

E-CA NO: CA-2023-007255

## BEFORE THE HONOURABLE HIGH COURT OF KERALA AT ERNAKULAM

\_\_\_\_\_ Of Year 2023

In

WP(C) No.14484/2021

VISHNUNARAYANAN C.V

Petitioner

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TRAVANCORE DEVASWOM BOARD, : Respondent

## COUNTER AFFIDAVIT FILED BY ADDITIONAL RESPONDENT NO.10 DRAWN BY J SAI DEEPAK, ADVOCATE

Sd/-E-VERIFIED GEORGE J.NALAPPAT K/000945/2020



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V/S	
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## BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

(Special Original Jurisdiction)

W.P.(C) NO. 14484 OF 2021

Vishnunarayanan

...Petitioner

Versus

Travancore Devaswom Board & Ors.

...Respondents

## COUNTER AFFIDAVIT FILED BY ADDITIONAL 10th RESPONDENT

I, K P Madhusoodhanan, aged 46years, S/o. S Krishna Iyer having address at TC 37/425, ARA 24, Srcepadam West Street, Fort PO, Thiruvananthapuram, Kerala PIN 695023 do hereby take oath, solemnly affirm and state as follows:

- 1. I am the Trustee & Kerala Coordinator of the 10<sup>th</sup> Additional Respondent (hereinafter referred to as "The Respondent"), a registered trust under the provisions of Indian Trust Act, bearing Reg. No.148/2017 with the objective of protecting unique customs and traditions of Dharmic places of worship across the country. I am fully conversant with the facts of the case. I am swearing to this affidavit as I am competent and authorized to do so.
- 2. The Respondent has, *inter alia*, represented the interests of the devotees of the Deity Sree Sabarimala Ayyappa (hereinafter referred to as "The Deity") as well as the rights of the Deity before the Hon'ble Supreme Court of India. Consequently, it has the necessary *locus* to assist this Hon'ble Court in the instant proceedings wherein the Writ Petitioner has assailed the Notification dated May 27, 2021 issued by the Respondent No. 1 for the post of Melsanthi (hereinafter referred to as "the Impugned Notification").



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- 3. The Writ Petition has been filed seeking *inter alia* issuance of a writ of certiorari or any other appropriate writ, order or direction, to quash Exhibit-P1 Notification to extent of it restricting the applications from persons who are Malayali Brahmins to the post of Melsanthi in Sabarimala/ Malikappuram Temple functioning under the Travancore Devaswom Board. At the outset, it is humbly submitted that all the averments, allegations and contentions in the Writ Petition, save those which are specifically admitted hereunder, are *per se* incorrect and hence denied. The Petitioner has converted the Writ Petition into a compendium of incorrect statements, inexact submissions and irrelevant documents and is not entitled to the reliefs sought in the writ petition. The Petitioner has approached this Hon'ble Court only experimentally and fully knowing that the averments against these Respondents cannot sustain either on law or facts.
- 4. The Respondent's sole interest is in preserving the religious traditions of the Sree Sabarimala Ayyappa Temple (hereinafter referred to as "The Temple") which are sought to be eviscerated by the Petitioner by treating the appointment of Melsanthi as merely a "secular" activity over which the Respondent No. 1 has complete control. This flawed premise, which forms the bedrock of the Petition as evidenced from Paragraphs 2, 4, 10(A) and 10 (B) of the Petition, is based on the equally flawed position that the Temple is fully controlled by the State Government of Kerala since it is administered by the Respondent No. 1. This fallacy forms the substratum of the Petition and informs the Grounds invoked by the Petitioner to challenge the Impugned Notification. Furthermore, it is humbly submitted that if the prayers in the instant Writ Petitioner are granted, it shall directly result in the unconstitutional abridgement of the rights of the Deity, His Temple, the custodians of its sacred traditions, and His devotees.
- 5. At outset, it is humbly submitted that the Petitioner's challenge to the Impugned Notification is fundamentally not maintainable since the





Petitioner's understanding of the relationship between the Temple, the Respondent No.1 and the State Government of Kerala is flawed. The Petition is based on the erroneous assumption that since the Temple is administered by the Respondent No.1 which, in turn, is fully controlled by the State Government of Kerala, the Temple too is part of "State" within the meaning of Article 12 of the Constitution. While it may be true that the Respondent No.1 is an extension of the State Government of Kerala, the administration of the Temple by the Respondent No.1 under the Travancore Cochin Hindu Religious Institution Act, 1950 (herein after referred to as the "TCHRI Act") is pursuant to Article 25(2)(a) of the Constitution. In other words, the Act has been promulgated by the Kerala State legislature in exercise of the qualified powers vested in it by Article 25(2)(a) of the Constitution, namely to make any law to regulate or restrict any economic financial, political or other secular activity which may be associated with religious activities.

- 6. Viewed in this light, the Respondent No.1, which is a creature of the Act, is a mere regulatory body that has been tasked with the administration of Temples under its jurisdiction. This, by no stretch of imagination, renders the Temple or any other Temple administered by the Respondent No.1 an extension of the State within the meaning of Article 12. Critically, it cannot be contended that a secular administrative body that performs the qualified role of superintendence over a religious body subsumes the religious body entirely within its ambit in all respects.
- 7. Without prejudice to the said position, it is further submitted that as per the language of Article 25(2)(a), any HRCE legislation such as the Act in question can merely regulate or restrict only a secular activity associated with a religious practice. Simply put this power does not extend to the religious practices/traditions/rights/rituals or any other related aspect of the religious body such as the Temple in question. This is evident from the language of Section 15A of the Act which makes it abundantly clear that the

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Board is statutorily bound to preserve the religious traditions of all the Temples it administers under the Act.

- 8. Consequently, in so far as the secular aspects of the administration are concerned, the Respondent No.1 performs the role of a regulatory body with a very limited purview and in so far as religious aspects of administration are concerned, the Respondent No.1 is bound by the religious traditions of the Temple and has no option but to abide by and enforce them. It cannot sit in judgement over such religious traditions unless such traditions require legislative revisitation under Article 25(2)(b) to further the causes therein.
- 9. Applying the position set out above, it is humbly submitted that the appointment of any religious figure such as the Melsanthi in relation to the Temple cannot be remotely considered a secular activity since it involves the application of a continuing living tradition in relation to the position of the Shebait/Servitor which is governed by both scripture and unwritten traditions/customs of the Temple that have been observed for millennia. Since the appointment of the Melsanthi in so far as the prescription of requisite qualifications is concerned is not a secular activity, and the qualifications prescribed in the Impugned Notification issued by the Respondent No.1 are an integral part of the religious practices of the Temple, the Impugned Notification is consistent with Section 15A(i) of the Act. Therefore, the Writ Petition is not maintainable since neither is the Temple State within the meaning of Article 12 nor are the qualifications for the post based on secular considerations. The Petition fails to strike a distinction between the secular aspects of appointment such as emoluments on the one hand, and religious aspects of appointment on the other such as prescription of qualifications in accordance with the religious practices of the Temple. At best, the former may be treated as a secular activity, whereas the latter is not secular by any yardstick.

Reliance is placed on [Ajay Hasia Etc vs Khalid Mujib Sehravardi, 1981 AIR 487; Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5



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SCC 111; Kaushal Kishor vs. State of Uttar Pradesh and Ors. Writ Petition (Criminal) No. 113 of 2016 and Special Leave Petition (Arising out of (Diary) No. 34629 of 2017) Decided On: 03.01.2023]

- 10. Since the Petitioner has filed a Writ Petition as a party aggrieved by the Impugned Notification, the Petition must be assessed for adequacy of pleadings and supporting material on the anvils of the standards which apply to a writ petition and not a PIL. Even if the Petition had been filed as a PIL, it would still have had to pass muster on the anvils of sufficiency of pleadings and adequate supporting material to advance the case of the Petitioner. Having filed a cryptic Writ Petition whose sole assumption is that the Sabarimala Temple (the Temple) and the Travancore Devaswom Board (TDB) are arms of the State in relation to an alleged secular activity such as the appointment of the Melsanthi, the Petitioner cannot be afforded any room beyond the scope of its pleading in the Petition or the material filed along with it. Furthermore, no case for horizontal assertion of alleged fundamental rights has been set up in the Petition and consequently no material has been adduced to advance such an assertion. Therefore, the Petition is liable to be dismissed for lack of horizontal maintainability. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in Riju Prasad Sarma and Ors. vs. State of Assam and Ors. (2015) 9 SCC 46 where in Para 49 (at Page 419/551 of the Compilation) the Supreme Court had dismissed the writ petition therein for want of sufficiency of the pleadings on part of the petitioners therein. There the petitioners had failed to demonstrate the existence of a serious dispute with respect to the established rights of the respondents therein in relation to the management of the Sri Sri Kamakhya Temple in Assam.
- 11. It is humbly submitted that if such is the standard laid down by the Supreme Court in relation to management of religious and secular aspects of the Sri Sri

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Kamakhya Temple, at the very least the very same standard must be applied to the Petition herein and the claim of the Petitioner. This is because the Petitioner has challenged the established practice of appointing only Malayali Brahmins to the post of Melshanthi without presenting any material or advancing a substantial pleading in the Petition. The fact that only Malayali Brahmins can be appointed to the post of Melshanthi is a long-standing practice which has also received judicial recognition and endorsement by the order of this very Hon'ble court in *R.R. Varma* vs. *Travancore Devaswom Board* [O.P. NO. 19832 of 2002 and O.P. NO. 6625 of 2002] dated August 14, 2002 (at Page 515/551 of the Compilation). To add to it, the Supreme Court, by order dated September 06, 2011 in *Kantaru Neelakantaru Thanthri* vs. *Travancore Devaswom Board* [Civil Appeal No. 2570 of 2003 at Page 526 at 527/551 of the Compilation), has upheld the order of this Hon'ble Court, thereby giving its stamp of approval to the conditions of appointment/eligibility criteria for the post of Melsanthi.

12. In light of the settled judicial fact of the rights of Malayali Brahmins and the failure of the Petitioner herein to raise even a semblance of a serious factual dispute in the Petition or the supporting material on the basis of scripture to advance his claim, the Petition must fail for not raising grounds of horizontal assertion as well as for not demonstrating a case of horizontal assertion on merits. In this regard, reliance is placed on Paras 49 and 50 of *Riju Prasad Sarma* (at Page 419-420/551 of the Compilation). In view of the fact that the established rights of Malayali Brahmins in relation to the post of Melsanthi has been endorsed by the Supreme Court, the instant Petition is not maintainable before this Hon'ble Court for yet another reason – the Petitioner must approach the Supreme Court in order to challenge the eligibility criteria for the post of Melsanthi.





- 13. In so far as the maintainability of the prayers sought in the Petition are concerned, in Riju Prasad Sarma, the Supreme Court has held that reform in matters of religion is within the exclusive domain of the State, namely, the legislature or executive, and not the judiciary [Para 59 at Page 423/551 of the Compilation]. This is because Article 25(2)(b) grants only the State the power to undertake reform in matters of faith since only an elected body has the constitutional mandate to do so. It is pertinent to note that the Judiciary is not 'State' within the meaning of Article 12 in the exercise of its judicial powers. Only in the exercise of administrative powers can the judiciary be treated as State within the meaning of Article 12. In this regard, reliance is placed on Paras 61, 63 and 64 of Riju Prasad Sarma [at Page 423-424/551 of the Compilation]. It is precisely for this reason that both this Hon'ble court and the Hon'ble Supreme Court did not interfere in any manner with the long-established conditions of appointment to the post of Melsanthi. In short, through the prayers sought in instant petition the Petitioner is inviting this Hon'ble court to exercise powers under Article 25(2)(b), which is constitutionally impermissible. This raises yet another ground of non-maintainability of the Petition.
- 14. Even when exercising powers under Article 25(2)(b), the legislature itself cannot alter the identity of a religious institution in the name of reform and social welfare or egalitarianism unless it is able to establish after considering the context and the metaphysics involved that a particular practice in question fundamentally offends all conceivable notions of reasonableness, fairness and dignity. It is critically clarified that in assessing religious traditions/practices the limits of secular rationality must be recognized since faith and secular rationality seldom see eye to eye.
- 15. Furthermore, it is humbly submitted that in the process of reducing the issue of appointment of Malayali Brahmins to the post of Melsanthi to a



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caste-related consideration, the Petitioner has exposed his utter ignorance of the traditions of the Temple and their origins. It is well known that most Temples have their own history better known as "Sthala Puranas" which inform the rituals of the Temple and the qualifications needed to perform the said rituals. In the facts of the instant case, the Temple subscribes to Tantra tradition which has its own set of prescriptions. Just as there are Temples wherein the priestly position is the exclusive preserve of specific non-brahmin groups, there are Temples whose tradition prescribes the assignment of the role of the Tantri/Melsanthi/Priest to specific brahmin groups. In fact, it is evident from the Impugned Notification that the qualification criteria prescribed therein are informed by the specific traditions of the Temple which envisage appointment of not any and all brahmins but only Malayali Brahmins of a particular age and training. In view of this, to make the claim that the Impugned Notification furthers any form of caste supremacy to the exclusion of other groups is to foist a non-dharmic view on a dharmic institution. In short, selection based on shastraic considerations does not amount to discrimination.

Reliance is placed on: [Adi Saiva Sivacharyargal Nala Sangam v. Govt. of Tamil Nadu AIR 2016 SC 209; Seshammal and Ors. etc. v. State of Tamil Nadu AIR 1972 SC 1586; Venkataramana Devaru and Ors. vs. The State of Mysore and Ors. AIR 1958 SC 255]

16. By seeking to alter the criteria prescribed for the post of Melsanthi, the Petitioner seeks to alter the very identity of the Temple which affects the nature of consecration of the Temple, the preservation of the consecrated energy by performing the prescribed rituals, and the faith of millions of devotees in the said rituals which keep alive the consecrated energy ("Chaitanyam"). In other words, if the prayer of the Petitioner were to be granted it would defeat the rights of the Deity, the Temple, the guardians of the institution and the believers in the institution. Therefore, in the interest of preserving and protecting each of these fundamental rights under Articles 25

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and 26, the Petition must necessarily fail. It is humbly submitted that secular judicial assessment of such issues through the prism of secular constitutional morality and rationality is incapable of appreciating or accommodating the metaphysics of faith, particularly in the realm of consecrated energy. It is for this reason that constitutional morality dictates that Courts must be alive to the limits of application of secular rationality in relation to religious institutions, in particular their religious aspects.

[Ratilal Panachand Gandhi v. State of Bombay AIR 1954 SC 388; Most. Rev. P.M.A. Metropolitan and Ors. vs. Moran Mar Marthoma and Ors. AIR 1995 SC 2001.]

- 17. Applying the above position, it is humbly submitted that the dynamics of and considerations involved in the Application of Article 14 to a secular institution are very different from its application to a religious institution and its religious practices. It is for this reason that despite furthering the goals of egalitarianism from the perspective of entry of all classes of Hindus into Hindu religious institutions, the framers of the Constitution chose not to interfere with those aspects of religious institutions which do not lend themselves to application of secular rationality. It is also for this very reason that Constitutional Courts of this country have consistently held that in matters of appointment to religious positions even the law must make way to the *shastras*/scripture that apply to religious institutions. [*Riju Prasad Sarma and Ors.* vs. *State of Assam and Ors.* (2015) 9SCC 46/
- 18. In the context of Temples, even the Supreme Court has acknowledged that what distinguishes a Temple from a Mosque is that the former involves the foundational ritual of *Prana Prathistha*/Consecration which makes it a place of worship in stark contrast to a Mosque which is a place of prayer/congregation. Given that the act of consecration and its centrality to a Temple under Hindu Law has been judicially recognized, all those rules, rituals, practices and traditions which shape and inform the act of



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consecration and the continued preservation of the consecrated energy must remain free from secular interference under the garb of social justice or reform. Should the State or its judicial arm fail to observe these limitations, it may result in a situation where the cause of reform would have been advanced at the expense of the spiritual quality of a religious institution. Secular rationality/constitutional morality does not understand the close nexus between rituals and energy (performance of Karma and preservation of Dharma), and therefore must desist from applying itself to those realms which are beyond secular considerations. In the above circumstances, the Petitioner cannot claim to have greater or better rights than the rest of the stakeholders to the Temple including and starting with the Primary Cause, namely, the Deity Himself. It is for these reasons that the Petitioner lacks a fundamental right which is capable of being horizontality asserted in the instant context and if such right exists, it is necessarily subservient to the rights of the stake holders to the Temple. This would be consistent with the combined interpretation of Articles 14, 25(1) and 26.

Reliance is placed on [Vidya Varuthi Thirtha Swamigal vs. Balusami Ayyar and Ors AIR 1922 PC 123; Seshammal and Ors. etc. v. State of Tamil Nadu AIR 1972 SC 1586; Ram Jankijee Deities v. State of Bihar 1999 AIR SCW 1878; Commissioner, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar, Sri Shirur Mutt AIR 1954 SC 282; N. Adithayan vs. The Travancore Devaswom Board and Ors. AIR 2002 SC 3538]

19. Moreover, it is humbly submitted that the devotees of the Deity constitute a religious denomination within the meaning of Article 26 whose rights must prevail over the rights of the Petitioner. Since the Shirur Math judgement of the Hon'ble Supreme Court is under reconsideration as part of the Reference proceedings in the Sabarimala Temple entry case by the Supreme Court, it is humbly submitted that pending adjudication of the questions raised in the said Reference, *status quo* must be preserved in favor of the devotees of the Temple and its religious traditions including the qualifications of the post of



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Melsanthi. [SC order dated 10 February 2020 in Kantaru Rajeevaru vs. Indian Young Lawyers Association and Ors. (2020)3 SCC 52 ]

20. Without prejudice to the above position, it is humbly submitted that religious denomination derives its identity from the object of its faith and not *vice versa*. Further, in the absence of a definition of religious denomination, a definition spelt out by the judiciary cannot be rigidly applied on the same lines as a statutory definition. A perusal of the history of the Shirur Mutt case starting from the judgement of the Madras High Court in 1951 makes it abundantly clear that the spirit of the *Shirur Mutt* judgement pronounced in the year 1954 has been misunderstood in subsequent judgements by applying a rigid test to the recognition of denominational status. Following is the definition of religious denomination from the Webster Dictionary used by the Madras High Court in the 1951 Shirur Mutt Judgement:

"of action of naming from or after something; giving a name to, calling by a name; a characteristic or qualifying name given to a thing or class of things; that by which anything is called; an appellation, designation or title; a collection of individuals classed together under the same name; now almost always specifically a religious sect or body having a common faith and organisation and designated by a distinctive name."

The definition in the Oxford dictionary at the relevant time was as follows:

- 1. the action of naming from or after something; giving a name to, calling by a name;
- 2. a characteristic or qualifying name given to a thing or class of things; that by which anything is called; an appellation, designation, title;
- 3. Arith. A class of one kind of unit in any system of numbers, measures, weight, money, etc., distinguished by a specific name;

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- 4. A class, sort, or kind (of things or persons) distinguished or distinguishable by a specific name;
- 5. A collection of individuals classed together under a same name; now almost always specifically a religious sect or body having a common faith and organisation and designated by a distinctive name
- 21. The definitions of denomination from various dictionaries reveal that the underscored portion of the fifth definition in the Oxford Dictionary is a reflection of the later development of Christian denominations, and were merely one of the definitions of a denomination. In light of this history and in light of one of the definitions from Oxford Dictionary quoted by this Hon'ble Court, it is evident that the Court did not reject the applicability of the rest of the definitions, which includes "A class, sort, or kind (of things or persons) distinguished or distinguishable by a specific name". Going by the dictionary definition of a religious denomination, Dharmic Kshetras enjoy denominational status under Article 26 even if they do not have Christian organizational trappings. This would not be against the dictum of Shirur Mutt, but would in fact be consistent with it. In this regard, reliance is also placed on the fact that the term Sampradaya, as used in the Hindi version of Article 26, more accurately describes Indic sects as opposed to "denomination" which is distinctly Christian and therefore cannot be used to understand Hindu sects or denominations or sections thereof. Applying the above, it is humbly submitted that Ayyappa Devotees must be treated as a religious denomination within the Hindu fold given its distinctive features and practices. Consequently, the Temple enjoys the protection of Article 26, which limits the Petitioner's ability to assert Article 14 is such an unrestrained fashion. [Commissioner, Hindu Religious Endowments vs. Lakshmindra Thirtha Swamiar, Sri Shirur Mutt AIR 1954 SC 282; Sardar Sayedna Taher Saifuddin Saheb vs. State of Bombay AIR 1962 SC 853]



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- 22. The above argument is without prejudice to the position of the additional Respondent No. 10 that the instant Petition must be adjourned *sine die* in view of the pendency of the Reference proceedings in the Sabarimala case, which raises serious constitutional questions of far-reaching import that are directly relevant and applicable to the adjudication of the instant Petition. However, despite this state of affairs, should this Hon'ble Court still proceed to decide the instant Petition *without* impleading the Chief Thanthri of the Sabarimala Temple and the Pandalam Royal Family, the law laid down by the Supreme Court in *Riju Prasad Sarma* squarely applies to the Petition herein, both with respect to absence of sufficient pleadings/material as well as on preserving the established rights of the Malayali Brahmins to the post of Melsanthi.
- 23. Also, while the pendency of the Reference proceedings comes in the way of adjudication of the Petitioner's claim, the pendency does not in any manner prevent this Hon'ble court from enforcing the established rights of the Malayali Brahmins applying the logic of *Riju Prasad Sarma*. In a nutshell, this Hon'ble court may be pleased to consider one of the following courses of action:

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- (i) Apply *Riju Prasad Sarma* and dismiss the Petition for its flawed vertical assertion and for failing to set up a serious case of horizontal assertion in view of the established rights of Malayali Brahmins; or
- (ii) Adjourn the instant proceedings *sine die* until in the Reference proceedings the Supreme Court clarifies its position with respect to the power of judicial review over ecclesiastical questions.
- 24. Should the Hon'ble Court still deem it fit to continue hearing the matter, it must at the very least seek the assistance of the Chief Tantri of the Temple as well as the Pandalam Royal family which is the foster family of the Deity Himself. Without prejudice to the above, it is humbly submitted that the



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application of ERP test by a secular constitutional court creates the conundrum of application of secular rationality to religious institutions by seeking to distill the essential and non-essential aspects of religious practice which a secular court is institutionally untrained to undertake. [Commissioner, Hindu Religious Endowments vs. Lakshmindra Thirtha Swamiar, Sri Shirur Mutt AIR 1954 SC 282; Ratilal Panachand (1954); Seshammal and Ors. etc. v. State of Tamil Nadu AIR 1972 SC 1586; Adi Saiva Sivacharyargal Nala Sangam (2016); Most. Rev. P.M.A. Metropolitan and Ors. vs. Moran Mar Marthoma and Ors. AIR 1995 SC 2001]

25. It is humbly submitted that on matters of religious practice the word of the religious authority of the institution is deemed to be authoritative. In the instant case, the Chief Tantri of the Sabarimala Temple must be invited to assist this Hon'ble Court on the essentiality of the qualifications of the Melsanthi to the preservation of the consecrated energy of the Temple. In the absence of such expert assistance on an issue in which this Court has no institutional training, the continuation of the instant proceedings would be at the expense of fairness and to the detriment of the rights of the Deity, the Temple and the devotees. At the end of the day, the Temple is the abode of the Deity and within the Temple the Deity's writ is final which are given effect to by the Servitors and are expected to be observed by all those who wish to enter the Temple. The Deity does enjoy rights under the Constitution as a juristic person. After all, if a corporate body is entitled to enjoyment of fundamental rights as a juristic person for the benefit of its stakeholders, the Deity has a better case for enjoyment of such rights since the existence of the Deity is real for believers in stark contrast to the creation of a legal fiction such as a company. In this regard too, since the judgement dated September 28, 2018 delivered in Indian Young Lawyers Association and Ors. v. State of Kerala W.P. (C) No.373 of 2006 is under Review and the Reference proceedings which arise therefrom are pending, this Hon'ble Court must preserve the rights of the Deity by preserving the status quo in relation to the qualifications of the Melsanthi. [Vidya Varuthi Thirtha Swamigal vs.





Balusami Ayyar and Ors AIR 1922 PC 123; Pramatha Nath Mullick vs. Pradyumna Kumar Mullick and Ors.AIR 1925 PC 139; Yogendra Nath Naskar vs. Commissioner of Income-Tax, Calcutta 1969 AIR 1089; Ram Jankijee Deities vs. State of Bihar 1999 AIR SCW 1878.]

- 26. It is submitted that even on the basis of the case as set up by the Petitioner, there is no basis for invocation of Articles 14 and 21 for the following reasons:
  - (i) Arguendo the Travancore Devaswom Board is a local authority within the meaning of Article 12, it may be treated as 'State' only in relation to secular aspects of the Temple but not in relation to prescription of eligibility criteria for the post of Melsanthi since that is strictly a religious aspect and is by no means secular;
  - (ii)The Impugned Notification which spells out the eligibility criteria is not a case of State action. In contrast, the TDB is merely performing its duties under Section 15A(i) of the Travancore Cochin Hindu Religious Institutions Act of 1951 and by preserving enforcing pre-existing tradition/custom/practice/right by virtue of being a trustee in relation to the Temple. Therefore, there is no secular State action in question which enables a vertical assertion of fundamental rights. In this regard, reliance is placed on Para 42 of Riju Prasad Sarma (at Page 417/551 of the Compilation). Critically, Article 16(5) specifically exempts the application of the principles of equality in relation to appointment to religious posts since such appointments are governed by considerations under Articles 25 and 26. In this regard, reliance is placed on the judgment of the Hon'ble



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Supreme Court in *Adi Saiva Sivacharyargal Nala Sangam* vs. *Govt. of Tamil Nadu* AIR 2016 SC 20 in Paras 37 and 38 (at Page 271/551 of the Compilation);

- (iii) It is submitted that under Article 13 all pre-constitutional laws, which are not inconsistent with Part III of the Constitution, shall be deemed to be valid. 'Laws' include customs and traditions. Customs and traditions include religious beliefs and practices. In this regard, reliance is placed on Para 59 of Riju Prasad Sarma (at Page 423/551 of the Compilation). Applying Riju Prasad Sarma and Adi Saiva Sivacharyargal, it is evident that the Supreme Court has already held that the selection of one particular group for appointment to religious posts in accordance with applicable scripture or tradition does not militate against the principles of Article 14. Therefore, the prescription of only Malayali Brahmins to the post of Melsanthi is not violative of Part III, and consequently enjoys the presumption of validity under Article 13. This coupled with the fact that the eligibility criteria for the post of Melsanthi has been judicially recognized and endorsed by Supreme Court and this Hon'ble Court, the historically unbroken practice of the Sabarimala Temple enjoys greater presumptive validity. This, in turn, translates to a higher burden on the part of the Petitioner to demonstrate a serious challenge to the established practice of the Sabarimala Ayyappa Temple. As stated earlier, the Petitioner has failed to do so;
- (iv) To compare the eligibility criteria for the post of Melsanthi with the practice of untouchability is to resort to the unfortunate use of untouchability as the sole prism/lens to



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understand every Hindu practice, which does grave injustice to the greatness of Sanatana Dharma and its followers. It is submitted that despite having abolished untouchability under Article 17, and having enabled the entry of the formerly depressed classes in temples through Article 25(2)(b), the framers of the Constitution were conscious of religious rights and therefore did not include places of worship in Article 15 and went a step further to add Article 16(5). Consequently, neither Articles 15 nor 17 can come to the aid of the petitioner. In this regard, reliance is placed on Paras 37 and 38 of Adi Saiva Sivacharyargal Nala Sangam (at Page 271/551 of the Compilation);

- (v) Finally, it is submitted that even Section 3 of the Protection of Civil Rights Act, 1955 Act cannot come to the aid of the Petitioner as it only furthers the purpose of Articles 17 and 25(2)(b). Thus, the provisions of the 1955 Act should be read in the context of Articles 17 and 25(2)(b). In any case, Article 16(5) cannot be prevailed upon by any provision of the 1955 Act. Section 16 of the 1955 Act allows the Act to prevail over other statutes but not Article 16(5) of the Constitution, since the Constitution is not 'any other law' or statute. The fact that the 1955 Act cannot prevail over Article 16(5) in matters of appointment to religious posts has been established by the Supreme Court in Para 40 of Adi Saiva Sivacharyargal Nala Sangam (at Page 272/551 of the Compilation).
- 27. Applying the ratio of all the above cited judgments and the law as it stands, it is clear that selection of a particular individual or a group for appointments to religious posts in religious institutions is by no stretch of imagination a secular activity. It necessarily requires adherence to the applicable scripture or tradition, in this case Chapter 15 of *Bhoothanatha Upakhyanam*, to give



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effect to the rights of the Deity and the Temple under Articles 25 and 26. Such selection is not discrimination or negative exclusion. If this position were to be turned on its head, as sought by the Petitioner herein, every religious institution shall lose the right to adhere to its religious practices in matters of appointment to religious posts. This would amount to weaponization of Article 14 to the detriment of the rights of Deities, religious institutions, their guardians and their followers under Articles 16(5), 25, 26 and 29. It would also result in taking away the exclusive rights of non-Brahmin priests in those institutions where they have the sole right to be appointed as priests.

- 28. It is pertinent to note that if the prayer sought in the Petition were to be granted, it would amount to forcing the Chief Thanthri of the Temple to grant *Deeksha* in direct violation of the scripture that governs the Temple and consequently the Will of Deity as reflected through scripture. In other words, the Chief Thanthri, who is the guardian of the Deity's Will, cannot be mandated or compelled to act against the Deity's Will and violate his own swadharma. On the significance of *Prana Prathishtha* and importance of rites and rituals which preserve the consecrated energy, reliance is placed on *Pramatha Nath Mullick* vs. *Pradyumna Kumar Mullick and Ors*.AIR 1925 PC 139 (Paras 8-10, 28, 35 and 36 at Pages 538/551, 541/551 and 543/551 respectively of the Compilation) and *Ram Jankijee Deities* vs. *State of Bihar* 1999 AIR SCW 1878 (Paras 11, 15 and 20 at Pages 443-444/551 and 446/551 respectively of the Compilation).
- 29. It is humbly submitted that in matters of religious practices, specifically in relation to temples, the doer is as important as the deed on account of the concept of scripturally prescribed *adhikara* which translates to right/authority to perform a particular act. As submitted during oral submissions, a temple is materially different from a mosque or a church. Right from the consecration of the Murti/the image through invocation of a specific *moolamantra*, which



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is known as the process of *Prana Prathishtha*, to the rites and rituals which are mandated for the preservation of the consecrated energy and the specific prescriptions as to who can perform such rites and rituals, each of these aspects are part of the core philosophy behind establishment and maintenance of temples. Consequently, the Petitioner cannot be allowed to rewrite the history and identity of the Temple and create new rights to the detriment of established rights of existing stakeholders through its weaponized invocation of Article 14.

30. It must be appreciated that a temple is established as an abode of a deity and therefore, everyone who seeks access to the temple in whatever capacity must necessarily subscribe to its traditions. It follows that it cannot be argued that since the Sabarimala Temple is open to everyone for the darshan of the Deity, everyone must have the equal right to be appointed to the post of Melsanthi. If the Petitioner's prayer were to be granted, Russians, Muslims, Argentinians and people from all over the world who visit the Sabarimala Temple would claim the right to be appointed to the post of Melsanthi, provided they acquire the necessary training. This is fallacious since it would amount to reduction

of the spiritual requirements for the post of Melsanthi to a mere qualification. Such an approach suffers from the problem of applying secular rationality to application of secular rationality and equality to ecclesiastical issues and institutions. Judgments both in Bharat and elsewhere have recognized the inapplicability of secular rationality to matters of faith, and the consequent deference of courts to religious authorities in matters of faith. In this regard, the reliance is placed on *Bonacum* vs. *Harrington*, 65 NEB. 831 (at Pages 185-189/551 and Page 191/551 of the Compilation); *MD. & VA. Churches* vs. *Sharpsburg* ch., 396 U.S. 367 (1970) (at Pages 194-195/551 of the Compilation); *United States* vs. *Ballard* 322 U.S. 78 (1944) (at Pages 199-200/551 and 204-206/551 of the Compilation); and *Sutton* vs. *Rasheed*, 323 F.3D 236, 240, 242 (3D CIR. 2003) (at Pages 241-243/551 of the Compilation).



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31. It is precisely on account of recognition of the limits of secular rationality to matters of faith that the Hon'ble Supreme Court has framed seven questions in the Sabarimala Reference proceedings *vide* order dated February 10, 2020, which shows that even the highest constitutional court of the land is revisiting all questions and issues which have been taken to be settled since 1954. In view of this welcome introspection by the Supreme Court on such matters, which are directly relevant and applicable to the Petition herein, the submissions of Para 22 of the instant additional Written Submission are reiterated which spell out the possible courses of action for this Hon'ble Court's kind consideration.

In view of the above, it is humbly prayed that this Hon'ble Court maybe pleased to accept the counter affidavit on record and the writ petition may be dismissed for the fair play of justice.

All the facts stated above are true. Dated this the 3<sup>rd</sup> day of March, 2023



FOR MEDPLE FOR DHARMA TRUS

DEPONENT

Solemnly affirmed and signed before me by the deponent who is known to me on this the 3<sup>rd</sup> day of March, at my office at Ernakulam.

**ADVOCATE** 

DRAWN BY: J SAI DEEPAK, ADVOCATE

For PECALE FOR DHARMA TIMES

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