

CENTRAL BOARD OF DAWOODI BOHRA COMMUNITY A
& ANR.

V.

THE STATE OF MAHARASHTRA &ANR.

(Writ Petition (Civil) No. 740 of 1986) B

FEBRUARY 10, 2023

[SANJAY KISHAN KAUL, SANJIV KHANNA,
ABHAY S. OKA, VIKRAM NATH AND
J. K. MAHESHWARI, JJ.] C

Bombay Protection of Ex-communication Act, 1949 – The Act, 1949 provided that ex-communication of a member of any community shall be invalid and shall be of no effect – Head of the Dawoodi Bohra community challenged the Act on grounds that it infringed on fundamental rights guaranteed u/Arts.25 and 26 of the Constitution – A Constitution Bench of Supreme Court (of five Judges) in the case of Sardar Syedna, by majority, held that ex-communication amongst the Dawoodi Bohras forms an integral part of the management of the community and therefore, interference with the right to ex-communicate amounts to interference with the right of the community to manage its own affairs in matters of religion – The Supreme Court held that as the Ex-communication Act invalidates excommunication on any ground whatsoever including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community guaranteed u/Art.26(b) of the Constitution – Present writ petition filed seeking reconsideration and overruling of that decision and for issuing a writ of mandamus directing the respondent-State to give effect to the provisions of the Act, 1949 – Meanwhile, the Maharashtra Protection of People from Social Boycott Act repealed the Ex-communication Act – Whether the view taken by Constitution Bench in the case of Sardar Syedna requires reconsideration – Held: The exercise of balancing the rights under Art.26(b) with other rights under Part III and in particular Art.21 was not undertaken by the D E F G H

- A *Constitution Bench in the case of Sardar Syedna – This question is substantially in issue before the Bench of nine Judges in Sabrimala Temple Review -9JJ – Moreover, the question of whether protection can be given by Art.26(b) to the practice of ex-communication also is to be tested on the touchstone of the concept of Constitutional morality as the said right is subject to morality – Thus, these questions are the two main grounds on which the said decision may need reconsideration by a larger Bench – The Bench of nine-Judges (Sabrimala Temple Review –9 JJ) framed seven questions of law, out of which questions 3 and 4 also arise for consideration in the present writ petition – Present writ petition, thus, deserves to be tagged with Review Petition pending before the Bench of nine Hon'ble Judges – Registry to seek appropriate directions in this behalf from Hon'ble the Chief Justice of India – Constitution of India – Arts. 25 and 26 – Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016.*

Constitution of India – Interpretation of Constitutional provisions – Approach to be adopted – Held: Constitution is a living instrument – The originalist interpretation rendered to provisions of the Constitution decades back, cannot continue to be valid for all times to come if the Constitution is to continue as a living instrument with continued relevance – Interpretation of law must keep pace with changing needs of society.

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- F *Constitution of India – Arts. 25 and 26 – Morality in the context of Arts. 25 and 26 – Discussed.*

While passing directions, the Court

HELD: Whether the writ petition survives for consideration:

- G **1.1. By a majority, the Constitution Bench in the case of Sardar Syedna held that the Bombay Protection of Ex-communication Act, 1949 was void being in violation of Article 26(b) of the Constitution. However, considering the definition of ‘community’ under Section 2(a) of the Ex-communication Act, the applicability thereof was not confined only to the Dawoodi**
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Bohra community. The provisions of the Ex-communication Act A were applicable to the practice of ex-communication prevailing in different religions, castes or sub-castes, whereas the findings rendered by the majority view are only in respect of the right of the head of the Dawoodi Bohra community to ex-communicate a member of the community. Thus, the Ex-communication Act in its entirety could not have been declared void. Therefore, even assuming that the view taken by the Constitution Bench is correct, the question which certainly survives for consideration is whether the practice of ex-communication prevailing in other religions, castes or sub-castes is constitutionally valid. [Para 19][307-E-H] C

1.2. Even if the Ex-communication Act has been repealed, the issue remains whether the power of the head of Dawoodi Bohra Community to ex-communicate its members is non-justiciable being protected under the umbrella of clause (b) of Article 26. This issue requires examination in the present-day context. [Para 20][307-H; 308-A] D

Approach to be adopted:

2. While interpreting the Constitutional provisions, one must remember that the Constitution is a living instrument. The originalist interpretation rendered to the provisions of the Constitution decades back, cannot continue to be valid for all times to come if the Constitution is to continue as a living instrument with continued relevance. Constitutional law has developed a great deal during the last few decades. The concept of freedom has undergone changes and in the 21st century, society looks completely different from what it looked in the last century. Thus, the interpretation of law must keep pace with changing needs of society. [Paras 21 and 23][308-B-C, F-G; 310-A-B] E F G

Morality in the context of Articles 25 and 26:

3. The freedom of conscience guaranteed under clause (1) of Article 25 is subject to public order, morality and health. All four clauses (a), (b), (c) and (d) of Article 26 are also made H

- A specifically subject to public order, morality and health. Thus, the right of the religious denomination to manage its own affairs in matters of religion is always subject to morality. As far as the concept of morality contemplated by Articles 25 and 26 is concerned, much water has flown after the decision in the case of
- B *Sardar Syedna* where the argument that Article 26(b) is subject to morality was not at all considered as it was not canvassed and pressed at the time of hearing. Thus, the question whether Constitutional morality can be equated with equality, fraternity and non-discrimination needs consideration. [Para 24][310-B-E]

- C **Conclusion:**

- 4.1. The exercise of balancing the rights under Article 26(b) with other rights under Part III and in particular Article 21 was not undertaken by the Constitution Bench in the case of *Sardar Syedna*. This question is substantially in issue before the Bench of nine Judges in Sabrimala Temple Review -9JJ. Moreover, the question of whether the protection can be given by Article 26(b) to the practice of ex-communication also is to be tested on the touchstone of the concept of Constitutional morality as the said right is subject to morality and this is an important and emergent issue. Thus, making these questions, two main grounds on which the said decision may need reconsideration by a larger Bench. [Para 32][315-A-C]

- 4.2. Sabrimala Temple–5JJ decision was subjected to a review. This Court dealt with the review (Sabrimala Temple Review–5JJ). The majority opinion contains questions formulated for referring it to a larger Bench. Accordingly, the review petition was listed before a nine-Judge Bench. The Bench of nine-Judges (Sabrimala Temple Review –9 JJ) framed seven questions of law, out of which questions 3 and 4 also arise for consideration in the present writ petition. The decision which will be rendered by the nine-Judge Bench will have a direct impact on the questions which arise for determination in this writ petition. In the circumstances, the present writ petition deserves to be tagged with Review

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Petition (Civil) No.3358 of 2018 pending before the Bench of nine Hon'ble Judges. Accordingly, the Registry is directed to seek appropriate directions in this behalf from the Hon'ble Chief Justice. [Paras 33, 34 and 35] [315-C-D, G; 316-B-C]

Navtej Singh Johar & Ors. v. Union of India 2018 (10) B
SCC 1: [2018] 7 SCR 379 – followed.

K. S. Puttaswamy & Anr. v. Union of India & Ors. 2017
(10) SCC 1: [2017] 10 SCR 569; *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.* 1986 (3) SCC 156: [1986] 2 SCR 278 – relied on.

Sardar Syedna Taher Saifuddin Saheb v. State of Bombay [1962] Suppl. 2 SCR 496; Manoj Narula v. Union of India 2014 (9) SCC 1: [2014] 9 SCR 965; State (NCT of Delhi) v. Union of India & Anr. 2018 (8) SCC 501: [2018] 7 SCR 1; Indian Young Lawyers Association & Ors. v. State of Kerala & Ors. 2019 (11) SCC 1: [2018] 9 SCR 561; Kantaru Rajeevaru v. Indian Young Lawyers Association & Ors. (Sabarimala Temple Review-5 JJ.) 2020 (2) SCC 1 : [2019] 17 SCR 599; Kantaru Rajeevaru (Right to Religion; in Re - 9 JJ.) v. Indian Young Lawyers Association & Ors. (Sabarimala Temple Review- 9 JJ) 2020 (3) SCC 52 and Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [1954] SCR 1005 –referred to.

Hasanali & Ors. v. Mansoorali & Ors. 1947 SCC OnLine PC 63 – referred to.

Case Law Reference

[1962] Suppl. 2 SCR 496	referred to	Para 1
[2014] 9 SCR 965	referred to	Para 7

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A	[2018] 7 SCR 1	referred to	Para 7
	[2018] 7 SCR 379	followed	Para 7
	[2018] 9 SCR 561	referred to	Para 7
B	[2019] 17 SCR 599	referred to	Para 11
	2020 (3) SCC 52	referred to	Para 11
	[1954] SCR 1005	referred to	Para 13
C	[2017] 10 SCR 569	relied on	Para 21
	[1986] 2 SCR 278	relied on	Para 22

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 740 of 1986.

D (Under Article 32 of the Constitution of India)

With

Criminal Appeal No. 39 of 1991

E Siddharth Bhatnagar, Sr. Adv., Sanklap Goswami, Azhar Alam, Ms. B. Vijayalakshmi Menon, Mrs. Manik Karanjawala, Ms. Nandini Gore, Jatin Mongia, Ms. Tahira Karanjawala, Ms. Niharika Karanjawala, Arjun Sharma, Ms. Neha Khandelwal, Sarthak Gaur, Karanveer Singh Anand, Ritwik Mohapatra, Ms. Pracheta Kar, Aditya Sidhra, Nadeem F Afroz, Vardaan Wanchoo for M/s. Karanjawala & Co., Advs. for the Petitioners.

G Tushar Mehta, S.G., Fali S Nariman, Dariaus Khambata, Pravin H Parekh, D. J. Khambata, Parag Tripathi, Sr. Advs., Siddharth Dharamdhikari, Kanu Agrawal, Aaditya Aniruddha Pande, Sameer Parekh, Subhash Sharma, Abbezar Faizullabhoy, D.P. Mohanty, Murtaza Kachwala, Ms. Sonal Gupta, M. Algaus Shaikh, Prateek Khandelwal, Ms. Manju Bajaj, Ms. Prerna Amitabh, Mustafa Maimoon, Ammar Faizullabhoy for M/s. Parekh & Co., Sandeep Narain, Moinuddin Algaus Shaikh, Ms. Kanak Malik for M/s. S. Narain & Co., Ms. Deepanwita H Priyanka, Advs. for the Respondents.

The Judgment of the Court was delivered by A

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. In Writ Petition (C) No.740 of 1986, the preliminary issue is whether the view taken by a Constitution Bench of this Court in the case of *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*¹, requires reconsideration. B

2. In the case of *Sardar Syedna*¹, the jurisdiction of this Court under Article 32 of the Constitution of India was invoked for challenging the constitutional validity of the Bombay Protection of Ex-communication Act, 1949 (for short, ‘the Ex- communication Act’). Section 3 of the Ex-communication Act provided that notwithstanding anything contained in any law, custom or usage for the time being in force to the contrary, no ex- communication of a member of any community shall be valid and shall be of any effect. Under the Ex-communication Act, the term ‘community’ was defined to mean a group, the members of which are connected together by reason of the fact that by birth, conversion or the performance of any religious rite, they belong to the same religion or religious creed and includes caste or sub- caste. Under clause (b) of Section 2 of the Ex-communication Act, ‘ex-communication’ was defined as the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of civil nature by him or on his behalf as such member. C

3. Sardar Syedna Taher Saifuddin Saheb, who was the 51st Dai-al-Mutlaq and the head of the Dawoodi Bohra community, challenged the Ex-communication Act on the ground that the same infringes the fundamental rights guaranteed under Articles 25 and 26 of the Constitution of India. The said petition was placed before a Constitution Bench. The Constitution Bench, by a majority, held that ex-communication amongst the Dawoodi Bohras forms an integral part of the management of the community. Therefore, interference with the right to ex- communicate amounts to interference with the right of the community to manage its own affairs in matters of religion. This Court held that as the Ex-communication Act invalidates ex-communication on any ground whatsoever including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community guaranteed under Article 26 (b) of the Constitution of India. Therefore, this Court proceeded D

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- A to hold that the Ex-communication Act is void, being in violation of Article 26 of the Constitution of India.
 - 4. The prayer in the present writ petition filed by the Central Board of Dawoodi Bohra Community represented by its Secretary is for issuing a writ of *mandamus* directing the State Government to give effect to the provisions of the Ex-communication Act after reconsidering the decision of this Court in the case of *Sardar Syedna*¹. “Rule nisi” was issued in the petition on 25th August 1986. On 18th March 1994, a Division Bench directed that the petition be listed before a Bench of seven Judges. The 2nd Respondent – Syedna Mufaddal (53rd Dai-al-Mutlaq) made an application seeking a direction that the petition should be listed before a Division Bench. The writ petition was listed before a Constitution Bench. By the judgment and order dated 17th December 2004², the Constitution Bench partly allowed the application filed by the 2nd Respondent. Paragraph 14 of the said order read thus:
- D “14. In the facts and circumstances of this case, we are satisfied that the matter should be placed for hearing before a Constitution Bench (of five Judges) and not before a larger Bench of seven Judges. It is only if the Constitution Bench doubts the correctness of the law laid down in *Sardar Syedna Taher Saifuddin Saheb case* [1962 Supp (2) SCR 496 : AIR 1962 SC 853] that it may opine in favour of hearing by a larger Bench consisting of seven Judges or such other strength as the Chief Justice of India may in exercise of his power to frame a roster may deem fit to constitute.”
- E 5. In terms of the aforesaid order, Writ Petition with the connected Criminal Appeal has been placed before this Bench. In the meanwhile, F there was a subsequent event in the form of the enactment of the Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016 (for short, ‘the Social Boycott Act’). By clause (c) of Section 20 of the Social Boycott Act, the Ex-communication Act was repealed.

G THE BROAD QUESTIONS FOR CONSIDERATION

- G 6. As the Ex-communication Act has been repealed, the question which arises for consideration is whether anything survives in the writ petition for a decision on merits. If we come to the conclusion that the

¹ (1962) Suppl. (2) SCR 496 : AIR 1962 SC 853

H ² 2005 (2) SCC 673

writ petition still survives for consideration, the question which will arise is whether the view taken in the case of *Sardar Syedna*¹ needs reconsideration. A

SUBMISSIONS

7. We have heard the parties on the aforesaid questions. Shri Siddharth Bhatnagar, the learned senior counsel representing the petitioners pointed out that the Constitution Bench has held that the practice of Baraat/ex-communication in the Dawoodi Bohra community falls within the ambit of “matters of religion” under clause (b) of Article 26 of the Constitution of India. He urged that even if the Ex-communication Act is repealed, the question whether the practice of ex-communication falls within the ambit of “matters of religion”, needs to be decided. His submission is that the 2nd Respondent – Syedna Mufaddal (53rd Dai-al-Mutlaq) is not only the religious Head but also the Trustee of the community property. Therefore, he has to perform acts that are not wholly religious. His submission is that even assuming that the practice of ex-communication is considered a matter of religion, it must yield to the legislations on social reforms which are protected by Article 25(2) of the Constitution of India. He urged that the rights guaranteed under Article 26 are subject to morality. He submitted that the concept of morality under Articles 25 and 26 would subsume within itself the concept of Constitutional morality. He relied upon the decisions of this Court in the cases of *Manoj Narula v. Union of India*³, *State (NCT of Delhi) v. Union of India & Anr.*⁴ and *Navtej Singh Johar & Ors. v. Union of India*⁵ and submitted that the concept of Constitutional morality has been elaborated under these decisions. He also pressed into service a decision of this Court in the case of *Indian Young Lawyers Association & Ors. v. State of Kerala & Ors.*⁶ (*Sabrimala Temple 5JJ*), which according to him, holds that practices destructive of liberty and those which make some citizens less equal than others cannot be countenanced. He would also submit that Article 26 cannot override the protections afforded under other provisions of Part III of the Constitution of India. His submission is that the practice of ex-communication in the Dawoodi Bohra community is violative of Articles 17, 19(1)(a), 19(1)(c) B
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³ 2014 (9) SCC 1

⁴ 2018 (8) SCC 501

⁵ 2018 (10) SCC 1

⁶ 2019 (11) SCC 1

- A and 19(1)(g), 21 and 25 and therefore, it cannot enjoy the protection of Article 26 of the Constitution of India.
8. The learned senior counsel also urged that the Social Boycott Act does not afford any protection against ex-communication as it seeks to prohibit the social boycott of a member of the community by the Khap Panchayat of the community. He submitted that a member of the Dawoodi Bohra community who is already ex-communicated, will not be a member of the community within the meaning of the Social Boycott Act. Therefore, the Social Boycott Act gives no protection to the members of the Dawoodi Bohra community from the unjust and illegal practice of ex-communication.
- C 9. He urged that as held in the case of *Sabarimala Temple 5JJ*⁶, the word ‘morality’ found in Article 26 would subsume within itself the concept of Constitutional morality and takes colour from the ideals of justice, liberty, equality and fraternity on which our Constitution has been founded. He urged that the practice of Baraat is regressive, which resulted in practically civil death of the person excommunicated. Therefore, the practice of Baraat will have to be held as contrary to Constitutional morality.
- D 10. He urged that even the issue whether any protection is afforded by Article 17 to an ex-communicated person belonging to the Dawoodi Bohra community needs examination. He submitted that though Article 26 has not been expressly made subject to other provisions of Part III, in the event of its conflict with Articles 14, 19 and 21, it must give way to these three Articles unless the conflict can be reconciled. In other words, he submitted that the rights of a religious denomination under Article 26 cannot be determined in isolation and interpreted in a manner that renders the rights guaranteed to its members under other provisions of Part III nugatory. He urged that much water has flown after *Sardar Syedna*⁷ and therefore, it requires reconsideration.
- G 11. Shri Tushar Mehta, the learned Solicitor General of India, appearing for the State Government submitted that even if the Ex-communication Act has been repealed, the question whether the practice of Baraat/ex-communication is protected by Article 26(b) of the Constitution of India, survives for consideration. He invited our attention to the order of this Court in the case of *Kantaru Rajeevaru v. Indian Young Lawyers Association & Ors.*⁷ (*Sabarimala Temple*
- H ⁷ 2020 (2) SCC 1

Review – 5 JJ.) He submitted that the Constitution Bench has held that freedom of religion guaranteed under Articles 25 and 26 of the Constitution needs authoritative pronouncement by a larger Bench of not less than seven Hon'ble Judges. He invited our attention to the questions formulated under the said order. He pointed out that on the basis of the said order, a Bench of nine Judges in *Kantaru Rajeevaru (Right to Religion; in Re – 9 JJ.) v. Indian Young Lawyers Association & Ors.*⁸ (*Sabarimala Temple Review – 9 JJ.*), has framed seven issues and at least, the first three issues framed by the said Bench will arise even in the present case. Therefore, he urged that this petition be tagged along with the case before the Bench of Hon'ble nine Judges.

12. Shri Fali S. Nariman, the learned senior counsel appearing for the 2nd Respondent urged that in view of the repeal of the Ex-communication Act, nothing survives in the petition considering the prayers made in the petition. He also invited our attention to the fact that the second petitioner has died and there is no one to represent the first petitioner which is an unregistered organization.

13. He submitted that the decision in the case of *Sardar Syedna*¹ was noted by the Constitution Bench in the case of (*Sabarimala Temple 5JJ*)⁶. He relied upon the decision of the Bench of seven Judges of this Court in the case of *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*⁹. He submitted that the issue of the interpretation of Article 26 has been concluded. He lastly submitted that this case should not be tagged with the review pending before the bench of Hon'ble nine Judges and at the highest, it may be kept pending till the disposal of the said case.

14. Shri Dariaus J. Khambata, the learned senior counsel while supplementing the submissions made by Shri Fali S. Nariman stated that the judgment in the case of *Sardar Syedna*¹ has stood the test of time and there has been no contrary view taken by any Bench. Therefore, no further orders are warranted in this petition.

RELEVANT PROVISIONS

15. Before we deal with the submissions, a brief reference to the Ex-communication Act is necessary. Sections 2 and 3 thereof, are material, which read thus:

⁸ 2020 (3) SCC 52

⁹ 1954 SCR 1005

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- A “**2.** In this Act, unless there is anything repugnant in the subject or context, –
 - (a) “community” means a group the members of which are connected together by reason of the fact that by birth, conversion or the performance of any religious rite they belong to the same religion or religious creed and includes a caste or sub-caste;
 - (b) “ex-communication” means the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of civil nature by him or on his behalf as such member.
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- C Explanation.- For the purposes of this clause a right legally enforceable by a suit of civil nature shall include the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such rights depends entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community.
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- E **3.** Notwithstanding anything contained in any law, custom or usage for the time being in force, to the contrary, no ex-communication of a member of any community shall be valid and shall be of any effect.”
- F The Ex-communication Act has been repealed by the Social Boycott Act. At this stage, it is not necessary for us to go into the question of the effect of the Social Boycott Act on the practice of ex-communication or “Baraat” prevailing in the Dawoodi Bohra community.

THE FINDINGS RECORDED IN SARDAR SYEDNA

- G 16. Now, we advert to the findings recorded by the Constitution Bench in the case of *Sardar Syedna*¹. The said decision contains separate opinions of K.C. Das Gupta, J. for himself and J.R. Mudholkar, J.; N. Rajagopala Ayyangar, J. and B. P. Sinha, C.J. We may note here that B.P. Sinha, C.J. has written a dissenting opinion. The other Hon’ble Judges took the view that the Ex- communication Act was void as it infringes the rights guaranteed under Article 26(b) of the Constitution.
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Das Gupta, J. concluded that:

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- (a) The exercise of the power of ex-communication on religious grounds forms a part of the management of the community through its religious head;
 - (b) The Ex-communication Act takes away the freedom conferred by clause (b) of Article 26 on the head of the Dawoodi Bohra community to ex-communicate its members on religious grounds; B
 - (c) Though, it is true that the ex-communication of a member of the community will affect many of his civil rights, the rights conferred by clause (b) of Article 26 have not been made subject to the other fundamental rights. Therefore, the fact that the civil rights of a person are affected by the exercise of the rights under clause (b) of Article 26, is of no consequence; C
 - (d) Prohibiting ex-communication on religious grounds, pure and simple, cannot be considered to promote social welfare and reform. Therefore, the law which invalidates ex-communication on religious grounds, cannot be considered to be a measure of social welfare and reform as contemplated by clause (2)(b) of Article 25; and D
 - (e) Though, in the counter affidavit filed by the State Government, reliance was placed on the fact that Article 26(b) is subject to morality, the said argument was not pressed into service. E

17. Ayyangar, J. in his elaborate opinion concluded that:

- (a) Though, it was argued that a law preventing ex-communication is a measure of social reform, it was not suggested that the practice of ex-communication offended public order, morality, health or any other part of the Constitution;

(b) Though, the right under Article 26(b) is subject to public order, morality or health, it was not suggested that the

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- A practice of ex-communication offended public order, morality or health;
- (c) The denomination within the meaning of Article 26 and the members of the denomination are entitled to ensure the continuity of the denomination and such continuity is possible only by maintaining the bond of religious discipline which would secure the continued adherence of its members to certain essentials like faith, tenets and practices;
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- (d) The right guaranteed under clause (1) of Article 25 is not confined to freedom of conscience as it also includes the right to practice religion;
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- (e) By the phrase “law providing for social welfare and reforms”, it was not intended to enable the legislature to reform a religion out of existence or identity. Clause (2)(b) of Article 25 does not cover the basic essentials of the creed of a religion which are protected by clause (1) of Article 25;
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- (f) The power of ex-communication for the purpose of ensuring the preservation of the community has a prime significance in the religious life of every member of the group; and
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- (g) The legislation which penalizes the power to ex-communicate even when exercised for the purposes of preservation of the community cannot be sustained as a measure of social welfare or reform without eviscerating the right guaranteed under clause (1) of Article 25, thereby rendering the protection illusory.
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- 18. In his dissenting opinion, B.P. Sinha, C.J., came to the following conclusions:
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- (a) The expressions ‘matters of religion’ and ‘activities associated with religious practice’ in clause (b) of Article 26 do not cover exactly the same ground. The activities associated with the religious practice may have serious ramifications, such as economic and financial;
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- (b) The autonomy that a religious denomination enjoys under clause (b) of Article 26 is in matters of religion. Article 26 itself indicates that a religious denomination has to deal not only with matters of religion but also with other matters such as managing property owned and possessed by the religious community; A
- (c) The matters of religion under clause (b) of Article 26 are subject not only to public order, morality and health but also to legislation contemplated by clause (2)(b) of Article 25. In the case of *Sri Shirur Mutt*⁹, it is distinctly laid down that clause (b) of Article 26 must be read subject to clause (2)(b) of Article 25; and B
- (d) The right of ex-communication vested in the head of the community is not purely a religious matter. Therefore, the Ex-communication Act is valid as it does not infringe the right conferred by clause (b) of Article 26. C
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WHETHER THE WRIT PETITION SURVIVES FOR CONSIDERATION

19. By a majority, the Constitution Bench held that the Ex-communication Act was void being in violation of Article 26(b) of the Constitution. We must note here that considering the definition of ‘community’ under Section 2(a) of the Ex- communication Act, the applicability thereof was not confined only to the Dawoodi Bohra community. The provisions of the Ex- communication Act were applicable to the practice of ex- communication prevailing in different religions, castes or sub- castes. The findings rendered by the majority view are only in respect of the right of the head of the Dawoodi Bohra community to ex-communicate a member of the community. With the greatest respect to the Constitution Bench, while recording a finding regarding violation of Article 26(b) only in relation to Dawoodi Bohra community, the Ex-communication Act in its entirety could not have been declared void. Therefore, even assuming that the view taken by the Constitution Bench is correct, the question which certainly survives for consideration is whether the practice of ex-communication prevailing in other religions, castes or sub-castes is constitutionally valid.

20. Even if the Ex-communication Act has been repealed, the issue remains whether the power of the head of Dawoodi Bohra

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- A Community to ex-communicate its members is non-justiciable being protected under the umbrella of clause (b) of Article 26. This issue requires examination in the present day context. Therefore, the argument that nothing survives on merits in the petition, cannot be accepted.

APPROACH TO BE ADOPTED

- B 21. While interpreting the Constitutional provisions, we must remember that the Constitution is a living instrument. In paragraph 262 of the decision of this Court in the case of *K. S. Puttaswamy & Anr. v. Union of India & Ors.*¹⁰, this Court observed thus:
- C “**262. Hence, it would be an injustice both to the draftsmen of the Constitution as well as to the document which they sanctified to constrict its interpretation to an originalist interpretation. Today’s problems have to be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society.** We describe the Constitution as a living instrument simply for the reason that while it is a document which enunciates eternal values for Indian society, it possesses the resilience necessary to ensure its continued relevance. Its continued relevance lies precisely in its ability to allow succeeding generations to apply the principles on which it has been founded to find innovative solutions to intractable problems of their times. In doing so, we must equally understand that our solutions must continuously undergo a process of re-engineering.”

- F (emphasis added)

The originalist interpretation rendered to the provisions of the Constitution decades back, cannot continue to be valid for all times to come if the Constitution is to continue as a living instrument with continued relevance.

- G 22. In paragraph 26 of the decision of this Court in the case of *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*¹¹, this Court held thus.:

¹⁰ 2017 (10) SCC 1

H ¹¹ 1986 (3) SCC 156

“**26.** The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. **It must keep time with the heartbeats of the society and with the needs and aspirations of the people.** As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said: “When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool.” The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and time-consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society.”

(emphasis added)

In view of what is held above, the role of the Constitutional Courts to interpret the Constitution considering the changing needs of the society assumes importance.

23. The Constitution Bench in the case of *Navtej Singh Johar*⁵ emphasized that the principle of transforming Constitutionalism also places upon the judicial arm a duty to ensure that a sense of transformation is ushered consistently in the society by interpreting and enforcing the Constitutional as well as other provisions of law. Constitutional law has developed a great deal during the last few decades. The interpretation of various provisions of the Constitution made by this Court decades back has undergone a drastic change. For example, the narrow interpretation given to Article 21 in the ‘A.K. Gopalan’ era is no longer

- A valid. The concept of freedom has undergone changes. In the 21st Century, society looks completely different from what it looked in the last century. We see a change in the socio-cultural ethos of society. Thus, the interpretation of law must keep pace with changing needs of society.

MORALITY IN THE CONTEXT OF ARTICLES 25

AND 26

24. The freedom of conscience guaranteed under clause (1) of Article 25 is subject to public order, morality and health. All four clauses (a), (b,), (c) and (d) of Article 26 are also made specifically subject to public order, morality and health. Thus, the right of the religious C denomination to manage its own affairs in matters of religion is always subject to morality. As far as the concept of morality contemplated by Articles 25 and 26 is concerned, much water has flown after the decision in the case of *Sardar Syedna*¹. Moreover, in the case of *Sardar Syedna*¹, the argument that Article 26(b) is subject to morality, was not D at all considered as it was not canvassed and pressed at the time of hearing. In the case of *Navtej Singh Johar*⁵, this Court held that when this Court deals with the issue of morality, it must be guided by the concept of Constitutional morality and not by societal morality. Moreover, notion of morality evolves with time and is not static. The question whether Constitutional morality can be equated with equality, fraternity and E non-discrimination needs consideration.

25. The concept of morality as contemplated by Articles 25 and 26 was considered in greater detail by another Constitution Bench in the case of *Sabrimala Temple 5JJ*⁶. There were four separate opinions rendered by the Constitution Bench. Dipak Misra, C.J., who wrote the F opinion for himself and A. M. Khanwilkar, J. and Dr. D. Y. Chandrachud, J. (as then he was), in their separate opinions concurred on the interpretation of the concept of morality under Articles 25 and 26 of the Constitution. They also dealt with the issue of the interplay between the rights under Article 26 and the other rights under part III of the G Constitution. The conclusions in the separate opinions of Dipak Misra, C.J. and Dr. D.Y. Chandrachud, J. can be summarized as under:

- (a) The expression ‘morality’ used in Articles 25 and 26 has an overarching position similar to public order and health;
- (b) The term ‘morality’ cannot be viewed with a narrow lens so as to confine the definition of morality to what an individual H

or a religious sect may perceive to mean. Morality naturally implies Constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the basic tenets of Constitutional morality. ‘Morality’ for the purposes of Articles 25 and 26 must mean that which is governed by fundamental Constitutional principles; A

(c) The expression ‘subject to’ is in nature a condition and therefore, public order, morality and health control Article 26; B

(d) There is no convincing reason to allow provisions of Article 26 to tread in isolation. Even if Article 26 is not specifically made subject to other fundamental rights, there would still be a ground to read both together so that they can exist in harmony. Absence of specific words in Article 26 making it subject to other fundamental rights cannot allow freedom of religious denomination to exist in an isolated silo; and C

(e) The freedom of religious denominations under Article 26 must be read in a manner that requires the preservation of equality, and other individual freedoms which may be impacted by unrestricted exercise; D

26. Nariman, J in paragraph 176.7, stressed that the term ‘morality’ refers to that which is considered abhorrent to civilized society, given the mores of the time, by reason of harm caused by way, inter alia, of exploitation and degradation. E

27. In his opinion rendered in *Sabrimala Temple–5JJ*⁶, Dr. D.Y. Chandrachud, J.(as he then was) has dealt with the engagement of essential religious practices with Constitutional values. While dealing with the said issue, in paragraph 289, he has observed thus: F

“289. For decades, this Court has witnessed claims resting on the essentiality of a practice that militate against the constitutional protection of dignity and individual freedom under the G

Constitution. **It is the duty of the courts to ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality. While the Constitution is solicitous in its** H

- A protection of religious freedom as well as denominational rights, it must be understood that dignity, liberty and equality constitute the trinity which defines the faith of the Constitution. Together, these three values combine to define a constitutional order of priorities. Practices or beliefs which detract from these foundational values cannot claim legitimacy.”

B (emphasis added)

C 28. The question is whether the exclusionary practice which prevails in the Dawoodi Bohra community of ex-communicating its members will stand the test of Constitutional morality? As observed by Das Gupta, J. in the case of *Sardar Syedna*¹, the ex-communication of a member of the community affects many of his civil rights. The Privy Council, in the case of *Hasanali & Ors. v. Mansoorali & Ors.*¹², in paragraph 4, has dealt with the effect of ex-communication in Dawoodi Bohra community. Paragraph 4 reads thus:

D “4. The appellants would limit the effect of excommunication, whatever steps might have been taken to bring it into being, to complete social ostracism. There is nothing, they say, to show that it excluded from rights of property or worship. Their Lordships do not find themselves able to accept this limitation. The Dai is a religious leader as well as being trustee of the property of the community, and in India exclusion from caste is well known. There is at least one case in which it is recorded that certain persons applied to the King to intercede with the thirty-third Dai, complaining that in consequence of excommunication they were kept from the mosques and places where true believers met; and no instance has been cited where excommunicated persons freely exercised their religious rights. Indeed, the complaint in the cases brought to their Lordships' attention as regards which relief is claimed for the appellants or those whom they are said to represent is that they were wrongly excommunicated, not that if rightly excommunicated they were wrongly deprived of their religious rights. Excommunication, in their Lordships' view, if justified, necessarily involves exclusion from the exercise of religious rights in places under the trusteeship of the

H ¹² 1947 SCC OnLine PC 63

head of the community in which religious exercises are performed.” A

(emphasis added)

A person who is ex-communicated by the community, will not be entitled to use the common property of the community and the burial/cremation grounds of the community. In a sense, such a person will virtually become untouchable (being banished or ostracized) within the community. In a given case, it will result in his civil death. It can be argued that the concept of Constitutional morality which overrides the freedom conferred by clause (b) of Article 26, will not permit the civil rights of ex-communicated persons which originate from the dignity and liberty of human beings to be taken away. The concepts of equality, liberty and fraternity are certainly part of our Constitutional morality. Basic ideas enshrined in our Constitution are part of Constitutional morality. The conscience of our Constitution is Constitutional morality. Hence, it is contended that ex-communication or ostracisation is anathema to the concepts of liberty and equality. It is against the anti-discriminatory ethos which forms a part of Constitutional morality. Therefore, the Constitutional Court ought not to tolerate anything which takes away the right and privilege of any person to live with dignity as the concept of Constitutional morality does not permit the Court to do so. Therefore, in our view, the protection under Article 26(b) granted by the decision in the case of *Sardar Syedna*¹ to the power to ex-communicate a member of the Dawoodi Bohra community, needs reconsideration as the said right is subject to morality which is understood as Constitutional morality. This issue will require examination by a larger Bench.

29. The concurring opinions rendered by Dr. D.Y. Chandrachud, J. and Mr. R.F. Nariman, J. extensively refer to the case of *Sardar Syedna*¹. In paragraph 164, Nariman, J. records that there is a need to look into the finding recorded by the majority view in the case of *Sardar Syedna*¹ on the applicability of clause (2)(b) of Article 25 in some future cases.

INTERPLAY BETWEEN THE OTHER FUNDAMENTAL RIGHTS UNDER PART III AND ARTICLE 26

30. We have already referred to the opinion of D.Y. Chandrachud, J. (as then he was) in *Sabrimala Temple– 5 JJ*⁶. It was held that

- A though Article 26 is not specifically made subject to other fundamental rights, there would still be a ground to read both together so that they can exist in harmony. The freedom of religious denominations cannot exist in isolation. Nariman, J. in his opinion has also dealt with this issue. In note 59 appended to paragraph 176.7, he observed that:
- B “**(59).** We were invited by the learned Amicus Curiae, Shri Raju Ramachandran, to read the word “morality” as being “constitutional morality” as has been explained in some of our recent judgments. If so read, it cannot be forgotten that this would bring in, through the back door, the other provisions of Part III of the Constitution, which Article 26 is not subject to, in contrast with Article 25(1). **In any case, the fundamental right under Article 26 will have to be balanced with the rights of others contained in Part III as a matter of harmonious construction of these rights as was held in *Shri Venkataramana Devaru*, AIR 1958 SC 255 : 1958 SCR 895. But this would only be on a case-to-case basis, without necessarily subjecting the fundamental right under Article 26 to other fundamental rights contained in Part III.”**
- E (emphasis added)
- F Thus, Nariman, J. was of the view that there may be a need to balance rights under Article 26(b) with the other fundamental rights under Part III of the Constitution without necessarily subjecting the fundamental rights under Article 26 to other fundamental rights contained in Part III.
- G 31. Even assuming that the ex-communication of members of the Dawoodi Bohra community is always made on religious grounds, the effect and consequences thereof, on the person ex-communicated needs to be considered in the context of justiciable Constitutional rights. The ex-communication will have many civic consequences which will, *prima facie*, affect his fundamental right to live with dignity and the right to lead a meaningful life guaranteed by Article 21. Therefore, the question is whether the said right of the community to ex-communicate its members can be balanced with the other fundamental rights under Part III of the Constitution and in particular, Article 21.
- H

CONCLUSIONS

A

32. To conclude, *prima facie*, we find that the exercise of balancing the rights under Article 26(b) with other rights under Part III and in particular Article 21 was not undertaken by the Constitution Bench in the case of *Sardar Syedna*¹. This question is substantially in issue before the Bench of nine Judges in *Sabrimala Temple Review -9JJ*. Moreover, the question whether the protection can be given by Article 26(b) to the practice of ex-communication is to be tested on the touchstone of the concept of Constitutional morality as the said right is subject to morality. This is an important and emergent issue. These are the two main grounds on which the said decision may need reconsideration by a larger Bench.

B

C

33. *Sabrimala Temple-5JJ*⁶ decision was subjected to a review. This Court dealt with the review (*Sabrimala Temple Review – 5JJ.*⁷). The majority opinion contains questions formulated for referring it to a larger Bench. Question Nos. 5.1 to 5.3 are relevant which reads thus:

D

“5.1.(i) Regarding the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III, particularly Article 14.

E

5.2.(ii) What is the sweep of expression “public order, morality and health” occurring in Article 25(1) of the Constitution.

F

5.3.(iii) The expression “morality” or “constitutional morality” has not been defined in the Constitution. Is it overarching morality in reference to Preamble or limited to religious beliefs or faith. There is need to delineate the contours of that expression, lest it becomes subjective.”

Accordingly, the review petition was listed before a nine-Judge Bench. By the order dated 10th February 2020, the Bench of nine-Judges (*Sabrimala Temple Review –9 JJ.*⁸) framed seven questions of law, out of which questions 3 and 4 are relevant for our purposes read thus:

G

“3. Whether the rights of a religious denomination under Article 26 of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health?

H

- A 4.What is the scope and extent of the word ‘morality’ under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality?”
- B 34. In view of the discussion made above, questions 3 and 4 formulated by the nine-Judge Bench also arise for consideration in the present writ petition. The decision which will be rendered by the nine-Judge Bench will have a direct impact on the questions which arise for determination in this writ petition.
- C 35. In the circumstances, we are of the view that the present writ petition deserves to be tagged with Review Petition (Civil) No.3358 of 2018 pending before the Bench of nine Hon’ble Judges. We, accordingly direct the Registry to seek appropriate directions in this behalf from the Hon’ble Chief Justice.

Bibhuti Bhushan Bose
(Assisted by : Sanika Thakare, LCRA)

Directions issued.