Anti-conversion laws

Tuesday, Dec 17, 2002, the Hindu

The true impetus for religious conversion will remain contested, and in all probability, it may never be established one way or the other, for the reality lies somewhere in between.

THE RECENT controversy concerning the enactment of the anti-conversion law in Tamil Nadu was characterised by two kinds of reactions. On the one hand there were those who proposed and voted for the legislation for political gains combined with concern that in the absence of such a law, `forcible' conversions would go unnoticed and unpunished. The opposing camp consisted of those belonging to minority communities who felt that such legislation was aimed at restricting the right to propagate religion, which is guaranteed by Article 25 of the Constitution. While these reactions tend to polarise masses of the communities concerned in particular instances, what is at stake here is the nature of Indian democracy, which provides the larger context for these arguments. It is therefore worth our while, whether we belong to the majority or the minority community, to ponder the issue historically, before we consolidate our opinions.

Legislative history

The legislative history relating to the issue of conversion in India underscores the point that the authorities concerned were never favourably disposed towards conversion. While British India had no anti-conversion laws, many Princely States enacted anti-conversion legislation: the Raigarh State Conversion Act 1936, the Patna Freedom of Religion Act of 1942, the Sarguja State Apostasy Act 1945 and the Udaipur State Anti-Conversion Act 1946. Similar laws were enacted in Bikaner, Jodhpur, Kalahandi and Kota and many more were specifically against conversion to Christianity. In the post-independence era, Parliament took up for consideration in 1954 the Indian Conversion (Regulation and Registration) Bill and later in 1960 the Backward Communities (Religious Protection) Bill, both of which had to be dropped for lack of support. The proposed Freedom of Religion Bill of 1979 was opposed by the Minorities Commission due to the Bill's evident bias.

However, in 1967-68, Orissa and Madhya Pradesh enacted local laws called the Orissa Freedom of Religion Act 1967 and the Madhya Pradesh Dharma Swatantraya Adhiniyam 1968. Along similar lines, the Arunachal Pradesh Freedom of Religion Act, 1978 was enacted to provide for prohibition of conversion from one religious faith to any other by use of force or inducement or by fraudulent means and for matters connected therewith. The latest addition to this was the Tamil Nadu Prohibition of Forcible Conversion of Religion Ordinance promulgated by the Governor on October 5, 2002 and subsequently adopted by the State Assembly. Each of these Acts provides definitions of `Government', `conversion', `indigenous faith', `force', `fraud', `inducement' (and in the case of Arunachal, that of `prescribed and religious faith'). These laws made forced conversion a cognisable offence under sections 295 A and 298 of the Indian Penal Code that stipulate that malice and deliberate intention to hurt the sentiments of others is a penal offence punishable by varying durations of imprisonment and fines.

As early as 1967, it became evident that the concern was not just with forced conversion, but with conversion to any religion other than Hinduism and especially Christianity and Islam. In the Orissa and Madhya Pradesh Acts, the punishment was to be doubled if the offence had been committed in respect of a minor, a woman or a person belonging to the Scheduled Caste or Scheduled Tribe community. These may be seen as further reinforcing the several statutory penalties for ceasing to be a Hindu such as the 1955-56 Hindu Law enactments namely Hindu Minority and Guardianship Act 1956 (Section 6), Hindu Adoption and Maintenance Act 1956 (Sections 7, 8, 9, 11, 18-24), Hindu Marriage Act 1955 (Sections 13 (ii), 13 A) and the Hindu Succession Act (section 26). The picture is complete if we account for the fact that most of these laws are aimed to keep the low caste Hindus within the fold of Hinduism. And so while law prohibits conversion, `reconversion' of low caste Hindus is permissible. If a low caste Hindu who had converted to another faith or any of his descendants reconverts to Hinduism, he might get back his original caste (Kailash Sonkar (1984) 2 SCC 91; S. Raja Gopal AIR 1969 SC 101).

Meaning of propagation

In a prominent case challenging the validity of the Madhya Pradesh and Orissa Acts, Chief Justice A.N. Ray in Reverend Stainislaus v. State of Madhya Pradesh (AIR 1977 SC 908) and Yulitha v. State of Orissa and others ruled that propagation is different from conversion. Adoption of a new religion is freedom of conscience, while conversion would impinge on `freedom of choice' granted to all citizens alike. After examining the different meanings of the word "propagate" in Article 25(1), Justice Ray expressed the view that "what Article 25(1) grants is not the right to convert another person to one's own religion by exposition of its tenets." On the question of legislative competence, the court was of the opinion that since any attempt at conversion was likely to result in a breach of public order affecting the community at large, the State legislatures would have the competence to enact legislation which is likely to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community.

Commenting on this judgement, Justice P. Jaganmohan Reddy opined that since the court did not comment on the definitions in the two Acts of the expressions, namely, allurement, fraud, force, inducement, fraudulent means, etc., it was not possible to say whether these definitions affected the fundamental rights of the minorities to propagate their religion. Moreover, the court significantly overlooked the freedom of religion of the person getting converted. Conversion is equally the right of the person who is sought to be converted, as such it is of no consequence to him if it is not a part of the freedom of propagation of the religious group to which conversion is made, provided he is not subjected to force/fraud and inducement. In the aftermath of the Meenakshipuram conversion of February 1981, the Ministry of Home Affairs, Government of India, is reported to have advised the State Governments and Union Territory administrations to enact laws to regulate change of religion on the lines of the existing Acts in Madhya Pradesh, Orissa and Arunachal Pradesh (*TheStatesman*, Delhi, November 16, 1982). Let us keep in mind that the ruling party then was not the BJP, but the Congress (I).

Arguments of use of force and the indelible `foreign hand' in the conversion of low caste and poor people have been the impetus behind such enactments. In the case of the much agonised over Meenakshipuram conversion, the Home Ministry presented evidence of the extent of foreign support to these conversions. However there were several reports including one by the Regional Director of the SC/ST Federation that this conversion was a protest against the humiliation of untouchability suffered by the community. In Madhya Pradesh, one of the States in which the anti-conversion had been enacted decades ago, two priests and a nun were sentenced to imprisonment on the charge of forcible conversion by a Raigarh court. This despite a written communication sent to the District Magistrate, the SDM and the SO (Police) claiming they had changed their religion voluntarily and without any allurement (*TOI*, August 22, 2002). How valid are these concerns if it is true that in both Madhya Pradesh and Orissa, not a single case had been framed under this Act for more than three decades (Walter Fernandes, *The Hindu*, November 10, 1999). The true impetus for religious conversion will remain contested, and in all probability, it may never be established one way or the other, for the reality lies somewhere in between.

Humiliating conditions

Whereas in the 1980s the concern was over conversion to Islam, conversions to Christianity have been the source of worry in the 1990s. Yes, forced conversions are wrong. (And in some cases the converts have admitted to ridiculous logic of conversion given to them). But, what is worse is forcing masses of people to accept their humiliating conditions without protest, when they seem to have made a conscious decision to opt out of the Hindu fold as a form of symbolic protest.

The BJP's election manifesto in Gujarat speaks of enacting a similar law in the State that has now become infamous for its persecution of Christian and Muslim minorities. In a democracy, the majority will inevitably benefit from the principle of `majority rule.' What we hope for are discerning majorities, who will vote and strive for meaningful democracy.

ARPITA ANANT

Research Scholar, Jawaharlal Nehru University, New Delhi

Conversion debate

V.VENKATESAN
in New Delhi

Volume 25 - Issue 19 :: Sep. 13-26, 2008
INDIA'S NATIONAL MAGAZINE
from the publishers of THE HINDU, Frontline

The violence in Orissa is the result of prejudice caused by a flawed understanding of the freedom of religion as guaranteed by law.

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Rajendra Narayan Singh Deo, Ganatantra Parishad (Swatantra Party) leader, was the Chief Minister when the Orissa Freedom of Religion Act, 1967, was passed.

ORISSA was the first State in India to enact a piece of legislation restricting religious conversions. The Orissa Freedom of Religion Act, 1967, provides that no person shall "convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means".

What were the compulsions in 1967 for Orissa to enact this law, which became a precedent and a model for several States, namely, Madhya Pradesh (1968), Arunachal Pradesh (1978), Gujarat (2003), Chhattisgarh (2003), Rajasthan (2005), Himachal Pradesh (2006), and Tamil Nadu (a law was enacted in 2002, but repealed in 2004)?

Before Independence, some princely states enacted anti-conversion laws meant to protect the local people from religious conversion against their free will. Among these were the Raigarh State Conversion Act, 1936, the Sarguja State Apostasy Act, 1942, and the Udaipur State Anti Conversion Act, 1946.

The adoption of the Constitution of India in 1950, with Article 25 guaranteeing freedom of conscience and free profession, practice and propagation of religion, these pre-Independence Acts were seen more as anachronisms and were allowed to lapse with the integration of the princely states into the Indian Union. But suspicions lingered over

the activities of Christian missionaries, especially in States such as Madhya Pradesh and Orissa, which had large tribal populations.

The Government of Madhya Pradesh set up a committee to inquire into the activities of Christian missionaries in the State. The committee's report focussed on, among other things, the inflow of money from abroad. This raised concerns about the misuse of the money in the garb of social service and charitable activities. Strangely, the report of this Madhya Pradesh committee became the basis for Orissa's law.

Does conversion undermine faith?

The basic premise of the Orissa Act was debatable. The Act claimed: "Conversion in its very process involves an act of undermining another faith. This process becomes all the more objectionable when this is brought about by recourse to methods like force, fraud, material inducement and exploitation of one's poverty, simplicity and ignorance." As the Orissa Act became the model for other States, which provided more scope for abuse by the authorities than what the Orissa Act had envisaged, it deserves a close scrutiny.

The Act defines conversion as renouncing one religion and adopting another. It explains that "force" shall include a show of force or a threat of injury of any kind, including the threat of divine displeasure or social excommunication. Under the Act, "inducement" shall include the offer of any gift or gratification, either in cash or in kind, and shall also include the grant of any benefit, either pecuniary or otherwise. "Fraud" has been defined to include misrepresentation or any other fraudulent contrivance. Each of these definitions is amenable to varied interpretations, and the scope for its abuse is inherent.

Section 3 of the Act states that no person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion. The loose language in the provision suggests that in its scope, it encompasses every act of conversion, whether forced or otherwise.

The Madhya Pradesh Act introduced an additional provision requiring that whoever converts any person, either as a religious priest or by taking part directly or indirectly in a ceremony necessary for such conversion, must send an intimation to the District Magistrate that such a conversion has taken place. Failure to do so would invite imprisonment up to one year and a fine. The Act substitutes the word "inducement" used in the Orissa Act with "allurement" but makes no difference in the scope of its abuse.

Both the Orissa and Madhya Pradesh Acts were challenged in the respective High Courts. The Orissa High Court declared the Orissa Act *ultra vires* of the Constitution, insofar as it infringed upon the right guaranteed by Article 25. The court also held that the State legislature had no legislative competence to enact such a law, as only Parliament could legislate on matters concerning religion under Entry 97 of the Union List under the Seventh Schedule to the Constitution. Both the States had claimed that they were competent to legislate in terms of Entry 1 of List II (State List) dealing with public order. However, the Madhya Pradesh High Court upheld the Madhya Pradesh Act.

The Supreme Court's five-Judge Constitution Bench heard the appeals against these two verdicts in *Rev. Stainislaus vs. State of Madhya Pradesh and Others (1977)* and upheld these Acts. As the Supreme Court's judgment became a sort of licence for other States to enact similar anti-conversion laws, it needs to be asked whether the judgment was correct. The court considered whether the two Acts were violative of the fundamental right guaranteed under Article 25(1) of the Constitution and whether the State legislatures were competent to enact them.

Right to propagate

K. PICHUMANI

AIADMK leader J. Jayalalithaa. Tamil Nadu enacted an anti-conversion law in 2002, when she was Chief Minister, only to repeal it in 2004.

Under Article 25(1), subject to public order, morality and health and to the other provisions of Part III of the Constitution dealing with Fundamental Rights, all persons are equally entitled to the freedom of conscience and the right freely to profess, practise and propagate religion. The court rejected the argument that the right to "propagate" one's religion meant the right to convert a person to one's own religion.

Relying on the dictionary meaning of the word "propagate", the court held that what Article 25 granted was not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. The court further held that Article 25(1) guaranteed "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulated that if a person purposely undertook the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed alike to all citizens.

There are enough reasons to suggest that the court's ruling needs reconsideration by a larger Bench. H.M. Seervai, the eminent author of *Constitutional Law of India*, whom the Supreme Court often cites in its many judgments as an authority in support of its conclusions, has pointed out in Volume 2 (1993) of his book that it was unfortunate that the legislative history of Article 25 was not brought to the Supreme Court's attention in this case (page 1287). Seervai wrote:

"When the matter was debated in the Constituent Assembly, there was considerable discussion on the word 'propagate'. In the course of the debate, T.T. Krishnamachari pointed out what is clear from the language of Article 25 itself, namely, that it was 'perfectly open to the Hindus and the Arya Samajists to carry on their *suddhi* propaganda as it is open to the Christians, the Muslims, the Jains and the Buddhists and to every other religionist so long as it is subject to public order, morality and the other conditions that have to be observed in any civilized society'.

"But the speech of Mr. K.M. Munshi gave the historical background of Article 25(1) in the paragraph set out below, in which he pointed out the insertion of the word 'propagate' was the result of a compromise to reassure the minority communities, particularly the Indian Christian community. He said:

'Moreover, I was a party from the very beginning to the compromise with the minorities, which ultimately led to many of these clauses being inserted in the Constitution and not because they wanted to convert people aggressively,

but because the word 'propagate' was a *fundamental part of their tenet*. Even if the word were not there, I am sure, under the freedom of speech which the Constitution guarantees it will be open to any religious community to persuade other people to join their faith. *So long as religion is religion, conversion by free exercise of the conscience has to be recognised.* The word 'propagate' in this clause is nothing very much out of the way as some people think, nor is it fraught with dangerous consequences'" (emphasis added by Seervai).

Seervai was clear that Chief Justice A.N. Ray's conclusion in the Stainislaus judgment ran counter to legislative history. He submitted that Chief Justice Ray did not ask the central question that was involved in the appeals before him, namely, whether conversion was a part of the Christian religion. This omission, he said, was indefensible because the judgment of the Orissa High Court delivered on October 24, 1972 (*Yulitha Hyde vs. State*), was under appeal to the Supreme Court and that judgment had squarely raised the central question whether conversion was a part of the Christian religion.

In its judgment, the Orissa High Court had held: "Counsel for the several petitioners have freely quoted from several Christian Scriptures of undoubted authority to show that propagating religion with a view to its spreading is a part of religious duty for every Christian and, therefore, must be considered as a part of the religion. *Learned Govt. Advocate does not dispute this assertion of fact.* We, therefore, proceed on the basis that it is the religious duty of every Christian to propagate his religion" (emphasis added by Seervai).

The High Court thus recorded its finding that Article 25(1) saw propagation of religion and conversion as a part of the Christian religion. Seervai observed that the Supreme Court, which reversed the judgment of the Orissa High Court, made no attempt to show that the question raised and decided was either irrelevant, or was wrongly decided. It is clear from Seervai's comment that the Orissa High Court's finding still holds the field, irrespective of what the anti-conversion statutes enacted by various States may say.

Seervai also explained the basic misconception in the judgment of Chief Justice Ray. He wrote: "Ray C.J. mistakenly believed that if A deliberately set out to convert B by propagating A's religion, that would impinge on B's 'freedom of conscience'. But, as we have seen, the precise opposite is true: A's propagation of his religion with a view to its being accepted by B gives an opportunity to B to exercise his free choice of a religion."

Freedom of religion

Seervai was convinced that the "freedom of religion" guaranteed in Article 25(1) is not limited to the religion in which a person is born but includes any religion. Freedom of conscience, he wrote, harmonises with this, for its presence in Article 25(1) shows that our Constitution has adopted "a system which allows free choice of religion". Therefore, freedom of conscience gives a person freedom to choose or not to choose any one of the many religions that are being propagated.

He elaborated further: "The right to propagate religion gives a meaning to freedom of choice, for choice involves not only knowledge but an act of will. A person cannot choose if he does not know what choices are open to him. To propagate religion is not to impart knowledge and to spread it more widely, but to produce intellectual and moral conviction leading to action, namely, the adoption of that religion. *Successful* propagation of religion would result in conversion" (italics supplied by Seervai). Seervai concluded his discussion thus: "The Supreme Court's judgment is clearly wrong, is productive of the greatest public mischief and ought to be overruled." The huge atmosphere of prejudice against Christians in Orissa and elsewhere is based on a myth that conversion is unconstitutional. The words of Seervai, who passed away on the Republic Day in 1996, are indeed prophetic.

'Public order' and anti-conversion laws

A study carried out by the South Asia Human Rights Documentation Centre (SAHRDC), New Delhi, and published in *Economic and Political Weekly* (January 12, 2008) has revealed that none of the anti-conversion laws enacted by the States demonstrates any credible nexus with public order, a justification for the enactment of these laws. The study points out that while the phrase "public order" is very broad, the discretion this leaves to the State legislatures is not unlimited. The State should be required to demonstrate adequately that the disturbance extends beyond mere

maintenance of law and order and qualifies as a public order issue, on the basis of its scale and extent, the study has pointed out.

The Rajasthan Bill (before its enactment), for instance, merely stated that owing to alleged conversions by force, allurement and fraud, there had been "annoyance in the community", a weakening of the "inter-religious fabric", and "law and order problems". The Bill, therefore, aimed to curb illegal activities and maintain harmony amongst persons of various religions – objectives which could only be termed as vague and irrelevant to the legislation. Indeed, the SAHRDC study found that the crucial distinction between public order and law and order was not reflected in the language of these pieces of legislation.

Orissa High Court

Mrs. Yulitha Hyde And Ors. vs State Of Orissa And Ors. on 24 October, 1972

Equivalent citations: AIR 1973 Ori 116

Author: R Misra

Bench: R Misra, K Panda

JUDGMENT

R.N. Misra, J.

1. These are three applications under Article 226 of the Con- stitution essentially challenging the vires of the Orissa Freedom of Religion Act 2 of 1968 (hereinafter referred to as the Act) and were heard analogously. This common judgment shall dispose of all these applications.

2. Though the main challenge is on a common stand several allegations have been made in these applications which it may be useful to briefly indicate.

(a) O. J. C. No. 185 of 1969:

The four petitioners here are Indian citizens and are Christians belonging to the Roman Catholic church. Of them, the petitioners 2 and 4 are Priests who claim to have dedicated themselves to the propagation of the Catholic faith and are engaged in evangelization leading to conversion of persons belonging to other faith by and/or through preaching exhortation. The impugned Act received assent of the Governor of Orissa on 9-1-1968 and came into force from the following day. Father Fernando and three others named in paragraph 13 of the application who are said to be catechists have been prosecuted under the Act in the Court of a Magistrate at Gunupur in four separate

cases bearing Nos. G. K. Nos. 314. 311. 312 and 313 of 1968 respectively. It is claimed that the Act is ultra vires the Constitution as it infringes the fundamental rights guaranteed under Articles 19(1)(a) and 25 of the Constitution. It is also alleged that the State Legislature has no legislative competency to enact the statute in question. The petitioners have, therefore, prayed for quashing of these several criminal oases upon a declaration that the Act is ultra vires the Constitution.

(b) O. J. C. No. 186 of 1969;

This application is by three petitioners. Petitioners 1 and 2 who are Indian Citizens and also Christians belonging to the Roman Catholic church are permanent residents of Orissa. Petitioner No. 3 is the Catholic Union of India -- a Society registered under the Societies Registration Act, 1860, and petitioners 1 and 2 claim to be members of the said society. It is claimed that the main purpose of the Society is to act as the exponent of the Catholic faith, to make representations and submissions to authorities and public bodies in this country in all matters affecting catholics in India and to safeguard by all lawful means the legitimate rights and liabilities and interests of the catholic community particularly in respect of rights granted or recognised by the Constitution. The petitioner No. 2 claims that he is a priest devotedly engaged in evangelization. The relief claimed in the application is the declaration that the Act is ultra vires the Constitution being violative of the fundamental rights guaranteed by the Constitution and as being an Act of the State Legislature without the requisite legislative competence.

(c) O. J. C. No. 217 of 1969:

The petitioner is an Indian Christian and happens to be a professor of the Theological College at Cuttack. He is also the President of the Utkal Christian Council -- an organisation formed to aid and assist the Protestant Churches, Christian organisations and Christians of Orissa of the Protestant Christian faith in particular. The relief asked for in the writ application is one of declaration that the Act is ultra vires the Constitution.

Thus the main contention raised in these three applications is that the Act is ultra vires the Constitution. The attack is on the following grounds.

(a) The State Legislature has no legislative competency to legislate on matters covered by the Act. end

(b) The Act infringes the fundamental right guaranteed under Article 25 of the Constitution.

3. No return has been made to the rule nisi issued by this Court in any of these applications. While in spite of time being granted for filing of affidavits in opposition in the first two cases no steps have been taken; in the last case, on 8-9-1969, counsel on behalf of the State of Orissa stated that no counter affidavit was intended to be filed.

We should have, therefore, ordinarily assumed all the allegations of fact raised in the applications to be correct and proceeded straightway to deal with the questions of law canvassed at the hearing. We, however, think it appropriate to examine in brief the correctness of the allegations that propagation and propagation by adopting some of the methods which have been made offences under the Act in particular are a part of the Christian religion. We have been referred to the Scriptures as the ultimate basis for such contention.

4. It has been alleged that ordinarily religious instructions covering a period of six months to a year are first imparted to those non-Christians who intend to become Christians by conversion. After such instructions are imparted care is taken to reach satisfaction on behalf of the Church that the "conversion-seeker" has fully understood the tenets of the faith and is therefore, fit enough to be baptised (so far as Catholics are concerned) or converted (as far as Protestants are concerned).

It has been contended that conversion to Christianity is due to all or some of the following reasons:--

(a) Christians believe that their religion is a Holy Gift and is particularly good; instead of selfishly keeping this divine gift all to themselves, they are willingly out to share the some with all others :

(b) Christ, the Holy Father, commanded every Christian to carry His message throughout the world irrespective of race caste and/or creed. Every Christian, therefore, takes it as a mandate of his religion that he must bring non-Christians into his religion,

(c) Though Christians do not deny salvation for non-Christians yet they believe that facilities available in their religion make the attainment of salvation smoother and more convenient and surer;

(d) Christians believe in the Fatherhood of God and Brotherhood of all men and, as such, they consider that all men are not only born equal but arc entitled to live as equals in the kingdom of God;

(e) Christians believe that conversion takes place by extension of God's grace which is obtainable only by daily prayers devoted for the purpose; many non-Christians are attracted towards this religion on account of the Christian belief in God and life after death :

(f) Christians have a very high spiritual standard and aspire for maintaining also a dignified standard of living. They believe that those who receive the grace of God have a divine mandate to allow others in His kingdom who have not received such grace to share it Christians believe that satisfaction of the basic physical wants creates a wholesome basis for effectiveness of religion. Therefore, attempt is made to improve the economic condition of the "conversion-seekers" as an Initial process of conversion;

(g) The exemplary life led by Christian Priests and Nuns and their dedicated life of renunciation evokes admiration and attracts many into the fold of Christianity;

(h) People of the depressed classes in Society feel that they are hated and despised by the well-placed section of people. People of the depressed classes embrace Christianity voluntarily as an escape.

As methods of this propagation of religion often mild threats are held out The preacher says; "You (non-Christians) shall go to hell" or "You shall not obtain salvation". The preacher also often says; "Wrath of God shall come down upon you" or "God will be displeased with you." Dealing with Blessings of obedience and Results of disobedience in the Old Testament it has been said:

".....Blessed shall you be in the city, and blessed shall you be in the field. Blessed shall be the fruit of your body, and the fruit of your ground, and the fruit of your beasts, the Increase of your cattle and the young of your flock ..... And the Lord will abound you in prosperity in the fruit of your body and in the fruit of your cattle and in the fruit of

your ground ..... The Lord will open to you His good treasury the heavens, to give the rain of your land in its season and to bless all the work of your hands .....

But if you will not obey the voice of the Lord your God or be careful to do all his commandments ..... The Lord will send upon you curses, confusion, and frustration, in all that you undertake to do. until you are destroyed and perish quickly ....."

It has been said elsewhere in the Holy Bible:

"To Him ell the prophets bear witness that every one who believes in Him receives forgiveness of sins through His name.

From the Sixteen Documents of Vatican II it has been quoted during argument; The Lord commanded;

"Go. therefore, and make disciples of all nations baptizing them in the name of the Father and of the son and of the Holy Spirit; ..... Go into the whole world, preach the gospel to every creature. He who believes and is baptized shall be saved; but he who does not believe, shall be condemned."

And again:

"Let Christians labour and collaborate with others in rightly regulating the affairs of social and economic life. With special care, let them devote themselves to the education of children and young people by means of different kinds of schools which should be considered not only as the most exultant means of forming and developing Christian youth but also as a valuable public service especially in the developing nations, working toward the uplifting of human dignity, and toward better living conditions. Furthermore let them take part in the striving of these peoples who. waging war on famine ignorance and disease, are struggling to better their way of life and to secure peace in the world. In this activity, the faithful should be eager to offer prudent aid to projects sponsored by public and private organisations, by Governments, by various Christian communities or even by non-Christian communities."

And again:

"Closely united with men in their life and work. Christ's disciples hope to render to others true witness of Christ, and to work for their salvation even where they are not able to announce Christ fully. For they are not seeking a mere material progress and prosperity for men. but are promoting their dignity and brotherly union, teaching those religious and moral truths which Christ illumined with High Light; and in this way, they are gradually opening up a fuller approach to God. Thus they help men to attain to salvation by love for God and neighbour, and the mystery of Christ begins to shine forth, in which there appears the new man, created according to God. and in which the charity of God is revealed ..... Whenever God opens a door of speech for proclaiming the mystery of Christ there is announced to ell men with confidence and constancy the living God, and he whom he has sent for the salvation of all, Jesus Christ in order that non-Christians, when the Holy Spirit opens their heart may believe and be purely converted to the Lord, that they may cleave sincerely to Him Who, being the 'way the truth and the life', fulfils ell their spiritual expectations, and even infinitely surpasses them."

Counsel for the several petitioners have freely quoted from several Christian Scriptures of undoubted authority to show that propagating religion with a view to its spreading is a part of religious duty for every Christian and, therefore, must be considered as a part of the religion. Learned Government Advocate does not dispute this assertion of fact. We, therefore, proceed on the basis that it is the religious duty of every Christian to propagate his religion,

5. The term "religion", as in the American Constitution also has not been defined in our Constitution. Waite, C. J. in Reynolds v. United States. (1879) 98 US 145, observed:

"The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain the meaning and nowhere more appropriately we think, than to the history of the tunes in the midst of which the provision (1st amendment) was adopted. The precise point of the enquiry is, what is the religious freedom which has been guaranteed?"

In course of the discussion, the learned Chief Justice further said:

"In the Preamble of this Act religious freedom is defined: and after a recital that to suffer a civil magistrate to intrude his powers into the field of opinion and to restrain the

profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty', it is declared that 'it is time enough for the rightful purpose of civil Government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found that true distinction between what properly belongs to the church and what to the State."

In Commr. of H. R. E. v. L. T. Swamiar (commonly known as Sirur Math case), AIR 1954 SC 282, at p. 290, Mukherji, J. as his Lordship then was, stated:--

"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, 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 'cults' 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 Article 44(2) of the Constitution of Eire and we have creat 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 Budhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs 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 lav down a code of ethical rules for its followers to accept, it may 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."

His Lordship quoted with approval the weighty observations of Latham, C. J. of the High Court of Australia in Adelaide Co. v. The Commonwealth, 67 CLR 116, running thus:

"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 Section 116 (of the Australian Constitution Act). The section refers in express terms to the 'exercise' of religion, end 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.'

While referring to several later decisions of the Supreme Court, counsel before us candidly stated that none has differed from the weighty observations indicated here. We, therefore, do not propose to refer to the other cases. 6. Article 25 guarantees 'freedom of conscience' and 'the right freely to profess, practise and propagate religion'. Dealing with the scope of the guarantee under this Article, their Lordships of the Supreme Court in Durgah Committee v. Hussain Ali, AIR 1961 SC 1402, at page 1414 stated :

"Under Article 25(1), subject to public order, morality and health and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and their right freely to profess, practise and propagate religion. This freedom guarantees to every citizen not only the right to entertain such religious beliefs as may appeal to his conscience but also affords him the right to exhibit his belief in his conduct by such outward acts as may appear to him proper in order to spread his ideas for the benefit of others."

The true scope of the guarantee under Article 25(1) of the Constitution, therefore, must be taken to extend to propagate religion and as a necessary corollary of this proposition,

conversion into one's own religion has to be included in the right so far as a Christian citizen is concerned.

The right guaranteed under Article 25(1), however, is not absolute, but has been expressly subject to 'public order', 'morality' and 'health' and 'to the other provisions of Part III of the Constitution', We must, therefore, now advert to the Act to find out whether its provisions which are alleged to infringe the right under this Article are covered by the limitations provided therein or do indeed infringe the right.

7. Sections 2, 3 and 4 are the material provisions of the Act with reference to which the vires thereof is attacked. These are those provisions:

"2: Definitions:

In this Act unless the context otherwise requires:--

(a) 'conversion' means renouncing one religion and adopting another;

(b) 'force' shall include & show of force or a threat of injury of any kind including threat of divine displeasure or social ex-communication;

(c) 'fraud' shall include misrepresentation or any other fraudulent contrivance;

(d) 'inducement' shall include the offer of any gift or gratification either in cash or in kind, and shall also include the grant of any benefit, either pecuniary or otherwise; and
(e) xx xx xx

3. Prohibition of forcible conversion: No person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion.

.4. Punishment for contravention of the provisions of Section 3:--

Any person contravening the provisions contained in Section 3 shall, without prejudice to any civil liability, be punishable with imprisonment of either description which may extend to one year or with fine which may extend to five thousand rupees or with both;

Provided that in case the offence is committed in respect of a minor, a woman or a person belonging to the Scheduled Castes or Scheduled Tribes, the punishment shall be imprisonment to the extent of two years and fine upto ten thousand rupees."

Section 5 makes any offence under the Act cognizable and Section 6 makes prosecution conditional upon sanction of the prescribed authority.

Counsel for the petitioners have conceded during argument that Christianity does not approve of 'force' or 'fraud' as methods of conversion. It has been indicated in the written note submitted by counsel that any conversion obtained by such process is void. Objection, however, is raised to the language used in the definition of 'fraud' and 'force'. It is stated that each of these two words, apart from being commonplace, has a known connotation having been used in the Penal Code for over a hundred years. Section 349 of the Code defines 'force' while Section 25 defines 'fraudulently'. 'Inducement' has been referred to in several sections of the Code. (e. g. Sections 366A and

415. I. P. C.). These words have received authoritative treatment in several judgments of Courts. If the impugned Act intended to prohibit the use of 'force' or 'fraud' as methods of conversion, mere reference to the words should have been enough. On the other hand, by giving extended meaning to the words, interference with the Christian religion has been caused.

It is true that 'force' as defined in the Code refers to physical force while the definition under the Act extends the scope. 'Threat of divine displeasure' or 'social ex-communication' are said to constitute the extension of the concept The petitioners have contended that people from the down trodden sections of society ordinarily take to Christianity as an escape. It is in this background that the legitimacy of the purpose -- the extension of the definition falls to be determined. Threat of divine displeasure numbs the mental faculty; more so of an undeveloped mind and the actions of such person thereafter are not free and according to conscience. Social ex-communication is a serious malady and forces the ex-communicated to live a hazardous life. The extended meaning given to the word 'force' does not seek to import anything very foreign into the word inasmuch as the two acts which are now included in the definition do fit into the essential concept of the word. Merely because the Penal Code confines the meaning of the word to bodily force, in our opinion, cannot justify the acceptance of the contention advanced before us. Similar is our view with regard to the term 'fraud'. The contention

that there is vagueness in the term 'misrepresentation' does not also impress us. As we have already said these are not the normal methods adopted for bringing about conversion. Again they are tainted and we see no justification in the contention that they cannot be prohibited. The intention of the law is to regulate conduct and we see nothing wrong with e law which excludes these as not approved conduct.

While we accept that these are sometimes used as methods of proselytizing and may be taken as a part of Christian religion, yet the restriction is covered by the limitation subiect to which the right is guaranteed under Article 25(1).

We shall now deal with the argument regarding the definition of 'inducement'. The attack is mainly on the ground that it is too widely stated and even invoking the blessings of the Lord or to say that 'by His grace your soul shall be elevated' may come within the mischief of the term. Learned Government Advocate while agreeing that even holding out that an intangible benefit is to come may answer the definition, contends that the intention of the Legislature is not to transcend the ordinary concept of the term. We are of the view that the definition is capable of covering some of the methods of proselytizing and though the concept of inducement can be a matter referable to 'morality', the wide definition is indeed open to reasonable objection on the ground that it surpasses the field of morality.

8. We shall now proceed to examine the legislative competence of the Orissa State Legislature to enact the impugned Statute. Learned Government Advocate has contended that the impugned Act is clearly referable to entry 1 of List II or Entry 1 of List III and as such the legislation is competent. Counsel for the petitioners. however, contend that there is no specific entry in Schedule VII of the Constitution dealing with the topic of 'religion' and. as such entry 97 of List I of Schedule VII alone must apply. Legislative powers have been distributed under the Constitution between the Union and the States. Yet our Constitu tion is centripetal in character. Article 248 provides:--

"Parliament has exclusive power to make any law with respect to any matter not enumerated in the concurrent List or State List."

Entry 97 of List I reiterates the provision by saying:

"Any other matter not enumerated in List II or List III including any tax not mentioned in either of these Lists." Their Lordships of the Supreme Court in the Second Gift Tax Officer v. D. H. Hazareth, AIR 1970 SC 999, have said:--

"Therefore to find out whether a piece of legislation falls within any entry its true nature and character must be in respect to that particular entry. The entries must of course receive a large and liberal interpretation because the few words of the entry are intended to confer vast and plenary powers. If, however, no entry in the three Lists covers it, then it must be regarded as a matter not enumerated in any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union List as a topic of legislation."

We have, therefore, to examine whether legislative power has been vested in the State Legislature under any of the entries in List II in respect of this subiect-matter or if it is a matter pertaining to an entry in List III. The two entries which have been placed before us by learned Government Advocate as alternates are as follows:

List II. Entry I, provides:--

"Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power)."

The 1st Entry of List III runs thus:

"Criminal law, including all matters Included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power."

9. Before adverting to the two Entries in List II and List III of Sche- dule VII of the Constitution, in order to find out whether the Act is ultra vires the State Legislature or not. It is proper that we indicate in brief the law to be applied for determining such a question.

In the Privy Purse case. (AIR 1971 SC 530) at page 577 of the Reporter, it has been said:

"But a constitutional provision will not be interpreted in the attitude of a lexicographer, with one eye on the provision and the other on the lexicon. The meaning of a word or

expression used in the Constitution often is coloured by context in which it occurs; the simpler and more common the word or expression, the more meanings and shades of meanings it has. It is the duty of the Court to determine in what particular meaning and particular shade of meaning the word or expression was used by the Constitution-makers and in discharging the duty the Court will take into account the context in which it occurs, the obiect to serve which it was used, its collocation, the general congruity with the concept or obiect it was intended to articulate, and a host of other considerations. Above all the Court will avoid repugnancy with accepted norms of justice and reason."

Dealing with distribution of legislative power, their Lordships of the Supreme Court in A. S. Krishna v. Madras State, AIR 1957 SC 297, have said:

"It must be remembered that we are construing a federal Constitution. It is the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping on the fields of legislation is inevitable. The British North American Act, 1867. which established a Federal Constitution for Canada, enumerated in Sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped and the Privy Council had time and again to pass on the Constitutionality of the laws made by the Dominion and the Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine that for deciding whether an impugned legislation was intra vires, regard must be had to its pith end substance. That is to say, if a Statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires even though it might incidentally trench on topics not within the legislative competence."

Their Lordships quoted with approval the test used by Lord Porter in Prafulla Kumar v. Bank of Commerce Ltd.. AIR 1947 PC 60, where dealing with the Question of the extent of the invasion by the Provincial Legislation into the Federal fields, the Law Lord said:--

"No doubt it is an important matter not as their Lordships think, because the validity of an Act, can be determined by discriminating degrees of invasion, but for the purpose of

determining what is the pith and substance of the impugned Act. Its provisions may advance so far into the Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

Keeping in view these tests, we shall now proceed to examine whether, in its pith and substance, the Act is a Statute relating to the topic of "Public Order" has in entry I of List II) or "Criminal Law" has in entry I of List III).

10. Counsel for both sides have referred to several decisions of undoubted authority to indicate the meaning the term "Public Order" comprehends. In Lakhi Das v. Province of Bihar, AIR 1960 SC 59 the corresponding entry (re: Public Order) under the Government of India Act, 1935, came up for consideration. Speaking for the Court. Mukherji, J. has his Lordship then was) spoke thus:

"The expression 'public order' with which item No. 1 begins is, in our opinion a most comprehensive term and it clearly indicates the scope and ambit of the subject in respect of which powers of legislation are given to the Province. Maintenance of public order within a Province is primarily the concern of that Province and subject to certain exceptions which involve the use of His Majesty's forces in aid of civil power, the Provincial Legislature is given plenary authority to legislate on all matters which relate to or are necessary for maintenance of public order."

In Romesh Thappar v. State of Madras. AIR 1950 SC 124. Pataniali Sastri J. has his Lordship then was) delivered the iudfiment of the maiority saving:

"Now 'public order' is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations by the Government which they have instituted."

Counsel for the petitioners referred us to several other later decisions of the Supreme Court where with reference to the term 'public order' judgments have been delivered. (Supdt. Central Prison v. Ram Manohar Lohia, AIR 1960 SC 633; Ram

Manohar Lohia v. State of Bihar, AIR 1966 SC 740;Pushkar Mukherjee v. State of West Bengal, AIR 1970 SC 852) but they are cases where the term 'public order' as occurring in Article 19(2) of the Constitution was dealt with. In our opinion, consideration which governs the interpretation of the phrase in Article 19(2) of the Constitution cannot be imported into construction of 'public order' as a legislative head of power.

The. Act essentially deals with the subject-matter of "religion" and its provisions do not indeed relate to "public order". Learned Government advocate has experienced some amount of embarrassment during the hearing of these applications in the absence of a firm disclosure upon affidavit as to which entry the State looks upto to justify the competence of the Act. The adoption of alternate entries in his argument is indicative of the uncertain situation. We do not find any basis to hold that the Act can be held to be covered by the topic of 'Public Order' in Entry I of List II.

11. Now coming to the other entry in the Concurrent List the topic is "Criminal Law." The entry clearly brings into its fold the Indian Penal Code as it stood at the commencement of the Constitution, but excludes specifically offences with respect to matters specified in List I or List II and use of military power in aid of civil power. The second entry in List III is "Criminal Procedure" including all matters in the Code of Criminal Procedure at the commencement of the Constitution. When both these entries are looked at the true import of the first entry becomes clear. The inclusive nature of the provision has the effect of enlarging of the scope. We must hold that the entry covers a field larger than the Indian Penal Code. "Criminal Law" has no definition in the Constitution nor is a definition of the term available in any Statute. The term must, therefore bear its ordinary meaning. Law dealing with crimes is criminal law. As the Law Lexicon states "it relates to crimes and their punishment. It is that body of law, whether dealing with "mala prohibita or mala in se", the infraction of which is a crime or an offence punishable by a criminal proceeding. "Punishment is certainly within the domain of criminal law and learned Government Advocate, therefore, contends that the Act is nothing but a penal statute and is thus an Act relat- able to the entry. According to him, the entry extends to the creation of new offences by legislation (AIR 1939 FC 58) and thus the Act is intra vires the State Legislature.

An analysis of the Act, however, has left no doubt in our mind that the pith and substance of the statute is not creation of offences and therefore, it does not relate to 'criminal law'. The real topic is religion and indeed not criminal law. Again religion is

not a matter specified in List II but must be taken to be covered only in List I. Therefore, even in terms of the entry, the State Legislature shall not have legislative jurisdiction.

In our view, therefore, the matter relating to which the Act has been enacted is not enumerated either in List II or List III and comes under entry 97 of List I. The State Legislature has, therefore, no power to make the law in question.

12. Our conclusions, therefore, are :

(1) Article 25(1) guarantees propagation of religion and conversion is a part of the Christian religion.

(2) Prohibition of conversion by 'force' or by 'fraud' as defined by the Act would be covered by the limitation subject to which the right is guaranteed under Article 25(1).

(3) The definition of the term 'inducement' is vague and many proselytizing activities may be covered by the definition and the restriction in Article 25(1) cannot be said to cover the wide definition.

(4) The State Legislature has no power to enact the impugned legislation which in pith and substance is a law relating to religion. Entry No. 1 of either Last II or List III does not authorise the impugned legislation.

(5) Entry 97 of List I applies.

13. On the conclusions, each of these three applications must succeeed. We declare that the Act is ultra vires the Constitution and direct the issue of a writ of mandamus to the opposite-party-State Government not to give effect to the Act. The four criminal cases pending before the Magistrate at Gunupur are hereby quashed.

We make no order as to costs.

Panda, J.

14. I agree.

Rev. Satya Ranjan Majhi And Anr. vs State Of Orissa And Ors. on 5 March, 2003

Equivalent citations: AIR 2003 Ori 163, 2003 I OLR 404

Author: C P.K. Balasubramanyan

Bench: P Balasubramanyan, P Mohanty

JUDGMENT

P.K. Balasubramanyan, C. J.

1. This writ petition is filed by two gentlemen said to be on behalf of the Christian Community. They seek to challenge the constitutional validity and legality of the provisions in Section 2 of the Orissa Freedom of Religion Act, 1967 and Rules 4 and 5 of the Orissa Freedom of Religion Rules, 1989 and the Rules inserted as Rules 2 and 3 by the Orissa Freedom of Religion (Amendment) Rules, 1999.

2. The Orissa Freedom of Religion Act, 1967 (hereinafter referred to as the 'Act') was enacted by the State Legislature under Entry I. List II of the Seventh Schedule to the Constitution of India. The validity of that enactment and the legislative competence of the State Legislature to enact that law came to be challenged before this Court. This Court, by the decision in Mrs. Yulitha Hyde v. State of Orissa, AIR 1973 Orissa 116, held that the enactment was outside the legislative competence of the State Legislature and Entry 1 in List II or List III did not authorise the impugned legislation and that the legislation came within Entry 97, List I of the Seventh Schedule. This Court further held that Article 25(1) of the Constitution of India guaranteed freedom of propagation of religion and conversion as a part of the Christian Religion. This decision was appealed against before the Supreme Court by the State of Orissa. A Constitution Bench, by the decision in Rev. Stainislaus v. State of Madhya Pradesh, AIR 1977 SC 908, reversed the decision of this Court. The Supreme Court held that the legislation was one under Entry I. List II of the Seventh Schedule to the Constitution and was hence legislatively competent. The Supreme Court further held that there was no fundamental right in any one to convert another person to one's own religion and that the freedom of religion and the right to propagate one's religion protected by Article 25 of the Constitution of India did not include the right to convert another to one's own religion.

3. It is in this background that the question whether any of the other rights of the petitioners herein have been violated has to be considered. But, at the threshold, it appears to us that the challenge by the petitioner's insofar as it relates to Section 2 of the Act, is clearly concluded against them by the decision of the Supreme Court referred to above. That apart, the petitioners herein are not persons who want to get themselves converted into any religion and the Act and the Rules stand in their way. They are persons who want to convert others into their religion. Their contention that their right under Article 25 of the Constitution of India is violated clearly stands rejected by the decision of the Supreme Court referred to above. As we have noticed, the Supreme Court has clearly held that the right to convert another person to one's own religion was not covered by Article 25(1) of the Constitution of India and there was no fundamental right in any one to convert another person to one's own religion. The argument that no legislation like the one is possible under cover of Article 25(2) of the Constitution raised by the learned counsel for the petitioners cannot also be accepted since in the above decision, the Supreme Court has very clearly held that the Legislature was competent to enact the law in the interests of maintaining public order covered by Entry I, List II of the Seventh Schedule to the Constitution or India. Therefore, the arguments based on the observations in The Commissioner, Hindu Religious Endowments. Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282 and Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388 do not enable the petitioners to establish that they have a fundamental right to convert and that right is part of the right guaranteed by Article 25(1) of the Constitution of India.

4. In this context, we posed the question whether the petitioners could complain, that any of their rights have been violated by the Act or by the Rules or by the amendment introduced into the Rules. Once it is held that the petitioners have no fundamental right to convert others into their religion, they cannot raise any contention challenging the validity of the Act, which even otherwise they cannot do in this Court in view of the decision of the Supreme Court referred to above.

5. As regards the challenge to the Rules, it is clear that Section 7 of the Act confers the Rule making power on the State Government to make Rules for the purpose of carrying out the provisions of the Act. Obviously, the intention behind the enactment was to prevent conversion or attempt at conversion, by use of force, by inducement or by any fraudulent means. It is to carry out this avowed object of the Act that Rules have been

framed and Rules 3 to 7 are merely intended to ensure that the conversions prohibited by the Act do not take place. The insertion of Sub-rule (2) to Rule 5 by the notification dated 26-11-1999 is also merely to ensure that the conversion or attempted conversion 4s not one prevented by the Act or sought to be curbed by the Act. The provisions for a local enquiry and for ascertaining whether there is any objection from any quarter, are also intended only to ensure that a conversion is out of the free will by the convertee and that no force, inducement or fraud has been practised on the convertee. The provision for a declaration to be made before a conversion that he intends to convert a person to his religion, is intended only to ensure that the conversion is not one hit by the Act. We do not see any infirmity in the Rules. Nor can it be said that the Rules are beyond the Rule making power conferred by Section 7 of the Act.

6. Here again, we are of the view that the petitioners who want to convert cannot have any objection to the procedure prescribed to ensure that the conversion is a free and fair one. They are not persons who want to convert themselves and who find the prescription in the Rules irksome, impractical or arbitrary. They are merely persons who do not want to follow the steps prescribed by the Rules before converting another person into their religion. We are inclined to hold that at their instance there is no occasion for finding the Rules invalid.

7. Thus, we find no reason to entertain this writ petition. It is dismissed.

Supreme Court of India

Rev. Stainislaus vs State Of Madhya Pradesh & Ors on 17 January, 1977

Equivalent citations: 1977 AIR 908, 1977 SCR (2) 611

Bench: Ray, A.N.

PETITIONER:

REV. STAINISLAUS

Vs.

RESPONDENT:

STATE OF MADHYA PRADESH & ORS.

DATE OF JUDGMENT17/01/1977

BENCH:

RAY, A.N. (CJ)

BENCH:

RAY, A.N. (CJ)

BEG, M. HAMEEDULLAH

SARKARIA, RANJIT SINGH

SHINGAL, P.N.

SINGH, JASWANT

CITATION:

1977 AIR 908 1977 SCR (2) 611

1977 SCC (1) 677

ACT:

Constitution of India--Article 25(1)--Freedom of reli- gion--Right to profess--Practice and propogate religion--Whether forcible and fraudulent conversion in- cluded--Public order--Meaning of--Seventh Schedule List II Entry 1--Madhya Pradesh Dharma Swatantraya Adhinivam 1968--Orissa Freedom of Religion Act 1967--Constitutional validity of.

HEADNOTE:

The constitutional validity of the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968, was challenged in the High Court of Madhya Pradesh and the constitutional validity of the Orissa Freedom of Religion Act, 1967 was challenged in the High Court of

Orissa. The two Acts prohibit forcible conversion and make the offence punishable. The Madhya Pradesh High Court upheld the validity of the Act. The Orissa High Court held that Art. 25(2) of the Constitution guarantees propogation of religion and conversion is a part Christian religion; that the State Legislature has no power to enact the impugned legislation which in pith and sub- stance is a law relating to religion; and that entry 97 of List I would apply.

Upholding the validity of both the Acts, HELD: (1) Article 25 guarantees to all persons right to freedom and conscience and the right freely to profess, practice and propogate religion subject to public order, morality and health. The word 'propogate' has been used in the Article as meaning to transmit or spread from person to person or from place to place. The Article does not grant right to convert other person to one's own religion but to transmit or spread one's religion by an exposition of its tenets. The freedom of religion enshrined in Art. 25 is not guaranteed in respect of one religion only but covers all religions alike which can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following other religion. What is freedom for one is freedom for the other in equal measure and there can, therefore, be no such thing as a fundamental right to convert any person to one's own religion. [616 B-F, 617 A-B]

(2) The Madhya Pradesh Act prohibits conversion from one religion to another by use of force, allurement or fraudu- lent means and matters incidental thereto. Similarly, the Orissa Act prohibits conversion by the use of force or by inducement or by any fraudulent means. Both the statutes, therefore, clearly provide for the maintenance of public order because if forcible conversion had not been prohibited that would have created public disorder in the States. The expression "public order" has a wide connotation. [617 C-E]

Ratilal Panachand Gandhi v. The State of Bombay & Ors. [1954] S.C.R. 2055; Ramesh Thappar v. The State of Madras [1950] S.C.R. 594; Ramjilal Modi v. State of U.P. [1957] S.C.R. 860 and Arun Ghosh v. State of West Bengal [1966] 1 S.C.R. 709, followed.

(3) If an attempt is made to raise communal passions, e.g. on the ground that someone has been forcibly converted to another religion it would in all probability give rise to an apprehension of a breach of the public order affecting the community at large The

impugned Acts therefore fall within the purview of Entry 1 of List II of the Seventh Schedule as they are meant to avoid

5--112SCI/77

612

disturbance to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community. The two Acts do not provide for the regulation of religion and do not fall under Entry 97 of List I. [618 A-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1489. & 1511 of 1974.

(Appeals by certificate./Special Leave from the Judg- ment and Order dated 23-4-1974 of the Madhya Pradesh High Court in Misc. Petition No. 136/73).

Criminal Appeal No. 255 of 1974.

(From the Judgment and Order dated 23-4-1974 of the Madhya Pradesh High Court in Criminal Revision No. 159/71) and

Civil Appeal NOs. 344-346 of 1976.

(Appeals by Special Leave from the Judgment and. Order dated 24-10-1972 of the Orissa High Court in C.J.C. 185, 186 and 217 of 1969).

Frank Anthony, in CA 1489, CrI. A. 255/74 and CA 346/76 for the appellant in CAs 1489 and 1511/74 and Crl. A.. No. 255/74 and RR. 1 and 2 in CAs 346/76.

Soli J. Sorabiee in CA 1511, Crl. A. 255/74 1. B. Dadac- hanji, K. J. John O.C. Mathur and Ravinder Narain for the appellant in CAs 1489 and 1511/74 and Crl. A. No. 255/74 and RR. 1 and 2 in CAs 346/76.

Gobind Das (In CAs 344-346/76) B. Parthasarthi, for the appellants in CAs 344-346/76.

Soli J. Sorabjee, B.P. Maheshwari and Suresh Sethi, for R. 3 in CA 346/76.

Brijbans Kishore, B.R. Sabharwal, for RR. in CA 345/76. Gobind Das,Raj Kumar Mehta,for the Intervener (State of Orissa) in C.A. 1489/74.

The Judgment of the Court was delivered by RAY, C.J. These appeals were heard together because they raise common questions of law relating to the interpre- tation of the Constitution.

Civil Appeals No. 1489 and 1511 of 1974 and Criminal Appeal No. 255 of 1974 are directed against a judgment of the Madhya Pradesh High Court dated 23 April, 1974. We shall refer to these as the Madhya Pradesh cases. Civil Appeals No. 344-346 of 1976 relate to a judgment. of the orissa High Court dated 24 October, 1972. We shall refer to these appeals as the Orissa cases.

613

The controversy in the Madhya Pradesh cases relates to the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968, hereinafter referred to as the Madhya Pradesh Act. The controversy in the Orissa cases arises out of the Orissa Freedom of Religion Act, 1967 hereinafter referred to as the Orissa Act.

The provisions of the 'two Acts in so far as they relate to. prohibition of forcible conversion and punishment there- for, are similar and the questions which have been raised before us are common to both of them. It will, therefore, be enough, for the purpose of appreciating the controversy, to make a somewhat detailed mention of the facts of the Madhya Pradesh case.

The Sub-Divisional Magistrate of Baloda-Bazar sanctioned the prosecution of Rev. Stainislaus for the commission of offences under sections 3, 4 and 5(2) of the Madhya Pradesh Act. When the case came up before Magistrate, First- Class, Baloda-Bazar, the appellant Rev. Stainislaus raised a preliminary objection that the State Legislature did not have the necessary legislative competence and the Madhya Pradesh Act was ultra vires the Constitution as it did not fall within the purview of Entry I of List II and Entry I of List III of the Seventh Schedule. The appellant's conten- tion was that it was covered by Entry 97 of List I so that Parliament alone had the power to make the law and not the State Legislature. An objection was also raised that the provisions of sections 3, 4 and 5(2) of the Act contra- vened Article 25 of the Constitution and were void. The

Magistrate took the view that there was no force in the. objection and did not refer the case to the High Court under section 432 of the Code of Criminal Procedure, 1898. The appellant applied to the Additional Sessions Judge for a revision of the Magistrate's order refusing to make a reference to the High Court. The Additional Sessions Judge also took the view that no question of constitutional impor- tance arose in the case and he did not think it necessary to make a reference to the High Court. The appellant thereupon applied to the High Court for revision under section 439 of the Code of Criminal Procedure and he also filed a petition under Articles 226 and 227 of the Constitution.

The High Court heard both the revision and the writ petition together. The appellant raised the following three questions in the High Court :--

(i) that sections 3, 4, 5(2) and 6 of the M.P. Dharma Swatantraya Adhiniyam, 1968 are viola- tive of the petitioner's fundamental rights guaranteed by Article 25 (1) of the Consti- tution of India;

(ii) that in exercise of powers conferred by Entry No.. 1 of List II, read with Entry No. 1 of List III of the Seventh Schedule the Madhya Pradesh Legislature in the name of public order could not have enacted

the said legislation. But the matter would fail within the scope of Entry No. 97 of List I of the Seventh Schedule, which confers residuary powers on Parliament to legislate in respect of any matters not covered by List I, List I1 or List III. Therefore, it is contended that Parliament alone had the power to legislate on this subject and the legisla- tion enacted by the State Legislature is ultra vires the powers of the State legislature; (iii) that section 5(1) and section 5(2) of the M.P. Dharma Swatantraya Adhiniyam, 1968 amount to testimonial compulsion and, therefore, the said provisions are violative of Article 20(3) of the Constitution of India.

The High Court examined the controversy with reference to the relevant provisions of the Madhya Pradesh Act and the Madhya Pradesh Dharma Swatantraya Rules, 1969 and held as follows :--

"What is penalised is conversion by force, fraud or by allurement. The other element is that. every person has a right to profess his own religion and to act according to it. Any interference with that right of the other person by resorting to conversion by force, fraud or allurement cannot, in our opinion, be said to contravene Article 25(1) of the Constitution of India, as the Article g

uarantees religious freedom subject to public health. As such, we do not find that the provisions of sections 3, 4 and 5 of the M.P. Dharma Swatantraya Adhiniyam, 1968 are violative of Article 25(1) of the Constitution of India. On the other hand, it guarantees that religious freedom to one and all includ- ing those who might be amenable to conversion by force, fraud or allurement. As such, the Act, in our opinion, guarantees equality of religious freedom to all, much less can it be said to encroach upon the religious freedom of any particular individual."

The High Court therefore held that there was no justi- fication for the argument that sections 3, 4 and 5 of the Madhya Pradesh Act were violative of Article 25(1) of the Constitution. The High Court in fact went on to hold that those sections "establish the equality of religious freedom for all citizens by prohibiting conversion by objec- tionable activities such, as conversion by force, fraud and by allurement".

As regards the question of legislative competence, the High Court took note of some judgments of this Court and held that as "the phrase 'public order' conveys a wider connotation as laid down by their Lordships! of the Supreme Court in the different cases. We are of the opinion that the subject matter of the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 fails within the scope of Entry No. I of List II of the Seventh Schedule relating to the State List regarding public order".

615

On the remaining point relating to testimonial compul- sion with reference to Article 20(3)of the Constitution, the High Court held that section 5 of the Madhya Pradesh Act read with Form A, prescribed by the Rules, merely made provision for the giving of intimation to the District Magistrate about conversion and did not require its maker to make a confession of any offence as to whether the conver- sion had been made on account of fraud, force or allurement, 'which had been penalised by the Act. The High Court thus held that mere giving of such information was not violative of Article 30(1) of

'the Constitution. But the question of testimonial compulsion within the meaning of Article 20(3) of the Constitution has not been raised for our considera- tion.

The Orissa cases arose out of petitions under Article 226 of the Constitution challenging the vires of the Orissa Act. The High ,Court stated its conclusions in those cases as follows:--

(1) Article 25(1) guarantees propagation of religion and conversion is a part of the Christian religion.

(2) Prohibition of conversion by 'force' or by 'fraud' as defined by the Act would be covered by the limitation subject to which the right is guaranteed under Article 25 (1).

(3) The definition of the term 'inducement' is vague and many proselytizing activities may be covered by the definition and the restriction in Article 25 (1) cannot be said to cover the wide definition.'

(4) The State LegisLature has no power to enact the impugned legislation which in pith and substance is a law relating to religion. Entry No. 1 of either List II or List III does not authorise the impugned legislation. (5) Entry 97 of List I applies.

The High Court has therefore declared the Orissa Act to be ultra vires the Constitution and directed the issue of mandamus to the State Government not to give effect to it. The criminal cases which were pending have been quashed. The common questions which, have been raised for our consideration are (1) whether the two Acts were violative of the fundamental right guaranteed under Article 25(1) of the Constitution, and (2) whether the State Legislatures were competent to enact them ?

Article 25(1) of the Constitution reads as follows:

"25(1) Subject to public order,' morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion." 616

Counsel for the appellant has argued that the right to 'propagate' one's religion means the right to convert a person to one's own religion. On that basis, counsel has argued

further that the right to convert a person to one's own religion is a fundamental right guaranteed by Article 25 (1) of the Constitu- tion.

The expression 'propagate' has a number of meanings, including "to multiply specimens of (a plant, animal, disease etc.) by any process of natural reproduction from the parent stock", but that cannot, for obvious reasons, be the meaning for purposes of Arti- cle 25 (1) of the Constitution. The Article guarantees a right to freedom of religion, and the expression 'propagate' cannot there- fore be said to have been used in a biologi- cal sense.

The expression 'propagate' has been de- fined in the Shorter Oxford Dictionary to mean "to spread from person to person, or from place to place, to disseminate, diffuse (a statement, belief, practice, etc.)"

According to the Century Dictionary (which is an Encylopaedic Lexicon of the English Language) Vol. VI, 'propagate' means as follows :--

"To transmit or spread from person to person or from place to place; carry forward or onward; diffuse; extend; as

propagate a report; to propagate the Christian religion".

We have no doubt that it is in this sense. that the word 'propagate' has been used in Article 25 (1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees "freedom of conscience" to every citizen, and not merely to the follow- ers of one particular religion, and that, in turn, postu- lates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the coun- try alike.

The meaning of guarantee under Article 25 of the Con- stitution came up for consideration in this Court in Ratilal Panachand Gandhi v. The State of Bombay & Ors. (1) and it was held as follows :--

"Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such, religious belief as may be approved of by his judgment or con- science but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others."

(1) [1954]S.C.R. 1055.

617

This Court has given the correct meaning of the Article, and we find no justification for the view that it grants. a fundamental right to convert persons to one's own reli- gion. It has to be appreciated that the freedom of religion enshrined in the Article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons follow- ing the other religions. What is freedom for one, is free- dom for the other, in equal measure, and there can there- fore be no such thing as a fundamental right to convert any person to one's own religion.

It was next been argued by counsel that the Legislatures of Madhya Pradesh, and Orissa States did not have legisla- tive competence to pass the Madhya Pradesh Act and the Orissa Act respectively, because their laws regulate 'rel- igion' and fall under the Residuary Entry 97 in List 1 of the Seventh Schedule to the Constitution. It is not in controversy that the Madhya Pradesh Act provides for the prohibition of conversion from one religion to. another by use of force or allurement, or by fraudulent means, and matters incidental thereto. The expressions "allurement" and 'fraud' have been defined by the. Act. Section 3 of the Act prohibits conversion by use of force or by allurement or by fraudulent means and section 4 pena- lises such forcible conversion. Similarly, section 3 of the Orissa Act prohibits forcible conversion by the use of force or by inducement or by any. fraudulent means, and section 4 penalises such forcible conversion. The Acts therefore dearly provide for the maintenance of public order for, if forcible conversion had not been prohibited, that would have created public disorder in the States. The expression "Public order" is of wide conno- tation. It must have the connotation which it is meant to provide as the very first Entry in List II. It has been held by this Court in Ramesh Thapper v. The State of Madras(1) that "public order" is an expression of wide connotation and signifies state of tranquility which pre- vails among

the members of a political society as a result of internal regulations enforced by the Government which they have established".

Reference may also be made to the decision in Ramjilal Modi v. State of U.P. (2) where this Court has held that the right of freedom religion guaranteed by Articles 25 and 26 of the Constitution is expressly made subject to public order, morality and health, and that "it cannot be predicat- ed that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order". It has been held that these two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order. Refer- ence may as well be made to the decision in Arun Ghosh v. State of WeSt Bengal(a) where it has been held that if a thing disturbs the current of the life of the community, (1) (1950) S.C.R. 594.

(2) (1957) S.C.R. 860

(3) (1966) 1 S.C.R. 709

618

and does not merely affect an individual, it would amount to disturbance of the public order. Thus if an attempt is made to raise communal passions, e.g. on the ground that some one has been "forcibly" converted to anoth- er religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large. The impugned Acts therefore fall within: the purview of Entry I of List II of the Seventh Schedule as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community. The two Acts do not provide for the regulation of religion and! we do not find any justification for the argument that they fall under Entry 97 of List I of the Seventh Schedule.

In the result Civil Appeals No. 1489 and 1511 of 1974 and Criminal Appeal No. 255 of 1974 fall and are dismissed while Civil Appeals No. 344-346 of 1976 are allowed and the impugned judgment of the Orissa High Court dated 24 October, 1972 is set aside. The

parties shall pay and bear their own costs, in Madhya Pradesh appeals. The State shall pay the respondent costs in the Orissa appeal according to previous direction.

P.H.P.

C.As. Nos. 1489 & 1511 of 1974 and

Cr. A. No. 255 of 1974 dismissed.

C.As. Nos. 344--346 of 1976 allowed.

619

Supreme Court of India

The Commissioner, Hindu ... vs Sri Lakshmindra Thirtha Swamiar ... on 16 April, 1954

Equivalent citations: 1954 AIR 282, 1954 SCR 1005

Bench: Mukherjea, B.K.

PETITIONER:

THE COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS

Vs.

RESPONDENT:

SRI LAKSHMINDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT.

DATE OF JUDGMENT:

16/04/1954

BENCH:

MUKHERJEA, B.K.

BENCH:

MUKHERJEA, B.K.

HASAN, GHULAM

BHAGWATI, NATWARLAL H.

AIYYAR, T.L. VENKATARAMA

MAHAJAN, MEHAR CHAND (CJ)

DAS, SUDHI RANJAN

BOSE, VIVIAN

CITATION:

1954 AIR 282 1954 SCR 1005

CITATOR INFO :

R 1954 SC 388 (9,21)

RF 1954 SC 400 (4)

F 1955 SC 493 (4,5)

RF 1956 SC 432 (5,12)

RF 1957 SC 645 (4)

R 1957 SC 846 (13)

R 1958 SC 255 (16,27,30)

R 1959 SC 860 (7)

F 1959 SC 942 (12,13,14)

F 1961 SC 284 (6)

R 1961 SC 459 (10,42)

R 1961 SC1402 (33)

R 1962 SC 853 (8,18,22,34)

RF 1962 SC1371 (37,78)

D 1963 SC 540 (7)

R 1963 SC 864 (26)

R 1963 SC 966 (19)

RF 1963 SC1638 (45,47,48,56,62,74)

R 1965 SC1107 (14,48,50)

R 1965 SC1874 (28)

R 1966 SC1603 (7)

R 1968 SC1119 (6)

R 1968 SC1408 (7)

R 1970 SC 181 (5,9,10)

R 1970 SC 564 (176)

R 1970 SC1114 (1)

E 1971 SC1182 (4,14)

F 1971 SC1691 (8)

RF 1971 SC1737 (17)

RF 1972 SC 845 (5)

R 1972 SC1586 (12)

RF 1973 SC 724 (33,34,43,44)

RF 1974 SC2098 (28)

R 1975 SC 706 (20,40)

R 1975 SC 846 (14)

R 1975 SC1121 (44,56)

MV 1975 SC1146 (62)

F 1975 SC2037 (19)

R 1978 SC1393 (9)

E 1980 SC 1 (3,12,13)

R 1980 SC1008 (8,9,10,11,22)

RF 1981 SC1863 (24,29)

D 1983 SC 1 (78,92,94)

R 1983 SC 617 (4)

R 1983 SC1246 (15,26,30,31)

R 1984 SC 51 (8A,9,10)

R 1985 SC 218 (7)

R 1986 SC 726 (7,10)

F 1986 SC1930 (19)

RF 1986 SC2094 (16,17)

R 1987 SC 748 (19)

RF 1989 SC 100 (14,17,18)

RF 1989 SC 317 (34)

RF 1992 SC1256 (13)

RF 1992 SC1383 (14)

ACT:

Constitution of India, arts. 19(1)V), 25, 26, 27-Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951), ss. 21, 30(2), 31, 55, 56 and 63 to 69, 76--Whether ultra vires the Constitution-- Word "property" in art. 19(1)(f) meaning of-- Tax and fee, meaning of- Distinction between.

HEADNOTE:

Held, that ss. 21, 30(2), 31, 55, 56 and 63 to 69 of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) are ultra vires arts. 19(1)(f), 25 and 26 of the Constitution of India.

Section 76(1) of the Act is void as the provision relating to the payment of annual contribution contained in it is a tax and not a fee and so it was beyond the legislative competence of the Madras State Legislature to enact such a provision.

That on the facts of the present case the imposition under a. 76(1) of the Act, although it is a tax, does not come within the latter part of art. 27 because the object of the contribution under the section is not the fostering or preservation of the Hindu religion or any denomination under it but the proper administration of religious trusts and institutions wherever they exist.

130

1006

The word " property " as used in art. 19(1)(f) of the Constitution should be given a liberal and wide connotation and should be extended to all well-recognized types of interest which have the insignia or characteristics of proprietary right.

The ingredients of both office and property, of duties and personal interest are blended together in the rights-of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. Therefore he is entitled to claim the protection of art. 19(1)(f).

A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.

It is not possible to formulate a definition of fee that can apply to all cases as there are various kinds of fees. But a fee may generally be defined as a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases such expenses are arbitrarily assessed.

The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for a special benefit or privilege."

Scope of arts. 25 and 26 discussed.

Meaning of the term " Mathadhipati " and religion explained.

Vidya Varuthi v. Balusami (48 I.A. 302), Monahar v. Bhupendra (60 Cal. 452), Ganesh v. Lal Behary (63 I.A. 448), Bhabatarini v. Ashdlata (70 I.A. 57), Angurbala v. Debabrata ([1951] S.C.R. 1125), Davis v. Benson,(133 U.S. 333), The State of West Bengal v. Subodh Gopal Bose (civil Appeal No. 107 of 1952 decided by the Supreme Court on the 17th December, 1953), Adelaide Company v. The Commonwealth (67 C.L.R. 116, 127), Minersville School District, Board of Education etc. v. Gobitis (310 U.S. 586), West Virginia State Board of Education v. Barnette (319 U.S. 624), Murdock v. Penissyl-vania (319 U.S. 105), Tones v. Opelika (316 U.S. 584), Matthew's V. Chicory Marketing Board (60 C.L.R. 263, 276), Lower Mainland Dairy v. Crystal Dairy Ltd. ([1933] A.C. 168) referred to.

(Findlay Shirras on Science of Public Finance, Vol. I. p. 203).

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 38 of 1953. Appeal under article 132(1) of the Constitution of India from the Judgment and Order dated the 13th December, 1951, of the High Court of Judicature, Madras, in Civil Miscellaneous Petition No. 2591 of 1951.

1007

V.K.T. Chari, Advocate-General of Madras (B. Ganapathy Iyer, with him) for the appellant.

B. Somayya and C.R. Pattabhi Raman (T. Krishna Rao and M.S..K. Sastri, with them) for the respondent. T. N. Subramania Iyer, Advocate-General of Travancore- Cochin (T. R. Balakrishna Iyer and Sardar Bahadur with him) for the Intervener (State of Travancor,Cochin). 1954. March 16. The Judgment of the Court was delivered by MUKHERJIA J.-This appeal is directed against a judgment of a Division Bench of the Madras High Court, dated the 13th of December, 1951, by which the learned Judges allowed & petition, presented by the respondent under article 226 of the Constitution, and directed a writ of prohibition to issue in his favour prohibiting the appellant from proceeding with the settlement of a scheme in connection with a Math, known as the Shirur Math, of which the petitioner happens to be the head or superior. It may be stated at the outset that the petition was filed at a time when the Madras Hindu Religion Endowments Act (Act II of 1927), was in force and the writ was prayed for against the Hindu Religious Endowments Board constituted under that Act, which -was the predecessor in authority of the present appellant and had initiated proceedings for settlement of a scheme against the petitioner under section 61 of the said Act.

The petition was directed to be heard along with two other petitions of a similar nature relating to the temple at Chidambaram in the district of South Arcot and questions were raised in all of them regarding the validity of Madras Act 11 of 1927, hereinafter referred to as the Earlier Act. While the petitions were still pending, the Madras Hindu Religious and Charitable Endowments Act,, 1951 (hereinafter called the New Act), was passed by the Madras Legislature and came into force on the 27th of August, 1951. In view of the Earlier Act being replaced by the new one,, leave was given to all the petitioners to amend their petitions and challenge the validity of the. New Act as well. 1008

Under section 103 of the New Act, notifications, orders and acts under the Earlier Act are to be treated as notifications, orders and acts issued, made or done by the appropriate, authority under the corresponding provisions of the New Act, and in accordance with this -provision, the Commissioner, Hindu Religious Endowments, Madras, who takes the place of the President, "Hindu Religious Endowments Board under the Earlier Act, was added as a party to the proceedings.

So far as the present appeal is concerned, the material facts may be shortly narrated as follows: The Math, known as Shirur Math, of which the petitioner is the superior or Mathadhipati, is one of the eight Maths situated at Udipi in the district of South Kanara and they are reputed to have been founded by Shri Madhwacharya, the well-known exponent of dualistic theism in the Hindu Religion. Besides these eight Maths, each one of which is presided over by a Sanvasi or Swami, there exists another ancient religious institution at Udipi, known as Shri Krishna Devara Math, also established by Madhwacharya which is supposed to contain an image of God Krishna originally made by Arjun and miraculously obtained from a vessel wrecked at the coast of Tulava. There is no Mathadhipati in the Shri Krishna Math and its. affairs are managed by the superiors of the other eight Maths by turns and the custom is that the Swami of each of these eight Maths presides over the Shri Krishna Math in turn for a period of two years in every sixteen years. The appointed time of change in the headship of the Shri Krishna Math is the occasion of a great festival, known as Pariyayam, when a vast concourse of devotees gather at Udipi from all parts of Southern India, and an ancient usage imposes a duty upon the Mathadhipati to feed every Brahmin that comes to the place at that time.

The petitioner was installed as Mathadhipati in the year 1919, when he was still a minor, and he assumed management after coming of age some time in 1926. At that time the Math was heavily in debt. Between 1926 and 1930 the Swami succeeded in clearing off a large portion of the debt. In 1931, however, came the

turn of his taking over management of the Shri Krishna Math and he had had to incur debts to meet the heavy expenditure attendant on the Pariyayam ceremonies, The financial position improved to some extent during the years that followed, but troubles again arose in 1946, which was the year of the second Pariyayam of the Swami. Owing to

scarcity and the high prices of commodities at that time, the Swami had to borrow money to meet the expenditure and the debts mounted up to nearly a lakh of rupees. The Hindu Religious Endowments Board, functioning under the Earlier Act of 1927, intervened at this stage and in exercise of its powers under section 61 -A of the Act called upon the Swami to appoint a competent manager to manage the affairs of the institution. The petitioners case is that the action of the Board was in stigated by one Lakshminarayana Rao, a lawyer of Udipi, who wanted to have control over the affairs of the Math. It appears that in pursuance of the direction of the Board, one Sripath Achar was appointed an agent and a Power of Attorney was executed in his favour on the 24th of December, 1948. The agent, it is alleged by the petitioner, wanted to have his own way in all the affairs of the Math and paid no regard whatsoever to the wishes of the Mahant. He did not even submit accounts to the Mahant and deliberately flouted his authority. In this state of affairs the Swami,, on the 26th of September, 1950, served a notice upon the agent terminating his agency and calling upon him to hand over to the Mathadhipati all account papers and vouchers relating to the institution together with the cash in hand. Far from complying with this demand, the agent, who was supported by the aforesaid Lakshminarayans Rao, questioned the authority of the Swami to cancel his agency and threatened that he would refer the matter for action to the Board. On the 4th of October, 1950, the petitioner filed a suit against the agent in the Sub,Court of South Kanara for recovery of the account books and other articles belonging to the Math, for rendering an account of the management and also for an injunction restraining the said agent from interfering with the affairs of the Math under colour of the

authority conferred by the Power of Attorney which the plaintiff had cancelled. The said Sripath Achar anticipating this suit filed an application to the Board on the 3rd of October, 1950, complaining against the cancellation of the Power of Attorney and his management of the Math. The Board on the 4th October, 1950, issued a notice to the Swami proposing to inquire into the matter on the 24th of October following at 2 p.m. at Madras and requesting the Swami either to apppear in person or by a pleader. To this the Swami sent a reply on 21st October, 1950, stating that the subject-matter of the very enquiry was before the court in the original suit filed by him and as the matter was sub judice the enquiry should be put off. A copy of the plaint filed in that suit was also sent along with the reply. The Board, it appears, dropped that enquiry, but without waiting

for the result of the suit, initiated proceedings suo moto under section 62 of the Earlier Act and issued a notice upon the Swami on the 6th of November, 1950, stating that it had reason to believe that the endowments of the said Math were being mismanaged and that a scheme should be framed for the administration of its affairs. . The notice was served by affixture on the Swami and the 8th of December, 1950, was fixed as the date of enquiry. On that date at the request of the counsel for the Swami, it was adjourned to the 21st of December, following. On the 8th of December, 1950, an application was filed on behalf of the Swami praying to the Board to issue a direction to the agent to hand over the account papers and other documents, without which it was not possible for him to file his objections As the lawyer appearing for the Swami was unwell, the matter was again adjourned till the 10th of January, 1951. The Swami was not ready with his objections even on that date as his lawyer had no t recovered from his illness and a telegram was sent to the Board on the previous day requesting the latter to grant a further adjournment. The Board did not accede to this request and as no explanation was filed by the Swami, the enquiry was closed and orders reserved upon it. On the 13th of January, 1951, the Swami, it appears sent a written

explanation to the Board, which the latter admittedly received on the 15th On the 24th of January, 1951, the Swami received a notice from the Board stating inter alia that the Board was satisfied that in the,, interests of proper administration of the Math and its endowments, the settlement of a scheme was necessary. A draft scheme was sent along with the notice and if the petitioner had any objections to the same, he was required to send in his objections on or before the 11th of February, 1951, as the. final order regarding the scheme would be made on the 15th of February, 1951. On the 12th of February, 1951, the peti- tioner filed the petition, out of which this appeal arises, in the High Court of Madras, praying for a writ of prohibition to prohibit the Board from taking further steps in the matter of settling a scheme for the administration of the Math. It was alleged inter alia that the Board was actuated by bias against the petitioner and the action taken by it with regard to the settling of a scheme was not a bona fide act at all. The main contention, however, was that having regard to the fundamental rights guaranteed under the Constitution in matters of religion and religious institutions belonging to particular religious denominations, the law regulating the framing of a scheme interfering with the management of the Math and its affairs by the Mathadhipati

conflicted with the provisions of art- icles 19(1) (f) and 26 of the Constitution and was hence void under article 13. It was alleged further that the provisions of the Act were discriminatory in their character and offended against article 15 of the Constitution. As has been stated already, after the New Act came into force, the petitioner was allowed to end his petition and the attack was now directed against the constitutional validity of the New Act which replaced the earlier legislation. The learned Judges, who heard the petition, went into the matter with elaborate fullness, both on the constitutional questions involved in it as well as on its merits. On the merits, it was held that in the circumstances of the case the action of the Board was a perverse exercise of its jurisdiction and that it should

1012

not be allowed to proceed in regard to the settlement of the scheme. On the constitutional issues raised in the case, the learned Judges pronounced quite a number of sections of the New Act to be ultra vires the Constitution by reason of their being in conflict with the fundamental rights of the petitioner guaranteed under articles 19(1)(f), 25, 26 and 27 of the Constitution. In the result, the rule nisi issued on the petition was made absolute and the Commissioner, Hindu Religious Endowments, Madras, was prohibited from proceeding further with the framing of a scheme inregard to the petitioner's Math. The Commisioner has now come up on appeal before us on the strength of a certificate granted by the High Court under article 132(1) of the Constitution. The learned Advocate-General for Madras, who appeared in support of the appeal, confined his arguments exclusively to the constitutional points involved in this case. Although he had put in an application to. urge grounds other than the constitutional grounds, that application was not pressed and he did not challen the findings of fact upon which the High Court based its decision on the merits of the petition. The position, therefore, is that the order of the High Court issuing the writ of prohibition against the appellant must stand irrespective of the decision which we light arrive at on the constitutional points raised before us.

It is not disputed that a State Legislature is competent to enact laws on the subject of religious and charitable endowments, which is covered by entry 28 of List III in Schedule VII of the Constitution. No question of legislative incompetency on the part of the Madras Legislature to enact the legislation in question has been raised before us with the exception of the provision, relating to payment of annual contribution

contained in section 76 of the impugned Act. The argument that has been advanced is, that the contribution is in reality a tax and not a fee and consequently the State Legislature had no authority to enact a provision of this character. We will deal with this point separately later on. All the other points canvassed

1013

before us relate to the constitutional validity or otherwise of the several provisions of the Act which have been held to be invalid by the High Court of Madras on grounds of their being in conflict with the fundamental rights guaranteed under articles 19(1) (f), 25, 26 and 27 of the Constitution. In order to appreciate the contentions that have been advanced on these heads by the learned counsel on both sides, it may be convenient to refer briefly to the scheme and the salient provisions of the Act.

The object of the legislation, as indicated in the preamble, is to amend and consolidate the law relating to the administration and governance of Hindu religious and charitable institutions and endowments in the State of Madras. As compared with the Earlier Act, its scope is wider and it can be made applicable to purely charitable endowments by proper notification under section 3 of the Act. The Earlier Act provided for supervision of Hindu religious endowments through a statutory body known as the Madras Hindu religious Endowments Board. The New Act has abolished this Board and the administration of religious and charitable institutions has been vested practically in a department of the Government, at the head of which is the Commissioner. The powers of the Commissioner and of the other authorities under him have been enumerated in Chapter II of the Act. Under the Commissioner are the Deputy Commissioners, Assistant Commissioners and Area Committees. The Commissioner, with the approval of the Government, has to divide the State into certain areas and each area is placed in charge of a Deputy Commissioner, to whom the powers of the Commissioner can be delegated. The State has also to be divided into a number of divisions and an Assistant Commissioner is to be placed in charge of each division. Below the Assistant Commissioner, there will be an Area Committee in charge of all the temples situated within a division or part of a division. Under section 18, the Commissioner is empowered to examine the records of any Deputy Commissioner, Assistant Commissioner, or Area Committee, or of any trustee not being the trustee 131

1014

of a, Math, in respect of any proceeding under the Act, to satisfy himself as to the regularity, correctness, or propriety of any decision or order. Chapter III contains the general provisions relating to all religious institutions. Under section 20, the administration of religious endowments is placed under the general superintendence and control of the Commissioner and he is empowered to pass any orders which may be deemed necessary to ensure that such endowments are properly administered and their income is -duly appropriated for the purposes for which they were founded or exist. Section 21 gives the Commissioner, the Deputy and Assistant Commissioners and such other officers asmay be authorised in th is behalf, the power to enter the premises of any religious institution or any place of worship for the purpose of exercising any power conferred, or discharging any duty imposed, by or under the Act. The only restriction is that the officer exercising the power must be a Hindu.