 10, clearly contemplated that when the burning ghat has endangered or likely to endanger the health of persons living in the neighbourhood thereof, a decision can be taken to prohibit the use of burning ghats. Thus, the statutory scheme contemplated closure of

the burning ghats subject to statutory requirement as prescribed therein. There is no such concept of partial closure or closure for the bodies coming from outside the Panchayat area.

44. The legislative intendment in Rule 10 is that the Panchayat, for taking any such decision, has to submit its decision to the District Medical officer, who, in turn, shall send his recommendation to the District Collector and it is only after the District Collector's permission, the decision of prohibition of burning ghats can be taken. The Panchayat itself has brought on record the report of the District Medical Officer dated 25.10.2010, which instead of recommending for closure, has suggested remedial measures.. The decision of the Panchayat, thus, cannot be said to be in the spirit of legislative intendment as delineated by Rule 10. If the Panchayat is satisfied that the burning ghat endangers health of persons living in the neighbourhood, it was free to proceed to close down in accordance with the procedure prescribed. It is well settled that the thing required to be done in a particular manner it shall have to be done in that manner alone or not at all.

45. The Apex Court in R.K. Mittal and Others Vs. State of Uttar Pradesh and Others, AIR 2012 SC 389 : (2011) 14 JT 133 : (2011) 13 SCALE 369 : (2012) 2 SCC 232 : (2011) 6 UJ 4245 : (2012) AIRSCW 390 : (2012) 1 Supreme 273 had occasion to consider the duties cast on the Development Authority while discharging duties and functions under the statutory regulation. The following was laid down in paragraph 42 of the judgment:

"42. The authorities while reconsidering such matters are expected to act reasonably and cautiously. They deal with larger public interest and, therefore, have a responsibility to act with greater degree of sensitivity and proper application of mind. If the Development Authority aids the violation of the statutory provisions, it will be a perversity in the discharge of statutory obligations on the part of the Development Authority. The public interest, as codified in the statutory regulations and the provisions of the Act, should control the conduct of the Development Authority and its decision making process, rather than popular public demand guiding the exercise of its discretion, that too, in a somewhat arbitrary manner."

46. In view of the foregoing discussions, we are of the view that the decision of the Panchayat dated 5.3.2011 is not in accordance with the 1998 Rules.

47. We now come to Issue No. III. As noted above, after the resolution of the Grama Panchayat dated 5.3.2011, a complaint was submitted to the State Government and the State Government by its order dated 19.3.2011 stayed the decision of the Grama Panchayat exercising its power under Section 91 of the Act, 1994. The submission which has been pressed by learned counsel for the Grama Panchayat is that the decision of the State Government dated 19.3.2011 is in exercise of its jurisdiction as provided under Section 191 of the Act, 1994. The decision of the State Government dated 19.03.2011 only communicates to

the Panchayat that the decision of the Panchayat dated 5.03.2011 has been stayed until further orders by invoking power under Section 191(4). The State Government in its statement filed in W.P(C). No. 11343 of 2011 has stated in paragraph 3 that the resolution of the Panchayat sparked of statewide protest from Hindu community. Section 191(1) provides that the Government on a petition received from a citizen, can cancel or vary a resolution passed or decision taken by the Panchayat. Section 191(1) reads as under:

"191. Power of cancellation and suspension of resolutions etc.-- (1) Government may either suo motu or, on a reference by President, Secretary or a member, or on a petition received from a citizen, cancel or vary a resolution passed or decision taken by the Panchayat if in their opinion such decision or resolution-

(a) is not legally passed or taken; or

(b) is in excess of the powers conferred by this Act or any other law or its abuse; or

(c) is likely to endanger human life, health, public safety, communal harmony or may lead to riot or quarrel; or

(d) is in violation of the directions or provisions of grant issued by Government in the matter of implementing the plans, schemes or programmes."

48. Thus, the decision of the State Government dated 19.3.2011 cannot be stated to be beyond its power as contained in Section 191 of the Act. Section 191 provides several grounds for the State Government for interfering with the decision of the Panchayat. The decision of the State is fully covered by the grounds mentioned in sub-section (1) of Section 191. Although Government Order dated 19.03.2011 does not give any reason or ground for passing the order, the statement filed by State clearly refers to the ground as given in Section 191(1)(c). Moreover, the order can also be sustained under grounds (b) and (c) of Section 191(1).

49. The Government have exercised its power under sub-sections (1) and (4) of Section 191 of the Act. Thus, we are of the view that there is no infirmity in the decision of the State Government dated 19.3.2011, which warrants any interference by this Court exercising its writ jurisdiction. More so, we have already held that the resolution of the Panchayat dated 5.3.2011 is not in accordance with law, therefore, the decision of the State Government dated 19.3.2011 has to be treated to have exhausted its purpose.

50. ISSUE No. IV is as to whether the Hindu community burning ghat situated on the banks of Bharatapuzha in an area of 2.41 acres in Sy. No. 243 is in addition to and different from 54 cents of land claimed by the Grama Panchayat as burning ghats in Sy. Nos. 444/3, 444, 446/6 of Pampady Village? In the counter affidavit filed in W.P(C). No. 8010 of 2011 the Panchayat has come up with the details of survey numbers which are being maintained by the Panchayat. Relevant revenue extracts were produced by the Panchayat. The petitioner in

reply to the said counter affidavit has come up with the case that apart from 54 cents of land, which is maintained by the Panchayat as burial ground, there is a larger area of 2.41 acres in Sy. No. 443, which is recorded as the Hindu cremation ground in the survey records prepared in 1928. He has also produced the extract of the Survey Settlement Register prepared in 1928 as Exhibit P5. Exhibit P6 is also the extract of basic tax register where the property in Sy. No. 443 is described as Hindu community cremation ground. Learned counsel for the petitioner has contended that the Hindu cremation ground, which is being used is in addition to the area managed by the Panchayat. He further submits that in fact the area of 54 cents is between the actual burning ground and the road. The above issue, which has been raised by the petitioner is the issue of facts, which requires measurement on the spot and scrutiny of the revenue records, which cannot be done in a proceeding under Article 226 of the Constitution.

51. We, thus, are of the opinion that the said Issue needs no consideration in these Writ Petitions. The Issue is left open to be decided in appropriate proceedings in a competent Court.

In view of the foregoing discussions, we decide all the above Writ Petitions in the following manner:

"i) W.P(C). Nos. 8010 and 8388 of 2011 are allowed. The Resolution dated 05.03.2011 of the Thiruvilwamala Grama Panchayat is quashed. However, the Panchayat is free to provide option of electric crematorium at the burning ghat to check the environmental pollution. The State Government shall extend necessary help to the Panchayat in setting up the electric crematorium.

ii) W.P(C). Nos. 10040 and 11343 of 2011 are dismissed.

iii) W.P(C). No. 24154 of 2012 is allowed. Respondents 1 to 3 are directed to afford adequate police protection for peaceful conduct of cremation of dead bodies in the Ivor Madom on the banks of river Bharathapuzha."

The parties shall bear their own costs.