

Riju Prasad Sarma Etc.Etc vs State Of Assam & Ors on 7 July, 2015

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Bench: Shiva Kirti Singh, Fakkir Mohamed Ibrahim Kalifulla

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NOS.3276-3278 OF 2013

Riju Prasad Sarma etc. etc.

....Appellants

Versus

State of Assam & Ors.

....Respondents

W I T H

W.P.(C)Nos.72; 91 and 140 of 2012

AND

S.L.P.(C)Nos.18070-18072 of 2015 [CC 8089-8091/2012]

J U D G M E N T

SHIVA KIRTI SINGH, J.

The Civil Appeals arise out of three writ petitions, two of the year 2000 and one of the year 2002 which were heard together and disposed of by a learned Single Judge of Guwahati High Court by a common judgment and order dated 06.08.2004. That judgment was challenged before the Division Bench through two writ appeals bearing W.A.Nos.311 and 312 of 2004 preferred by the appellants who confined the scope of the appeals only to the width and scope of Section 25A of the Assam State Acquisition of Lands Belonging to Religious or Charitable Institutions of Public Nature Act, 1959 (for brevity referred to as 'the Act'). Admittedly neither the State Government nor the private respondents preferred any cross appeal. However, there was a fresh writ petition filed directly before the Division Bench bearing Writ Petition No.923/2005 preferred in the name of The Deity, Sri Sri Ma Kamakhya claimed to be represented by appellant – Riju Prasad Sarma who further described himself as the Administrator, Kamakhya Debutter. The said writ petition sought to challenge the constitutional validity of Section 25A of the Act. The writ appeals and the Writ Petition No.923 of 2005 were finally disposed of by a common judgment and order of the Division Bench of Guwahati High Court dated 25.10.2011 which is under challenge in the principal matter – Civil Appeal Nos.3276-3278 of 2013 filed by Sri Riju Prasad Sarma & Ors. claiming to represent The

Kamakhya Debutter Board.

Along with the Civil Appeals three writ petitions bearing No.72, 91 and 140 of 2012 have also been heard together as connected matters because they either throw a challenge to the validity of the Section 25A of the Act or the Rules framed thereunder or to the actual election of Doloi held on 16.11.2011 on account of this Court not staying the direction of the Division Bench to hold such election governed by custom. The same dispute covered by the Civil Appeals noticed above is sought to be raised again through S.L.P.(C) Nos.18070-18072 of 2015 [CC 8089-8091/2012] which have been filed along with an application for permission to prefer the special leave petitions by those who were not parties earlier, Hiten Sarma and some others, against the same very common judgment of the Division Bench dated 25.10.2011. This judgment shall govern all the matters noticed above. For the sake of convenience the facts have been noted from the records of civil appeals except where indicated otherwise.

It is necessary to have a look at the nature of the three writ petitions decided by the learned single judge. But before that it will be useful to notice the background facts which led to those writ petitions. The appellants have, in one of their written submissions, furnished the introduction, it reads as follows:-

“INTRODUCTION The present group of matters concerns the Sri Sri Maa Kamakhya Devalaya, which is one of the most significant amongst the 51 Shaktipeethas. The temple and the site are referred to in the Sanskrit text “Kalikapurana” which is one of the eighteen upapurana. The Diety of Shri Shri Kamakhya is one of the most venerated Goddesses. The main Kamakhya temple and the subsidiary temples in and around the three Hills of Nilachal are collectively known under the general name of “Kamakhya”. It may be mentioned that the subsidiary temples are also known in Assamese as “Nanan Devalayas”. The families of the priests of the main temple call themselves “Bordeuris”. The families of the priests of the subsidiary temples are known as “Deuris”. The head priest is called the “Doloi”. “Shebait” means and includes all the community of persons who are directly connected to the performance of any kind of duty associated with the temple complex and thus, includes the Bordeuris, Deuris and other Brahmin and non Brahmin persons directly connected to the performance of any kind of duty associated with the temple complex.

There are before this Hon’ble Court four proceedings raising different aspects of the matter.

The principal matter is C.A. No.3276-3278/2013 filed by Shri Riju Prasad Sarma & Ors. (representing the Kamakhya Debuttar Board) challenging the final judgment and order of 25.10.2011 passed by the Division Bench of the Hon’ble Guhati High Court. In the said matter, the Learned Single Judge had upheld the locus standi of the appellants on the ground that it does not lie in the mouth of the State Respondents/Private Respondents to challenge the authority of the Kamakhya Debuttar Board to manage the affairs of the temple as they have not made any

attempt to de-recognize or question its authority in any court of law. (pg.216). The learned Single Judge had also upheld the vires of Section 25A of the Assam State Acquisition of Lands belonging to Religious or Charitable Institutions of Public Nature (Amendment) Act, 1987 (pg.218-225). The appellants preferred a limited Writ Appeal confined to the scope of Section 25A of the said Act. There was no cross appeal preferred by the State Government or the Private Respondents. The Division Bench of the Hon'ble Guwahati High Court vide impugned judgment has held that Section 25A of the said Act has very limited scope confined to the language used in the said provision and has held as follows:

“117.....Section 25A, as would be apparent on its face, only engrafts the enjoinder of the legislature for the constitution of a Managing Committee to exercise control over the matter of utilization of annuity and verification of the proper maintenance of the institution.....” It may be mentioned that all the parties have stated on Affidavit before this Hon'ble Court that the said interpretation rendered by the Division Bench of the Hon'ble Guwahati High Court is correct. Thus, interpretation of Section 25A of the Act is not in issue any more.

However, the Division Bench of the Hon'ble Guwahati High Court has erroneously reversed the finding of the Learned Single Judge on the issue of the locus standi of the appellants and has further held without any basis whatsoever that the Kamakhya Debutter Regulations/Kamakhya Debutter Board has no sanctity in law (pg.34-36). This was not an issue before them as it was not even the subject matter of the writ appeal. In fact, there was no cross appeal against the finding of the Ld. Single Judge on the issue of locus standi in favour of the appellants. Moreover, the Division Bench of the Hon'ble Guwahati High Court has gone into and examined the issue of election of Dolois (Head Priest) which was not the subject matter of the writ proceedings and thereafter, rendered an erroneous finding solely on the basis of the purported customary practices that the electorate for the said election to the post of Dolois should be confined only to the male members of the four Bordeurie families (pag.89-90).

In terms of the order dated 13.5.2002 passed by the Hon'ble High Court and the orders dated 11.11.2011 and 21.11.2011 passed by this Hon'ble Court, the administration of the temple has been carried on by the appellants, the Kamakhya Debuttar Board. Further, the two Dolois has been given exclusive monopoly in religious affairs by this Hon'ble Court vide its order dated 21.11.2011. Thus as stated above, Section 25A of the said Act is confined to “control over the matter of utilization of annuity and verification of proper maintenance of the institution.” The interpretation of Section 25 of the Act is not in issue here. The State Government has paid only Rs.80,500/- and further deposited Rs.50,000/- with the Hon'ble High Court till date for acquisition of the land belonging to the temple. The issue regarding the administration of non-ritual activities other than those covered by Section 25A of the said Act was never and is not the subject matter of these proceedings.

It may be mentioned that when the matter was heard at some length on an earlier occasion, this Hon'ble Court had observed that parties may consider initiating proceedings under Section 92 C.P.C. Pursuant thereto, the appellants have filed a Title Suit being T.S. No.2 of 2013 before the Ld. District Judge, Kamrup (Metro) under Section 92(g) C.P.C. with an application seeking leave of the Court as required under the said provision. The District Judge, Kamrup has issued notice on the said application on 7.1.2013 and the matter is now kept on 8th August, 2014.

2. Writ Petition (C) No.72 of 2012 filed by Shri Shailen Sarma challenging the validity of Assam State Acquisition of Lands belonging to Religious or Charitable Institutions of Public Nature (Election of Managing Committee of Sri Sri Maa Kamakhya Temple) Rules framed under Section 25A of the said Act. Though the electoral college under Section 25A of the Act for the post of ex-officio Secretary to the managing committee to be constituted under the said provision of the Act includes "deuris/Bordeuris, the said Rules have illegally excluded the Deuris (both male and female) and the female bordeuris of their voting rights as well as the right to contest.

It may be mentioned that this Hon'ble Court in its order dated 21.11.2011 had stated that the State Government shall take steps to frame rules and any objection to the rules should be challenged only before this Court.

3. Writ Petition (C) No. 140 of 2012 filed by Shri Shailen Sharma and others challenging the actual election of Dolois held on 16.11.2011 on the ground that confining the electoral college and right to vote to only the male Bordeuris to the exclusion of Deuris (both male and female) and the female Bordeuris is illegal, arbitrary and unconstitutional in law.

4. Writ Petition No. 91 of 2012 filed by Nanan Bordeuris regarding the validity of Section 25A of the said Act and the rights of the shebaitis." From the above introduction furnished by the appellants, it is evident that according to the appellants the Division Bench erred in deciding the issue relating to administration of non-religious activities of Maa Kamakhya Temple (other than those which relate to scope and interpretation of Section 25A of the Act). To same effect was the first and main submission advanced by learned senior counsel Sri Ashok H. Desai, appearing for the appellants. According to Mr. Desai, the issue relating to customary right of Bordeuris represented by the two Dolois who are elected by adult male Bordeuris belonging at present to four specified priest families vis-à-vis the rights and the status of the Debutter Board was never and is still not the subject matter of the present proceedings and hence the judgment of the Division Bench deciding the above said issue in favour of the Bordeuries and the Dolois must be set aside. Further stand of the appellants is that even if the issue did arise before the Division Bench, the same has been wrongly decided by ignoring break in the old custom since 1970/1973 and thereafter through creation of Debutter Board in 1998. The stand of the appellants is that essential religious rites of Maa Kamakhya Temple is still left in the hands of the Dolois as per custom and the Debutter Board is governing and entitled to govern only the secular/non religious activities of the temple and its properties because for that it is empowered by the Debutter Board Regulation of 1998.

On behalf of the appellants, as an alternative it was highlighted in the oral as well as in the written submissions that no observations be made by this Court which may have any impact in the pending proceeding initiated by the appellants under Section 92 of the Code of Civil Procedure pending before the learned District Judge, Kamrup, Guwahati. On the other hand, it is the categorical stand of private respondents except the State of Assam that there is no dispute between the parties with respect to amplitude of Section 25A of the Act. All except State of Assam are in agreement that it has to be given a narrow meaning in the context of the Act and the various provisions contained therein which restrict the functions of the Statutory Managing Committee conceptualized thereunder to exercise control only over the matter of utilization of annuity and verification of the proper maintenance of the institution. According to respondents, the Debutter Board represented by the appellants has used writ petitions filed before the learned single judge for the clandestine and concealed object of grabbing control over the properties and affairs of the Maa Kamakhya temple after its attempt to get recognition from the District Judge failed. According to respondents only the two Dolois whose term has expired and who did not want holding of elections to elect Dolois for a further term of five years, went in collusion with the Deuries/priests of other subsidiary temples known as Nanan Devalayas to support the formation of a body which describes itself as Debutter Board and its self serving constitution as Debutter Board Regulation 1998, which has no legal sanctity.

Dr. Rajeev Dhavan, learned senior counsel for the private respondents took great pains to take us through the pleadings and prayers in the three writ petitions decided by the learned single judge to show that in writ petition Nos. 6184 and 5385 of 2000, while challenging the Deputy Commissioner's Committee, the Debutter Board cleverly raised the issue of its status in several paragraphs. In addition, in writ petition No.2955 of 2002 Mr. Riju Prasad Sarma as petitioner went on to describe himself as the administrator of Maa Kamakhya Debutter with a further claim that as an administrator he is responsible and authorized to represent the grievances of Brahamins and non-Brahmins Shebaitas as well as devotees of the Maa Kamakhya Debutter. In Paragraph 34 the appellant Riju Prasad Sarma made a specific prayer that the annuity which is payable under the Act be paid to the Maa Kamakhya Debutter Board.

The contents of the writ appeal No. 311 of 2004 were similarly highlighted to show that at various places the Debutter Board had claimed a status for itself even in the writ appeals. The writ petition No. 923 of 2005 filed by appellant Riju Prasad Sarma was heard originally by the Division Bench along with writ appeals. In this writ petition the petitioner claimed to represent the Deity. In their counter affidavits the State Authorities as well as the private respondents strongly disputed such claim. According to learned senior counsel Mr. Dhavan, the issue was though loosely referred to and argued as an issue of locus but it was actually an issue relating to status and/or rights of the appellants and the Debutter Board; whether the Board had any established right to claim a share in the management of even secular affairs of Maa Kamakhya temple. According to learned senior counsel, the Debutter Regulation of 1998 is a self serving document which does not have any sanctity of law and did not create any right in the Debutter Board to take over the religious endowment of Maa Kamakhya and represent the deity.

On behalf of the appellants, a number of judgments have been cited in course of reply to the aforesaid stand of the respondents in respect of locus/status. No doubt, the concept of locus was seriously diluted in the majority of cited cases which were noticeably in the nature of Public Interest Litigation. But the writ petitions filed before the learned single judge or even before the Division Bench claimed rights in the petitioners as administrator or as lawful representative of religious endowment or the deity and were not in the nature of PIL. In any case, in view of strong and categorical denial made by the respondents to the right of the Debutter Board to represent the deity of Maa Kamakhya in writ petition No. 923 of 2005, the Division Bench could not have ignored the issue of rights and status. Hence, in our considered view it was necessary for the Division Bench on being called upon through pleadings, to decide the locus or status of the appellants representing the Debutter Board. In its wholesome writ jurisdiction, the Division Bench could not have shut its eyes and ears to such a serious dispute arising in the context of a public religious endowment relating to Maa Kamakhya temple in the Nilachal hills of Assam at Guwahati, which is highly revered by the Hindus residing anywhere since several centuries.

In view of above, the foremost contention of appellants advanced by learned senior counsel Mr. Desai that the Division Bench erred in deciding the locus or status of the Debutter Board represented by the appellants cannot be accepted. This brings us to the next contention, which is more intricate and challenging; whether the findings of the Division Bench upholding the control of Bordeuries and their representatives, the Dolois over the religious and secular affairs of Maa Kamakhya temple and endowment as per customs is correct or not.

Before advertng to the above issue, it will be useful to notice some past disputes, their adjudication by courts as also the recent events, disputes and consequent three writ petitions decided by the learned single Judge. A title suit bearing no.45 of 1919 under Section 92 of the Civil Procedure Code was filed against the then two Dolois, seeking a fresh scheme for management of endowment known collectively as Kamakhya Endowment inclusive of Maa Kamakhya Temple or Devalaya. The suit was finally decided in favour of the Dolois by judgment dated 25.2.1931. Both the parties have referred to the said judgment in detail not only to demonstrate the custom which empowered the four Bordeori families to elect Dolois which is the main issue decided by the judgment but also to highlight the claim of the Bordeoris and the Dolois that they being the sole trustees of the endowment were alone competent to elect the Dolois to supervise the affairs of the temple. The judgment reveals that the bordeoris who earlier belonged to five principal families of priests attached to the main temple at Kamakhya, now reduced to four families, were found to be not only the de facto but also de jure trustees of the entire concern in the Kamakhya Scheme of Endowment and the Dolois were really their agents or managers. The object of that suit was held to be an attempt to supersede the Bordeoris from their exclusive management and control and substitute them with a body consisting of all subordinate Shebaites belonging to Brahmins of Nanan Devalayas as well as non Brahmins. The word 'Bordeori' or 'Panda' in relation to five families of Bordeoris was found used in old copper plate dated 1686 Saka era which was in force in Assam at that time and also in a parwana issued by the Commissioner of Assam to the Managing Bordeori in 1827 A.D. which used the expression 'five pandas of Kamakhya Dham'. Decrees in old suits of the year 1838 and 1855 were also noted by the Civil Court along with several old agreements between Bordeoris and Dolois to come to a conclusion that five distinctive families of priests known by the names of Brahma, Bura, Deka, Hota and

Bidhipathak originally constituted the five families of Bordeoris out of which Brahmas later became extinct. The judgment also indicates that descendents of the five principal and leading families of priests who were originally appointed for the Kamakhya temple were also sometimes called collectively as five Pandas and sometimes as five Deoris.

It is interesting to note that in the 1931 judgment the Civil Court looked into an old decree of the Sadar Diwani Adalat of Calcutta dated 1838 made in appellate jurisdiction in connection with a dispute over the Doloiship at Kamakhya. The Sadar Diwani Adalat judgment contained several references to the five ancient families of priests and made it clear that save and except those five houses, the work of the Doloiship and Sebayati could not be conferred on anyone else; that none of the other Brahmins at Kamakhya or elsewhere had any right, power or authority of even touching or handling the Goddess at Nilachal Kamakhya Temple proper for conducting the Sevapuja (Rajaki puja) at the temple. Such rights and privileges were held to be hereditary ancestral rights of the Bordeori families and hence the Dolois elected by them were restored to possession and management of Kamakhya by replacing another person who was put in as Doloi by an independent agency during the chaos and disorder of the Burmese occupation. The Judicial Commissioner's findings in 1873 have been summarised in the said judgment as follows :

“(1) That the office of the Doloi is not a hereditary office, but elective and the right of election is in the hands of the Bordeoris;

That as the Government will no longer take any steps, as of old, to guard the Temple funds from misappropriation by the Dalois, the power to guard them must be held to have developed upon the Elective Body;

That the power of guarding is clearly a power some one must exercise, as it would be in the highest degree wrong to have left the uncontrolled management to the Dolois.

That the Bordeoris as a class fall within the description of ‘Zaminders and other recipients of the rent of lands’, according to the spirit of the law and that they do fall within that description;

That the Bordeoris, as a class, have a right to watch over the administration of the temple lands, and protect such funds from waste, and that the Dolois are, so to speak, their (the Bordoris’) agents in that matter.” Another judgment in the case of Baroda Kanta v. Bangshi Nath reported in AIR 1940 Cal. 269 is a judgment of Calcutta High Court dated 30.11.1939 which again clearly recognized the custom of exclusive control of Dolois elected by Bordeori families to be incharge of religious as well as secular affairs of Kamakhya temple and endowment. It is also not in dispute that in the Act of 1959 which came into force on 11.1.1963 and in the Rules of 1963 framed thereunder, there are provisions requiring the identification of the Head of a religious or charitable institution as defined in Section 2(d) in whom the control and management of the properties of that institution is vested. The notification of acquisition under Section 3(2) has to be served on such Head in the manner

prescribed. The consequences of such notification take place as per Sections 4 to 6 leading to the payment of compensation which is determined under Section 8 and as per sub- section (5) thereof the net income as per calculations is required to be paid in cash annually as perpetual annuity as compensation to the Head of the institution for lands acquired under the Act. The proviso to sub- section (5) of Section 8 takes care of entitlement of any person to a share of the income of any such institution or to a lump sum allowance under the terms of any grant or endowment relating to that institution which is required to be determined in the prescribed manner. Besides containing provisions for appeal, as per Section 18 the Head of religious or charitable institution is obliged to submit to the Deputy Commissioner a return giving the particulars of all his lands including the lands selected for retention under Section 5, etc. Admittedly, the Dolois as agents of Bordeoris are recognized as the Head of the public religious endowment of Kamakhya including the Maa Kamakhya Temple.

The Act was amended by Assam Act No.XIX of 1987 which received the assent of the Governor on 19.10.1987. Inter alia, this Amendment Act introduced a new Section 25A which reads as follows :

“25A. Constitution of the Managing Committee.-For each of the Religious or Charitable Institution of Public Nature, a Managing Committee shall be constituted with the following members to have a control over the matter of utilization of the annuity and verification of the proper maintenance of the Institution.

(a) The Deputy Commissioner or Sub-divisional Officer or his nominee – President.

(b) An Ex-Officio Secretary to be elected by the Deuries/ Bor Deuries.

(c) 5 (five) elected members – to be elected from amongst the devotees.

The term of the Committee shall be for three years from the date of its constitution.” The Statement of Objects & Reasons of the Amending Act are noted in paragraph 111 of the impugned judgment under appeal as follows :

“111. The statement of objects and reasons of the Amending Act discloses the following impelling factors therefor:-

i) certain religious or charitable institutions of public nature whose lands had been acquired did neither take proper steps for finalization of compensation nor did they file appeal within the stipulated time;

ii) it was felt necessary to enhance the annuity payable to the institution due to rise of market price of essential commodities for its maintenance and upkeep;

iii) it was felt imperative to have control over the annuity and to verify and audit the accounts to the satisfaction of the concerned authority.” The last election of Dolois by the members of Bordeori families or bordeori samaj was made in 1991-1992 in accordance with the custom. Sri Jnanada Prasad Sarma and Sri Paran Chandra Sarma were elected as the Doloi and Saru Doloi respectively. The constitutional validity of Section 25A was challenged by head of another religious institution through a Writ Petition bearing No.3118 of 1994 before the Guwahati High Court.

17. Pendency of that writ petition could not have posed any hindrance to election of successor Dolois after five years, in 1996-1997. But that did not happen. An attempt was made by the shabiats, brahmins as well non- brahmins including priests/Deories of Nanani Devalayas to democratize the management of Kamakhya temple by diluting the control of Bordeori Samaj and the Dolois by framing a new scheme of management described as the Kamakhya Debutter Regulation, 1998 providing for constitution of a Board for the superintendence, management and administration of all the affairs of the main Kamakhya temple and also the temples of Dasa Mahavidyalaya and all other temples and places of religious significance in and around the three hills of Nilachal described as temples’ complex.

18. The Board as defined under the Regulation means the general Board of members of Kamakhya Debutter or the Kamakhya Temple Trust Board constituted under the Regulation. The regulation also ordained that the Board shall be the head of the institution for the purpose of Section 2(d) of the Act. Doloi of the Kamakhya Temple as per Regulation means the person elected by the brahmin shabiats and not only by Bordeori Samaj. The regulation vests women also with the right to vote but not the right to contest for the post of Doloi because the Doloi is the head priest or poojari. Though the Debutter regulation and the Board contemplated therein claimed their existence from 1998 but according to the list of dates and events given by the appellants in the course of arguments and from the list of dates filed as a document in the course of arguments on behalf of the State of Assam, it appears that when the two elected Dolois did not hold the elections even after the expiry of their term of five years, Bordeori Samaj approached the district Judge Kamrup for holding of elections. Before the District Judge an attempt was made by other shebiats to include themselves in the list of voters for electing the Dolois but their claim was rejected by the District Judge by an order passed on 12.6.1998. By another order dated 21.10.1998, the District Judge Kamrup, Guwahati in file No.D9/ K/KT/6/95 maintained in connection with Kamakhya temple, disposed of the petition filed by Bordeori samaj of the Kamakhya temple seeking election of the managing Committee of Kamakhya temple against which the then Dolois and some others had filed objections.

19. In that Order the District Judge has noted that there was a defacto Managing Committee described as “the present Managing Committee” supported by the then two dolois who took the stand that there was no scheme of holding election nor there was any term of office of managing committee fixed in Constitution. Such defacto Committee also challenged the jurisdiction of the District Judge to impose any election. The District Judge was not impressed with zerox copy of the so-called Constitution which as per arguments was of the year 1970-1971 and after perusing the judgment and decree rendered by the Civil Court long back, the District Judge found that the shebait had not been given any power of voting in the election of Dolois and their prayer to include

them in the voters list had already been rejected on 12.6.1998 but even thereafter the present committee had filed a Constitution wherein Shebiats had been included as voters. The District Judge therefore, did not accept the Constitution as a valid document. On the issue of jurisdiction of the District Judge, the order reveals that the entire records relating to the management of the Kamakhya temple disclosed that earlier also on many occasions the Managing Committee of even those very persons who had challenged the jurisdiction of the District Judge had accepted notices and directions regarding proper management of the temple without raising any challenge to the exercise of such power by the District Judge. Since the District Judge noticed that there was a Public Interest Litigation pending before the Guwahati High Court, hence instead of ordering for election of Dolois he directed to get a Committee formed through the Deputy Commissioner, Kamrup, Guwahati under Section 25A of the Act by dissolving the present committee or to form an ad-hoc Committee from amongst the Bordeori Samaj till regular election is held after disposal of Public Interest Litigation.

20. Against such direction the then Dolois preferred writ petition No.6221 of 1998 which was heard and disposed of by the Division Bench of the High Court of Guwahati along with writ Petition No.3118 of 1994 relating to vires of Section 25A of the Act. By a common judgment and order dated 2.5.2000, the Division Bench upheld the vires of Section 25A. It also noted the stand on behalf of the then Dolois who had preferred Writ Petition No.6221 of 1998, that there were no instructions to challenge Section 25A and they had challenged only the jurisdiction of the District Judge in passing the order dated 21.10.1998. The Division Bench did note that the District Judge had passed the order not in any judicial proceeding but in accordance with the past practice whereunder parties used to approach the Court of District Judge for making arrangement for constituting Committee to manage the affairs of the Kamakhya temple. That Division Bench did not go further into the issue because it concluded that it may not be necessary to do so because the vires of Section 25A of the Act had been upheld and that would take care of any remaining controversy between the parties. To the same effect was the submission made on behalf of the writ petitioners, hence Writ Petition No.6221 of 1998 was dismissed as infructuous.

21. In the light of above noted Division Bench judgment the Deputy Commissioner issued an order dated 15.9.2000 in which he also took notice of some other judgments including one by the High Court in PIL No.35 of 1997 decided on 12.1.2000 and ordered for immediate dissolution of the then Managing Committee of Kamakhya Devalaya headed by the then two Dolois whose tenure was noted to have expired. They were directed to hand over charge of office to the Deputy Commissioner, Kamrup, Guwahati within three days. Further, to look after the management of the Kamakhya Temple, an ad-hoc Managing Committee of six members along with Deputy Commissioner as Chairman was also ordered. It was clarified that the ad-hoc Managing Committee will look after the management of the Kamakhya Devalaya till regular election is held or till the constitution of Managing Committee as per Section 25A of the Act, for which a period of one month only was indicated. The appellants challenged that order by filing a writ petition in September 2000 itself bearing W.P.(C)No.5385 of 2000 before the High Court. By an order dated 25.9.2000, a learned Single Judge issued rule and stayed the operation of order dated 15.9.2000. However an interim arrangement was made by ordering that the Deputy Commissioner or his nominee shall discharge the functions of the Managing Committee to be constituted under Section 25A, till it is constituted.

It was also clarified that in respect of religious functions, status quo shall be maintained. Against the same very order dated 15.9.2000 another writ petition bearing W.P.(C)No.6184 of 2000 was preferred by Sri Kamal Chandra Sarma, a member of the Kamakhya Debutter Board and Sri Paran Chandra Sarma, one of the then Dolois. In this writ petition also similar interim order was made.

22. On 20.03.2002 the Deputy Commissioner passed an order whereby in terms of the Court's interim orders he appointed one S.K. Roy, Additional Deputy Commissioner, Kamrup to discharge the functions of the Managing Committee till a Committee under Section 25A could be constituted. In that order also it was made clear that so far as the religious functions are concerned, the status quo shall be maintained. Through a notice dated 25.4.2002 Sri Roy communicated that he would take over the management of the Temple as per order of the Deputy Commissioner and by another notice dated 6.5.2002 he notified that he had taken over the responsibility of the Managing Committee on 27.4.2002. Against the order of the Deputy Commissioner as well as the orders and notices issued by Sri Roy, the appellants filed another writ petition bearing W.P.(C)No.2955 of 2002. In this third writ petition also an interim order was passed on 13.5.2002 restraining the respondents therein not to use the main Bharal, existing office of the Kamakhya Debutter Board and not to interfere with the functioning of "Peethas" of the "Jal Kuber" and "Dhan Kuber" and also religious functions of the Kamakhya Temple. By another interim order passed in that case on 16.10.2003, the Kamakhya Debutter Board and its office bearers were restrained from preparing draft voters list and also from holding or conducting any general election of the Board without prior permission of the Court. The aforesaid three writ petitions, two of the year 2000 and third of the year 2002 were disposed of by the learned Single Judge, as noted at the outset, by a common judgment dated 6.8.2004.

23. The judgment of the learned Single Judge is mainly founded upon earlier Division Bench judgment upholding the constitutionality of Section 25A of the Act. Learned Single Judge noted the arguments advanced on behalf of the rival parties that Section 25A must be given a narrow meaning so as to confine the Committee constituted under that provision only to matters concerning the utilization of annuity. But in paragraph 14 of the judgment it fell back upon judgment of the Division Bench dated 2.5.2000 for holding that since Section 25A was held to be constitutionally valid, "there will hardly be any room to consider the argument advanced on behalf of the petitioners and the supporting respondents to the effect that having regard to the object of 1959 Act, the Managing Committee constituted under Section 25A of the Act must be ascribed a limited role restricted to the annuity paid".

24. While dealing with the objection that the writ petitioners were not competent and had no right to maintain the writ petitions, in paragraph 12 of the judgment the learned Single Judge actually decided not to go deeper into that issue and preferred to dispose of the writ petitions on merits. The reasons indicated for adopting such a course are recorded thus :

".....What appears to be of significance is that though in the writ petitions filed, it has been clearly stated that the writ petitioners have approached this Court as Administrators/Members of the Board of Trustees. In course of the oral arguments, advanced, Mr. DK Bhattacharyya, learned Senior Counsel for the Petitioners in WP©

5385/2000, has made it clear that the approach to this Court by the Petitioners is in their capacity as Shebaites of the Temple. Notwithstanding the slightly contradictory stand taken, this Court has noticed that though the Debutter Board had been constituted in the year 1998 and though the Deputy Commissioner in his affidavit has given no credence or recognition to the said Board and the private Respondents Nos.4 to 8 in WP© 2955/02 represented by Shri KN Chaudhary has also disowned the Board, yet surprisingly no attempt was made either by the Deputy Commissioner to derecognize the Debutter Board or by the private Respondents 4 to 8 to challenge the authority of the Debutter Board even to claim to have a right to manage the affairs of the Temple before any competent Court of law.....”

25. Out of the two main reasons given above by the learned Single Judge for not pursuing the issue of locus seriously, the first cannot be questioned. Once the petitioners gave up their claim of having approached in the capacity of administrators/members of the Board of Trustees, relief of action in terms of Section 25A of the Act could have been granted for the benefit of the religious institution even on the asking of petitioners in their capacity as Shebaites of the Temple. The other reason however does not merit acceptance and must be treated only as an obiter or a passing reference. At no point of time the State or Deputy Commissioner had recognized the Debutter Board as Head of the institution and in such a situation there was no need for even the private respondents to challenge the authority of the Debutter Board. The issue as to who could be voter for electing the Dolois and who could stand for that post had not arisen at that stage because election of the Dolois had not been ordered by any court till then.

26. It appears that at least for a brief period the District Judge, the District Administration as well as the High Court had acted under misconception and confusion to equate the limited supervisory role of the statutory Committee under Section 25A of the Act with the rights of the Bordeoris and their representative, the Dolois to manage the religious as well as secular activities of the Kamakhya Temple, a public religious institution.

27. The scope and amplitude of Section 25A was wrongly not touched upon by the learned Single Judge. The earlier Division Bench Judgment had merely affirmed the constitutionality of this provision at the instance of another religious institution but had no occasion to weigh the powers of the statutory Committee vis-à-vis the customary rights of Bordeori Samaj and its elected representatives, the Dolois. The Division Bench, therefore rightly examined the width and scope of powers of customary trustees – The Bordeories and their elected agent, the Dolois considering all the relevant materials and custom, it committed no error in upholding their right to take care of management of secular as well as religious affairs of the Kamakhya Temple.

28. The powers of the Bordeories and Dolois has not been taken away or adversely affected by the Act as it stood earlier or even after Section 25A was inserted. The reasons and objects of introducing the statutory Committee under Section 25A as noted by the Division Bench in paragraph 111 of the judgment under appeal and extracted earlier in this judgment categorically clarify that it was (i) “to have control over the annuity” and (ii) “to verify and audit the accounts to the satisfaction of the concerned authority.” The statutory Committee under Section 25A is therefore concerned only with

the annuity payable or paid under the Act to the Head of the Institution and not with its ownership or management. The words – “..... and verification of the proper maintenance of Institution.” in Section 25A have to be understood in the background of all other provisions of the Act including the objects and reasons for the Amending Act No. XIX of 1987. In that light, the power of the Committee is indeed quite limited to verification of the proper maintenance of accounts of the Institution concerned and that too relating only to utilization of the annuity and other government grants under the Act, if any. Favouring the statutory Committee with powers to manage or oversee even only the secular aspect of management of the Institution will not only run counter to the objects and reasons for the Amending Act of 1987, it shall create an undesirable diarchy when the Act does not divest the Bordeories and Dolois of their customary powers, roles and rights. Hence we have no difficulty in accepting the contention of most of the parties that Section 25A postulates a Committee with limited role - only to exercise control over annuity and other grants under the Act and its proper accounting, if and when utilized, through the power of verification of relevant accounts for proper maintenance of Institutions.

29. We hasten to make it clear that the above inference is in view of peculiar features of the Act dealing mainly with acquisition of lands of certain types of Institutions. There can be no doubt that within the constitutional scheme guaranteeing freedom of religion, the legislature has to exercise restraints in matters essentially religious but still it has ample powers to legislate for better management of any religious or charitable Institution of public nature. However, in the present case, there is no such legislation.

30. Submissions have been advanced on behalf of the appellants that Kamakhya Debutter Regulation is a perfect solution for all the ills allegedly affecting proper management of the Kamakhya Temple; its provisions do not interfere with the customary rights of the Dolois in the religious matters and in secular matters its provisions promote democracy to the satisfaction of large number of concerned persons including Deuris/priests looking after the other temples known as Nanan Devalayas. Hence, it is pleaded that no interference is required with the Kamakhya Debutter Regulation. From the discussions made earlier, we find that there has been no interruption in the essential custom whereunder the Bordeori Samaj consisting of all adult males of Bordeori families enjoys exclusive monopoly over the power to elect Dolois. We also find no merit in the plea of appellants that if there was a custom in favour of Bordeori Samaj, it stood discontinued by agreement or by framing of some sort of Constitution in 1970 and/or 1973 such plea is vague and not backed by any acceptable evidence. So far Dolois have always been elected as per the old custom, by the Bordeori Samaj. The custom of electing the Dolois was no doubt attempted to be changed by a group of persons who claimed to have formulated and adopted the Kamakhya Debutter Regulation but such Regulation does not have acceptance of the Bordeori Samaj and the dispute on account of the Kamakhya Debutter Regulation is now before this court by way of the present proceedings.

31. For the reasons assigned by the Division Bench of the High Court, with which we are in agreement, it has to be held that Kamakhya Debutter Regulation, 1998 is not a valid instrument and has no sanction of law for depriving the customary rights of the Bordeori Samaj to elect the Dolois who have been customarily exercising the right to manage the religious as well as secular affairs of the Kamakhya Temple. Admittedly, the appellants have now taken recourse to provisions of Section

92 of the Code of Civil Procedure for seeking whatever relief they want against the Bordeori Samaj and the Dolois elected by the Bordeori Samaj. In view of their categorical submissions that this Court may not make any observation which might affect either of the parties in Section 92 CPC proceeding, we leave the matter at rest without commenting on the provisions of Kamakhya Debutter Regulations. However, in the light of discussions and findings made earlier, except to clarify, as pleaded on behalf of the appellants that Section 25A of the Act provides for a Committee having only a narrow and limited role, we find no merit in the Appeals and no scope to interfere with the impugned judgment of the Division Bench. The Appeals are therefore dismissed along with SLP... cc 8089-8091/2012. This order, however, shall not prejudice the case of the appellants and similarly placed persons in the proceeding under Section 92 of the CPC pending before the District Judge, Kamrup, Guwahati.

32. Having taken note of the background facts and expressed our views on merits of the Appeals, now we shall take note of some interim orders passed by this Court after the Division Bench judgment dated 25.10.2011 came under challenge through Special Leave Petitions filed in 2011 itself. This is necessary to understand the real controversy between the parties in the three writ petitions which have been preferred directly before this Court. In the SLP preferred by the appellants, an order was passed on 11.11.2011 to direct that the interim arrangement made by the High Court vide order dated 13.5.2002 shall remain operative. As a consequence the official respondents continued under an obligation not to use the main Bharal and the existing office of Kamakhya Debutter Board and not to interfere with the religious affairs of the temple. In view of twin directions by the Division Bench in the impugned order, to hold elections of Dolois as per custom and to hold elections for constituting the Committee under Section 25A of the Act, the State Authorities issued a notice for election of Doloies and that election was held on 16.11.2011. On 21.11.2011 further interim order was passed by this Court for framing of rules for election of members of Managing Committee as per Section 25A of the Act and also for holding of such elections. It was clarified that till the Managing Committee is constituted the administration of the temple will be as per order of the High Court dated 13.5.2002. No interference was made with the elections of Dolois held on 16.11.2011 and hence the elected Dolois were left with the power to carry out all religious functions of the temple. It was also observed that any challenge to the validity of the Rules for constitution of the Managing Committee under Section 25A could be raised before this Court. On 3rd February, 2012 this Court by another interim order directed Deputy Commissioner to take control of precious articles belonging to the deity and prepare an inventory. The Dolois were permitted to perform worship but the office complex was directed to be handed over to the Kamakhya Debutter Board and such arrangement was to remain operative until the constitution of Managing Committee under Section 25A. Admittedly, the said Committee has not been constituted as yet because the rules framed for the purpose and notified on 27.1.2012 have been challenged before this Court in Writ Petition No. 72 of 2012 as well as in Writ Petition No.91 of 2012. The other writ petition bearing No.140 of 2012 filed by Sailen Sharma, petitioner of Writ Petition No. 72 of 2012 seeks to challenge the election of Dolois as well as the legality of the electoral college prepared for that election, mainly on the ground that women Bordeories and other Deuris, both male and female, were wrongly excluded from the same. We shall first take up the challenge to the Rules framed under Section 25A of the Act, i.e. Writ Petition Nos. 72 and 91 of 2012.

33. The rules notified on 27.1.2012 are called The Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature (Election of managing committee of Sri Sri Maa Kamakhya Temple) Rules, 2012 (hereinafter referred to as 'The Rules of 2012'). The notification clearly mentions that the Rules are pursuant to order of this Court dated 21.11.2011 for carrying out the elections of ex-officio secretary and elected members of the managing committee as contemplated by Section 25A of the Act in respect of Sri Sri Maa Kamakhya Temple. Rule 2 defines various definitions such as Devotee, Temple and Bordeories. The term 'Devotee' is wide enough to include all worshippers, priests and shebaites or persons associated with the Maa Kamakhya Temple residing permanently in Revenue Village Kamakhya either directly or through ancestors since last 50 years or more. But Temple has been defined to mean only the Temple of Sri Sri Maa Kamkhya situated on the Nilachal Hill near the city of Guwahati. Bordeories mean the devotees constituting the traditional Bordeori Samaj of the temple. There are two electoral colleges under Rule 3, one for the election to the post of ex-officio secretary, restricted to the Bordeories of the temple and the other for the election of five members of the managing committee, consisting of the 'Devotees'.

34. Rule 6 requires the Deputy Commissioner to treat the list of electors already prepared by the Bordeories and published in connection with the election of Dolois as the electoral rolls for the election of ex-officio secretary. Claims and objections on the basis of such tentative electoral rolls are to be entertained from the Bordeories only. It is not in dispute that the traditional list of electors for election of Dolois includes only adult male Bordeories and hence women members of Bordeori families did not find place in the draft electoral rolls which were published under the Rules. It goes without saying that Deuries and priests of other Devalayas known as Nanam Devalayas are also not included in this electoral roll because for election to the post of ex-officio secretary only the Bordeories are qualified to be in the electoral college and be a candidate also. Hence a strong grievance has been raised by the Dolois of Nanam Devalayas, both male and female as well as female members of the Bordeori families that their exclusion by virtue of Rules notified by the State Government is unconstitutional being violative of Article 14 of the Constitution of India.

35. On behalf of State of Assam a categorical stand has been taken that the Rules do not debar the female members of the Bordeori families rather the nomination form in Schedule II of the Rules requires the candidate to declare that their names as well as that of their father/mother/husband has been correctly spelt out. Hence the State has no objection in allowing claims by female members of Bordeories family if they want their names to be included in the electoral rolls. However, on behalf of the State Mr. Jaideep Gupta learned senior counsel took a categorical stand that Deories cannot claim equality with Bordeories for the purpose of election of ex-officio secretary because, according to State, in the Temple of Sri Sri Maa Kamakhya, which does not include the Nanam Devalayas, the four Bordeori families occupy the status of trustees whose representatives are the Dolois elected for the purpose of looking after the secular as well as religious affairs of the temple. He submitted that the Deories are priests only in the Nanam Devalayas and for the main temple of Sri Sri Maa Kamakhya which alone is covered by the Rules of 2012, they can only be included in the definition of 'Devotees' and in that capacity they are entitled to be in the electoral college for the purpose of electing the other five members of the Managing Committee. Hence, according to him the State has not committed any discrimination or perpetrated any illegality in creating two electoral colleges, one for the single post of ex-officio secretary confined to the Bordeori families on account

of their de jure as well as de facto status since long and another electoral college for the five other members of the Managing Committee, consisting of the Devotees which shall include all other Dolois, Shebaites/Worshippers etc. He made it clear that for the purpose of statutory Managing Committee under Section 25A of the Act, the State shall not discriminate between the male and female members of the Bordeori families or the male and female Devotees, as the case may be.

36. In view of discussions made earlier it is evident that the Bordeori families enjoy a distinct status and monopoly in matters connected with the religious as well as secular management of the temple of Sri Sri Maa Kamakhya and hence the claim of equality on behalf of Deoris associated with the Nanan Devalayas or even with Maa Kamakhya Temple does not have any merit. In view of such clear and categorical legal distinction, the State cannot be blamed for creating two electoral colleges and confining election rolls for the post of ex-officio secretary only to the members of the Bordeori families including females. The alleged discrimination vis-à-vis Deoris has no foundation. Fair treatment to others interested in the temple is assured by permitting the 'Devotees' to elect as many as five members of the Managing Committee. Hence the challenge to the impugned provisions in the Rules on ground of Article 14 fails. The plea that Rules must cover not only the temple and endowment of Sri Sri Maa Kamakhya Devalaya but the entire complex including Nanan Devalayas has no support or basis in law. The Act permits the State to constitute a Managing Committee for each of the Institution covered by Section 25A of the Act. It has not been pleaded or proved that Sri Sri Maa Kamakhya temple and endowment is not so covered. In fact the lands acquired under the Act appear mainly of main temple of Sri Sri Maa Kamakhya. Submissions were advanced but no pleading or proof was placed before us to show that lands of Nanan Devalayas have also been acquired. Moreover, it is discretionary power under Section 25A under which the State may choose not to have any Managing Committee separately for the Nanan Devalayas.

37. On behalf of writ petitioners the same very impugned provisions of the Rules have been challenged also on the ground that they are contrary to the mandate of Section 25A of the Act which under Clause (b) requires that an ex-officio secretary be elected by the Deories/Bordeories. According to petitioners, the Kamakhya Temple Complex enjoys the services of Dolois as well as Bordeories hence the Act requires both the groups to be treated as equal and the Rules must be declared to be against the Act inasmuch as they run counter to the Act by giving recognition only to Bordeories at the cost of Deories.

38. To meet the aforesaid contention, Mr. Jaideep Gupta, ;earmed senior counsel referred to the various provisions of the Act to highlight that the scheme was to recognize the Head of the Institution in whom the control and management of the properties is vested under any enactment, grant or usages relating to the Institution or any scheme of management framed by a court under Section 92 of the CPC. Such a Head, upon notice has to deliver the possession of the acquired property and is entitled to receive compensation in the form of annuity. In this background he laid stress upon the fact that Section 25A was inserted not for constitution of a common Managing Committee for all the religious or charitable institutions in the State but for constitution of a Managing Committee for each of the religious or charitable institutions of public nature. In this context, considering that some of the religious institutions have only Deories whereas some like the Kamakhya Temple have their control vested totally in Bordeories, the legislature provided for

election of ex-officio secretary either by the Deories or by Bordeories as the case may be. According to him, the use of 'slash' (/) between the word Deories and the word Bordeories, in the background of scheme and provisions of the Act connotes the option to act as per factual situation obtaining in a particular institution. His further submission was to the effect that factually the claim of the petitioners that the temple of Shri Shri Maa Kamakhya requires daily worship/puja not only by the Bordeories but also by atleast two families of Deories, the Chandi Pathaks and the Supakars has been controverted by explaining that the daily worship/puja is under the management of Dolois who represent the Bordeories and it is only on some special occasions, once or twice in a year that the Chandi Pathaks and the Supakars participate as Shebaites. Thus, on facts it has been seriously contested that the temple of Sri Sri Maa Kamakhya requires services of Deories for daily worship/puja.

39. After considering the rival submissions and on going through the pleadings as well as provisions in the Act, we are in agreement that the submission advanced on behalf of the State of Assam that Clause (b) in Section 25A gives a choice or option for electing the ex-officio secretary either by the Deories or Bordeories depending upon the facts of a particular religious or charitable institution has merits and deserves to be accepted. It is not the case of petitioners that all the institutions in the State have both Deories and Bordeories. In that view of the matter it would be inevitable to get the ex-officio secretary elected either by the Deories or the Bordeories, whosoever may be managing the concerned institution.

40. It is important to notice that the terms 'Deories' and 'Bordeories' is not defined under the Act. Under Section 30 of the Act, the State Government has the power to make rules for carrying out the purposes of the Act. Such rules are required to be laid before the Assam Legislative Assembly as soon as possible after they are made, for not less than fourteen days and are subject to such modifications as the Legislative Assembly may make. Clearly the task of defining or explaining the terms 'Deories' or 'Bordeories' in the context of a particular institution has been left to be done by making of rules. The Rules of 2012 seek to provide for a Managing Committee in terms of Section 25A only for the temple of Sri Sri Maa Kamakhya. Under statutory powers, the State Government in the context of this particular institution has recognized only Bordeories by referring to the traditional Bordeori Samaj of the temple. The other Devotees, Shebaites and Deories, if any, have been included in the category of 'Devotee' with a right to participate in the election of other five members of the Managing Committee. The Rules of 2012 thus supplement the provisions of the Act and do not run counter to the intention of the legislature which has accepted the Rules of 2012 without exercising its power to make modifications. Such Rules must be treated as part of the Act and in absence of any conflict it has to be held that the Rules of 2012 only explain the real intention of the legislature in using the sign of slash (/) between the words Deories and the Bordeories in Clause (b) of the Section 25A. The second ground of assailing the rules, therefore, must also fail. Accordingly Writ Petition Nos. 72 and 91 of 2012 are dismissed for lack of any merits.

41. As already noticed earlier the third Writ Petition bearing No. 140 of 2012 has also been filed by the same person - Shailen Sharma who is the petitioner in Writ Petition No. 72 of 2010 - to challenge the election of Dolois held on 16.11.2011. The only ground urged on behalf of the petitioners is denial of equality or in other words, violation of Article 14 of Constitution of India.

According to petitioners even if the electoral college was required to be confined by tradition only to Bordeories Samaj, the custom of depriving women members of such families the right to vote and to stand as candidate for the post of Dolois is obnoxious, immoral, discriminatory and against Public policy. It is also the case of petitioners that another class of priests known as Dolois play equally important role as the Bordeories and hence the male and female members of Deories families have also been subjected to hostile discrimination by the customs that are archaic and must be struck down as law contrary to the fundamental right of equality guaranteed by the Article 14 of the Constitution of India.

42. It is not in dispute that the impugned custom is not in existence on account of any State action. The temple in question is admittedly an ancient religious institution of public nature. The temple of Sri Sri Maa Kamakhya occupies a place of pride among Hindu temples, especially as a Shakti Peeth. No doubt there are other smaller temples which have sprung up on or around the same hill of Neelachal near the town of Guwahati in Assam under the belief that there are secret Peethas which may be discovered/ found by the enlightened persons gradually in due course of time. From the judgments referred in earlier litigations of old times it is evident that the monopolistic control of Bordeories over the religious and secular spheres of the temple has been resented and challenged by the other priests including Deories of Nanan Devalayas but without success. It has already been noticed that the appellants before this Court have now taken resort to a proceeding under Section 92 of CPC which is pending before the District Judge, Kamrup, Guwahati. The appellants and the petitioners have evidently spared no efforts to break the power and control of the Bordeories and the Dolois but so far without success. The aforesaid facts have been noted in view of strong objection by Mr. Rajiv Dhawan, learned senior advocate for the respondents that the writ petitions including No. 140 of 2012 are not bonafide petitions because they have been filed only to support the case of the appellants and the Debutter Board of 1998.

43. On going through the pleadings in the said petition we find as a fact that writ petitioners have at places taken contradictory stand to challenge the custom granting rights to the Bordeories and Dolois and at places they have praised the Debutter Board which recognizes the supremacy of the Dolois atleast in matters relating to the religious practices in the temple. However, it would not be proper to decide the writ petition merely on such technical pleas when it has been heard at quite some length.

44. The plea of the petitioners is that no doubt fundamental rights under Articles 14 and 15 unlike rights such as against untouchability are guaranteed only against State action and not against private customs or practices but Judiciary is as much a part of State as the Executive and the Legislature and hence it cannot permit perpetuation of discrimination in violation of Article 14, particularly in view of Article 13(1) which mandates that all pre Constitution Laws in the territory of India to the extent they are inconsistent with the provisions of part III of Constitution shall, to the extent of such inconsistency, be void.

45. Part III of the Constitution contains fundamental rights and begins with Article 12 which defines 'the State' for the purposes of part III. For better appreciation of the issues involved, Articles 12 and 13 are extracted here in below:

“12. Definition - In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

13. Laws inconsistent with or in derogation of the fundamental rights (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void (3) In this article, unless the context otherwise requires,--

“law” includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law;

“laws in force” includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.”

46. Since the controversy at hand embraces Articles 25 and 26, these also, must be noted in extenso:

“25. Freedom of conscience and free profession, practice and propagation of religion (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

26. Freedom to manage religious affairs - 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.”

47. It is the case of the petitioners that the custom relating to election of the Dolois to the extent it violates Article 14, must be treated as void and this Court should grant relief to the women members of Bordeories families and also to the Deories by ordering for inclusion of their names in the electoral college.

48. On the other hand, the respondents have taken a firm stand that for the purpose of part III of the Constitution Article 12 defines the term “the State” to include the Government as well as Parliament of India as well as Government and legislature of the States but conspicuously it has left out the Judiciary and hence the Judiciary cannot be included and treated as ‘the State’ when it performs strictly judicial functions in contradistinction to administrative powers. It is also the stand of the respondents that personal laws and religious practices are not covered by the sweep of Article 13(1). Lastly it was submitted on behalf of the respondents that Articles 25 and 26 guarantee freedom to practice and propagate religion of choice as well as to establish and maintain institutions for religious and charitable purposes with further rights to manage its own affairs in matters of religion; to own and acquire all moveable and immoveable property and administer such property in accordance with law. Such rights being in part III of the Constitution itself, must be respected and read in harmony with each other and other provisions in Part III. With this stand the respondents have supported their plea that Article 13 will have no application in respect of personal laws based on Shastaras and Scriptures and also in respect of essential religious practices which are matters of faith based upon religious scriptures that are inviolable for the believers.

49. Before referring to the various judgments by Mr. Shanti Bhushan, learned senior counsel for the petitioners and the judgments relied upon by Mr. Rajiv Dhawan and Mr. Jaideep Gupta, senior advocates for the respondents, the basic facts pleaded by the parties may be noted with a view to find out whether the factual foundation has been laid down and established for claiming equality with Bordeories Samaj which elects the Dolois as per customs. In the pleadings, petitioners have highlighted that in the several kinds of pujas the women Bordeories take active part and hence are equally aware of all the rituals and have the necessary qualification to be treated as equal of men Bordeories for the purpose of electing the Dolois and also for being a candidate. The reply of the respondents in essence is a complete denial of aforesaid assertion with a counter plea that women participate only as worshippers and not as priests and they have no say in the matter of management of the temple so as to claim same knowledge and consequent equality with the male Bordeories. Such dispute of facts may be resolved only on basis of a detailed proper study of the customs and practices in the temple of Sri Sri Maa Kamakhya but there is no authoritative textual commentary or report which may help this Court in coming to a definite finding that women belonging to Bordeori families are equally adapt in religious or secular matters relating to that temple. The relevant scriptures have also not been disclosed to this Court which could have helped in ascertaining whether the basic religious tenets governing the Shakti Peethas in the Kamakhya Temple would not stand violated by permitting female Bordeories to elect or to get elected as Dolois. Hence on facts we are not in a position to come to a definite finding on the issue of equality for the

purpose at hand as claimed by the petitioners. The same logic is equally, if not more forcefully, applicable in the case of claim of the Deories that they are equally situated as the Bordeories Samaj in the matter of election of Dolois. The petitioners have also not explained at all as to why equality be extended only to female Bordeories and Deories and not to all and sundry.

50. In the aforesaid situation it is always with a heavy heart that a Writ Court has to deny relief. It may not always be safe for a Writ Court to decide issues and facts having great impact on the general public or a large part of it only on the basis of oath against oath. Where the right is admitted and well established, the Writ Court will not hesitate in implementing such a right especially a fundamental right. But enforcement of established rights is a different matter than the establishment of the right itself. When there is a serious dispute between two private parties as to the expertise, experience and qualification for a particular job, the prime task before the Court is first to analyse the facts for coming to a definite conclusion whether the right stands established and only when the answer is in affirmative, the Court may have no difficulty in enforcing such an established right, whether statutory, fundamental or constitutional. In the present case, as indicated above, it is indeed difficult for this Court to come to a definite conclusion that the petitioners claim to equality for the purpose at hand is well established. Hence we have no option but to deny relief to the petitioners.

51. Coming to the issues of law, on behalf of the petitioners Mr. Shanti Bhushan placed reliance upon judgment in case of Sant Ram versus Labh Singh, 1964 (7) SCR 756 in support of his submission that any law which includes customs, as per Article 13 must be declared void to the extent it is inconsistent with fundamental rights in part III of the Constitution. For the same purpose he also placed reliance upon the case of Bhau Ram vs. B. Baijnath Singh, 1962 (Suppl.) 3 SCR 724 and Atam Prakash vs. State of Haryana & Ors., (1986) 2 SCC 249.

52. On the aforesaid issue Mr. Rajiv Dhavan has pointed out a categorical distinction that in all those three cases the concerned right was a right of pre-emption claimed by a land holder on account of vicinage and not any personal or religious right flowing out of religious scriptures and believes. In Bhau Ram the pre-emption right arose out of a statute and it was found to be against Article 19(1)(f). Only a reference was also made to Article 15. In the case of Atam Prakash also the right was based upon Punjab Pre-emption Act, 1913. In the case of Sant Ram on which strong reliance has been placed, the custom based right of pre-emption was found invalid on the ground of infringing Article 19(1)(f).

53. Mr. Dhavan has referred to as many as 13 cases as per list given below:

Shirur Math (The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.), 1954 SCR 1005 Tilkayat (Tilkayat Shri Govindlalji Maharaj vs. The State of Rajasthan & Ors.), 1964 1 SCR 561 Raj Bira Kishore Deb vs. State of Orissa, 1964 7 SCR 32 Seshammal and Others etc. etc. vs. State of Tamil Nadu; 1972, 2 SCC 11 State of Rajasthan vs. Sajjanlal Panjawat, 1974 (1) SCC 500 Pannalal Bansilal Pitti and Ors. vs. State of Andhra Pradesh & Anr., 1996 (2) SCC 498 A.S. Narayana Deekshitulu vs. State of A.P. and Ors.; 1996 9 SCC 548 Sri

Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors. vs. State of U.P. & Ors. 1997 (4) SCC 606.

Bhuri Nath Vs. State of J & K, 1997 (2) SCC 745.

Sri Kanyaka Parameswari Anna Satram Committee and Ors. vs. Commissioner, Hindu Religious & Charitable Endowments Deptt. and Ors; 1999 7 SCC 666 N. Adityam v. Travancore Devaswrom Board (2002) 8 SCC 106 M.P. Gopalkrishnan Nair v. State of Kerala, 2005 (11) SCC 45 Durgah Committee v. Syed Hussain Ali, 1962 (1) SCR 383

54. It is highlighted that in all these cases relating to religious endowment and institution, under challenge were changes in customs that had been brought about by Statutes enacted by the legislature. According to the respondents while granting right to profess, practice and propagate religion under Article 25(1), by sub-clause (ii) of the same Article the Constitution has saved the operation of any existing law and also vested power in the State to make laws for “(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.” In contrast Article 26 does not envisage any restriction through a statute made by the State so far as freedom to manage religious affairs is concerned. But the right under Article 26 has also been made subservient to public order, morality and health, the same three factors that also control the right under Article 25(1) which has been made subject to the other provisions of Part III also.

55. There is no need to go into all the case laws in respect of Articles 25 and 26 because by now it is well settled that Article 25(2)(a) and Article 26(b) guaranteeing the right to every religious denomination to manage its own affairs in matters of religion are subject to and can be controlled by a law contemplated under Article 25(2)(b) as both the articles are required to be read harmoniously. It is also well established that social reforms or the need for regulations contemplated by Article 25(2) cannot obliterate essential religious practices or their performances and what would constitute the essential part of a religion can be ascertained with reference to the doctrine of that religion itself. In support of the aforesaid established propositions, respondents have referred to and relied upon the judgment in the case of Shirur Math (The Commissioner Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005 and also upon Shri Venkataramana Devaru and Ors. Vs. State of Mysore and Ors. 1958 (SCR) 895.

56. An interesting situation arose in the case of Bijoe Emmanuel & Ors. v. State of Kerala & Ors., (1986) 3 SCC 615. School children having faith in Jehovah’s Witnesses Sect refused to sing national anthem in their school for which they were expelled on the basis of executive instructions contained in circulars which obliged singing of national anthem in schools. Such action against the children was challenged with the help of defence based upon Articles 25(1) and 19(1)(a). In the aforesaid judgment, this court upheld the defence of the children on both counts. In Paragraphs 19 and 20, Article 25 was considered with a view to find out the duty and function of the Court whenever the fundamental right to freedom of conscience and to profess, practice and propagate religion is invoked. The answer given in the judgment in a concise and succinct manner is as follows:

“....Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practise or to provide for social welfare and reform. It is the duty and function of the court so to do. Here again as mentioned in connection with Article 19(2) to (6), it must be a law having the force of a statute and not a mere executive or a departmental instruction.”

57. Respondents have also relied upon judgment of this Court in the case of Pannalal Bansilal Pitti & Ors. v. State of Andhra Pradesh & Anr., 1996 (2) SCC 498. The challenge in this case was to the constitutionality of certain provisions of an Andhra Pradesh Act bringing certain reforms in respect of Hindu Religious Institutions. At the behest of adversely affected hereditary trustees of Hindu Religious and Charitable Institutions, this Court considered the argument that by confining the reforms only to Institutions maintained by Hindus, the provisions of the Act had violated Article 14. Paragraph 12, made it clear that though an uniform law may be highly desirable, in a democracy the legislature should have the freedom to bring about gradual progressive changes and the process may start where the need is most acute. This Court further held that it would be inexpedient and incorrect to think that all laws must be made uniformly applicable to all people in one go. In other words the legislature has to be trusted for bringing about necessary changes by way of reforms in matters relating to faith and religion which at times may include personal laws flowing from religious scriptures. In the case of Seshammal & Ors. etc. etc. vs. State of Tamil Nadu, 1972 (2) SCC 11, paragraphs 11 and 12 exhibit a detailed discussion relating to the Agamas which contain elaborate rules relating to construction of temple as well as consecration of the idol. It is the religious belief of Hindu worshippers that once the image of the deity is consecrated, it is fit to be worshipped in accordance with the detailed rituals only by a competent and trained priest. The religious belief extends to protecting any defilement of the idol and if the image of the deity is defiled on account of violation of any of the rules relating to worship, purificatory ceremonies must be performed for restoring the sanctity of the shrine. The worshipers value the rituals and ceremonies as a part of Hindu religious faith. In paragraph 12, the Court concluded that “any State action which permits the defilement or pollution of the image by the touch of an Archaka not authorised by the Agamas would violently interfere with the religious faith and practices of the Hindu worshipper in a vital respect, and would, therefore, be prima facie invalid under Article 25(1) of the Constitution”.

58. In the aforesaid judgment it was also held that the matter of appointment of a competent Archaka i.e. the priest is a secular matter and therefore can be regulated by a State action. However, the situation may be different and more complicated if, like in the present case, the Bordouries are the trustees as well as the priest and the management of religious and secular activities have been entrusted by the Bordouries themselves to their elected representatives, the Dolois. The element of appointment stands substituted by the action of the trustees themselves performing the necessary rituals. This aspect need not be pursued any further because there is no statute framed by the State

so far to regulate even the secular affairs of the temple. Only when such State action takes place, there may arise an occasion to examine the related issues as to whether interference with the custom governing appointment of Dolois would amount to regulating only the secular affairs of the temple or it shall obliterate the essential religious practices of the institution.

59. On considering the rival submissions and the relevant case laws, we are inclined to agree with the submissions on behalf of the respondents that Article 13(1) applies only to such pre-constitution laws including customs which are inconsistent with the provisions of Part III of the Constitution and not to such religious customs and personal laws which are protected by the fundamental rights such as Articles 25 and 26. In other words, religious believes, customs and practices based upon religious faith and scriptures cannot be treated to be void. Religious freedoms protected by Articles 25 and 26 can be curtailed only by law, made by a competent legislature to the permissible extent. The Court can surely examine and strike down a State action or law on the grounds of Articles 14 and 15. But in a pluralist society as existing in India, the task of carrying out reforms affecting religious believes has to be left in the hands of the State. This line of thinking is supported by Article 25(2) which is clearly reformist in nature. It also provides scope for the State to study and understand all the relevant issues before undertaking the required changes and reforms in an area relating to religion which shall always be sensitive. While performing judicial functions *stricto-sensu*, the Judiciary cannot and should not be equated with other organs of state – the executive and the legislature. This also fits in harmony with the concept of separation of powers and spares the judiciary or the courts to dispassionately examine the constitutionality of State action allegedly curbing or curtailing the fundamental rights including those under Articles 25 and 26.

60. On the related issue of the scope of Article 12 and whether for the purposes of issuance of writ, judicial decisions by the judiciary can be included in State action, we are in agreement with the submissions advanced by Mr. Rajiv Dhavan that definition of ‘the State’ under Article 12 is contextual depending upon all relevant facts including the concerned provisions in Part III of the Constitution. The definition is clearly inclusive and not exhaustive. Hence omission of judiciary when the government and Parliament of India as well as government and legislature of each of the State has been included is conspicuous but not conclusive that judiciary must be excluded. Relevant case laws cited by Mr. Dhavan are:-

(i) Pradeep Kr. Biswas vs. Indian Institute of Chemical Biology & Ors., (2002) 5 SCC 111

(ii) Naresh Shridhar Mirajkar And Ors vs. State of Maharashtra And Anr, (1966) 3 SCR 744

(iii) Triveniben vs. State of Gujarat, (1989) 1 SCC 678

(iv) Poonam vs. Sumit Tanwar, (2010) 4 SCC 460

61. Hence, in accordance with such judgments holding that judgments of High Court and Supreme Court cannot be subjected to writ jurisdiction and for want of requisite governmental control,

Judiciary cannot be a State under Article 12, we also hold that while acting on the judicial side the courts are not included in the definition of the State. Only when they deal with their employees or act in other matters purely in administrative capacity, the courts may fall within the definition of the State for attracting writ jurisdiction against their administrative actions only. In our view, such a contextual interpretation must be preferred because it shall promote justice, especially through impartial adjudication in matters of protection of fundamental rights governed by Part III of the Constitution.

62. On the aforesaid issue Mr. Shanti Bhushan has placed reliance upon the judgment of this Court in *Harjinder Singh vs. Punjab State Warehousing Corporation*, 2010 (3) SCC 192 and *Indira Nehru Gandhi vs. Raj Narain* 1975 (Suppl.) SCC 1, The aforesaid judgments do not require us to change our view because the issues in both the cases were quite different. In the case of *Harjinder Singh* this Court while considering the proper parameters for the exercise of writ jurisdiction, held that there was no justification in entertaining a new plea raised by the employer for the first time before the High Court. The context in which some minority views that the judiciary is a State within the meaning of Article 12 of the Constitution were noted in Paragraphs 40 and 41 of the judgment was quite different and such exercise was undertaken only to highlight that judiciary is essentially one of the three arms of the State and as such it must also be aware of its responsibilities flowing from the Preamble and Article 38 of the Constitution. At best, those observations are clearly an obiter.

63. In order to fully appreciate the implication of including judiciary within 'the State' as defined under Article 12 it may be recapitulated that in catena of judgments it has been held that writ petitions will not be entertained against purely private parties. Further, elaborate tests have been laid down for finding out when an authority can be treated to be the State for the purposes of Part III of the Constitution.

64. If the submission of Mr. Shanti Bhushan is accepted that by simply hearing a writ petition the Court becomes a party with same duties and responsibilities as the State, then the rights which can be claimed only against the State can also be claimed against all private parties because judiciary has to hear and decide almost all cases. Such plea is required to be noticed only for rejection otherwise all disputes against private persons will have to be treated as a dispute against the State also, because it is primary responsibility of the judiciary to hear and adjudicate all disputes. The judicial forum will then lose its impartiality because petitioners, like in the present case, will make a demand that court itself should act as the State and deliver all reliefs in a dispute where the executive or the legislature is not at all involved as a party. For the aforesaid reasons we find no merit in the contention that while acting in judicial capacity the judiciary acts as the State and hence it must, as a corollary, entertain a writ petition against purely private parties only because the matter has been brought before the court.

65. The writ petitions are, therefore, liable to be dismissed for want of merits. In some of the Writ Petitions, there is a prayer to accord a narrow scope to Section 25A of the Act and powers of the Managing Committee contemplated thereunder. Since that relief has already been granted in the Appeals, the same does not require fresh consideration. With this clarification the writ petitions are dismissed.

66. Since the Debutter Board is occupying some part of the premises in the temple of Sri Sri Maa Kamakhya temple on account of interim orders of this court, all those interim orders are now vacated. The District administration is directed to ensure that those premises are vacated by the members or representatives of the Debutter Board at the earliest and in any case within four weeks. The premises and other properties of Sri Sri Maa Kamakhya Temple shall, if required, be placed back within the same time in possession of the Bordeories Samaj through the last elected Dolois against receipts which shall be retained in the office of Deputy Commissioner, Guwahati. The parties representing the Debutter board are also directed to hand over the vacant and peaceful possession of the concerned premises and other properties of the temple, if any, within four weeks. There shall be no order as to costs.

67. Before parting with the order we would like to direct in the larger interest of Justice, that like in the past if there is any need of mediation or intervention of an authority for election of Dolois at five years interval etc. or for smooth functioning of affairs of the Sri Sri Maa Kamakhya Devalaya, the concerned affected parties can approach the District Judge, Kamrup, Guwahati who shall try and settle such disputes as in the past, till a specific law is enacted for this purpose. In such matters the decisions of the District Judge shall be of course subject to supervisory writ jurisdiction of the High Court.

.....J. [FAKKIR MOHAMED IBRAHIM KALIFULLA]
.....J. [SHIVA KIRTI SINGH] New Delhi.

July 07, 2015.

ITEM NO.1A
(For Judgment)

COURT NO.11

SECTION XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal Nos. 3276-3278/2013

RIJU PRASAD SARMA ETC.ETC.

Appellant(s)

VERSUS

STATE OF ASSAM & ORS.
WITH

Respondent(s)

S.L.P. (C) Nos. 18070-18072 @ CC No. 8089-8091/2012

Date : 07/07/2015 These appeals/Petitions were called on for Judgment today.

For the parties: Mr. Arunabh Chowdhury, Adv.

Mr. Parthiv Goswami, Adv.

Mr. Vaibhav Tomar, Adv.

Mr. Karma Dorjee, Adv.

Mr. Anupam Lal Das, Adv.

Mr. Vikash Singh, Adv.

Mr. Hrishikesh Baruah, Adv.

Mr. Rameshwar Prasad Goyal, Adv.

M/s Corporate Law Group, Adv.

Mr. Ajay Bansal, Adv.

Mr. Gaurav Yadava, Adv.

Mr. Ansar Ahmad Chaudhary, Adv.

Mr. Puneet Taneja, Adv.

Hon'ble Mr. Justice Shiva Kirti Singh pronounced the Judgment of the Bench comprising Hon'ble Mr. Justice Fakkir Mohamed Ibrahim Kalifulla and His Lordship.

Delay condoned.

The Civil Appeals, Writ Petitions and the Special Leave Petitions are dismissed.

| (USHA BHARDWAJ)
| AR- cum- PS

| (SAROJ SAINI)
| COURT MASTER

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(Signed Reportable Judgment is placed on the file)