

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

W.P. (C) NO. 472 OF 2019

(PIL)

IN THE MATTER OF :

YASMEEN ZUBER AHMAD PEERZADE & ANR. ... PETITIONER

VERSUS

UNION OF INDIA & ORS. ... RESPONDENTS

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[PAPER BOOK]

ADVOCATE FOR THE RESPONDENT NO.7 M. R. SHAMSHAD

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INDIA MUSLIM PERSONAL LAW BOARD

I, Mohammed Fazlurrahim,

as under:-

1. That I am one of the Secretaries of the answering Respondent (Respondent No. 7) in the above referred petition and I am duly authorised to swear the present counter affidavit on behalf of Respondent No. 7. Accordingly I am competent to sign this affidavit.
2. That the present Writ Petition has been filed by the Petitioners claiming to be in public interest. The Petitioners have invoked Articles 14, 15, 21, 25 and 29 of Constitution of India to assert the rights of Muslim women to enter into Mosque/Masjid (for Namaz inside the Mosque). At the same time, the Petitioners have also relied upon Islamic principles / provisions to claim the reliefs as prayed in the petition.
3. It is submitted that, essentially the questions as raised in the petition are relating to the doctrine of Islamic religious principles. The questions are directly in relation to tenets of Islam as professed and practiced by followers of Islam in different Islamic religious denominations in India. The questions in the present petition are in relation to purely religious principles/ beliefs

and it shall not be appropriate for this Hon'ble Court to enter into the religious practices based upon beliefs of the religion by invoking Articles 14, 15, 21, 25 and 29 of Constitution of India. It is further clarified that the issues raised in this petition are not the issues pertaining to statute(s). To put it differently, the rights claimed herein do not merely concern the management of a religious place neither do they only concern regulating the activities connected with religious practice. In essence, this Hon'ble Court has been invited to interpret the religious beliefs and religious practices. It is not appropriate for this Hon'ble Court to enter into that area. Hence, the Respondent is of its firm view that the averments/ pleadings in relation to Articles 14, 15, 21, 25 and 29 of the Constitution of India cannot be considered and looked into for the prayers as claimed in the present petition.

4. That during the pendency of the present petition, a five Judge Bench judgment dated 14.11.2019 has been passed in Review Petition (C) No. 3358 of 2018 (*Kantaru Rajeevaru Vs. Indian Young Lawyers Association*) and other connected petitions wherein by majority judgment, this Hon'ble Court has recorded inter-alia as under:

"5. It is our considered view that the issues arising in the pending cases regarding entry of Muslim Women in Durgah/Mosque (being Writ Petition (Civil) No. 472 of 2019); of Parsi Women married to a non-Parsi in the Agyari (being Special Leave Petition (Civil) No. 18889/2012); and including the practice of female genital mutilation in Dawoodi Bohra community (being Writ Petition (Civil) No. 286 of 2017) may be overlapping and covered by the judgment under review. The prospect of the issues arising in those cases being referred to larger bench cannot be ruled out. The said issues could be:

- (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.*
- (ii) What is the sweep of expression 'public order, morality and health' occurring in Article 25(1) of the Constitution.*
- (iii) The expression 'morality' or 'constitutional morality' has not been defined in the Constitution. Is it over arching 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.

(iv) The extent to which the court can enquire into the issue of a particular practice is an integral part of the religion or religious practice of a particular religious denomination or should that be left exclusively to be determined by the head of the section of the religious group.

(v) What is the meaning of the expression 'sections of Hindus' appearing in Article 25(2)(b) of the Constitution.

(vi) Whether the "essential religious practices" of a religious denomination or even a section thereof are afforded constitutional protection under Article 26.

(vii) What would be the permissible extent of judicial recognition to PILs in matters calling into question religious practices of a denomination or a section thereof at the instance of persons who do not belong to such religious denomination?"

5. That in light of the above, and this Hon'ble Court being a Constitutional Court, it may be more appropriate to decide the following issues:-

- i. Should the court judicially determine the meaning of faiths and the extent of constitutional protection from interference in their practices considering the diversity of both faiths and religious denominations practicing particular faiths?*
- ii. Should not a religious denomination be the sole authority to determine its essential religious practices and should the court exercise jurisdiction in question the essential features of such practices?*
- iii. Except in the context of threat to life and liberty, should the court even attempt to answer issues that are matters of faith alone?*
- iv. Should not a constitutional court only take up such matters for judicial determination which are brought before it in respect of State action, which seeks to interfere in religious beliefs and the practice of the essential features of any religion?*
- v. In the absence of any such state action, should issues of faith not be left to be resolved through the processes of social transformation within the religious faith itself instead of the court seeking resolution through judicial process?*

- vi. *Are interfaith conflicts not best resolved through the religious denomination itself rather than be subject matter of judicial determination?*
 - vii. *Should any person other than a member of a religious denomination be allowed to question the faith of another religious denomination? Should member of a religious denomination belonging to that faith, in the event of any violation of their fundamental rights, only to the extent of a threat to life and liberty, have the locus to seek the protection of the court and determine the issues of faith arising therefrom?*
6. It is submitted that the questions raised in the present petition are not in the background of state action. The practices of religion on the places of worship (which in the present matter are Masjids) are purely private bodies regulated by Muttawalis of the Mosques. We being body of experts, without any State powers, can only issue advisory opinion, based on Islam. The answering Respondent, and this Hon'ble Court for that matter, cannot enter into the arena of detailed arrangements of a religious place, which is completely privately managed entity for religious practices of believers in particular religion.
 7. That, apart from the above, the *core issue of the Petitioner in the present petition is entry of Muslim Women in the Mosque for offering Namaz. The same is reflected from pages 48-49 & 55 of the petition.* The answering Respondent submits its reply purely in the light of religious doctrine/tenets/belief in Islam. Considering the said religious texts, doctrine and religious belief of the followers of Islam, it is submitted that entry of women in the Mosque for offering prayer/Namaz, inside the Mosque, is permitted. Thus, a Muslim woman is free to enter Masjid for prayers. It is her option to exercise her right to avail such facilities as available for prayers in Masjid. The All India Muslim Personal Law Board does want to comment on any contrary religious opinion to this effect. Islam has not made it obligatory on Muslim women to join congregational prayer nor is it obligatory for woman to offer Friday Namaz in congregation though it is so on Muslim men. The Muslim woman is differently placed because as per doctrines of Islam she is entitled to the same religious reward (*Sawab*) for praying as per her option either in Masjid or at home.

In support of above two issues, the Answering Respondent seeks liberty to rely upon the following Hadiths:-

(i) Namaz in congregation is not obligatory for women:

- (a). It was learned that though the permission was given to women to pray in the mosque; but the congregation is not obligatory for them like men; that's why women didn't attend the congregation of mosque generally in the time of the Prophet peace be upon him, Alauddin Kasani Hanafi says: sane, mature(major), independent, able to go the mosque, non-disabled, on men, the prayer with congregation is obligatory, the congregation is not obligatory on women.(Badaie as Sanae:1/84-385)
- (b). The jurists of Shafi'i school of thought also defined that participation of women in congregation is not mandatory. (Al jamu commentary of Almuhaqqab:4/188, Bab salatujuma)
- (c). The jurists of Ahnaf school of thought say that prayer with congregation for women is not Farzain not Farzkifaya.

(ii) Friday prayer is not obligatory for women, in this regard different Prophet's sayings and traditions are narrated:

- (a). Tariq bin Shahab narrated by the Prophet peace be upon him: He said that the performing Friday prayer with congregation on Friday is obligatory for all Muslims except four persons and they are: slave, child, woman and patient. (Sunan Abudaud:1067)
- (b). Narrated by Mohammad bin Kaab bin al -Qarzi: he said that the Messenger of Allah peace be upon Him said: whoever believe in Allah and the Last Day, must perform the Friday prayer on Friday except woman, child, slave, or patient.(MusannafibnAbiShaiba, Hadith number: 5149)
- (c). Narrated by Jabir that the Messenger of Allah peace be upon Him said: whoever believe in Allah and the Last Day, must perform the Friday prayer on Friday except patient, traveler, woman, child, or slave. (Sunan al - Daar qutni:1579).

- (d). Narrated by Abi Hazim master of Al-Zubbair: he said that the Messenger of Allah peace be upon Him said: the Friday prayer is obligatory for every adult except four: child, slave, woman, and patient. (Mosannafibn AbiShaiba, Hadith number: 5148, Al- Sunan Al- Kubra lilBaihaqi, Hadith number:5635)
- (e). Narrated by Abu Huraira that the Messenger of Allah peace be upon Him said: do not forbid the female slaves of Allah to go to the mosques of Allah, however, they must go in simple dresses. (SunanAbudaud: 565, SahihIbnKhozaima: 1679)
- (f). Narrated by Abdullah bin Umarthat the Messenger of Allah peace be upon Him said: do not forbid the female slaves of Allah to go to the mosques of Allah.(Moatta Malik:674, Musnad Ahmad :4655)
- (g). As far as Islamic jurists' opinion in this regard is concerned they all them are unanimous that the Friday prayer is not obligatory for women, it is the reason for what a great Islamic jurist Allama Khitabi said:

Islamic jurists are unanimous that the Friday prayer is not obligatory for women. (Ma'alimussonan:1/243)

8. That prayer relating to appropriate writ of certiorari seeking quashing of Fatwa restraining the Muslim women to enter into Mosque is an issue on which the answering Respondent submits that the said relief becomes irrelevant in view of what has been stated above in relation to entry of women into Mosque for offering Namaz. The present respondent has taken stand, as per Islamic texts, that entry of woman into Mosque for Namaz is permitted. Any other fatwa to this effect may be ignored.

However, on the sanctity of *Fatwa*, it is submitted that it is an opinion based upon religious texts, doctrine and their interpretation and has no statutory force. In case, if some believer of Islam is of the opinion that he/she needs religious opinion/fatwa, based upon interpretations of religious texts, then delivering of Fatwa on that issue cannot be restrained by judicial order of this Hon'ble Court as the same shall directly hit the right and freedom of religious belief of an individual. Upon having received the opinion, it is for the follower of Islam, who seeks Fatwa, either to accept the same or not.

9. The other reliefs as prayed in prayer (c), (d), (f) does not deserve to be considered by this Hon'ble Court for the same reasons as stated above. The Answering Respondent seeks liberty to file detailed affidavit, in case circumstances so require.

DEPONENT

VERIFICATION

Verified at New Delhi on this 28th day of January 2020 that the contents of the above affidavit in above paras are true and correct to the best of my knowledge as per religious texts, knowledge as per records and belief and nothing material have been concealed therefrom.

DEPONENT

DRAWN & FILED By

Filed on:29.01.2020

*[M.R.SHAMSHAD]
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