IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. 5236 OF 2022

IN THE MATTER OF:-

AISHAT SHIFA … PETITIONER

-VERSUS-

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

AND

SPECIAL LEAVE PETITION (CIVIL) NO. 15416 OF 2022

IN THE MATTER OF:-

SHARIA COMMITTEE FOR WOMEN & ANR. … PETITIONERS

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Introduction

1. The Petitioner No.1 society is engaged in furthering the cause of women's rights, safety, education, empowerment and social justice issues relating to women across India. One of the objects *inter alia* is to encourage girls and women to seek higher education and achieve economic empowerment. The president of Petitioner No. 1 Society, Dr. Asma Zehra Tayiba has also been involved in the consultation on Muslims in India on an initiative

conducted by the PM's High - Level Committee at New Delhi on 10th April 2016. The Applicant / Petitioner No.1 is filing this SLP in relation to the rights of Muslim girl students to wear *Hijab* / headscarf along with the school uniform which has been denied by passing of the Impugned Judgment and Final Order dated 15th March 2022 passed by the Hon'ble High Court of Karnataka in Writ Petition No. 2347 of 2022 and other Writ Petitions along with it **("the Impugned Judgment")**. The Impugned Judgment not only affects Muslim girl students in Karnataka but also across India as the ramifications of the Impugned Judgment is a denial of the right to education of Muslim girls across India. The ramifications could be equally profound for Muslim Women employed or seeking employment opportunities in job market, as they stand the chance of being denied the same on the ground that they are wearing *Hijab* / headscarf.

2. The Applicant / Petitioner No.1 Society and its members are therefore, directly aggrieved by the Impugned Judgment.

3. The Petitioners before the Hon'ble High Court of Karnataka are adherents of Islam and are also following the religious practice of wearing *Hijab* / headscarf. The Petitioners had been wearing *Hijab* / headscarf since their admissions into their respective colleges. It is specifically averred in para R, at page 142 of the SLP that *"In the instant case, the Muslim girl students in particular were wearing their Hijab for the past 2 years and since*

the time of their admission into the College in as much the same manner as did their seniors and alumni from previous years in the history of the college”. These facts are uncontroverted by the Respondents in the present SLP. However, to their shock and surprise, when they attended the college on 3rd February 2022 wearing the *Hijab* / headscarf as per the normal practice, they were stopped at the entry gate of the college by the principal and other staff of the college. They were asked to remove their *Hijab* / headscarf and were insulted and humiliated; subsequently being denied entry into the college premises by the Principal (Respondent No.5), who closed the entry gate of the college. The State Government (Respondent No.1) issued Government Order dated 5th February 2022 (**“the Impugned G.O.”**) directing the College Development Committee to proscribe wearing of *Hijab* / headscarf. Further, in the synopsis of the SLP, particular instances giving the list of dates it is mentioned that since December 2021, Six Muslim girl students were denied permission to enter classrooms at the Pre-University College (P.U College) for Girls, Udupi as they were wearing Hijab. Then in January 2022, A state-run college in Balagadi village in Karnataka’s Chikkamagaluru district banned the practice of hijabs, despite the fact that the same was being observed by Muslim girl students since inception as it was essential and integral to the faith of these girls. (see page J of the Synopsis). Further, specific instances of the objection to *Hijab* / headscarf which occurred in February 2022, prior to the issuance

of the Impugned G.O., are also stated. All these specific averments contained in the Synopsis at pages J, K, L, M and N are not controverted by the Respondents. The Petitioners being aggrieved by the Impugned G.O. challenged the same in the various Writ Petitions.

4. It is pertinent that during the course of arguments before the Hon'ble Karnataka High Court, no questions were framed by the Hon'ble High Court of Karnataka. After the conclusion of all the arguments and in the course of writing the judgements, the Hon'ble High Court of Karnataka framed four questions, which are at page 39 of the judgment; placing wrong focus on the controversy involved in the matter. The main thrust of the Petitioners' argument before the Hon'ble High Court of Karnataka was to assert their right of education by attending education institution wearing the prescribed uniform, with *Hijab* / headscarf in addition to the prescribed uniform. It is submitted that the Petitioners before the High Court of Karnataka asserted their right to education by attending educational institutions wearing uniform but with addition of *Hijab* / headscarf. It is contended that the Petitioners before the Hon'ble High Court of Karnataka wearing of *Hijab* / headscarf is included in freedom of speech and expression and it does not in any way threaten public order, decency or morality or incitement to an offence. The Petitioners before the Hon'ble High Court of Karnataka also claimed the right

under Article 21 of the Constitution of India, 1950 (**“the Constitution”**) which includes right to education, therefore, Q. Nos. 1 and 2 were wrongly framed which completely side - tracked, the real questions involved in the controversy. The Petitioners before the Hon’ble High Court of Karnataka further claimed the right of privacy as well as freedom of conscience.

5. The second question framed by the Hon’ble High Court of Karnataka is also erroneous. The Petitioners before the Hon’ble High Court of Karnataka never objected to wearing the prescribed uniform but merely insisted on wearing *Hijab* / headscarf. The Petitioners always abided by the prescribed uniform, but asserted that opposition to wearing *Hijab* / headscarf is unreasonable, irrational and interferes with the Petitioners’ fundamental rights under Articles 19(1)(a), 25(1), 29 and 21 as guaranteed by the Constitution. The Petitioner before the Hon’ble High Court of Karnataka also contended that wearing of *Hijab* / headscarf is also the part of the Freedom of Conscience, thus the Petitioners before the Hon’ble High Court of Karnataka placed emphasis on the right of expression under Article 19(1)(a) and Article 25(1). It was also submitted before the Hon’ble High Court that when the Petitioners based their claim on freedom of expression and freedom of conscience the issue whether the wearing of *Hijab* / headscarf is part of Essential Religious Practice (“ERP”) becomes irrelevant and the whole matter ought to have been decided without going

into the question whether wearing of *Hijab* / headscarf was ERP. However, some of the Petitioners did argue that if it is necessary to go into the question of ERP, then it is also established with reference to the religious belief and practices of Muslims that it is an integral part of the religion / ERP for Muslims.

6. It is submitted that the only question that arises in the present matter is - ***Whether the concerned authorities are justified in preventing a student from accessing educational institutions and exercising their Right to Education on the ground of wearing Hijab / headscarf?***

PRELIMINARY OBJECTIONS:

It is submitted that in the present proceedings, several substantial questions of interpretation of constitution are involved. The Ld. Sr. Counsel Mr. Devadatt Kamat, has submitted the list of those questions which need authoritative pronouncement by the larger Constitution bench.

The Petitioners in the present Special Leave Petition submit the following further questions which need authoritative pronouncement by the larger Constitution bench. The same are stated below:

(a) Whether the right to freedom of conscience and the right to practice religion are mutually exclusive, or they complement each other?

(b) When the claim is made by an atheist or agnostic or on the basis of one's belief in universality of all religions, does the doctrine of essential religious practice apply?

(c) Does the doctrine of essential religious practice apply to the claim made under Article 25(1) of the Constitution?

(d) Are fundamental rights of freedom of expression under Art. 19(1)(a) and fundamental rights of privacy under Article 21 mutually exclusive or are they complementary to each other?

(e) Whether scope of fundamental right of freedom of expression under Article 19(1)(a) and the right of privacy are required to be determined in the context in which they are asserted?

(f) Whether any restraint on the fundamental right under Article 19(1)(a) and right of privacy are required within parameters of Art. 19(2) of the Constitution?

It is substantial question because it affects a large number of people across India; Muslim Women in general and Muslim girl students in particular. The Impugned Judgment not only affects Muslim girl students in Karnataka but also across India as the ramifications of the Impugned Judgment is a denial of the right to education of Muslim girls across India. The ramifications could be equally profound for Muslim Women employed or seeking employment opportunities in job market, as they stand the chance of being denied the same on the ground that they are wearing *Hijab* / headscarf. Its huge ramification has already

been felt in Karnataka considering the reports collected by the Petitioners through their representatives and field experts undertaking surveys at the grass root level. The Petitioners have also received hundreds of calls on their helpline from distressed Muslim girl students and their families across Karnataka. On account of the fact that the Impugned G.O. was passed at the fag - end of the academic year 2021 - 2022, many Muslim girl students who were about to appear for their final exams, failed to do so, with some others dropping out of education altogether. The effect of the Impugned G.O. has percolated into the job market too with teachers being instructed to remove their *Hijabs* / headscarf not only in education institutions in Karnataka but as far as Maharashtra.

It is submitted that the Impugned Judgment, by creating an unreasonable barrier that denies young Muslim girl students access to education, is putting them at a grave disadvantage. The ramification of this unreasonable restriction will be to further marginalize the Muslim community in general and Muslim women in particular by undoing whatever little progress was made in the last few decades towards the cause of women empowerment that was being sought to be achieved through the instrument of education.

SUBMISSIONS:

A. The right to wear *Hijab* / headscarf flows from free speech and expression, belief and freedom of conscience guaranteed by Article 19(1)(a) and Article 25(1) of the Constitution. They do

not denude each other rather, they reinforce each other. It is well settled now that diverse fundamental rights enshrined in Part - III of the Constitution are inter - related and they need not be compartmentalized. Each right draws sustenance from the other and unless it is expressly read subject to the other parts of the Constitution, the same is required to be interpreted as to expand the concept of equality, freedom and liberty because they embody natural human rights in a constitutional form.

Any state action which impacts either of these articles must satisfy its constitutionality on the touchstone of Articles 19(1) and 25(1) of the Constitution. The Petitioners in support of this submission rely on the judgment delivered by the Hon'ble Supreme Court in ***Justice K. S. Puttaswamy v. Union of India*** **[(2017) 10 SCC 1]**. The verdict in K. S. Puttaswamy's judgment is unanimous. The majority view is authored by Dr. D. Y. Chandrachud, J. and separate concurring judgment is authored by Justice Chelameswar. This Hon'ble Court's attention is invited to paragraphs 21, 24, 298 and 373 of the judgment. The same are extracted hereinbelow for ready reference:

> ***"21. The theory that the fundamental rights are water-tight compartments was discarded in the judgment of eleven judges of this Court in Cooper. Gopalan had adopted the view that a law of preventive detention would be tested for its validity***

only with reference to Article 22, which was a complete code relating to the subject. Legislation on preventive detention did not, in this view, have to meet the touchstone of Article 19(1)(d). The dissenting view of Justice Fazl Ali in Gopalan was noticed by Justice J C Shah, speaking for this Court, in Cooper. The consequence of the Gopalan doctrine was that the protection afforded by a guarantee of personal freedom would be decided by the object of the State action in relation to the right of the individual and not upon its effect upon the guarantee. Disagreeing with this view, the Court in Cooper held thus :

> ***"…it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action — legislative or executive — Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and***

simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g. Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights." 24 (emphasis supplied)

"24. …The jurisprudential foundation which held the field sixty-three years ago in M.P. Sharmal and fifty-five years ago in Kharak Singh has given way to what is now a settled position in constitutional law.

Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of State action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that State action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III."

"248. Privacy has distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control. [Bhairav Acharya, "The Four Parts of Privacy in India", Economic & Political Weekly (2015), Vol. 50 Issue 22, at p. 32.] Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person.

With regard to informational privacy, it has been stated that:

> *"… perhaps the most convincing conception is proposed by Helen Nissenbaum who argues that privacy is the expectation that information about a person will be treated appropriately. This theory of "contextual integrity" believes people do not want to control their information or become inaccessible as much as they want their information to be treated in accordance with their expectation (Nissenbaum 2004, 2010, 2011)". [Bhairav Acharya, "The Four Parts of Privacy in India", Economic & Political Weekly (2015), Vol. 50 Issue 22, at p. 34]"*

"298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and

liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles

the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the

individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy : this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights

> ***and protects for the individual a zone of choice and self-determination."***
>
> ***"373. …The choice of appearance and apparel are also aspects of the right to privacy. The freedom of certain groups of subjects to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right to privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling under Article 25…"***
>
> *(Emphasis supplied)*

(1) It is well settled principle of the Constitutional law that any State action which impacts more than one fundamental right under Part III of the Constitution it must pass the muster of constitutionality in respect of each right so impacted. In the instant case the Petitioners have established that the State action of proscribing Hijab has interfered with the right under Articles 19(1)(a), 25(1) and 29 of the Constitution. Therefore, the impugned State action has to pass the muster of the parameters of reasonable restrictions as laid down under Article 19(2). In other words, the impugned State action must satisfy that proscribing Hijab either is (a) in the interest of the sovereignty and integrity of India; or (b) in

the interest of the security of the State; or (c) in the interest of friendly relations with foreign States; or (d) in the interest of public order, decency or morality; or (e) in relation to contempt of Court, defamation or incitement to an offence.

(2) It is also a well - established principle of constitutional law that for any State action which restrains the fundamental freedom guaranteed under Article 19(1)(a), the burden of justifying restraint on the same in terms of Article 19(2) is on the State. In the instant case, no such burden has been discharged by the State.

(i) The Hon'ble High Court of Karnataka has attempted to create doctrine of qualified public spaces and derivative rights of the kind by employing high sounding rhetoric and apply the same in the realm of the Constitutional juris prudence of our country. The freedom of expression guaranteed under Article 19(1)(a) can be restrained by a law which is in the interest of preserving public order, decency or morality or incitement to an offence. Simply put any restrictive state action must confront the test laid down under Article 19(2). The high-sounding jargons cannot become the basis to expand the scope of the restrictive measures as laid down under Article 19(2).

(ii) Turning to Article 25(1), the fundamental right of freedom of conscience or religious belief and practice is subject to public order, health or morality; the State has not discharged the burden to show that proscribing Hijab is in the interest of maintaining public order, health or morality.

Re:* *<u>Manifest Arbitrariness</u>

B. The State Government relies on Section 133(2) of the Karnataka Education Act, 1983 (**"the Act"**) to pass the Impugned G.O. which provides: *"in the backdrop of the issues highlighted in the proposal, using the powers granted by Karnataka Education Act, Section 133 (2), all Governments Schools in the State are mandated to abide by the official uniform. Private School should mandate the uniform decided by the Board of Management."*. In the second paragraph of the Impugned G.O., it then provides: *"In Colleges that come under the pre-University education department's Jurisdiction, the uniforms mandated by the College Development Committee, of the board of management, should be worn. In the event, the management does mandate a uniform, students should wear clothes that are in the interests of unity, equality and public order."* The State Government takes the shelter under the specious plea that it has not prescribed any uniform for pre-University Government Colleges, but left it to the College Development Committee (**"the CDC"**) to do so.

Reading the Impugned G.O. as a whole, it contains clear directions by the State Government to the Impugned G.O. to proscribe the wearing of *Hijab* / headscarf in pre-University Government Colleges. The introductory part called preamble clearly enunciates, the Government policies to target the Muslim girls by directing the CDC to proscribe the wearing of *Hijab* / headscarf.

(1) It is a well settled principle of Constitutional Law that any State action cannot be manifestly arbitrary which is a facet of Art. 14. The Petitioners assert their Fundamental Rights under Articles 19(1) (a), 25(1), 29(2), 21 and 14 of the Constitution. These rights are trampled upon by the Impugned G.O. The objectionable features of Impugned G.O. are as under:

    (i) It is issued totally ignoring the well - established feature for prescribing dress code by educational institution under the Karnataka Education Rules 11 and 12, the relevant provisions thereof are extracted hereunder:

"11. Provision of Uniform, Clothing, Text Books etc.,

(1) Every recognised educational institution may specify its own set of Uniform. Such uniform once specified shall not be changed within the period of next five years.

(2) When an educational institution intends to change the uniform as specified in sub-rule (1) above, it shall issue notice to parents in this regard at least one year in advance.

"12. Parent Teacher Committee.-

(1) It shall be the duty of the head of every recognised educational institution, to constitute a Parent Teacher Committee within thirty days of the commencement of each academic year;

(2) Till a Committee is constituted, under sub-rule (1) the committee constituted in the preceding academic year shall continue to function;

.
.

(5) The functions of the Parent-Teacher Committee shall be as follows:- (a) to redress the grievances of the students and their parents, if

> ***any; (b) to devise such action programmes as could be conducive for a healthy student-teacher, parent-teacher, teacher-management, parent-management relations. (c) any other activity conducive to the welfare of the students;***

As per the above quoted Rules, every recognized educational institution may specify its own set of uniform; once specified though, such uniform cannot change for the period of next five years and if any such change is desired, then such educational institution is required to issue notice to parents. In this regard, at least one year in advance. The Impugned G.O. totally ignores these Rules and mandates the School authorities to prescribe a uniform without *Hijab* / headscarf. The Impugned G.O. is mandatory as submitted in the following paragraphs.

(ii) Under Rule 12, every educational institution is obliged to constitute a Parent - Teacher Committee (**"the PT Committee"**). Rule 12(5) provides the function of PT Committee which, *inter alia*, is to redress the grievance of the students and parents if

any and to devise under Rule 5(b) action programs as could be conducive for a healthy student teacher, parent - teacher, parent - management relations. The Impugned G.O. has totally side - tracked the consultation with the PT Committee and has mandated the school authorities to proscribe *Hijab* / headscarf

(iii) The Impugned G.O. is mandatory. The attempt is made by the Respondents to downplay or read down the provisions of the Impugned G.O. by stating that the State has not prescribed any uniform. The Impugned G.O. at page 5 of Volume - I of the running compilation needs to be analysed. Firstly, the preamble of the Impugned G.O. refers to (vide 3rd recital of the Impugned G.O.) the obligation of, *"Any such supervisory committee in schools and colleges (SDMC in Government Institutions and Parents-Teachers' Associations and the management in private institutions) should strive to provide a conducive academic environment and enforce a suitable code of conduct in accordance with government regulations."*.

(iv) In the 5th Recital of the Impugned G.O. there is a pointed reference to *"religious observances"* being carried out by students in a few institutions which has become an obstacle to unity and uniformity in the schools and colleges. This has very clear reference to *Hijab* / headscarf.

(v) In the 6th recital there is reference to a case law with respect to the wearing of *Hijab* / headscarf and the observation in the next recital makes the intention very clear by stating that, *"As mentioned in the abovementioned rulings of the Hon'ble Supreme Court and various High Courts, since the prohibition of a headscarf or a garment covering the head is not a violation of Article 25 of the constitution."* Then, to make the position clear, it is stated, *"Additionally, in terms of the Karnataka Education Act 1983 and its rules, the government has decreed as below -"*. In the operative part of the Impugned G.O., it is clearly mentioned that, *"In the backdrop of the issues highlighted in the proposal, using the powers granted by Karnataka Education Act, 133 (2), all the government schools in the state are* ***mandated*** *to*

abide by the official uniform.”. It is, therefore, very clear that the Government has issued a mandatory order to proscribe the wearing of *Hijab* / headscarf. The natural reading of the Impugned G.O. by a layman, will leave no room for doubt, that the Government has ordered to proscribe the *Hijab* / head scarf in the dress code of the uniforms for the girl students.

(vi) As stated, the timing of issuance of Impugned G.O. is relevant to determine its arbitrariness. In the backdrop of the uncontroverted facts that several Muslim girl students were wearing *Hijab* / headscarf along with the prescribed uniform since the respective date of their admission into the institutions (which is uncontroverted) the Impugned G.O. is issued at the fag end of the Academic year which resulted into several Muslim girls wearing *Hijab* / headscarf being prevented from writing their exams. This was the manifest arbitrariness writ large on the State action.

(vii) In this connection, it is significant to note the averment made in the Statement of Objections filed

on behalf of the Respondent State before the Hon'ble High Court of Karnataka (Vol - I of the running compilation) at para 13 on page 46 wherein it is stated that *"...the State Government in exercise of its power of superintendence and control over the institution under the Karnataka Education Act issued directions on 25.01.2022 that the Government is examining larger issues of dress code and uniform system up to P.U. level and there are conflicting views and interest in the subject and in view of the sensitivity involved in the matter a high level committee is being formed to examine and report with the recommendations to the Government."*. It is further stated in the said paragraph that *"In the meanwhile, it was also directed that the Respondent No. 5 - College shall continue with the existing uniform dress code till a comprehensive policy or decision is taken on the subject."*. If no comprehensive policy or decision was taken on 25.01.2022, then what was the need to issue the Impugned G.O. The government has failed to give

any explanation for the same. This is the further indicia of manifest arbitration.

(viii) The Impugned G.O. clearly targeted Muslim girls and denied them their right to education and fundamental rights. The Respondent No.1's response in the Hon'ble High Court of Karnataka quotes sections 6 and 7 of the Act but fails to substantiate its claim that the Impugned G.O. was to cherish and follow the noble ideals which inspired our national struggle for freedom to promote harmony and the spirit of common brotherhood amongst all the people of India, transcending religious, linguistic and regional or sectional diversities to renounce practices derogatory to the dignity of women and to value and preserve the right heritage of our composite culture. The Impugned G.O. is a flagrant violation of the ideals and values mentioned in Section 7(2) of the Act. No harmony can be established, or the spirit of common brotherhood developed by upholding wrongful objections of some for exercise of the fundamental rights of the others. Even on the grounds of balance of convenience, it is submitted that once

prima facie the right was established, the balance of convenience should have shifted in favour of the Petitioners before the Hon'ble High Court of Karnataka, whose rights were destroyed. The Petitioners there were given the Hobson's choices either to educate themselves or to uphold their conscientious belief. In other words, Muslim girl students were asked to educate themselves at the cost of sacrificing their rights guaranteed under Article 19(1)(a), Article 21 and Article 25 of the Constitution. There was no explanation offered on behalf of the Educational Institution as to why the procedure laid down in Section 7 of the Act and Rules 11 and 12 was not followed. The impact of the Impugned G.O. is to compel the Educational Institutions to proscribe *Hijab* / headscarf which is manifestly arbitrary.

(ix) It is submitted that any state action cannot be manifestly arbitrary, which is a facet of Article 14. It is erroneous on the part of the Hon'ble High Court to discard the instance of prescription of uniform by *Kendriya Vidyalayas* as per the policy of the Central

Government, which is clearly accommodating of the usage/practices, customs of the diverse groups of people in our country so as not to deprive any group of the right to education. The Hon'ble High Court has discounted the example set by *Kendriya Vidyalayas* on the specious ground that in the federal units the state need not toe the line of the Centre. In the instant case, the policy of the Central Government is in consonance with Constitutional principles which ought not to have been departed from.

(x) Under Section 133(2) of the Act, there is sub-delegation of legislative authority by the Parent Act to the Government which itself states that Government may give directions to any educational institution or Tribunal as in its opinion are necessary and expedient for carrying out the purposes of the Act. However, this sub-delegation of legislative authority does not carry with it the right to restrict the exercise of fundamental rights. The Impugned G.O. which was in exercise of such delegated authority, travelled beyond the exercise of delegated authority and committed an act in breach of the fundamental

rights of the Muslim girl students, which could not have been restricted save and except by the legislature and subject to constitutionally laid down principles. This act of the Respondent No. 1 is arbitrary.

(xi) Then, Section 7(2)(g) provides that the curriculum which is prepared under sub-section (1) must inculcate the sense of duties of citizens enshrined in the constitution and incorporates provisions of Article 51(a) of the Constitution. The opposition to wearing *Hijab* / headscarf is not in observance of the citizens duty mentioned in Section 2(g)(v), (vi) and (vii) of the Act. Therefore, the Impugned G.O. issued u/s. 133(2) is not in furtherance of the purpose of the Act but it directly negates the values for which the Act is enacted. It falls within the mischief of being manifestly arbitrary vide paras 100, 101 and 102 of ***Shayara Bano v. Union of India*** **[(2017) 9 SCC 1]**. It is therefore submitted that the Impugned Judgment failed to appreciate that the Impugned G.O. was manifestly arbitrary and violative of Article 14 of the Constitution.

Re: Doctrine of Proportionality:

C. The Impugned G.O. cannot be characterized as imposing reasonable regulations or restrictions on the fundamental rights under Article 19(1)(a) and Article 25(1). The Impugned G.O. definitely falls foul of Article 19(1)(a) and does not come within the permissible limit of reasonable restriction of article 19(2), because they are vague and uncertain. There has not been a proper balancing of the fundamental rights of the Muslim girl students and restrictions imposed on them. The Respondent No.1 completely ignored the Doctrine of Proportionality when imposing restrictions in the form of the Impugned G.O. The doctrine of proportionality and its components are explained by the Supreme Court in the case of ***Modern Dental College and Research Centre v. State of Madhya Pradesh*** **[(2016) 7 SCC 353]** at paragraph 60.

> "**Doctrine of proportionality explained and applied**
>
> **59. (xxx)**
>
> **60.** ***…Another significant feature which can be noticed from the reading of the aforesaid clause is that the State is empowered to make any law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation or trade or business. Thus, while examining as to whether the impugned provisions of the statute and Rules amount to reasonable***

restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as 'Doctrine of Proportionality'. Jurisprudentially, 'proportionality' can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied[13], a limitation of a constitutional right will be constitutionally permissible if: (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."

{Emphasis supplied}

(1) The objections to wear the apparel of *Hijab* / headscarf are not in consonance with or does not advance the purpose of the Act. The purpose of the Act is to foster harmonious development of the mental and physical faculties of Muslim girl students and cultivating a scientific and secular outlook through education as stated in the preamble. The cultivation of scientific and secular outlook does not however, mean trampling upon the right of education of Muslim girls by an executive order. Section 7(2)(v) of the Act also talks of fundamental duties of the citizens enshrined under Article 51(A) of the Constitution and section 2(g)(v) speaks of promoting harmony and the spirit of common brotherhood, transcending religious, linguistic and regional or sectional diversities. However, the Impugned G.O. failed to understand that contrary thereto, the objection to wearing *Hijab* / headscarf was to promote disharmony and to encourage the obstructionist and to bow down to their demand. This was not in consonance of inculcating the spirit of common sisterhood / brotherhood but rather, it was a direct act of appeasing to intolerance of the obstructions. Such attitude does not even develop the spirit of humanism. The policy to bow down to the intolerance manifested by the obstructionists is against the purpose of the Act.

(2) Further, the measures undertaken to prevent the Muslim girl students to attend the classes are totally irrational and not connected with the fulfilment of the purpose of the Act. Additionally, making Muslim girl students to abide by the uniform dress code with rigidity smacks of irrationality and a lack of understanding / empathy towards the Muslim girl students whose fundamental rights under Article 19(1)(a) and 25(1) along with the right to receive education under Article 21 of the Constitution were blatantly violated. The rigid rule of dress code which was enforced on specious ground of maintaining discipline completely ignored that discipline could be enforced by making relaxation in the rules alongside inculcating the spirit of accommodation in the obstructionists. The policy and the manner in which the policy was enforced by the school authorities, has not balanced the fundamental rights of the Muslim girl students. It is important to note that though the obstructionists had not claimed of their fundamental rights being violated on account of wearing of *Hijab* / headscarf, but by placing a ban on the *Hijab* / headscarf, the Impugned G.O. sought to appease these obstructionists at the cost of violating the time-tested fundamental rights of the Muslim girl students under Articles 19(a) (a) and 25(1). The Hon'ble High Court of Karnataka therefore erred in not

holding that the Impugned G.O. is manifestly arbitrary and could not be upheld.

This clearly shows the oblique motive of the state action which is clearly discriminatory not only on the ground of religion but also on the ground of gender. The Impugned state action is therefore offending Articles 15(1) of the Constitution and should therefore be set aside.

Re: ***<u>Article 19(1)(a), Article25(1) AND Doctrine of Integral Part of Religion or Essential Religious Practice (ERP)</u>***

D. The Petitioners support the submissions made by the Ld. Sr. Counsel Mr. Devadatt Kamat and the Ld. Counsel Mohammed Nizamuddin Pasha on the above subject. The Petitioners further submit their arguments as under:

(1) It is submitted that the claim of the Petitioners before the Hon'ble High Court to wear *Hijab* flows from the fundamental right guaranteed to them under Article 25(1) of the Constitution being freedom of conscience as based on physical manifestation. It is submitted that expression of any kind, particularly physical one, are inevitably grounded in an individual's belief, thoughts and conscience. When an individual desires to adhere or refrain from certain practices of the religious beliefs systems, it invariably involves

exercise of his / her conscience, therefore, to say that something is exclusively a religious expression is to deny the role of human reason in submitting to a belief system. It would therefore be erroneous to say that every matter of freedom of conscience does not involve question of religious expressions. Therefore, when a claim is based on freedom of conscience, it is not necessary for the claimant to prove that it is an essential religious practice.

(2) It is significant to note what the Respondent State has stated, in its Statement of Objections filed before the Hon'ble High Court of Karnataka at para 14 of internal page 34 (page 64 of Volume - I of the running compilation) wherein it is acknowledged that, *"... the question of Hijab (Purdah) for Muslim Women has been a controversy for centuries and will probably continue for many more. Some learned people do not consider the subject open to discussion and consider that covering the face is required, while a majority are of the opinion that it is not required."*. Further, it is also acknowledged that, *"A middle line position is taken by some who claim that the instructions are vague and open to individual discretion depending on the situation."*. Referring to the *Qur'anic* verses more

particularly the verse contained in *Al - Qur'an*, *Surah* (Chapter) 24. *An - Nur*, *Ayah* (verse) 31, which is quoted hereunder, it is clear that many interpreters of *Al - Qur'an* emphasized the broad principle of value enshrined in that particular verse and that is that the men and women should observe modesty in their appearance. Constitutionally speaking Article 25(1) r/w Article 19(1)(a) gives freedom to the Muslim Women to exercise their discretion in the matter and consider the covering of the head and neck upto the bossom as essential part of modesty and would like to express themselves which is consistent with their freedom of expression and freedom of conscience. To exercise that right it is not necessary, constitutionally speaking, for any Muslim Woman to justify her individual action of wearing *Hijab* / headscarf as an ERP.

***Al - Qur'an* : *Surah* 24. *An - Nur* : Ayah 31**

> ***"And say to the faithful women to lower their gazes, and to guard their private parts, and not to display their adornment except what is apparent of it, and to extend their head coverings (khimars) to cover their bosoms (jaybs), and not to display their adornment except to their husbands, or their***

***fathers, or their husband's fathers, or their sons, or their husband's sons, or their brothers, or their brothers' sons, or their sisters' sons, or their womenfolk, or what their right hands rule (slaves), or the followers from the men who do not feel sexual desire, or the small children to whom the nakedness of women is not apparent, and not to strike their feet (on the ground) so as to make known what they hide of their adornments. And turn in repentance to Allah together, O you the faithful, in order that you are successful*”**

(3) What is stated above is reinforced by what is stated at internal page 32 of the Statement of Objections (page 62 of Volume - I of the running compilation) which contain extracts from the speech made by Mohammed M. Pickthall which clearly states *“... The true Islamic tradition enjoins the veiling of the hair and neck and modest conduct that is all...”*. This passage is approvingly quoted by the State of Karnataka.

(i) At internal page 32 of the Statement of Objections (page 62 of Volume - I of the running compilation), Mohammed M. Pickthall has also quoted the tradition

of the Prophet Muhammad, peace be upon him (p.b.u.h.) reported by (Abu Dawood) which is the authentic Hadith of the Prophet (p.b.u.h.) where the Prophet (p.b.u.h.) has said *"Oh Asma! when a girl reaches the menstrual age, it is not proper that anything should remain expose except this and this: he pointed to the face and hands"*

(ii) The above quotations from the speech of Mohammed M. Pickthall approvingly referred to by the State of Karnataka in its Statement of Objections shows that there is no controversy in these proceedings that wearing of *Hijab* / headscarf is an ERP as laid down in *Al - Qur'an* and the Hadith of the Prophet (p.b.u.h.).

(4) It is humbly submitted that the right to wear *Hijab* / headscarf flows from Art. 19(1)(a), 25(1) and 29. It is submitted that every religious minority has the fundamental right to conserve its religio - cultural identity. The Muslim girl students are adherents of Islam and in their individual capacities, they have a right to display / express their religio - cultural manifestations by wearing *Hijab* / headscarf. This is the fundamental right of such Muslim girl students

flowing from a conjoint reading of Articles 19(1)(a), 25(1) and 29 of the Constitution

(5) The Articles, when so read conjointly, a citizen of India by exercising his thought process can entertain a conscientious belief and put such belief into the practice; it is not necessary for him to justify his conscientious belief and practice on the ground that the same is “integral part of his / her religion”. Article 25(1) guarantees to every individual freedom of conscience. Article 19(1)(a) guarantees freedom of speech and expression. Under both the articles, it is not necessary for an individual or the citizen of the country to prove that to entertain conscientious belief and put the same into practice he has to justify the same on the ground that it is an integral part of his religion / ERP. An atheist or a personal believing in universality of religions cannot be obliged to justify his conscientious belief on the ground that the same is an integral part of religion / ERP. The doctrine of integral part of religion / ERP emerged only in cases where certain claim was made by a religious denomination to “manage its own affairs in matters of religion”. It is when a religious denomination asserts its rights under Article 26(b) of the Constitution that the doctrine of integral part of religion / ERP is applied. The trend of the decisions of the Hon'ble Supreme Court commencing from the case of ***The***

***Commissioner, Hindu Religious Endowments, Madras v. Shri. Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt* [1954 SCR 1005]**, clearly show that the order of Supreme Court in terms of the doctrine of integral part of religion / ERP has revolved around only in cases arising under Article 26(b) of the Constitution. The same has never been applied under Article 25(1) of the Constitution. Explaining the scope of Article 14, the Hon'ble Supreme Court in paragraph 14 of Shirur Mutt's case (*supra*) held:

> ***"14. We now come to Article 25, which has as its language indicates, secures to every person subject to public order, health and morality, a freedom not only to entertain such religious belief as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate and disseminate his ideas for the edification of others."***

(6) It is submitted that ERP or the doctrine of integral part of religion cannot be imported into Article 25(1) to determine individual's right of conscience. We support the submission that it is only when a law is made or any rule having force of law is made in the name of reform of religion under Article 25(2) the question whether such law defies the

essential religious practice can be considered and not otherwise. The aggrieved Muslim girl students in Karnataka had to merely establish, and they had adequately established their case that they have a Fundamental Right of conscience and belief under Article 25(1) coupled with the freedom of expression under Art. 19(1). In support of the contention of freedom of conscience and belief, we rely on passages from Justice K. S. Puttaswamy's case (*supra*) which clearly lays down the proposition that freedom of certain groups of subjects to determine their appearance and apparel are not as a part of their right to privacy but as part of their religious belief. Such a freedom need not necessarily be raised on religious beliefs falling under Art. 25.

(7) Art. 19(1) is elaborately explained in the case of NALSA i.e., ***National Legal Services Authority v. Union of India*** **[(2014) 5 SCC 438]** where in Para 69 it is clearly held that freedom of speech and expression includes one's right to expression of his self - identified gender; the self - identified gender through dress, words, action or behaviour or any other form. No restrictions can be placed on one's personal appearance or choice of dressing subject to the restrictions contained in Art. 19(2). In the same case, the Supreme Court has also approvingly referred to the views of the US Supreme Court in the case relating to rights of transgender's

freedom of expression. It is held that *'the notion that the state can regulate one's personal appearance unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with values of privacy, self – identity, autonomy and personal integrity that constitution was designed to protect'*. In the case of NALSA (*supra*), the Supreme Court of India also approved the view expressed in ***Doe v. Yunits*** **[2000 WL 33162199 (Mass Super Ct 2000)]** by the Supreme Court of Massachusetts upholding the right of a person to wear school dress that matches her gender identity as part of protected speech and expression and assertion of the tribe by the Petitioner is the symbol of her identity.

> ***69. Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from (sic on) exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognised and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his***

self-identified gender. The self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

70. We may, in this connection, refer to a few judgments of the US Supreme Court on the rights of TGs' freedom of expression:

70.1. The Supreme Court of the State of Illinois in City of Chicago v. Wilson [75 Ill 2d 525 : 389 NE 2d 522 (1978)] struck down the municipal law prohibiting cross-dressing, and held as follows:

> *"the notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with values of privacy, self-identity, autonomy and personal integrity that … the Constitution was designed to protect".*

70.2. In Doe v. Yunits [2000 WL 33162199 (Mass Super Ct 2000)], the Superior Court of Massachusetts, upheld the right of a person to wear school dress that matches her gender identity as part of protected speech and expression and observed as follows:

> ***"by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important for her health and well-being. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her identity".***
>
> ***71. The principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing, etc.***

The Muslim girl students, by wearing *Hijab* / headscarf, are asserting their gender identity which is protected under Art. 19(1)(a) of the Constitution.

Re: ***<u>Reasonable Accommodation</u>***

E. In addition to what is submitted by Ld. Sr. Counsel Mr. Devadatt Kamat, the Petitioners make further submissions as follows:

(1) The relevant questions to pose to answer the conundrum arising in these proceedings are as follows:

(i) Does the wearing of *Hijab* alter the essential nature of uniform?

(ii) Does the wearing of *Hijab* give an unfair advantage to the students who wear *Hijab*?

(iii) Is the objective of the uniform to erase all markers of individuality?

(2) It is submitted that taking the correct perspective of justice, one has to examine the purpose of the rule for prescribing a dress - code. Any accommodation or concession to a particular dress code is permissible if it does not defeat its purpose. The illustrative case demonstrating the above principle is the case of the US Supreme Court, ***PGA Tour, Inc. Petitioner v. Casey Martin*** **532 US 2001**. This is the case where Martin a professional golfer sought the permission for the use of the golf cart in tournaments owing to his ill - health. The majority opinion of the Supreme Court permitted Martin to use the golf cart as it found that it did not alter the purpose of enacting the rule nor did it confer any special benefit on Martin.

(3) Applying the same principle, it is submitted that the wearing of *Hijab* does not confer any special benefit to the Muslim girls insisting on the same, nor does it defeat the purpose of the law. It is submitted that the purpose of uniform is not to erase the markers of individuality. Simply

by wearing the prescribed dress - code, diverse distinctions that exist amongst students do not evaporate. In multi - cultural societies, students should be taught to acknowledge, accept and respect diversities in the society.

Re: ***<u>Right to Education under Article 21</u>***

F. In addition to the rights enjoyed under Articles 19(1)(a) and 25(1), the Muslim girl students also have the fundamental right to educate themselves emanating from Article 21 of the Constitution, which guarantees right to life and personal liberty, which means meaningful a life. Right to education is fundamental as without education, a person cannot live meaningful life. It is our contention that every Muslim girl student has an individual right to wear such dress which she conscientiously believes is consistent with her religious belief. The Muslim girl students are not obligated to justify their conscientious belief by proving that such belief is an integral part of their religion. The burden was on the Respondent No.1 to show that such right can be restrained by putting reasonable restrictions. As Muslim women, the Muslim girl students are entitled to come to a conscientious decision with the freedom of choice to select what appearance best reflects their religious identity, which is further reinforced by her freedom of speech

and expression under Article 19(1)(a) of the Constitution. Coming to the specific issue of wearing *Hijab* / headscarf, in the proceedings before the Hon'ble High Court of Karnataka, the issue was confined to the Muslim girl students' assertion to wear the head scarf, which is prescribed as *Hijab* / headscarf; an apparel which covers the hair and extends up to the neck. It is our case that the Muslim girl students are entitled to wearing of *Hijab* / headscarf as a matter of their conscientious belief. There is difference between wearing headscarf and observing *Parda* or *Gosha*. The distinction between *Parda* and *Hijab* / headscarf is to be borne in mind. It is submitted that it is their contention as also the fact that the Muslim girl students petitioning before the Hon'ble High Court of Karnataka consistently argued, that wearing of *Hijab* / headscarf is covered by Article 19(1)(a) and 25(1) of the Constitution. And by denying the exercise of their rights under Articles 19(1)(a) and 25(1), the Respondent No. 1 has also arbitrarily infringed upon their right to education under Article 21.

Re: ***Interpretation of Al - Qur'an - Institutional incapacity***

G. At this stage, it is necessary to respectful draw this Hon'ble Courts attention to the issue of dealing with scriptures and a whole jurisprudence developed on that matter. In the case of ***S.***

Veera Bhadharan v. E. V. Rama Swami Naicker **[AIR 1958 S.C. 1032]** this Hon'ble Court widely interpreted Sec. 295 of Indian Penal Code and has held that the words *"any object held sacred by any class of person"* must be given wide interpretation and should not be confined or limited to physical object like idols etc. and further unequivocally held that *"Sacred books like Bible or Koran or Granth Saheb are clearly within the ambit of those general words"*. Keeping in mind the sacred nature of Holy Scriptures the Hon'ble Courts in India has developed the jurisprudence not to interpret the Holy Scriptures. It is submitted that the Courts cannot and should not embark on the path of interpreting *Al - Qur'an* and pick up one view of the scholars as against others.

(1) The Hon'ble Courts have institutional incapacity to interpret *Al - Qur'an* or any other religious scripture, particularly *Al - Qur'an* which is very word of God, Allah and is expressed in Arabic language. The Hon'ble Courts are not equipped with Arabic; even the average Muslim in India may read *Al - Qur'an* in Arabic without understanding the Arabic language. It is submitted that there are well settled rules of interpreting *Al - Qur'an* known as *Asbab - ul - Nuzul* with which the Hon'ble Courts are not well acquainted. Keeping in view such handicaps to deal with Holy Scriptures, judicial prudence requires that Courts and

so also common citizens should refrain from interpreting the same

(2) Turning to the constitutional scheme, it is oft-repeated truism that the preamble of the Constitution encapsulates basic values thereof. The preamble clearly enshrines values of liberty of thought, expression, belief, faith, worship. Amongst other freedoms guaranteed under the provisions of the Constitution, the most cherished one is the freedom of conscience as contained in Article 25. Article 25 of the Constitution guarantees freedom of conscience and freedom to profess, practice and propagate religion. Article 25 guarantees individual freedom of conscience subject to public order, morality and health and to the other provisions of the Part III of the Constitution. Article 26 of the Constitutions grants freedom to every religious denomination or any section thereof to manage its own affairs "in matters of religion". Interpreting the aforesaid Articles, the Apex Court in the case of *Shirur Mutt* (*supra*) has held that those Articles protect the essential part of religion and further that when a question arises as to what constitutes essential part of religion, the same should primarily be ascertained with reference to the Doctrines of that religion itself.

Therefore, the Constitutional scheme clearly provides that judiciary, which is one of the important organs of the State,

shall not lay down religion for any religious denomination or section thereof and whenever the Court is confronted with any religious issues, it will look to the religious books of a particular denomination held sacred by it. In other words, there is no scope for the Court to import its own views while dealing with the religious questions or scriptures or beliefs of any religious denomination.

It is gainful to refer to the jurisprudence developed by the Hon'ble Privy Council and the Hon'ble SC which are recorded hereunder:

(i) ***Aga Mohamad Jaffer Bindanim v. Koolsoom Beebee & Ors.*** **(1898) ILR 25 Cal. 9** *at page* 203-204 : (1896-97) 24 IA 196 at 203-204

> ***"They do not care to speculate on the mode in which the text quoted from the Koran, which is to be found in Sura II, vv. 241-242, is to be reconciled with the Law as laid down in the Hedaya and the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."***

(ii) ***Baker Ali Khan v. Anjuman Ara Begum*** **30 I.A. 94** *at page* 111-112

> ***"Their Lordship think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of he law have not themselves drawn those conclusions"***

(iii) ***Krishna Singh v. Mathura Ahira*** **(1981) 3 SCC 689**

> ***"17. It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognized and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the Judgment of various High Courts,***

> ***except where such law is altered by any usage or customs or is modified or abrogated by statue."***

The Courts have therefore consistently resisted the temptation to embark on hazardous adventure to interpret religious scriptures.

(3) The Impugned Judgment of the Hon'ble High Court of Karnataka is a classic case to demonstrate, as to why the courts are not equipped to interpret verses of *Al - Qur'an*. In the instant case, the Hon'ble High Court of Karnataka has indulged into the luxury of relying on opinion of English translations of *Al - Qur'an* into English viz. Abdulla Yusuf Ali, as if the translation is of divine origin. The court has relied on defective secondary source of the scripture to pontificate on the basis of the comments of Abdulla Yusuf Ali. The Impugned Judgment at para IX (vi) on Pg. 71 erroneously assumes that *the practice of Hijab / headscarf had a thick nexus to the socio-cultural conditions then prevalent in the region…* and that *the veil was a safe means for women to leave the confines of their home"*. Such an assumption by the Hon'ble High Court of Karnataka, in its attempt to interpret the verses of *Al - Qur'an* contextually, is not well informed. Needless to say, that even in the present times, the position of women is as vulnerable as 1400 years ago, if not more. It is further submitted by us

that Courts cannot and should not embark on the path of interpreting *Al - Qur'an* and pick up one view of the scholars as against others.

Re: ***Constitutional Morality***

H. The concept of constitutional morality can be derived from the preamble of the Constitution read with several provisions of the Constitution. Liberty of thought, expression, faith and worship along with equality and fraternity assuring the dignity of the individual and unity and integrity of nation are enshrined in the Constitution. The expression / manifestation of wearing a piece of cloth to cover the head up to neck is the exercise of liberty of thoughts, expression, belief and faith. Any opposition to such thoughts, expression, belief and faith is against constitutional morality.

(1) The simple issue before this Hon'ble Court is to decide whether by wearing a simple apparel of head scarf / *Hijab* / headscarf by Muslim girls in assertion of fundamental rights under the Constitution, can it be enlarged by Respondent State by invoking the questions of constitutional morality, infringement of Article 28 of the Constitution and enforcement of discipline by the instrumentality of the State, in this case being fully funded educational institutions by the State. It is submitted before this Hon'ble Court that the argument of Respondent No.1 that assertion of fundamental rights under the Constitution

by a simple act of covering the head with a piece of cloth will threaten the fabric of secularism, which is the basic structure of the Constitution and therefore cannot be accommodated in view of the Constitutional morality, is violative of the principle of equality enshrined in the constitution.

(2) The manifestation of the cultural identity by the Muslim girl students is part of Article 19(1)(a) r/w Article 29 and they have also the right to preserve their cultural identity which is their fundamental right. It is submitted that by refusing permission to wear *Hijab* / headscarf which is in exercise of the fundamental rights of the petitioners the educational institutions do not foster any spirit of harmony but is violative of the fundamental rights of the Muslim girl students. Such refusal is not backed by any enactment of statutory law. The prescription of uniform dress code by the school authorities has no statutory or legal force at all and it cannot be even described as delegated legislation. Therefore, it is an administrative action to deny the fundamental rights of the Petitioners. It is an administrative cruelty and the constitutional annihilism.

Re: Further Additional Submission

I. Secularism necessarily implies that the State shall have no religion of its own but play the rule of benevolent neutrality (vide S.R. Bommai Case). It does not in any manner imply that it

should wipe out the identities of various religious groups, especially minorities, under the newly coined term of "positive secularism". The Impugned Judgment has, by introducing the novel concept of positive secularism, is seeking to arm the State and its instrumentalities with a weapon that hostilely discriminates religious minorities. The Impugned Judgment further goes on to equate positive secularism with religious intolerance. The impugned order has erred in viewing positive secularism as a means to curtail the fundamental rights of freedom of choice and expression and professing religion of one's choice, and that of the Muslim community.

FILED BY:-

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New Delhi
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