Kerala High Court
N. Adithayan vs The Travancore Devaswom Board And ... on 4 December, 1995
Equivalent citations: AIR 1996 Ker 169
Author: Thomas
Bench: K Thomas, K Usha, P Shanmugam
JUDGMENT Thomas, Ag. C.J.

1. An apparently sensitive issue has been brought to the High Court invoking Article 226 of the Constitution -- whether appointment of a person who is not a Malayala Brahmin, as "Poojari" (Priest) of a temple, is opposed to the recognised usage followed. If so, whether the appointment is liable to be quashed, is the ancillary question.

2. The above questions are mooted by the petitioner who himself is a Malayala Brahmin by community. He claims to be a worshipper of "Kongorpilly Siva Temple" at Alangad village in Ernakulam District thereinafter referred to as "the Siva Temple"). Administration of the temple vests with Travancore Devaswom Board (for short 'the Board") which is a statutory body created under the Travancore Cochin Hindu Religious Institutions Act, 1950 (for short 'the Act'). A large number of other temples are also being administered by the Board in exercise of the powers vested in it by the provisions of the Act. On 6-8-1993 one Shri K.S. Rajesh (third respondent) who is an Eshava by caste was appointed as 'Santhi-karan' of Siva Temple in the vacancy of one Mohanan Poti. (Santhikaran is the same as Poojari whose main function is to perform rituals for worship in the sanctum sanctorum of a temple). On 8-10-1993 a letter was sent by the Assistant Commissioner of the Board to a subordinate officer at the locality informing him that third respondent should be accommodated in the vacancy existing in the Siva Temple for a Poojari.

3. According to the petitioner, no person other than a Malayala Brahmin had conducted Poojas in the Siva Temple and that it has become a recognised usage. Hence it is asserted that no one other than a Malayala Brahmin can be appointed to the post of Santhikaran. This is because a non-Brahmin is not expected to perform Pooja rituals in the sanctum sanctorum of temple in Kerala as per the recognised usage, contended the petitioner. However, he confined his case to the Siva Temple in question as his counsel did not press for application of the usage to other temples in Kerala. Petitioner quoted Sections 24 and 31 of the Act for basing his contention that it was the duty of the Board to have followed the aforesaid usage prevalent in the Hindu community. Petitioner further contended that his fundamental right as enshrined in Articles 25 and 26 of the Constitution is in danger if he is unable to offer worship in his own temple conducted in accordance with the recognised practice and if third respondent is to conduct the prayers it would offend his religious faith. Petitioner, therefore, prays that the appointment may be quashed.

4. Learned single Judge admitted the original petition, but referred it to a Division Bench as the question was found to be of public importance. However, learned single Judge stayed the operation of the order appointing third respondent as "Santhi" of the Siva Temple. A Division Bench before which this matter came up earlier, referred it to a Full Bench.

5. Contentions in the original petition have been repudiated by the Board through the affidavit sworn to by its Secretary. We allowed Sree Narayana Dharma Paripalana Yogam, a company registered under the Travancore Companies Act (for short 'the SNDP Yogam') to be impleaded as a party since the company came forward to defend the decision of the Board.

6. In their counter affidavit filed by the Board it has been pointed out that there are two categories of Poojaris, one is called "Karanma Santhikars" and the other "Non-karanma Santhikars". The former holds office on the basis of hereditary rights while appointment to the latter is on the basis of selection made by the Board. Such selection is made after inviting applications from eligible Hindu candidates in the age group of 18 to 35 years with minimum educational qualification prescribed. A rank list is prepared after interviewing the eligible candidates on the basis of the marks secured by each of them. (A panel consisting of the President and members of the Board, the Devaswom Commissioner and a competent Thanthri would interview the candidates).

7. According to the Board there was no norm ever followed that Santhikaran (the Malayala word for 'Santhi') should be a Brahmin. On the other hand, candidates, irrespective of their caste have been appointed as Santhikars in various temples. A scheme for training up Santhikars was formulated by the President of "Ramakrishna Ashramam" which was approved by the Board as per resolution dated 7-5-1969 and a school was opened with Swami Vyomakesananda (who was the President of Ramakrishna Ashramam) as its Director. Ten Hindu students irrespective of their caste were selected for imparting training as Santhikars. Later the number of trainees was increased to 11 for the purpose of including a Harijan also. On successful completion of the training, those trainees were permitted to wear "sacred thread" for which a ceremony of 'Upanayanam' was performed. Such were the steps adopted for ordaining Santhikaran. The Board has mentioned the names of non-brahmins who were appointed as Santhikars during the past 10 years.

8. Both respondents stoutly repudiated the contention that there was a usage in the particular Siva Temple for appointing only Malayala Brahmins as Santhikars.

9. We shall first consider whether appointment of the 3rd respondent is in contravention of Sections 24 and 31 of the Act. The Sections are extracted below :

"24. The Board shall, out of the Devaswom fund constituted under Section 25, maintain the Devaswom mentioned in Schedule I, keep in a state of good repair the temples, buildings, and other appurtenances thereto, administer the said Devaswoms in accordance with recognised usages, make contribution to other Devaswoms in or outside the State and meet the expenditure for the customary religious ceremonies and may provide for the educational upliftment, social and cultural advancement and economic betterment of the Hindu Community."

"31. Subject to the provisions of this Part and the rules made thereunder the Board shall manage the properties and affairs of the Devaswoms, both incorporated, and unincorporated as heretobefore; and arrange for the conduct of the daily worship and ceremonies and of the festivals in every temple according to its usage".

No doubt both sections enjoin that recognised usages shall be preserved by the Board in the administration of the temples. But the word "usage" employed in the above provisions cannot be understood as capsuling the caste identity of the person holding any office. "Usage" and "custom" are words of cognate expression, but nevertheless both have some different perceptions and nuances. The word 'usage' generally denotes a habit or a mode of conduct or a course of action. Though such behaviour may generally be linked with human actions it is not the identity of the person vis-a-vis his caste which matters in discerning the contours of any 'usage'. In Black's Law Dictionary, the word 'usage' is described as different from custom as there is no usage through inheritance though a right can be acquired by prescription. The following passage is worthy of extraction here :

"Usage in its most extensive meaning, includes both custom and prescription, but in its narrower significance, it refers to a general habit, mode or course of procedure. A usage differ from a custom, in that it does not require to be immemorial to establish the same, but the usage must be known, certain, uniform, reasonable and not contrary to law".

1O. Thus, usage has been referred to a course of dealing, or a mode of conducting transactions of a particular kind. It cannot be understood as referring to any entitlement of a person to hold a particular office. In this context, reference can be made to Article 13 of the Constitution of India. While defining the word "law" for the purpose of the Article "custom" and "usage" have been treated differently and not as the same. If they werre meant to be regarded the same, a tautology would have been avoided by the framers of the Constitution,

11. We are, therefore, unable to agree with the contention that the word "usage" in Sections 24 and 31 of the Act is capable of legalising the practice, if any, of appointment of a person on the basis of his caste in respect of any office. The position remains the same even if the office is "Santhi" of a temple.

12. Nor can we affix legal approval to any usage by which persons belonging to one particular caste alone are employed in any office, be it priest-hood or even above it. This is particularly in view of the peremptory language contained in Article 13(2) of the Constitution which interdicts the making of any law abridging the fundamental rights. The word "usage" mentioned in Sections 24 and 31 of the Act cannot have any application to the caste of the person employed as priest or santhi in a temple because of the clear language contained in Articles 15(1) and 16(2) of the Constitution. Under the former the State cannot discriminate against any citizen on grounds only of religion, race, caste etc. and under the latter the State is restrained from discriminating between citizens on grounds only of religion, race, caste etc. regarding eligibility to hold any employment or office under the State.

13. The exception provided in Sub-article (5) of Article 16 of the Constitution cannot insulate any usage based on caste i.e. only persons belonging to a particular caste shall be employed as "Santhikaran" in a temple. The word 'denomination' mentioned in the sub-article is not intended to recognise various castes among Hindus as different denominations. The apex Court has dealt with the term "denomination" in Article 16(5) time and again (vide Commissioner, Hindu Religious Endowments v. Sri L.T. Swamiar (AIR 1954 S.C, 282), Shastri Yagnapurudadji v. Muldas

Bhundardas Vaishva (AIR 1966 SC 1119) and a recent decision in Bramchari Sidheswar Shai v. State of W.B. ((1995) 4 SCC 646). Till now no attempt is made to describe a particular caste in the Hindu community as a religious denomination.

14. Next contention to be considered is that appointment of any person other than a Brahmin to the post of "sathikaran" in a particular temple would offend the fundamental right of the petitioner as enshrined in Article 25 of the Constitution. This contention is based on the premise that the right to freely practice religion would include a right to have the religious rituals performed by persons belonging to certain communities. Learned senior counsel cited some decisions of the Supreme Court and tried to find support to the said contention therefrom.

15. In Commissioner, Hindu Religious Endowments v. Sri L.T. Swamiar (AIR 1954 SC 282) a Constitution Bench has observed thus : "if the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablutions to the sacred fire, all these will be regarded as parts of religion". But learned Judges have also observed that merely because such acts would involve expenditure of money or employment of priests and servants or the use of marketable commodities they will not become secular activities. Neither of the above observations can be of help in this case. The following observations of Venkitarama 'Aiyar, J. (speaking for another Constitution Bench) in Venkataramana Devaru v. State of Mysore (AIR 1958 SC 255) have been read out: "Under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted, are all matters of religion".

However, we cannot regard those observations as sufficient to support the contention that appointment to an office can be confined to a particular community as a matter of religion for the purpose of Article 25 of the Constitution. In Durgah Committee v. Hussain Ali (AIR 1961 SC 1402) Gajendragadkar, J. (as he then was) speaking for yet another Constitution Bench has stated that matters of religion in Article 26 would include even practices which are regarded by the community as part of its religion. We should point out that their Lordships added in the same decision that "in order that the practices in question should be treated as a part of religion they must, however, be regarded by the said religion as its essential and integral part: otherwise even purely a secular practice which is not an essential or integral part of religion would be apt to be clothed with a religious form and may make a claim for being treated as religious practices". The Bench further pointed out that protection under Article 26 "must be confined to such religious practices as are an essential and an integral part of it can no other." In Shri Govindlalji v. State of Rajasthan (AIR 1963 SC 1638) the same learned Judge has reiterated the position that "in deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not". In the said decision the Constitution Bench reiterated the observations in Durgah Committee v. Hussain Ali (AIR 1961 SC 1402) as quoted above.

16. Petitioner has no case that practice of a Malayala Brahmin performing poojas and rituals in the sanctum sanctorum of a temple is an essential and integral part of Hindu religion. Even otherwise, the right under Article 25 of the Constitution is placed only subject to the other fundamental rights enumerated in Part III of the Constitution. No religious right can, therefore, be claimed in contravention of the other fundamental rights.

17. In this context reference to Article 17 was made by Shri T.C. Mohandas, learned counsel who argued for the intervener (SNDP Yogam) which Article forbids the practice of "untouchability in any form". The said Article further proceeds to state that "the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law". The word "untouchability" has not been defined, but it unmistakably refers to the despicable obsolete attitude practised towards persons belonging to "lower" castes in the pre-Constitution India, particularly to Harijans. It was in enforcement of the Constitutional emphasis embedded in Article 17 that Parliament passed the enactment "The Protection of Civil Rights Act (Act 22 of 1955)". It defines "a place of public workship" as a place used for public religious worship or used generally by persons professing any religion "for the performance of any religious service or for offering prayers therein". Section 3 of the said Act is the penal provision which says that whoever on the ground of "untouchability", prevents any person from "worshipping or offering prayers or performing any religious service in any place of public worship.....in the same manner and to the same extent as is permissible to other persons professing the same religion or any section as such person" shall be punishable with imprisonment for a term of not less than one month etc.

18. The legislative message intended to be conveyed thereby is explicit and crisp. If a person belongs to one section or caste in the Hindu religion can perform "any religious service" in a temple, such right cannot be denied to another person belonging to a different caste of Hindu religion on the ground of his caste. The said enactment is the Parliamentary follow up for Article 17 of the Constitution and can, therefore, be understood as having become a part of it. One of the theme songs of Indian Constitution is that the erstwhile caste oriented social set up should never resurrect in this land. Even the provisions for upliftment of scheduled castes etc. embodied in the Constitution are intended to bring up those weaker sections in the society to the level of others, so that caste should eventually be inferred into oblivion and can remain there only as a fossil for future students in social science subjects. Any thinking to revive it must be snubbed in the bud itself.

19. Learned senior counsel lastly made a bid to show that under the Travancore Deveswom Manual a usage has been recognised that the priest or Santhikaran of a temple be confined to a person born in Brahmin community. He invited our attention to Chapter VII of Volume-I of the book titled "Travancore Deveswom Manual". But we failed to discern therefrom any idea of a caste oriented clergy having been formulated, nor can we treat the clauses contained in the said Manual as possessing statutory force. Even otherwise, if any such clause was intended to perpetuate any caste based order of priesthood for performing religious rituals in places of public worship, the same would crumble down hitting Article 13(2) of the Constitution.

20. The upshot of the discussion is that petitioner, apart from failing to establish a usage in respect of the Siva temple in question that only Malayaia Brahmins would be "Santhikaran", is disentitled to

oust third respondent from holding the office of "Santhi" in the said temple on the ground of his not being a Malayaia Brahmin. We further hold that even if any such usage was in vogue in any temple, the same became unenforceable in law being opposed to Part III of the Constitution of India.

21. As third respondent was prevented from continuing to be a "Santhikaran" in the said Siva Temple through the stay order passed at the admission stage of this Original Petition, we vacate the stay order and direct all concerned to allow the third respondent to hold the office to which he was appointed by the Board as indicated in Ext. R3A.

Original petition is disposed off in the above terms.