IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON
&
THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

MONDAY, THE 2ND DAY OF APRIL 2018 / 12TH CHAITHRA, 1940

WP(C).No. 33301 of 2015

PETITIONER:

T.G.MOHAN DAS,S/O. GOVINDA NAYIK, AGED 59 YEARS,
SANTHI NAGAR COLONY, HOUSE NO.9/996, KOOVAPPADAM,
KOCHI - 682 002.

BY ADVS.SRI.SAJITH KUMAR V.
SMT.M.DEEPAMOL
SRI.M.JAYAKRISHNAN

RESPONDENT(S):

1. **STATE OF KERALA,**
REPRESENTED BY CHIEF SECRETARY,
GOVERNMENT OF KERALA, SECRETARIAT, TRIVANDRUM 695 001.

2. **THE TRAVANCORE DEVASWOM BOARD**
REPRESENTED BY ITS SECRETARY, NANTHANCODE, TRIVANDRUM - 695003

3. **THE COCHIN DEVASWOM BOARD,**
REPRESENTED BY ITS SECRETARY, THRISSUR 680 001.

4. **DR. SUBRAMANIAN SWAMY,**
CONVENER, LEGAL & PARLIAMENTARY COMMITTEE, HINDU DHARMA ACHARYA SABHA A 77, NIZAMUDIN EAST, NEW DELHI 110013.

5. **GENERAL SECRETARY,**
KERALA PULAYA MAHASABHA NANDAVANAM,
TRIVANDRUM 695 033.

6. **GENERAL SECRETARY,**
SNDP YOGAM HEAD OFFICE, KOLLAM 691001.

7. **GENERAL SECRETARY,**
NAIR SERVICE SOCIETY, PERUNNA, CHANGANACHERY,
KOTTAYAM 686102

PBS

8. GENERAL SECRETARY
HINDU AIKYA VEDI, FORT P.O,
THIRUVANANTHAPURAM -695023

*ADDL.R9 IMPLEADED

*ADDL.R9: K.P.RAJAN ALIAS SWAMY AYYAPPADAS,
AGED 65 YEARS,S/O.PARAMESWARAN NAIR,
RESIDING AT KUMBALAPPALLY HOUSE, (THATWAMASI),
MUTHALAKODAM PO., THODUPUZHA,
IDUKKI DISTRICT, PIN - 686 506.

*ADD.R9 IS IMPLEADED AS PER ORDER DATED 2/2/15 IN I.A. 17099/15

R1 BY ADVOCATE GENERAL SRI.C.P. SUDHAKARA PRASAD
R2 BY SRI.D.SREEKUMAR,SC
SRI.K.SASIKUMAR, SC
R3 BY SRI. UNNIKRISHNAN V. ALAPPATT.
R4 BY DR.SUBRAMANIAN SWAMY (PARTY-IN-PERSON)
R6 BY ADVS. SRI.A.N.RAJAN BABU
SRI.P.GOPALAKRISHNAN (MVA)
R8 BY ADV. SMT.K.L.SREEKALA
SRI.HARIDAS P.NAIR
SRI.M.A.VINOD
SMT.B.SABITHA (DESOM)
ADDL R9 BY ADVS. SRI.K.SHRIHARI RAO
SMT.N.SHOBHA
SRI.A.S.SREEKANTH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22-02-2018, THE COURT ON 02/04/2018 DELIVERED THE FOLLOWING:

PBS

WP(C).No. 33301 of 2015 (K)

APPENDIX

PETITIONER(S)' EXHIBITS

P1 - A TRUE COPY OF THE RELEVANT COVENANT BETWEEN MAHARAJAS OF TRAVANCORE AND COCHIN ALONG WITH THE REPRESENTATIVE OF INDIAN UNION IN MAY 1949.

P2 - A TRUE COPY OF THE REPORT IN TIMES NEWS NETWORK

P3 - A TRUE COPY OF THE RELEVANT PAGES OF THE KERALA SECRETARIAT OFFICE MANUAL

P4 - A TRUE COPY OF THE RELEVANT PORTION OF THE DEBATE IN THE ASSEMBLY IS ATTACHED

P5 - A TRUE COPY OF THE RELEVANT PORTIONS OF THE REPORT OF K.P. SANKARAN NAIR COMMISSION IS ATTACHED.

P6 - A TRUE COPY OF THE RELEVANT PAGES OF THE KUTTIKRISHNA MENON COMMISSION REPORT.

P7 A TRUE COPY OF THE RELEVANT PAGES OF THE SANKARAN NAIR COMMISSION REPORT.

P8 A TRUE COPY OF THE COCHIN THIRUMALA DEVASWOM MANAGEMENT SCHEME APPROVED BY AS PER GOVERNMENT PROCEEDINGS NO PD 2-50233/24, 30/6/1949

RESPONDENT'S EXHIBIT **NIL**

/TRUE COPY/

PA TO JUDGE

PBS
2/4/2018

CR

P.R.Ramachandra Menon &
Devan Ramachandran, JJ.

W.P.(C)No.33301 of 2015 K

Dated this the 2nd day of April, 2018

JUDGMENT

Devan Ramachandran, J.

Tersely expressed, the petitioner challenges the vires of Sections 4(1) and 63 of the Travancore-Cochin Hindu Religious Institutions Act, 1950 ('the Act' for brevity).

2. The challenge impelled is fundamentally on the assertion that these two Sections are in violation of Article 14 of the Constitution of India and this assertion is sought to be justified on the bedrock of the various pleadings contained in the writ petition. Since it, therefore, requires a glance of the specific pleadings before the reliefs sought for by the petitioner can be considered, we deem it appropriate to make a brief narration of the averments of the petitioner to begin with.

3. The petitioner says that he is a devout Hindu and a believer of temple worship. He adds that he is a retired Electronics Engineer and 'a public worker of a reasonable

repute' residing at Kochi. As per his asseverations, he was the Vice President of the Bharatiya Vichara Kendram and 'a writer on various social and religious issues'. As per him, he worships regularly at the Thrichattukulam Mahadeva Temple and Pazhayannoor Bhagavathi Temple, which are respectively an incorporated Devaswom included in Schedule I of the Act and a temple governed by Section 61(5) of the Act, thereby being under the administrative control and supervision of the second and third respondent Boards, namely the Travancore Devaswom Board (TDB) and Cochin Devaswom Board (CDB) respectively.

4. The petitioner has filed this writ petition bringing on array respondents 4 to 8 presumably to support his case, which, as per his assertions, is a public cause and therefore, merits and deserves the strength and support from like minded individuals and groups.

5. The fourth respondent is Dr.Subramanian Swamy, who, the petitioner says, is impleaded in the writ petition in his capacity as the Convener of the Legal and Parliamentary

Committee of the Hindu Dharma Acharya Sabha, which is stated to be an 'Apex Body of Prominent Sanyasins' all over India and which is said to be involved in 'formation of Schemes for administration of temples and engaged in advising various Devaswoms and Parliamentarians/ Legislators'.

6. The petitioner has further arrayed respondents 5 to 8, namely, Kerala Pulaya Maha Sabha, the SNDP Yogam, the Nair Service Society and Hindu Aikya Vedi, who, he says represent the major Hindu communities in Kerala and who have all serious interests in the *lis* involved in this writ petition.

7. In addition to these respondents, three others, namely, a person by name Mr.K.P.Rajan @ Swami Ayyappadas and two Associations by names Hindu Help Line and Bharat Kshetra Bhumi Samrakshana Vedi Charitable Trust, have also caused themselves to be impleaded as additional ninth, tenth and eleventh respondents, which was allowed by this Court in I.A.Nos.17099/2015, 2767/2018 and 2833/2018. These

persons and Associations have got themselves impleaded only to support the petitioner and technically may not be necessary parties in deciding this *lis*. However, since the issue is one in public interest, we nevertheless did not deny opportunity to the learned counsel appearing for such proposed impleaded respondents also to make submissions before us.

8. The petitioner submits that the proximate cause for him to file this writ petition is because he is aggrieved by the arbitrariness in the process of nominations and elections of members to the TDB and CDB as is stipulated in Sections 4(1) and 63 of the Act. According to him, the method of nomination and appointment of members to the TDB and CDB are undemocratic and is in derogation of the rights of the devotees to be part of such process. His unequivocal assertion is that under the prescriptions of the two sections aforementioned, the nominations and election of the members to the two Boards in question are vested with the Hindu Ministers of the Cabinet of the Government of Kerala and the members of the Legislative Assembly who profess the Hindu

religion, exclusively but that no devotees, including the petitioner, would obtain any right to be part of this process. The petitioner alleges that the manner of nominations and elections, as provided in these two sections, to the post of members to the Boards violates the principles of democratic election and that it annuls the constitutional right of every devotee to be able to nominate and elect members through a process of direct election.

9. We have heard Sri.Mohan Parasaran, the learned Senior Counsel assisted by Sri.Sajith Kumar.V., appearing for the petitioner; The learned Advocate General assisted by Sri.V.Manu, the learned Senior Government Pleader, appearing for the State of Kerala; Dr.Subramaniam Swamy, the fourth respondent appearing in person; Sri.K.P.Sudheer, learned Standing Counsel for the Cochin Devaswom Board; Sri.K.Shrihari Rao, learned counsel appearing for the additional ninth respondent; Sri.A.N.Rajan Babu, learned counsel for the sixth respondent; Sri.Gopakumaran Nair, learned Senior Counsel, assisted by Sri.Krishnadas P.Nair,

appearing for the eight respondent; Sri.R.Krishna Raj, learned counsel for the additional tenth respondent and Sri.G.Prabhakaran, learned counsel for the additional eleventh respondent.

10. Since our consideration on the issues, submissions, contentions and reliefs made and sought for in this writ petition would ultimately involve the interpretation of the two sections whose vires are disputed herein, we deem it appropriate, as a prefatory step, to read the two sections closely, for which purpose, we extract them as under:

> "4. **Constitution of the Travancore Devaswom Board**.- (1) The Board referred to in Section 3 shall consist of three Hindu members, two of who, shall be nominated by the Hindus among the council of Ministers and one elected by the Hindus among the members of the legislative Assembly of the State of Kerala.
>
> 63. **Constitution of the Cochin Devaswom Board**.- (1) The Board referred to in sub-section 91) of Section 62 shall consist of three Hindu members of whom, one shall be a woman and one shall be a person belonging to Scheduled Caste or Scheduled Tribe.
>
> (2) Of the three members specified in sub-section (1), the woman member and the Scheduled Caste/Scheduled Tribe member shall be nominated by the Hindus among the Council of Ministers and the other member shall be elected by the Hindus among the Members of the Legislative Assembly of the State of Kerala."

As is discernible from the two sections which are more or less verbatim to each other, the members of the TDB and CDB shall be three in number, two of whom shall be nominated from the Hindus among the Council of Ministers and one elected from the Hindus among the members of the Legislative Assembly. The petitioner's focal allegation is that by confining and concentrating the power to so nominate and elect, to be with the Ministers of the Cabinet and the members of the legislative Assembly, the aspirations of the devotees to elect the members on their own and by them directly is obliterated.

11. To support his submission, the petitioner presents the illustration of a case where a particular legislative constituency does not elect a Hindu member and claims that there are such assembly segments in Kerala which have continuously and throughout elected only non-Hindu candidates. According to him, at the time when this writ petition was filed the Legislative Assembly of Kerala had only 50% Hindus. He says that this situation results in larger sections of the devotees being denied a chance to express

their will and opinion in the matters of administration of the temples, even under the present indirect method of elections, as is prescribed under the two sections. The petitioner further goes on to expatiate his contentions by saying that even in the system now in place, the Hindus among the MLAs are not allowed to exercise their fee will because even in the case of elections to the Devaswom Boards, political lines are clearly drawn and whips are issued by the political parties compelling their members to vote on dictated lines. In evidence of his submission, the petitioner has produced on record a newspaper report as Exhibit P2.

12. The petitioner, thereafter, attacks the provisions by asserting that even when the Ministers elect the members, it is not their will that is given paramountcy because, under the Kerala Secretariat Office Manual, the Hindu members will have to form a Cabinet Sub Committee or a group of Ministers to elect the members to the Boards and that all such decisions of the Sub Committee or the group of Ministers will obtain sanction only after approval by the Minister concerned and

the Chief Minister. The petitioner, relying on Section 190 of the Secretariat Office Manual, says that this is the only procedure possible when Ministers are to cause the election and the net effect would be that the Chief Minister, who may belong to any religion would thus obtain the locus to reject the recommendation of the Cabinet Sub Committee of group of Ministers, thus impeding the real will of the Hindu Ministers. He has to obtain strength for his submissions as afore, produced the relevant pages of the Kerala Secretariat Office Manual on record as Exhibit P3.

13. Finally, it is petitioner's singular assertion that the legislators of Kerala were all along aware of the anomalies in the Act and he refers to the debate of the United States of Travancore and Cochin in the legislative assembly on 29.01.1955, a copy of this has been appended to this writ petition as Exhibit P4, wherein he says that the then Chief Minister has conceded that '*there are many defects in the existing Act and that the whole Act may have to be examined; probably the whole basis of the Act may have to be re-*

considered'. He says that this promoted the Government to issue orders constituting various Commissions, called C.P.Ramaswamy Iyer Commission, Kuttikrishna Menon Commission, K.P.Sankaran Nair Commission, etc. to look into the issues and recommend a viable and suitable administrative set up for the Devaswom Boards. The petitioner says that K.P.Sankaran Nair Commission aforementioned filed its report in the year 1984, a copy of which has been placed on record as Exhibit P5, wherein recommendations have been made for unification of the various Devaswom Boards in Kerala under an Apex Body at the State level with appropriate executive control of the Governmental Agencies/Departments at appropriate levels. The petitioner alleges that these recommendations 'are gathering dust in the past more than three decades because the State never considered the cause' and that a Division Bench of this Court **In re: Temples in the Erstwhile Malabar Area** (AIR 1995 Ker 172) directed the Government to consider the formation of a Board for the whole of Kerala on the lines of the recommendations made by

the Kuttikrishna Menon Committee and Sankaran Nair Commission.

14. Foundationalised on the aforesaid averments and contentions in the writ petition, the petitioner has made the following prayers:

> "I. declare that Sections 4(1) and 63 of the Travancore Cochin Hindu Religious Institutions Act, 1950 unconstitutional, as the same are hit by Article 14.
>
> II. Declare that the practice of issuance of whip in Devaswom elections undemocratic and unconstitutional.
>
> III. To issue a writ of mandamus or other appropriate writ, order or direction commanding the State of Kerala to either implement the Sankaran Commission Recommendations by suitably updating them in view of long lapse of time or to formulate a suitable and efficacious scheme for administering the temples with assured democratic participation of devotees, within a time frame as may be stipulated by this Hon'ble Court.
>
> IV. Grant such other reliefs as may be prayed for and as the Hon'ble Court may deem fir to grant and
>
> V. Grant the cost of this Writ Petition."

15. In the conspectus of the above pleadings, contentions and materials, we proceed to evaluate its merits and justification or otherwise of the prayers made in the writ petition.

16. The compendious narration of the facts and

contentions of the petitioner as being above, we are called upon to consider the constitutional vires of Sections 4(1) and 63 of the Act on the touch stone of the issue as to whether every devotee of a temple could obtain the right to be a direct participant in a nomination or election process. However, it is irrefragible that many of the issues relating to the vires of Sections 4(1) and 63 of the Act have already engaged the attention of the Court earlier and have been answered in favour of it being unconstitutional.

17. The constitutionality of Section 63 of the Act, which is explicitly identical to that of Section 4, was called into question before a Full Bench of the Travancore-Cochin High Court in **P.M.Bramadathan Nambooripad v. The Cochin Devaswom Board** (1955 KLT 516). The issues raised by the Full Bench for consideration is available in paragraph 2 of the said judgment, the relevant portion of which reads as under:

> "After some discussion at the Bar the issues for decision as far as this court is concerned were settled as follows:-
>
> 1. Does the Travancore-Cochin Hindu Religious Institutions Act, 1950, offend Article 14 of the Constitution?

> 2. Is the Devaswom Board a local or other authority within the meaning of Article 12 of the constitution?
>
> 3. Is the right of the plaintiff to be an Ooralan “Property” within the meaning of Article 12 of the Constitution?
>
> 4. Do Sections 63 and 64 of the Act offend Articles 14, 15(1), 19(1)(f) & (g) and 26 of the Constitution?
>
> 5. Does Section 66(vi) of the Act offend Articles 19.26 and 254 of the Constitution?
>
> 6. If either Section 63 or Section 66(vi) of the Act is ultra vires of the Constitution, will that invalidate the entire Act or the constitution of the present Devaswom Board?
>
> 7. Does Section 61(6) of the Act offend Article 14 of the Constitution in view of Section 2(b) of the Act which exempts institutions belonging to and under the sole management of a single family?
>
> 8. Are Sections 79, 81, 83 and 86 ultra vires of the Constitution or alternatively will exercise of supervision by the Board before an enquiry and a finding of 'proved mismanagement' as provided in Section 36 of the Act offend Article 14 of the constitution?
>
> 9. Does Section 114 of the Act offend Articles 14 and 19 of the Constitution? Are the notification and order of the Board dated 12-1-1951 invalid and inoperative?”

The first issue, as is available from the afore extractions, was whether the Act offends Article 14 of the Constitution and the Full Bench, relying on and affirming the judgment of the Hon'ble Supreme Court in **Manohar Lal v. The State** (AIR 1951 SC 315), found the Act to be constitutional for the

reasons stated therein, which are recorded in paragraph 4 of the judgment as under:

> "(1) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that it s laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.
>
> (2) The presumption may be rebutted in certain cases by showing that on the fact of the statute there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.
>
> (3) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment of circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.
>
> (4) The principle does not take away from the State the power of classifying persons for legitimate purposes.
>
> (5) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.
>
> (6) If a law deals equality with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.
>
> (7) While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object to be attained and the classification cannot be made arbitrarily and without any substantial basis."

Therefore, the constitutional vires of the Act was granted an unequivocal imprimatur by the Full Bench and then it proceeded to consider issue No.4 afore, namely, if Section 63 of the Act offends Articles 14, 15(1), 19(1)(f) & (g) and 26 of the Constitution. After an elaborate consideration of the relevant factors and law involved, the Court entered into an affirmative conclusion as under:

> "Religion in its broadest sense includes all forms of faith and worship, all the varieties of man's belief in a Superior Being or a Moral Law transcending the things that are Caesar's and demanding his affection and obedience. In AIR 1954 SC 388 the Supreme Court said that "the language of the two clauses has clearly brought out the difference between them" and :
>
> > "In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here against it should be remembered that under Art.26(d) it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Art.26(d) of the Constitution".
>
> There is nothing in Sections 63 and 64 which can be considered as an interference with the right of the Hindus to manage their own affairs in matters of religion. We are

> also not prepared to say that the provision violates the right of the Hindus to administer according to law the property of their religious institutions and in the light of what is stated above our conclusion is that the restrictions imposed by Sections 63 and 64 in the choice of the members of the Cochin Devaswom Board do not violate the provisions of any of the Articles specified in this issue, namely, Articles 14, 15(1), 19(1)(f) & (g) and 26."

After having found so, their Lordships then entered into consideration of issue No.6, namely that if either Section 63 or Section 66 of the Act is *ultra vires* the Constitution, will that invalidate the entire Act and constitution of the present Boards. The Court obviously spoke to the negative, since these sections have already been found to be constitutional.

18. In the light of the rather explicit and unviolable declarations in **Bramadathan Nambooripad** (supra), we were constrained to ask Sri.Mohan Parasaran, the learned Senior Counsel appearing for the petitioner, whether the challenge in this writ petition against the very same sections, namely Section 63 and its identical twin provision, namely Section 4 could now brook any challenge as being unconstitutional. We asked him whether the questions raised herein and the challenge made are not virtually *cadit quaestio*

and therefore, unnecessary for this Court to enter into a further evaluation.

19. Sri.Mohan Parasaran, the learned Senior Counsel opened his submissions by saying that the particular line of challenge caused to be projected by the petitioner in this case has not been considered by this Court before even in **Bramadathan Nambooripad** (supra) and according to him, therefore, the issues herein are still *res integra* and he says that the two primary issues for consideration of this Court raised by the petitioner herein are, in fact, *res novo*. He elaborated that the apprehensions of the petitioner, as voiced herein, are the forensic competence of the Ministers and Legislators to be part of the nomination or election process as provided under these two sections and the danger of the rather unbridled, unguided and opaque powers that are vested with them to do so, there being no procedural safeguards or fetters in the manner in which the nominations and elections are allowed to be done by the Minsters and Legislators

respectively. According to him, this has led to questionable elements being inducted into the Board at various periods and that unless the entire provisions are recast, the chances of undesirable persons obtaining nomination by the Ministers and being collusively elected by the Legislators is a real possibility and present an imminent cause for interference by this Court. Sri.Parasaran asserts that these issues have never engaged the attention of the Full Bench in **Bramadathan Nambooripad** (supra) and urges us to consider these issues as being *res novo*.

20. Putting forth the contention that the Ministers and Legislators are incompetent to be part of the electoral college, Sri.Parasaran calls our attention to Sections 7 and 66 of the Act. Since both these sections are in *parimateria*, if not identical, we deem it appropriate to extract only Section 7 as under:

> 7. Disqualification for membership.- No persons shall be eligible for election or nomination as a member of the Board if such person.-
>
> (i) is of unsound mind, a deaf-mute or suffering from leprosy; or

> (ii) is an undischarged insolved; or
>
> (iii) is an office-holder or a servant of Government, a local authority, the Devaswom Board, an incorporated or unincorporated Devaswom or the trustee of a Hindu Religious Endowment; or
> (iv) is interested in a subsisting contract for making any supplies to or executing any work on behalf of the incorporated or unincorporated Devaswoms; or
>
> (v) has been convicted by a Criminal Court of any offence involving moral turpitude; or
>
> (vi) is a member of parliament or of the Legislature of any State."

Sri.Parasaran focuses on sub clause (vi) of Section 7, which is the same as sub clause (vi) of Section 66, to contend that the Act specifically provides that a Member of parliament and a Legislator of a State is disqualified and ineligible for either being nominated or elected as a member of the Boards. His contention is that once the MPs or Legislators are so disqualified to be a member of the Board, either through nomination or election, then it cannot be constitutionally correct to vest them with the power to make such nomination or to cause such election. Sri.Parasaran strongly says that this will amount to conflict of interest, since under Sections 4 and 63, the persons who are to nominate and elect the members of

the Board are themselves persons who are disqualified to be members. As per him, when the Statute imposes a disqualification on a person to be a member, then it cannot go ahead and give him authority to make the nomination or to elect a member to the Boards. This, according to him, is unconstitutional and not covered by **Bramadathan Nambooripad** (supra).

21. Sri.Parasaran, the learned Senior Counsel, in support of his submissions cites the decision reported in **TRF Limited v. Erergo Engineering Projects Limited** ((2017) 8 SCC 377) and points out that in the said judgment the Hon'ble Supreme Court was concerned about the question as to whether a person who is statutorily disqualified or ineligible to be appointed as an Arbitrator under the Arbitration and Conciliation Act, 1996 would be eligible to nominate a person as an Arbitrator even though he is personally disqualified. This contention in the said judgment was edificed on the provisions of Section 12(5) read with Schedules V and VII of the Arbitration and Conciliation (Amendment) Act, 2015,

whereunder, a Managing Director of a company is declared ineligible to act as an Arbitrator in an issue which concerns the said company. However, in the facts of that case, notwithstanding this ineligibility, the Managing Director was invested with the power, as per the contract involved therein, to nominate an Arbitrator. The Hon'ble Supreme Court found in favour of the contention against such power of nomination, holding that if the nomination of an Arbitrator by an ineligible Arbitrator is allowed, it would tantamount to carrying on the proceeding for arbitration by himself and then declared that the Managing Director cannot, therefore, nominate an Arbitrator.

22. Sri.Parasaran wants us to adopt the same reasoning as above in the facts of this case since, according to him, the Minsters and MLAs, being concededly disqualified to be members of the Board, it would not be constitutionally justified to give them the power to appoint members under Sections 4 and 63 of the Act.

23. Even though Sri.Parasaran submits before us, as

we have already recorded above, that this issue has never been considered by this Court earlier in **Bramadathan Nambooripad** (supra), the fact remains that the very same issue was, in fact, considered in the said judgment but from a different perspective while deciding issue No.5, which is extracted ut supra. The Hon'ble Court was considering whether the disqualification in Section 66(vi) of the Act against Legislators, being the members of the Board would offend Articles 19, 26 and 254 of the Constitution of India. The conclusion of the court on this issue is contained in paragraph 13 of the said judgment, which reads as under:

> "According to Section 66(vi) a Member of parliament or of the Legislature of a State is not eligible for election or nomination as a member of the Board and the contention is that such a provision violates Articles 19, 26 and 254 of the Constitution. Article 19 guarantees the right to freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property and to practise any profession, or to carry on any occupation, trade or business, and it is fundamental rights. If it is assumed that they do not affect some those rights, it cannot also be denied that considering the demands on the time and attention of a member of Parliament or the Legislature of a State that the working of a modern democracy involves, it is only a reasonable restriction to debar him from becoming a member of the Board and thus becoming liable to discharge the duties of that membership

> as well. It is also difficult to understand as already stated in dealing with issue No.4 how such a provision can offend Article 26 and the freedom of the Hindus to manage their affairs in matters of religion or to administer the properties of their religious and charitable institutions in accordance with law."

The tenor of the observations of the Full Bench manifestly makes it clear that the restrictions placed on the Legislators are on account of the demand on the time and attention of an MP or Legislator of a State and in their functions in a modern democracy and hence that it was only a reasonable restriction to restrict him from becoming a member of the Board, which would cast additional burden on their time. Their Lordships thus found that this is only a reasonable restriction, though enumerated under the head of disqualification, since going by the nature of the other disqualifications listed in the sections, Legislators are excluded from being members of the Boards not in the manner of a disqualification *per se*, in the way it is normally understood, but can only be construed as a restriction on them. To add to this, we would also assume that the intention of the framers of the Act in providing for this exclusion or restriction on the right of Legislators being

elected to the Board was also on account of the fact that without such a restriction they would be encouraged and persuaded to nominate and elect themselves, thus giving the members of the electoral college itself an undue advantage.

24. The submissions of Sri.Mohan Parasaran hinged on the ratio of **TRF Limited** (supra) cannot obtain favour in our mind in the facts of this case because, as we have already said earlier, the restrictions placed on the Legislators under Sections 7(vi) and 66(vi) of the Act are not really disqualifications but intended to exclude them from the field of choice when nominations and elections are made and held to the post of members of the Board. Since this exclusion or restriction is not on account of any deleterious reasons like conviction in a criminal case, insolvency, unsoundness of mind, having a subsisting contract with the Board or being a servant of Government, etc., which are the real disqualifications enumerated under these sections, we cannot accede to the proposition that such exclusion/restriction cast upon the Legislators would then disentitle them to be the members of

the electoral college on the ground of conflict of interest. The position noticed in **TRF Limited** (supra) is completely in dissonance to the facts of this case because while the Managing Director therein was disqualified statutorily to be an Arbitrator, thus impeding him from nominating another as the Arbitrator, which would otherwise obviously mean a conflict of interest, the Legislators are members of the electorate and hence the restriction on them being nominated or elected as Board members is obviously salutary in nature and intended to ensure that there is no conflict of interest. The learned Advocate General submits on this issue more or less on the same lines as we have thought. He also submits that the restriction placed on the Legislators from being Board members is only to ensure that they would not be burdened with additional duties of the membership of the Boards and that this can only be seen to be a reasonable restriction and not a disqualification in its normal sense.

25. Once our opinion was formulated as above, on the question of conflict of interest of Legislators, Sri.Parasaran

commenced submissions on the second issue which he says is equally important. According to him, both Sections 4 and 63 are the products of colonial hangover and are the vestiges of the pre-constitutional era. He builds this submission on the foundation of the assertion that both these sections draw their validity from the pre-constitutional Covenant entered into by the rulers of Travancore and Cochin while forming the United State of Travancore and Cochin, wherein the control and administration of the temples under them was provided to be under Article 8 thereof. Sri.Parasaran shows us that the provisions of Sections 4 and 63 of the Act are virtually on identical lines as Articles (e) and (f) of Clause 8 of the Covenant, under which the respective Boards were to consist of three Hindu members, one of whom was to be nominated by the ruler of the respective covenanting States of Travancore and Cochin, one by the Hindus among the Council of Minsters and one elected by the Hindu members of the legislative Assembly of the United State of Kerala. The submission of Sri.Parasaran is that the provisions of the covenant, a copy of

which is on record as Exhibit P1, was intended to provide for the circumstances and exigencies of the time when they were created in the year 1949 and that it is not, therefore, proper or prudent to have the same provisions incorporated into the Act through Sections 4 and 63, since India is now a sovereign Democratic Republic and, therefore, that the power should now vest in its people and not in the rulers as was the case prior to the Constitution. He, therefore, says that since the Act was brought into force mechanically adopting the provisions of Exhibit P1 covenant, it has now become virtually archaic and hence anachronistic in the present milieu.

26. We notice that this submission, which is part of the pleadings in the writ petition, has been refuted by the State of Kerala in their additional counter affidavit dated 21.02.2018 by stating that even though the covenant resulted in the creation of Boards, Sections 4(1) and 63 of the Act are not exclusively guided by the provisions of the covenant. The learned Advocate General asserts that the Legislature of the erstwhile Travancore-Cochin State had the legislative

competency to enact the Act and that it has been adapted by the State of Kerala as per the Kerala Adaptation of Laws Order, 1956. The learned Advocate General further says that there is nothing archaic or primordial in the provisions of Sections 4 and 63 of the Act, since the nomination and election of members to the Board are best left to the Ministers and legislators who are elected by the citizens of this State, thus making the process of nomination and election to the Board democratic and representative in its nature. As regards Exhibit P1 Covenant and Act are concerned, the learned Advocate General says that another Bench of this Court in **Prayar Gopalakrishnan v. State of Kerala** (2018 (1) KLT 478), while considering the validity of certain Ordinances amending the Act, had already considered its ambit and relevance and that it has declared the forensic position that the Covenant is not an existing law within the meaning of Article 366(10) and is not saved by Article 372(1) of the Constitution of India and further that the Covenant can at best refer to the personal rights, privileges and dignitaries of the

rulers and should be deemed to have been repelled after the coming into force of the Constitution. He contends, therefore, that this position is no longer *res integra*, it having been answered against the petitioner and hence that this Court should not re-engage itself in this area.

27. No doubt, in **Prayar Gopalakrishnan** (supra), this Court has declared the law as stated by the learned Advocate General and we are in complete confirmation of the same. However, what is pleaded before us by the petitioner, through his learned Senior Counsel, is that since the Act was initially guided and imbued by Exhibit P1 covenant, which was entered into as early as in 1949, it should now obtain necessary changes and amendments to make it relevant and applicable to the contemporary time. The submission ineluctably, therefore, is that the Act has not moved along with the times and that it should be struck down. We are afraid that even if the submissions of the Sri.Parasaran are accepted without contest, it would not obtain to us the jurisdiction to strike down the Act or any of its provisions as being unconstitutional,

merely because the amendments or changes to it, as may be warranted by the march of time, has not been effectuated. This is not a ground on which a Statute or its provisions can be struck down and it would have to be left to the Legislature to make such amendments or changes as may be warranted, to bring the Statute to contemporaneous relevance of the present era. This is not something on which we can, therefore, affirmatively speak on.

28. Sri.Parasaran then called our attention to the contention of the petitioner that the Ministers and Legislators are bound to act under 90 of the Secretariat Office Manual and that for the purpose of nomination or election, as the case may be, of the members to the Boards, it will require the Council of Ministers to form a Cabinet Sub committee or a group of Ministers, which alone can take decisions as regards the candidature of persons for being considered. He says that as long as the Secretariat Office Manual prevails, the power to the Hindus among the Council of Ministers is illusory, since the actual decision to be taken will be only under the approval

of the concerned Minister or Chief Minister. As we have already noticed above, the petitioner's contention is that the practical process for Ministers to take decisions being so the powers given to them under Section 4 becomes nugatory, since all their decisions, taken under the aegis of a Cabinet sub committee or group of Ministers, would be finally decided only with the approval of the Chief Minister, whether he professes Hindu religion or otherwise.

29. Sri.Parasaran, as a complement to this contention, adds that even when nominations or elections are made by the Ministers, the decision is, in fact, taken by a political party to whom they swear religion and that their actions are governed by the 'whips' issued by the parties. The learned Senior counsel submits that this practice must be put an end to, even if the elections are found constitutional by this Court, so as to enable the Ministers and Legislators to exercise their individual freedom. These contentions of the petitioner, as submitted by the learned Senior Counsel, is sought to be answered by the learned Advocate General showing us the

relevant portions of the additional counter affidavit filed by the State, wherein it is stated as under:

> "The contention in paragraph 15 of the writ petition that the Indus among the Council of Ministers, in the process of nominating the Members of the Travancore and Cochin Devaswom Boards, is legally and procedurally a Cabinet Sub Committee or Group of Ministers is not correct and hence denied. ..... The terminology of "Cabinet Subcommittee of Hindu Ministers" used by the writ petitioner is a misnomer and the said phraseology is totally misconceived in so far as nomination of Members to the Devaswom Boards is concerned. The nomination by "Hindus among the council of Ministers" is for all purpose a nomination by those who are "Hindus" in the "Council of Ministers" and the same is not in any way related to the functioning of the Council of Ministers as an entity or is a subcommittee of the Council of Ministers. The decision of the Hindus among the Council of Ministers with regard to the nomination is a statutory procedure in accordance with the provisions of the Act and the said decision cannot be rejected or modified by the Chief Minister, who may probably belong to another religion. There is no bar on the exercise of the free will of the Hindus among the Council of Ministers. Even otherwise, the provisions of the Act cannot be overridden by the provisions of the Secretariat Manual."

As regards the allegation that even the nominations and elections of members to the Boards are controlled by political parties by issuing whips are concerned, the learned Advocate General tells us that this contention is without basis. According to him, the nominations and elections of members are not coloured by political affiliation and that generally, no instructions are issued by political parties to the Ministers or

Legislators belonging to them to vote in a particular manner. He further says that the Statute provides an opportunity to each Minister or Legislator, as the case may be, to exercise their power of nomination and franchise in the most independent manner and hence, it may not be necessary for this Court to answer this contention of the petitioner. He adds that under Article 212 of the Constitution of India, the courts cannot inquire into the proceedings of the State Legislature and therefore that, it may not be judicious for this Court to decide whether a particular Minister or Legislator voted on a whip or otherwise. We find some force in the submissions of the learned Advocate General, since the Statue does not provide for issuance of a whip in such matters and the Ministers and Legislators thus being obviously free to exercise their minds subjectively. It will, therefore, not be possible for this Court to grant the second prayer of the petitioner and declare that issuance of a whip in Devaswom elections are undemocratic or unconstitutional, since even if such a whip is issued, it can only be seen as an unofficial one and not

sanctified by the provisions of the Statute.

30. The above submissions of the the learned Advocate General and the statement *ut supra* in the counter affidavit would make it indubitable that the apprehension of the petitioner on these counts is not supported on factual foundations.

31. The unequivocal stand of the Government that the decisions of the Ministers and Legislators, while making nominations or elections to the Devaswom Boards are not governed by the Secretariat Office Manual would also be sufficient protection against the petitioner's apprehension to the contrary. We, therefore, do not deem it necessary to consider or answer these issues any further, but deem it appropriate to record the submissions of the learned Advocate General and the statements in the counter affidavit afore-extracted, which will be the enough safeguard to any such fear in the minds of the petitioner.

32. Finally, Sri.Parasaran submits that Sections 4(1) and 63 of the Act as it is presently legislated, grants

unbridled, unshackled and unguided powers to the Ministers and Legislators to make nomination or to elect members to the Boards. Sri.Parasaran says that the process is not transparent and that going by the latest trends as shown to us by him, the Hon'ble Supreme Court has been emphasising the need for transparency in such processes, as a necessary concomitant to a true Democratic Republic. According to Sri.Parasaran, the provisions do not show how the candidature of persons, either to be nominated or elected, are to be invited or considered and, therefore, that it would lead to a situation where the Ministers and the Legislators, as the case may be, could choose any one of their choice behind closed doors without the controlling gaze of the citizens, thereby creating a situation enabling pernicious tendencies and selection of undesirable persons. Sri.Parasaran says that as regards the nomination of members by the Ministers are concerned, the Statute does not even provide for the procedure to be followed but he concedes that in the case of nominations to be made by the legislators, the procedure is as mandated in Schedule II of

the Act. Inviting our attention to Schedule II, Sri.Parasaran shows us that the nominations for election can be made by any Hindu member of the Legislative Assembly, thus getting such candidates elected either unopposed or through an election without any further scrutiny of the credentials or qualifications of such candidates.

33. Sri.Parasaran asserts rather vehemently that since the Ministers and Legislators are thus enabled to present candidates without any ssessment of the relative merits or credentials and that there being no real challenge to the candidature of their choice, it would become easy for them to bring in persons, either through nominations or election,who are unsuitable and undesirable to hold the post. He says that this problem is more pertinent because once a candidate is so nominated or elected and appointed as a member of the Board, then his removal is possible only as per Sections 9 and 69 of the Act on an application being made to the High Court by the Advocate General or a person belonging to a Hindu community on the ground of proved misbehaviour or

incapacity. Sri.Parasaran submits that since removal of a member is subjected to a long drawn out process and that too on proved misconduct or incapacity, the selection of an undesirable or less meritorious person would obtain all protection, since that would not be a ground on which he can be removed. Sri.Parasaran thus impresses upon us the inviolable need for a transparent procedure and he contends that in the absence of such procedure being prescribed, the power of the Ministers and Legislators are unbridled and hence in violation of the constitutional protection to the citizens under Article 14 of the Constitution.

34. Before considering the above contentions of Sri.Parasaran, we deem it apposite to first refer to the submissions made by the learned counsel for various respondents in this case.

35. Sri.Subramanian Swamy, the fourth respondent, who is appearing in person, makes submissions in conformity with what has been made by Sri.Parasaran, but travels beyond them by saying that the Act itself and not merely Sections 4(1)

and 63 are unconstitutional. He relies on his eponymous judgment of the Hon'ble Supreme Court in **Dr.Subramanian Swamy v. State of Tamil Nadu** ((2014) 5 SCC 75) to assert that no law can be found to be constitutional which provides for ex-proprietary measures to take over a property in perpetuity. Dr.Swamy contends that the management of a temple can be allowed to be taken over by the Government only in the case of allegation of mismanagement and that once that evil is remedied, the management must be handed over to the person concerned immediately. He contends that the supersession of the right of administration cannot be of a permanently enduring nature and that the management has to be returned to the owners of the properties as soon as the mismanagement is remedied.

36. We notice from the judgment referred to by Dr.Swamy that the issue therein relates to the rights of a religious denomination coming within the ambit of Articles 25 and 26 of the Constitution to obtain back the proprietary rights and possession of the religious/charitable institution,

once the evil of mismanagement was remedied by the Government. The Hon'ble Supreme Court found that the 'pothu dikshidars' ('smarthi brahmins') are qualified to be described as a 'religious denomination' under Article 26 of the Constitution and that their rights to be in ownership and possession of the Sree Sabanayagar Temple in Tamil Nadu had already been found in their favour by a competent court as early as in the year 1954. However, in the previous round of litigation, the Madras High Court took the view that the Tamil Nadu Religious and Charitable Endowments Act, 1954, which provided for the permanent taking over of the temple was in order, since the 'pothu dikshidars' would not obtain the benefit of being a religious denomination. The Hon'ble Supreme Court declared , on account of the earlier judgment in their favour that they are a religious denomination, the properties will have to be returned to them notwithstanding the Act. It is in that context that the Hon'ble Supreme Court has made the following observations in paragraphs 65 and 66 of the judgment, which are extracted as under:

> 65. Even if the management of a temple is taken over to

> remedy the evil, the management must be handed over to the person concerned immediately after the evil stands remedied. Continuation thereafter would tantamount to usurpation of their proprietary rights or violation of the fundamental rights guaranteed by the Constitution in favour of the persons deprived. Therefore, taking over of the management in such circumstances must be for a limited period. Thus, such an ex-propriatory order requires to be considered strictly as it infringes the fundamental rights of the citizens and would amount to divesting them of their legitimate rights to manage and administer the temple for an indefinite period. We are of the view that the impugned order is liable to be set aside for failure to prescribe the duration for which it will be in force.
>
> 66. Supersession of rights of administration cannot be of a permanent enduring nature. Its life has to be reasonably fixed so as to be co-terminus with the removal of the consequences of maladministration. The reason is that the objective to take over the management and administration is not the removal and replacement of the existing administration but to rectify and stump out the consequences of maladministration. Power to regulate does not mean power to supersede the administration for indefinite period."

37. From what we have seen above, it becomes obvious that the case of a religious denomination, seeking restitution of their property or return of management rights of a religious or charitable institution, stands on a completely different footing.

38. The unexpendable criterion for being qualified as a denomination has been spoken about by the Hon'ble Supreme Court in several cases before. As early as in the year 1954, in

the judgment in **The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri. Shirur Mutt** (AIR 1954 SC 282), the Hon'ble Supreme Court enumerated the criterion lucidly in paragraph 15 of the said judgment, which is extracted below:

> "As regards Art.26, the first question is what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name; a religious sect or body having a common faith and organisaiton and designated by a distinctive name". It is well known that the practice of setting up Maths as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day.
>
> Each one of such sects or sub-sects certainly be called a religious denomination, as it is designated by a distinctive name, - in many cases it is the name of the founder. - and has a common faith and common spiritual organisaiton. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As Art.26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this Article."

This view of the Hon'ble Supreme Court has been followed consistently, as can be noticed in the subsequent decisions in **Durgah Committee, Ajmer and another v. Syed Hussain Ali and others** (AIR 1961 SC 1402), **Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan and others** (AIR 1963 SC 1638), **Raja Bira Koshore Deb v. State of Orissa** (AIR 1964 SC 1501), **Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya** (AIR 1966 SC 1119) and **S.P.Mittal v. Union of India and others** ((1983) 1 SCC 51).

39. In **S.P.Mittal** (supra), the Hon'ble Supreme Court further expatiated it as under:

> "We have mentioned earlier that laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice are excluded from the guarantee of free of conscience and the right freely to profess, practise and propagate religion. We have also pointed out that the administration of the property of a religious denomination is different from the right of the religious denomination to manage its own affairs in matters of religion and that laws may be made which regulate the right to administer the property of a religious denomination. Questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of Article 26 applies. It has been so decided in the *Shirur Mutt case* as well as other cases following it."

This declaration of law by the Hon'ble Supreme Court has

stood the test of time until now and has been followed subsequently in several judgments.

40. The position of the temples in the Travancore-Cochin area, save the Guruvayoor Temple, has a peculiar history. We do not require to speak on it afresh because the historical background was noticed by the Division bench of this Court in **Muraleedharan Nair v. State of Kerala** (1990 (1) KLT 874) wherein in paragraph 9, this Court narrated it as under:

> ”The Hindu temples in the State of Travancore were mostly under private management called Ooralars or Karukars. When those bodies were found mismanaging the institutions, Col. Munro decided in 987 ME (1811-1812 AD) that the State should assume control over them and therefore the Government assumed the management of these temples with their properties movables and immovables. With a view to secure better efficiency in the management and control of the Devaswoms, M/s. Chempakaraman Pillai and N. Rajaram Rao were deputed in July 1905 to investigate the question of regulating their expenditure both as regards pathivus and as regards the purificatory ceremonies. As the information collected by these officers was merely of a preliminary character, Mr. M. K. Ramachandra Rao, a Puisne Judge of the High Court was, in May 1907, placed on special duty to make a more detailed investigation into the affairs of the Devaswoms and to formulate proposals which would enable the Government to secure a more efficient management and control. Thereafter the Government appointed a mixed Committee of Hindus and non Hindus to consider and report upon the exact character of the assumptions of those Devaswoms, the feasibility of separating their administration from the Land

Revenue Department and the nature and cost of the additional staff that might be necessary if the organisation of a separate department be deemed desirable. The Committee, in their report recommended that the administration of the Devaswom should be separated from the Land Revenue Department and entrusted to a distinct agency. The members of the Committee differed in one respect. While the majority held the view that the State being a Sovereign Proprietor is legally accountable to none for their management.. The dissenting member was of the opinion that the assumption extended only to management, thereby constituting the State a trustee of the Devaswoms and that as the State has mixed up the trust property with its own, the entire expenditure in connection with the Devaswoms, however large, is a legitimate charge upon its general revenue. The Government of Travancore after taking necessary legal opinion came to the conclusion that the State's assumption of these Hindu Religious Institutions in the days of Col. Munro was an act done in the exercise of the traditional right of 'Melkoima' inherent in the Hindu Sovereigns of the State and that it was not an act of confiscation. The Government therefore were under the undoubted obligation to maintain the Devaswoms for all time properly and efficiently. The Government also came to the conclusion that for the proper discharge of this obligation the creation of a separate department which will devote its attention exclusively to the administration of Devaswoms is necessary. Considering that it is the solemn right and duty of the Government to maintain efficiently and in good condition the Hindu Religious Institutions in the State of Travancore irrespective of the income from such institution or the cost of such maintenance and in pursuance of such right and duty of the State the Travancore Government issued the Devaswom Proclamation on 12th April, 1922 corresponding to 30th Meenom, 1097. It also constituted a Devaswom fund for the Devaswoms mentioned in the schedule to the proclamation. S.7 of the Proclamation provided for creation of a Department for better and more efficient management and more effective control over the Devaswoms. Clause 7 is as under:

"7(1) Our Government may for the better and more efficient management and more effective control of the Devaswoms

mentioned in the schedule organise a Devaswom Department of the State consisting of such member of officers and other servants as they think fit.

2. The expenditure in connection with the said Department shall, notwithstanding anything contained in S.3 and 4, be met out of the general revenues of the State."

The Devaswom under the proclamation is managed by a Devaswom Department of the State consisting of such number of officers and other servants. The Government had power under S.8 to define the powers and duties of the officers of the Devaswom Department to regulate the scale of expenditure of the Devaswoms and to make rules generally for carrying out the purpose of the proclamation. The Devaswom Department has become a part of the Government Department. The Maharaja did not want to leave the administration of the Devaswoms to the State Government in the new set up. Therefore on 10-8-1123 (23-3-1948), yet another proclamation was issued by which the Maharaja assumed control and management of Devaswoms and Devaswom Department of the Government. A material change also made in respect of funds from which expenditure was to be made. It was also provided that expenditure to be made not from general revenue but only from Devaswom fund. Thereafter when Travancore - Cochin States were integrated it was provided by S.8(c) of the Covenant that the administration of the Devaswoms, Hindu Religious Institutions and Endowments and their properties and funds would vest with effect from 1-8-1949 in a Board known as Travancore Devaswom Board. The Hindu Religious Institutions Ordinance 10 of 1124 was promulgated which came into force on 1-8-1949. Before expiry of the period of Ordinance, Act 15 of 1950, namely the Travancore - Cochin Hindu Religious Institutions Act, 1950 was enacted. S.3 of the Act provided that the administration of incorporated and unincorporated Devaswoms and of Hindu Religious Endowments and all their properties and funds as well as the fund constituted under the Devaswom Proclamation which were under the management of the Ruler of Travancore prior to the first day of July, 1949 except the Sree Padmanabhaswamy Temple shall be vested in the Travancore Devaswom Board. S.4 of the Act provided the

> constitution of the Travancore Devaswom Board. It shall consist of three Hindu members, one of whom shall be nominated by the Ruler of Travancore, one by the Hindus among the Council of Ministers and one elected by the Hindus among the members of the Legislative Assembly of the State of Travancore - Cochin. S.5 provided that a meeting of the Hindus among the members of the Legislative Assembly of the State of Travancore - Cochin shall be summoned under the authority of His Highness the Raj Pramukh by any person authorised in this behalf by the Raj Pramukh to meet at such time and place and on such date as may be fixed by him in this behalf for the election of a member to the Board. The election had to be held in accordance with the rule specified in Schedule II by the person commissioned by the Raj Pramukh to preside over the meeting. Under S.6 a person shall not be qualified for nomination or election as a member of the Board unless he is a permanent resident of the State of Travancore - Cochin and professes the Hindu Religion and has attained thirty five years of age. Thus it will be seen that the Devaswom Board has, by the Act, broad based giving it a representative status, for the Hindu Ruler of the State of Travancore, Hindu among the Council of Ministers and the Hindu among the members of the Legislative Assembly. The power of nomination given to the Ruler of Travancore was taken away and was given to the Council of Ministers by Travancore - Cochin Hindu Religious Institutions (Amendment) Act 70 of 1974. Thereafter, of the three Hindu members of the Board, two will have to be nominated by the Hindus among the Council of Ministers. The power given to Rajapramukh was subsequently vested in the Governor."

The afore-extracted portion of the said judgment would leave no doubt that the nature of the temples are not denominational *stricto sensu* but that the temporal interests including the proprietary rights of the properties was sought to be controlled by the Government, since even while the

temples were earlier controlled by the erstwhile rulers, its ownership was construed to be of a public nature with the devotees at large having interest in its proper management.

41. In the case at hand, the writ petition has been filed by an individual who claims to be a devotee. He has not claimed any rights over the temple nor does he have a contention that he is entitled to its management. The submissions of Sri.Swamy as above are, in fact, beyond the scope and ambit of this writ petition. But we must remind ourselves that the judgment of the Hon'ble Supreme Court in Sree Sabanayagar Temple is specifically in relation to a case of denomination. The present case has no such assertion and we cannot, therefore, accede for the time being to the submissions of Dr.Swamy that the Act is bad and that the temple should revert to its prior owners.

42. Dr.Swamy at this time cites the judgment of the Hon'ble Supreme Court in **Ramanlal Gulabchand Shah v. State of Gujarat** (1969 KHC 665) and contends that notwithstanding the contention raised in the writ petition, this

Court must look into this issue and strike down the Act thereby facilitating return of the temple properties to the original owners, which he says, are the erstwhile rulers in the family. According to him, in **Ramanlal Gulabchand Shah** (supra) the Hon'ble Supreme Court has stated, without leaving room for doubt, that no expropriatory Statute can be put into operation without any limit and that if the management is likely to continue for an indefinite period, it cannot claim constitutional protection. He then adds by way of reiteration that the judgment of the Hon'ble Supreme Court in **Dr.Subramanian Swamy** (supra) is not limited to temples belonging to religious denominations alone but to all temples, be that owned by earlier princely rulers, which were taken over by the Government even prior to the coming into force of the Constitution.

43. We are afraid, going by the various judgments noticed above and even from the declarations of law by the Hon'ble Supreme Court in **Dr.Subramanian Swamy** (supra), this submission would not obtain sanction in law. We are

certain that the ratio in the judgment cited by Dr.Swamy would apply only to a case of religious denomination and since the constitutional vires of the Act in question in this case has already been answered by this court in **Bramadathan Nambooripad** (supra), such issues may not be relevant here and we leave Dr.Swamy with liberty to impel these issues and invoke the remedies, as he is advised in appropriate proceedings. This is more so because the contentions of Sri.Swamy are more than what has been asked for by the petitioner and since he is an individual respondent, though supporting the petitioner, it would not be necessary for us to consider this in any greater detail.

44. Sri.K.P.Sudheer, the learned Standing Counsel for the CDB supports the constitutionality of the Act by relying on **Bramadathan Nambooripad** (supra) and shows us that, at least in two judgments earlier, this Court had occasion to consider the constitutional validity of the provisions of the Act. He cites **Muraleedharan Nair** (supra) and **Raman Nair v. State of Kerala** (2008 (2) KLT 416), which are both Bench

judgments of this Court wherein the view in **Bramadathan Nambooripad** (supra) had been expressly affirmed. He further says that in **Raman Nair** (supra) this Court in paragraph 9 of the said judgment has declared that the Travancore-Cochin Hindu Religious Institutions Act, 1950 has stood the test of timeover half a century. He further says that when Section 4 was challenged in **Muraleedharan Nair** (supra) on the ground that said Section does not say that the Legislators should believe in God and is, therefore, illegal, this Court chose not to strike down the provisions but to declare, by a process of reading in, that only those Hindus who believe in God and Temple worship can be got nominated or to vote in the election to the Devaswom Boards.

45. Sri.S.Gopakumaran Nair, the learned Senior Counsel, assisted by Sri.Krishnadas P.Nair, appearing for the eighth respondent, virtually adopts the submissions of Sri.Mohan Parasaran but interestingly contests the assertion of Dr.Swamy that the temple properties should be now ordered to be reverted to the members of the erstwhile royal

families. He contends that this is not possible practically or legally, since though the temples were managed by the erstwhile rulers of Travancore-Cochin, they were always construed to be public temples. He further says that the concept of rulers or their royal families are no longer relevant in the present milieu in Kerala and that it is not possible to make any orders to revert the proprietary rights of temples to such families or their successors.

46. Sri.R.Krishna Raj, learned counsel appearing for the additional ninth respondent also supports Sri.Parasaran, but, in addition, contends that the Statutes like the Act in question violates the fundamental rights of the Hindus in taking over temple properties and managing them, while it does not make provisions in the case of other communities or religions. Even though we notice this submission, we are of the view that it does not require us to speak on it at this time, since this issue was specifically noticed and answered by the Full Bench in **Bramadathan Nambooripad** (supra), wherein the words of Justice Fazl Ali in **Manohar Lal** (supra) was

affirmed. The specific observations of the Full Bench on this issue is as under:

> "The gravamen of the charge is that while the Christian and Muhammaden religious and charitable institutions and endowments were excluded, Hindu religious and charitable endowments and institutions alone were selected for special treatment and that such a discrimination is unwarranted, unreasonable and unjust. The classification of institutions be either arbitrary or unreasonable having regard to the object sought to be arraigned, viz, the better administration and management of such institutions. It is not a classification nearly a century. As the incidents and the nature of the institutions and endowments of different religions differ in several respects, it cannot be said that the classification is based solely on religion as the institutions included in the classification are religious as well as secular and having regard to the object in view, the institutions having several common features are rightly classified under one group. Article 14 does not prevent the legislature from taking up one set of institution for legislative consideration at one time and enacting laws in respect of them reserving the other types of institutions for consideration to a future date."

These principles have stood the ravages of time and we do not think that it would be now necessary for us to re-open such issues at the hands of a respondent, when the petitioner has not pleaded on these lines nor has he prayed for reliefs in the writ petition based on such contentions.

47. Sri.Parasaran, at this point of time, interjected to say that even though it is not specifically pleaded so, the issue raised by Sri.Krishna Raj is relevant because at the crux of the

objections to the powers granted to the Government under the Act, is the issue as to why Hindu temples alone are taken as a class and that it, therefore, violates Articles 25 and 26 of the Constitution. We are afraid that, in spite of the persuasive submissions of Sri.Parasaran, these issues are no longer open for consideration, because as we have already said above, these Articles would apply only when it comes to the rights of religious denominations and secondly even under Articles 25 and 26 of the Constitution, the power to control, administer and manage the temporal and secular activities of a temple are expressly permitted. The various judgments in these area of the Hon'ble Supreme Court over the years have crystalised this principle and we will fleetingly refer to some of the judgments only to show that the law now stands settled incapacitating us from speaking in any manner to the contrary. The judgments in **Sri.Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** (supra), **Ratilal Panachand Gandhi and others v. State of Bombay and others** (AIR 1954 SC 388) and **Durgah Committee** (supra), which are also relied upon

by the learned Advocate General, are guiding lights in this area. The views in the above three judgments of the Hon'ble Supreme Court are *ad idem* and **Durgah Committee** (supra), in fact, subsumes all such views into itself. The unmistakable opinion of the Hon'ble Supreme Court on Articles 25 and 26 is available in paragraph 33 of the judgment in **Durgah Committee** (supra), which is as under:

> "We will first take the argument about the infringement of the fundamental right to freedom of religion. Articles 25 and 26 together safeguard the citizen's right to freedom of religion. Under Art.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. Art.26 provides that subject to public order, morality and health every religious denomination or any section thereof shall have the right-
>
> (a) to establish and maintain institutions for religious and charitable purposes;
>
> (b) to manage its own affairs in matters of religion;
>
> (c) to own and acquire movable and immovable property; and
>
> (d) to administer such property in accordance with law.
>
> The four clauses of this article constitute the fundamental

freedom guaranteed to every religious denomination or any section thereof to manage its own affairs. It is entitled to establish institutions for religious purposes, it is entitled to manage its own affairs in the matters of religion, it is entitled to own and acquire movable and immovable property and to administer such property in accordance with law. What the expression "religious denomination" means has been considered by this Court in Commr., Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar, 1954 SCR 1005. Mukherjea, J., as he then was, who spoke for the Court, has quoted with approval the dictionary meaning of the word "denomination" which says that a "denomination" is "a collection of individuals classed together under the same name, a religious sect or body having a common faith and organisation and designated by a distinctive name." The learned Judge has added that Art.26 contemplates not merely a religious denomination but also a section thereof. Dealing with the questions as to what are the matters of religion, the learned Judge observed that the word "religion" has not been defined in the Constitution, and it is a term which is hardly susceptible of any rigid definition. Religion, according to him, is a matter of faith with individuals or communities and, it is not necessarily theistic. It undoubtedly has its basis in a system of pleas or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress (pp. 1023, 1024)((of SCR): (p. 290 of AIR). Dealing with the same topic, though in another context, in Venkataramana Devaru v. State of Mysore, 1958 SCR 895, Venkatarama Aiyar, J. spoke for the Court in the same vein and observed that it was settled that matters of religion in Art.26(b) include even practices which are regarded by the community as part of its religion. And in support of this statement the learned judge referred to the observations of Mukherjea, J., which we have already cited. Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the

> practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art.26. Similarly even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art.26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."

This view of the Hon'ble Supreme Court has been followed consistently in several judgments and in **Pannalal Bansilal Pitti and Others v. State of A.P. and Another** ((1996) 2 SCC 498), the Hon'ble Supreme Court considered this issue with respect to the abolition of hereditary trusteeship of temples and answered it has under:

> 13. The second question is: whether abolition of hereditary trusteeship violates Articles 25 and 26 of the Constitution. Article 25(1) assures, subject to public order, morality and health and to the other provisions of Chapter III that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. Sub-clause (2) of Article 25 saves the operation of the existing law and also frees the State from Article 25 (1) to make any law regulating or restricting any economic, financial, political or other secular activity, which may be associated with religious practice. Equally, law may provide for social welfare and reform, the throwing open of Hindu religious institutions of a public character to all classes and

> sections of the society. Article 26 gives freedom to manage religious affairs, subject to public order, morality and health, every religious denomination or any section thereof, to establish institutions for religious and charitable purpose, to manage its own affairs in matters of religion, to own and acquire moveable and immovable property and to administer such property in accordance with law.
>
> 14. Contents of Articles 25 and 26 of the Constitution have been considered in several decisions starting from *Shirur Mutt* case and have been placed beyond controversy. The first principle laid is that the protection of these articles is not limited to matters of doctrine or belief. They extend also to acts done in pursuance of religion and, therefore, a guarantee for rituals and observances, ceremonies and motive of worship which are integral parts of religion. The second principle is that what constitutes an essential part of religion or religious properties has to be decided by the courts with a reference to the doctrine of a particular religion and includes practices which are regarded by the community as part of its religion."

48. While dealing with an identical issue, regarding management of the Shri Jagannath Temple Puri and in the matter of Mumukshu Jana Maha Peetham, the Hon'ble Supreme Court in its judgments in **Shri Jagannath temple Puri Management Committee represented through its Administrator and another v. Chintamani Khuntia and Others** ((1997) 8 SCC 422) and **Sri Sri Sri Lakshmana Yatendrulu and Others v. State of A.P. and another** ((1996) 8 SCC 705) respectively restated these principles affirming that the management and control of the temporal

activities of religious institutions do not violate Article 25 or Article 26 of the Constitution of India. This is the same view taken by the Hon'ble Supreme Court in **T.M.A. Pai Foundation and others v. State of Karnataka and others** (AIR 2003 SC 355), when certain collateral issues relating to education was considered. Reliance was also placed on the decisions reported in **Bramchari Sidheswar Shai and others v. State of W.B.** (AIR 1995 SC 2089) and **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi, and others v. State of U.P. And others** ((1997) 4 SCC 606).

49. In view of the affirmative declaration of the Hon'ble Supreme Court in this area, it is not necessary for us, in any manner, to consider the validity of the Act from the touch stone of Articles 25 and 26 of the Constitution of India, especially when it is admitted that what is sought to be governed by the provisions of the Act are temporal and secular matters without infringing the rights over religious doctrines or belief, which has been left for the spiritual authorities to prescribe and continue.

50. We are cognizant that one of the prayers in the writ petition is that Exhibit P2 report be implemented. We must, however, notice that the recommendations in the said report are with regard to the unification of the Board for all the temples in Kerala and that, therefore, strictly speaking, beyond the scope of this writ petition. In any event of the matter, since unification of the Board and constitution of a single Board for all temples in Kerala, in the form of an Apex Body, are matters within the domain of the policy of the Government, it would not be proper for this Court to affirmatively speak on it. This is more so because, nothing is on record to show that Exhibit P2 report is a statutory one or that it was requisitional by the Government in terms of any particular law. The recommendations contained therein speak of the requirement for unifying the method of management of all temples in Kerala. But this is not something that can be ordered by this Court because several other considerations and criterion will have to be put into it by the Government before a unified or Apex Board can be constituted. This prayer

of the petitioner, therefore, cannot be acceded to by this Court in this writ petition filed under Article 226 of the Constitution of India.

51. That finally brings us to the argument of Sri.Parasaran that the procedures for both nomination and election of the members to the TDB and CDB are shrouded in utmost secrecy and that it is kept away from public scrutiny or inspection, thus encouraging favouritism, cronyism, arbitrariness and capriciousness. This submission of Sri.Parasaran, we understand, is based on the avouchment that even though Sections 4(1) and 63 of the Act provide for nomination of two members by the Hindus among the Council of Ministers and election of one member by the Hindus among the members of the Legislative Assembly, it does not specify how the candidates who can so be nominated or elected is to be identified. According to Sri.Parasaran, in the absence of any provision in the Statute to provide for the manner of identification of suitable candidates, the nomination and election as provided in the Sections could only lead to

appointment of undesirable persons, if not the least suitable, since the candidates are not chosen through any discernible or rationale process but are chosen by the Ministers or the Legislators, as the case may be, on secret considerations.

52. The learned Senior Counsel says that Sections 7 and 66 of the Act, which provide for disqualification for membership, do not provide for safeguards and cannot be construed as any fetters in the unrestrained power of the Legislators to propose a candidate of their choice either by nomination or election. He points out that the prescriptions of disqualifications are broad in nature that the candidate should not be of unsound mine, deaf-mute, suffering from leprosy, an undischarged insolvent, an office-holder or a servant of Government/a local authority/the Devaswom Board, the trustee of the Hindu Religious Endowment, interested in a contract of supply of work with the Devaswom or convicted by a criminal court for an offence involving moral turpitude. He asserts that these disqualifications are the most basic ones and merely because a candidate does not fall into any of such

categories, it cannot be said that the best has been chosen.

53. The contention of Sri.Parasaran, therefore, is that since the process of nomination/election envisaged by the sections are unduly secretive and surreptitious, these sections itself will have to be found and struck down as being unconstitutional on the touch stone on the vice of arbitrariness, which is an anathema to Article 14 of the Constitution of India. He says that arbitrariness of the process had already been noticed by this Court in the judgment reported in **Krishnan v. Guruvayoor Devaswom Managing Committee** (1979 KLT 350 (FB)), wherein the Guruvayoor Devaswom Act, 1971 had been struck down *inter alia* holding that it violated the denominational rights of the persons entitled to management of the temple. He shows us paragraph 41 of the said judgment, which is as under:

> "Though it was contended by the petitioner that the power of nomination, the members of the Managing Committee who will virtually be functioning as the trustees of the Temple should not be vested in the executive Government we are not prepared to go to the extent of holding that the conferment of the power of nomination on the Government is by itself illegal. We may, however, observe that in the light of the recent amendment of the preamble to the Constitution emphasising the secular character of the State

> it is desirable that the legislature should consider whether the power to nominate the members of the Committee should not be conferred on an independent statyutory body other than the State Government with sufficient guidelines furnished to it for ensuring that the nominations will be effected in such a way as to be truly representative of the denomination consisting of the worshiping public."

Sri. Parasaran, relying upon the the afore-extracted portion of the judgment, submits that even though this court found the power to nominate members being vested in the Executive Government was by itself is not illegal, it will be desirable that such power should be conferred on an independent statutory body other than the State Government with sufficient guidelines. Sri.Parasaran continues to submit that nothing has changed in spite of the view of this Court and that this arbitrariness in this process was noticed by this Court even subsequently in **In re: Temples in the Erstwhile Malabar Area** (supra), wherein this Court was considering the need for implementation of the very same Commission report shown in this writ petition, namely Exhibit P2 and the K.P.Sankaran Nair Commission report. Sri.Parasaran shows us that in paragraph 62 of the said judgment directions had already been given for formation of a unified Board for all the three

regions in Kerala, namely, Travancore, Cochin and Malabar, *“on the lines of the recommendations made by Kuttikrishna Menon Committee and Sankaran Nair Commission”.*

54. He further says that in paragraph 55 of the said judgment, the most important recommendations of the High Power Commission was noticed, that the '*Ministers of the Government and members of the legislature charged with the responsibility of nominating members of the Board should not nominate persons identified as belonging to or having an affiliation with political parties. Only eminent person; who are held in high esteem by the public and who have been proven integrity should be nominated. It will be an added advantage if they have proven administrative ability or have background in the financial or legal matters*'. He then asserts that in spite of these recommendations, since the Government did nothing, a Larger Bench of this Court in **Gopalakrishnan Nair v. State of Kerala** (1999 (3) KLT 574) again hortatively recommended in paragraph 39 as under:

> “Before parting with this case, we want to make it clear that it is a very important function or duty that is assigned to the nominating persons, namely, the duty of constituting a

> committee for the efficient management and administration of Guruvayoor Temple. It is true that the Act prescribes that persons who are elected as members of the Managing Committee should be persons who have faith in Temple Worship and they have also to give a declaration to that effect. But, every man who believes in God and Temple worship may not be a good or efficient administrator or may not be aware of the formalities of temple management. It is our earnest hope and desire that the persons nominated by the Hindu Ministers should be of high integrity and the honesty and should discharge the functions of management and administer with care, sincerely and in the interests of the religious denomination and in public interest. With a view to avoid politics among the members of the committee, it is desirable that no politician from any party should be nominated to the Committee."

Sri.Parasaran bewails that in spite of such explicit expression of mind by this Court, nothing has been done by the government or the Legislature of the State to change the manner in which candidates are identified and selected and therefore, that it is now time for this Court to act affirmatively and strike down the offending sections.

55. The learned Advocate General contests these submissions of Sri.Parasaran with equal vehemence. He asserts that even in all the judgments cited by Sri.Parasaran, the view taken by this court and the Hon'ble Supreme Court is that vesting of power to nominate and elect members to the Boards is not perverse or illegal. He specifically relies on

Bramadathan Nambooripad (supra) to contend that the Full Bench of this Court, while approving Section 63 of the Act, concluded that such investiture of power is valid and legal. According to him, since the Ministers and Legislators are directly elected by the citizens of this State, the grant of such rights to them would certainly have to be construed to be the best mechanism possible in nominating and selecting the members to the Board. The learned Advocate General reiterates that even though the Act in question and the various other similar Acts like the Guruvayoor Devaswom Act and the Madras Hindu Religious and Charitable Endowments Act were subjected to challenge *quad hoc* its constitutionality, the common conclusions by courts in every such case was that grant of powers to the legislators or Ministers, as the case may be, cannot be found to be illegal. As regards the judgment in **In re: Temples in the Erstwhile Malabar Area** (supra) is concerned, the learned Advocate General says that the issues therein were completely different and that it relates to the requirement of a Unified Board and therefore, that the

observations contained therein would not apply to the facts of this case. He further says that the contention of the petitioner, as voiced through Sri.Mohan Parasaran, that every citizen of this country has a right to propose himself as a candidate for nomination or election to the Board is misplaced, in view of the Full Bench judgment of this Court in in **K.Krishnankutty & Others v. State of Kerala** (1985 KLT 298 (FB)), which has stated the law in this area contrary to such assertion in paragraphs 42 and 43, which is as under:

> "42. We also see considerable force in the plea of the learned Senior Government Pleader that the right to elect a member is a statutory right, not a fundamental right, which can be impaired, curtailed or even destroyed by the statute provision itself. He relies on the decision in *Jamuna Prasad v. Lachhi Ram* (AIR 1954 S.C. 686) for this purpose. Referring to the Representation of the People Act, the Supreme Court observed thus:-
>
> "The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute. The appellants have no fundamental right to elect members of Parliament. If they want that they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are 'intra vires'.
>
> 43. In this case also, the right to elect a member to the Board is a right created by statute and not a fundamental right. In the exercise of the right conferred by the Statute, conditions prescribed by the statute have also to be followed. The right to elect is thus subject to the conditions

> so imposed. In this view also, the contention of the petitioner based on an alleged violation of a fundamental right cannot be accepted."

56. Even though we are of the view that Sections 4(1) and 63 of the Act cannot be found to be ultra vires the Constitution on the touch stone of Articles 25 and 26 and even though we cannot find favour with the submission of Sri.Parasaran that the powers vested with the legislators are bad on account of conflict of interest, we are certainly of the view that his last submission afore, that the processes of nomination or election of the members to the two Boards are steeped in secrecy and non-transparency, requires some consideration. This is because even though Sections 4(1) and 63 provide for nomination and election of members to the Boards from candidates who are free of disqualification prescribed under Sections 7 and 66, nothing is available in the Act as to the manner in which the candidates for such nomination or election are to be identified. Even in Schedule II of the Act, though it is provided that any Hindu member of the Legislative Assembly may nominate a person for being elected, it does not say how the candidates deserving such

nomination are to be identified. The power of identifying the candidates for being nominated or being elected thus appears to be completely unbridled and uncanalised at the hands of the Legislators. It is obviously in this background that the petitioner alleges that the process of both nomination and election are illusory, since the Ministers or the Legislators, as the case may be, are now entitled to propose the candidature of the persons of their exclusive choice that there being no chance for any competition or public scrutiny, thus perpetuates cronyism, favouritism and such other deleterious considerations.

57. Sri.Parasaran, of course, submits that as the process under Sections 4(1) and 63 is so unbridled, the sections itself should fall. We cannot find favour with this submission per se because the sections provide for nomination and election in a particular manner and even assuming that its functioning is arbitrary, that cannot be a reason for these sections itself to be unconstitutional. This is more so because, as regards the process of election to the members to the

Boards, Sections 5 and 64 prescribe that it shall be done in terms of Schedule II. Therefore, a process is certainly there with respect to the election of members but when it comes to the nomination of members, it is left to the subjective wisdom and choice of the Hindus among the Council of Ministers. The learned Advocate General says that the sections were framed with great care and caution because, he asserts that if citizens cannot trust their Ministers and Legislators, who they themselves have directly elected, then it would mean a death blow to the democracy itself. The learned Advocate General justifies the said sections and the powers given to the Ministers and Legislators by asserting that they know their electorate and that the choice of candidature they make would always in the best interests of the citizenry. He then adds that even as per the petitioner, there is no alternative and shows us that when a similar contention was raised in the matter of Guruvayoor Devaswom, that members are to be elected directly by the devotees themselves, the Hon'ble Supreme Court in the judgment in **M.P.Gopakakrishnan Nair and**

Another v. State of Kerala and others ((2005) 11 SCC 45) (which was delivered in an appeal against *Gopalakrishnan Nair v. State of Kerala* (1999 (3) KLT 574)) has held in paragraph 54 of the said judgment as under:

> The contention by the appellant that the "electorate" should be representative of the denomination of believers in temple worship (assuming such a denomination exists) also cannot be accepted. Who will determine the electorate from amongst the millions of devotees of Lord Krishna visiting the Temple? It will be impossible and impracticable to select such a college of "electors" from among them. The whole exercise will be arbitrary and time-consuming and will be open to further challenge. The present mode has the advantage of being precise as the same has the advantage that only believers in temple worship are put in charge of the administration."

The sum total of the learned Advocate General's submissions is that the present method of nomination and election is the only viable method and that the plea for direct election by the devotees of a temple is no longer legally tenable on account of the clear declaration to the contrary by the Hon'ble Supreme Court as afore.

58. We have given our anxious thought, consideration and deliberation to the contentions of Sri.Parasaran and after noticing the submissions of the learned Advocate General as recorded above, we are guided to think that this is an area

where the Government and the legislature should immediately devote its dispassionate attention. This is because, as rightly pointed out by Sri.Parasaran, in the present milieu, there is absolutely no discernible process or method by which the candidates are identified and chosen by the Ministers and Legislators for being nominated and elected, as the case may be, as members of the TDB and CDB. The closer scrutiny of the provisions of the Act would not show any method or manner in which choice of candidates are to be made but it only provides that the Ministers may nominate any persons of their choice and that the Legislators may put forth nomination of candidates, for being elected, but without there being any provision for choice of such candidates. This rather uncanalised method of choice of candidates given to the Ministers and Legislators would certainly throw suspicion of favouritism, cronyism, patronisation and even nepotism.

59. It is pertinent that the provisions of the Act makes it ineluctable that any qualified person may aspire to be a member of the Boards. It does not confine the candidature to

any class of persons but leaves it to the Ministers and legislators to identify the candidates at their choice. Even though the Hon'ble Supreme Court in **Gopalarishnan Nair** (supra) has made it clear that the whole group of worshipers and devotees cannot be the electorate to vote the members and that the composition of the electorate, being confined to the Ministers on one hand and Legislators on the other, cannot be found to be constitutionally impermissible, confining the choice of candidature merely to the decision of the Ministers or Legislators can never obtain favour or sanction of a vibrant and robust democracy.

60. The learned Advocate General intervened at this moment to say that the right to be nominated or elected and the right to nominate and elect are both created by Statutes and hence not a fundamental right. He cites the judgment of the judgment of the Full Bench in **K.Krishnankutty** (supra) and read to us paragraphs 42 and 43, which are already extracted afore. We have no doubt about this proposition in law. We are not saying that every Hindu citizen of this State

has a fundamental right to be elected as a member of the Board. However, the indubitable fact, going by the provisions of the Act, is that the candidature for being nominated or elected has not been specifically confined to any class of persons and therefore, can only concede to an irresistible inference that any Hindu who is otherwise not disqualified under Sections 7 and 66 of the Act can be brought within the zone of consideration for being nominated or elected as a member of the Board. However, in the absence of any specific procedure ingrained in the provisions of the Act as to how the candidature of persons have to be made, we are firmly of the view that it is susceptible to the vice of cronyism, favouritism and patronisation.

61. We are aware that the answer to this by the learned Advocate General is that it should be presumed that the Ministers and Legislators know their citizens, who voted them into such positions and therefore, that a further presumption will have to be drawn that the nominations made by them have been done for legal and justifiable reasons. We

are afraid that this stand of the learned Advocate General, though may sound lofty, cannot obtain our favour or that of any other court, since the practical working of the democracy has, many a time, shown and demonstrated to the contrary. The hope that was expressed by this court in **Krishnan** (supra), **In re: Temples in the Erstwhile Malabar Area** (supra) and **Travancore Devaswom Board Staff Association** (supra) that only the best persons with proven integrity and efficiency and absolute faith in temple worship and belief should be nominated or elected, has its soul in the unimpeachable principle that integrity, efficiency, good reputation, moral standards, social recognition and such other is the imperative *sine qua non* to ensure that public offices remain reverential and deferential to the desire and requirements of the 'We the people of India'.

62. As has been rightly pointed out by Sri.Parasaran, the Act is completely silent with regard to the manner in which candidates are identified by Ministers for being nominated while, as regards the candidature of a member put

up for election by the Legislators is concerned, Schedule II of the Act only says that every Legislator would be entitled to nominate a duly qualified person. In both these events, it is doubtless that the candidature of persons put up for nomination or election are exclusively within the choice of the Legislators and Ministers, as the case may be and the private citizens who aspires or desires to put his life and service at the feet of the Lord, as a member of the Devaswom Boards, would obtain no chance at all for being considered as a candidate. In other words, it is irrefragible that persons would be able to obtain candidature only if they are known to and cultivate connections of such nature so as to be identified by the Ministers or Legislators and further since such candidates would perhaps find no competition at all, the general citizenry being not involved either in the choice, scrutiny or nomination/election, it certainly may lead to cronyism, favouritism, patronisation and such other irrelevant considerations, while the field of choice is created for nomination/election of members to the Board.

63. The unexpendable need for transparency in such appointments and the requirement for unimpeachable personal integrity of candidates has been declared with the greatest force by the Hon'ble Supreme Court in **Centre for PIL and another v. Union of India and another** ((2011) 4 SCC 1). The issue therein of course was with respect to the appointment of Central Vigilance Commissioner and the Hon'ble Court re-stated the same principles in **N.Kannadasan v. Ajoy Khose** ((2009) 7 SCC 1) that the institution is more important than an individual and that while making recommendation for such posts, the competent authority has to look at the records of the candidate, his personal integrity, his competence, his independence and such other attributes as would be necessary to discharge the functions of the post. Similarly, in **Board of Control for Cricket v. Cricket Association of Bihar and others** ((2016) 8 SCC 535), the Hon'ble Supreme Court has taken the view that the persons to be nominated even to such a Board should be a person of eminence in life, should have a good public standing and

should have good experience in matters of administration. The Hon'ble Supreme Court has underlined the need for the nomination process to be transparent so that the credentials of the candidates could be available for scrutiny appropriately.

64. We are certain that the underlining principles in the said judgments would apply to the post of members of the Boards also because they are entrusted with the task of administration of institutions in which the citizens have reposed implicit faith and belief and consequently, the members would come to occupy the position of trustees of their beliefs. The primary requisite of such a member would certainly be a clean record, good reputation, unimpeached character, unquestioned integrity, substantial degree of administrative capacity and experience in temple administration and such other institutions. These parameters can never be absolutely ascertained or ensured unless the field of choice is open to attract the best available and we strongly think that leaving it exclusively to the choices of Ministers and Legislators cannot, in the greatest traditions of

a democracy, be found to be enough or desirable.

65. We are not oblivious to the now well settled principles that the true function of a court is *jus dicere* and not *jus dare* normally, which is to say that we are only expected to normally expound the law and not to make the laws. We, therefore, may not be able to command and compel the Government or the Legislature to make laws in a particular manner, but we certainly can commend and recommend for their attention the need to better the system.

66. We are certainly distressed that in spite of the express desire shown by this Court, for having a more democratic and transparent system in the State for nomination and election of members to the Boards in **Krishnan** (supra), **In re: Temples in the Erstwhile Malabar Are**a (supra) and **Gopalakrishnan Nair** (supra), not even a little step has been taken by the Executive or by the Legislature to consider and put in place a system, within the parameters of the Act, to ensure that the process of nomination and election is transparent and legitimate to the

maximum extent and that members are not chosen in secrecy and beyond the reach of reasonable scrutiny by the citizens and other *bona fide* stake holders.

67. We are greatly benefited by the submissions we heard and the interaction we had from the various counsel appearing in this case, that a suitable method or procedure will have to be brought in by the Executive or Legislature into the provisions of the Act to make the process of nominations and elections to the Boards transparent, democratic and legitimate. The most proximate method of doing this would of course be ensuring that the candidates being considered are chosen well. If the candidates are persons with impeccable record, reputation, character and integrity and have substantial degree of capacity in temple administration or have proven their eminence in other walks of life, thus commanding respect from citizens, then half the battle would be won.

68. The only way of doing this, of course, is to make the process of identification of the candidates transparent and

the information regarding this being allowed to be placed in public domain. The Government may, either allow citizens to offer their candidature in a prescribed manner by stipulating specific qualifications or conditions or the Ministers and Legislators, within the electorate, may make a choice of their candidates, as is now provided in the Statute, but with an obligation and enjoinment to disclose such nominations for public scrutiny and opinion suitably, perhaps in a website maintained for this purpose. This would enable the citizens to know who the potential candidates are and would enable them to make their views on such candidatures available to the competent authorities, which, we are certain, will go a long way in obtaining transparency to the process. Once the nominations of the candidates are made available for public information and scrutiny, it would also be the desideratum that a proper mechanism, either in the form of a Sub committee or such other, be constituted by the Government to assess and evaluate all such candidates and then place the names for consideration before the Ministers and the

Legislators, as the case may be.

69. Subject to the limits of practicality, we would also commend to the Government to frame suitable Rules for such purpose so as to allow the citizens to offer themselves as candidates or to suggest eminent persons of their choice, who may be supported by a fixed number of nominations, to be considered for being nominated or elected to the Boards. The formal procedure and the methodology for all these, of course, would be upto the wisdom of the competent authorities of the Government, but we ingeminate that time has now come for the Executive and the Legislature to act and cause framing of appropriate Rules/ Procedure/Mechanism to make the process of nomination and election of members to the Boards open and transparent.

70. Since we cannot compel or command the Government or the Legislature to do this, we cannot fix a time frame for such action either. We are certainly aware of this; however, we hortatively implore to the Government to act as fast as possible in such manner, taking into account our

observations above, as they deem fit.

71. Such action to ensure transparency and openness is the need of the hour and we are certain that every Government who believes in the dignity of democracy would employ their wisdom for this purpose without any reservation.

We close this writ petition with this fond hope.

P.R.Ramachandra Menon, Judge

Devan Ramachandran, Judge

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