IN THE SUPREME COURT OF INDIA

[S.C.R., Order XXI Rule 3(1) (a)]

(Civil Appellate Jurisdiction)

SPECIAL LEAVE PETITION (C) Diary No. 9156 OF 2022

(Under Article 136 of the Constitution of India)

(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition No. 2347 of 2022)

(WITH PRAYER FOR INTERIM RELEIF)

IN THE MATTER OF:

Fathima Jazeela and Ors. ... Petitioner

Versus

State of Karnataka and Ors. … Respondent

PAPER BOOK

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

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ADVOCATE FOR PETITIONER: Mr. Satya Mitra

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1. That the decision of the Hon'ble Karnataka High Court on the wearing of the hijab in schools is wrong on several counts which are as under:

Article 25 protects practices which are part of religion though may not be an essential part

2. It is submitted that the Hon'ble High Court has gone on the wrong track by entirely focussing on the essentiality of the practice of wearing hijab by Muslim girls, and thereby disallowing them the protection enshrined under Article 25. The practice of Hijab is a prescribed practice in the Quran and it is to be followed as such by those who choose to follow it. It is not for the court to decide whether the practice is an essential practice and therefore warrants protection. Even if

the practice has a basis in Islam and if the wearer of the hijab voluntarily manifests a bonafide belief in its wearing, even then Freedom of Religion encapsulated in Article 25 protects the wearer. The Hon'ble High Court has missed giving due consideration to the question as to whether voluntary practices based on sincere religious beliefs are constitutionally protected, which in the Petitioners' humble submission are protected by Article 25 and not excepted by any of the reasonable restrictions as envisaged under Section 25(1) as well as Section 25(2)(a).

3. The discussion on essentiality runs throughout the judgment. The main discussion is to be found in the 34 pages from pages 53 to 87.

4. The observations in the impugned order that make "essentiality" a pre-condition for protection are as under:

> "Thus, a person who seeks refuge under the umbrella of Article 25 of the Constitution has to demonstrate not only essential religious practice… It hardly needs to be stated, **if essential religious practice as a threshold requirement is not satisfied**, the **case does not travel** to the **domain of those constitutional values**." (at Page 57)

5. The High Court further makes a hurtful conclusion by holding as under:

> "at most the practice of wearing this apparel may have something to do with culture but certainly not with religion".

6. Additionally, the High Court states that the exercise of the fundamental right, including the right to practice and profess one's religion is subject to the reasonable restrictions. However, it is submitted by the present petitioners that the reasonable restrictions under any provision of Part III and Article 25 do not do not bar the practice of wearing hijab in schools by students, in addition to their uniform. The act of the state cannot be said to be in exercise of restrictions under any provision of Part III and Article 25, as the students who are wearing the hijab are doing so in addition to their uniform and not in lieu of it.

7. In Mohamed Fugicha vs. Methodist Church in Kenya ([2016] eKLR 1) the Court of Appeal of Kenya in Civil Appeal 22 of 2015 (hereinafter 'Fugicha's case') held that "*the hijab is genuinely considered to be an item of clothing constituting a practice or manifestation of religion. It is important to observe at this point that it is not for the Courts to judge on the basis of some 'independent or objective' criterion to the correctness of the beliefs*".

8. In MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06) the Constitutional Court of South Africa (hereinafter 'Pillay's case') held that *"[62]…religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality. …[64] A necessary element of freedom and of dignity of any individual is an entitlement to respect voluntary religious and cultural practices in which we participate. That we chose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, identity and dignity. …[65] The*

protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. …[86] The School further argued that the nose stud is not central to Sunali's religion or culture, but is only an optional practice. …The essence of reasonable accommodation is an exercise of proportionality. Persons who merely appear to adhere to a religious and/or cultural practice, but who are willing to forego it if necessary, can hardly demand the same adjustment from others as those whose identity will be seriously undermined if they do not follow their belief. The difficult question is how to determine centrality. Should we enquire into the centrality of the practice or belief to the community, or to the individual?"

9. In Balvir Singh Multani vs. Commission Scolaire Marguerite-Bourgeoys & Attorney General and World Sikh Organization of Canada (2006 SCC 6), the Supreme Court of Canada (hereinafter 'Multani's case') held *"33. …freedom of religion consists of the freedom to undertake practices and harbour beliefs having a nexus with religion in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine irrespective of whether a particular practice or belief is required by official religious dogma."*

A modified uniform with a hijab
Cannot be said to be destructive of discipline

10. Secondly, the High Court concludes that the use of the hijab would lead to the destruction of discipline forgetting that in all the States and Union Territories as well as the Central Government run Kendriya Vidyalayas throughout India, the

hijab is permitted to be used in schools and in all public places. For all these decades there has never been a single instance, and there was no evidence before the Court, that the wearing of a hijab led to a breakdown in public order. This view it is submitted is purely majoritarian in its outlook and lies absolutely in contradiction to our Constitution's spirit which is to not just tolerate but in fact celebrate diversity.

11. That the High Court while deducing that it is in the interest of discipline that curtailment on wearing of hijab is justified observes as under:

> "Such **'qualified spaces'** by their very nature **repel the assertion of individual rights** to the **detriment of** their general **discipline & decorum**. (at page 100)
>
> …
>
> Petitioners' contention that 'a class room should be a place for recognition and reflection of diversity of society, a mirror image of the society (socially & ethically)' in its deeper analysis is only a hollow rhetoric, 'unity in diversity' being the oft quoted platitude since the days of IN RE KERALA EDUCATION BILL." (at Page 101).
>
> …
>
> However, in 'qualified public places' like schools, courts, **war rooms, defence camps**, etc., the freedom of individuals as of necessity, is curtailed consistent with their discipline & decorum and function & purpose. (at Page 104)
>
> …

However, conduct by a student, in class or out of it, which for any reason-whether it stems from time, place, or type of **behavior-materially disrupts class work or involves substantial disorder or invasion of the rights of others, is not immunized by the constitutional guaranty of freedom of speech…** (at Page 105)

An extreme argument that the students should be free to choose their attire in the school individually, if countenanced, would only breed indiscipline that may eventually degenerate into chaos in the campus and later, in the society at large. (at Page 105-106)

…

…such a proposal if accepted, the school uniform ceases to be uniform. There shall be two categories of girl students viz., those who wear the uniform with hijab and those who do it without. That would establish a sense of **'social-separateness'**, which is not desirable. It also offends the feel of uniformity which the dress-code is designed to bring about amongst all the students regardless of their religion & faiths. As already mentioned above, the statutory scheme militates against sectarianism of every kind. (at Page 106)

…

Young students are able to readily grasp from their immediate environment, differentiating lines of race, region, religion, language, caste, place of birth, etc. The aim of the regulation is to create a 'safe space' where such divisive lines should have no place and the ideals of egalitarianism should be readily

> apparent to all students alike. Adherence to dress code is a mandatory for students. (at Page 107)
>
> …
>
> At times, regard being had to special conditions like social unrest and public agitations, governments do take certain urgent decisions which may appear to be knee-jerk reactions. However, these are matters of perceptions. (at Page 120)"

12. In Fugicha's case the Court held that, *"…cannot accept that perfect uniformity of dress, pleasing to the eye and picture-perfect though it be, can be a fair, proportionate or rational basis for discrimination. …We do not conceive of a system of exemptions consistent with the principle of accommodation as a nullification of rules or an invitation to a-free-for-all when it comes to school uniform or the observance of discipline and the other dictates of the school routines. It is not every fanciful, capricious or whimsical request for exemption that will be countenanced or granted. Rules clearly do have their place but they cannot be allowed to infringe or intrude upon the space occupied by religion and belief or make of no effect the express protection granted by the Constitution…"*

13. In Pillay's case the Court has held that *"the admirable purposes that uniforms serve do not seem to be undermined by granting religious and cultural exemptions. There is no reason to believe, ……., that a learner who is granted an exemption from the provisions of the Code will be any less disciplined or that she will negatively affect the discipline of others. [102] …Indeed, the evidence shows that Sunali wore the stud for more than two years without any demonstrable effect on school discipline or the standard of education.*

Granting exemptions will also have the added benefit of inducting the learners into a multi-cultural South Africa where vastly different cultures exist side-by-side. [114] …However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not (justify the exemption)."

14. It is therefore the Petitioners' submission that the assumption that the wearing of hijab would in any way be a threat to the discipline of the school, cannot be accepted. It would not only indicate to the girls wearing hijab that their beliefs are not welcome, it would insinuate that the ideals of secularism, religious and cultural tolerance so embedded in our constitution have no place in schools – an institution that is more often than not the bedrock of a child's life.

Right to dignity, autonomy, privacy and freedom of expression

Done away with in the impugned order

15. Thirdly, the High Court brushes aside the very important argument raised regarding freedom of expression, the right to privacy and the right to dignity which are all fundamental rights elaborated in a catena of decisions of the Supreme Court. The High Court observes:

> "the petitions we are treating do not involve the right to freedom of speech and expression or the right to privacy to such an extent as to warrant the employment of these tests for evaluation of argued restrictions, in the form of school dress code. **The complaint of the petitioners is against the violation of essentially 'derivative rights' of**

> **the kind. Their grievances do not go to the core of substantive rights as such but lie in the penumbra thereof.** So, by a sheer constitutional logic, the protection that otherwise avails to the substantive rights as such cannot be stretched too far even to cover the derivative rights of this nature, regardless of the 'qualified public places' in which they are sought to be exercised."

16. In Pillay's case the Court held that, "*[156] …With human dignity as the lodestar, it becomes clear that treating people as worthy of equal respect in relation to their cultural practices requires more than mere tolerance of sincerely held beliefs with regard to cultural practices. [157] …an approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life; cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and solidarity is not best achieved by simple toleration arising from a subjectively asserted practice."*

17. The Court in Pillay's case while taking note of the submission by the school that there was a slight infringement on Sunali's right, as she was allowed to wear the nose stud outside of the school premises, held, *"[85] The School submitted that the infringement of Sunali's right, if any, is slight, because Sunali can wear the nose stud outside of school. I do not agree. The practice to which Sunali adheres is that once she inserts the nose stud, she must never remove it.*

Preventing her from wearing it for several hours of each school day would undermine the practice and therefore constitute a significant infringement of her religious and cultural identity. What is relevant is the symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome."

18. In Fugicha's case it has been held by the court that, "*…an education system or any school administration that by word or deed violates the rights of students or condones their violation by others and otherwise diminishes their importance is a danger to the…, the rule of law and the culture of democracy for true it is that "what monkey see, monkey does." In violating rights or showing them to be minor irrelevancies, mere inconveniences or optional extras, such schools inculcate a culture of disregard of or contempt for rights and the students graduating from those schools will in their future adult lives be a whole army of rights-abusers steeped in audacious and odious impunity, instead of their defenders.* ***We must set our face firmly against such an eventuality that involves a grave dimunition and dilution of the constitutionally-protected right to have one's inherent dignity protected*** *(Article 28) and reaffirm the command in Article 21(1) to observe, respect, protect, promote and fulfill the fundamental rights and freedoms in the Bill of Rights."*

Freedom of conscience a fundamental right
Protected by Article 25

19. That the High Court in fact negates entirely the argument on freedom of conscience. The observations in impugned order entirely ignoring the freedom of conscience which is guaranteed as a fundamental right are as under:

> "Conscience is by its very nature subjective. Whether the petitioners had the conscience of the kind and how they developed it are not averred in the petition with material particulars. **Merely stating that wearing hijab is an overt act of conscience and therefore, asking them to remove hijab would offend conscience, would not be sufficient for treating it as a ground for granting relief.**" (at Page 80)
>
> …
>
> "There is scope for the argument that the **freedom of conscience and the right to religion are mutually exclusive**… No material is placed before us for evaluation and determination of pleaded conscience of the petitioners. They have not averred anything as to how they associate wearing hijab with their conscience, as an overt act. There is **no evidence that the petitioners chose to wear their headscarf as a means of conveying any thought or belief on their part** or as a means of symbolic expression." (at Page 81)

20. In Fugicha's case, the Court observed that, "…We reiterate and adopt the essential and intimate link between freedom

of religion and the cherished dream of a truly free society… To force students to abandon or refrain from a practice or observance dear to them and genuinely held as a manifestation of their religious convictions, as happened herein, violates their conscience, is the antithesis of freedom, is unconstitutional and is therefore null, void and of no force or effect."

21. Therefore the petitioner submits that the ultimate conclusion is that genuinely believed religious practices which are voluntarily followed by members of a religious community can also be constitutionally protected under freedom of religion, dignity, privacy, conscience, autonomy, diversity and identity, are ignored. One certainly does not have to search desperately for a binding obligation within the religion itself to secure these rights.

Secularism not equivalent to homogeneity
Diversity a very important part of democracy
Schools equated with war rooms and defence camps

22. Fourthly, the High Court enunciates a militaristic adherence to uniforms as a requirement of "secularism". The notion of a secular society being pluralistic and diverse is at the core of the Constitutional tenets of this nation. On the contrary it warns of "disruption", "disorder" and "invasion of rights of others" without there being a shred of evidence on record. "War rooms" and "defence camps" (a phrase used in the judgment) kind of uniformity are never to be equated with secularism. This, the Petitioners' are afraid, is a majoritarian

point of view that all minorities must merge with the majority in grand sameness.

23. The High court by harping on the compulsory nature of uniforms, completely ignores the plea of the petitioners for reasonable accommodation within the existing uniform. It holds:

> "The idea of schooling is incomplete without teachers, taught and the dress code. **Collectively they make a singularity. No reasonable mind can imagine a school without uniform**." (at Page 88)
>
> …
>
> However, in 'qualified public places' like schools, courts, **war rooms, defence camps**, etc., the freedom of individuals as of necessity, is curtailed consistent with their discipline & decorum and function & purpose. (at Page 104)

24. In Pillay's case the court eloquently enunciates the principle of reasonable accommodation by stating, *"[73]… At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms. …First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but*

which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck."

25. In Fugicha's case the Court observed that, *"…accommodation, which involves the granting of exception to the common rule, so as to give effect to a request considered to be of exceptional importance to the seeker's religion, is key to non-discrimination. …In the instant case, the school did not even stand to suffer any additional hardship or expense since Fugicha's daughters and other Muslim girls were seeking to wear hijab and trouser,* ***not in lieu of, but in addition to the school uniform****, and had in fact offered that the school itself do choose the colour of the hijab. The* ***failure to accommodate Fugicha's daughters' request indirectly discriminated against them in their enjoyment of the right to education on the basis of both religion and dress.*** *… a more pragmatic approach is that of accommodation which ought to uphold school uniform while at the same time permitting exceptions and exemptions where merited. …by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped from raising a complaint or seeking exemptions ex post facto. Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach*

of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education. …Schools cannot raise an estoppel against the Constitution. No one can. …It must be remembered that such rules are not in consonance with the very clear principles for permissible limitations to the fundamental rights and freedoms as stipulated in Article 24 of the Constitution. Where they conflict with the Constitution it is an altruism that it rules, and they are voided to the extent of the conflict or inconsistency."

26. The High Court in its impugned order observes as under on citing secularism to be enhanced by encouraging homogeneity:

> "**The school regulations prescribing dress code for all the students as one homogenous class, serve constitutional secularism**. (at Page 96)
>
> …
>
> Petitioners' argument that 'the goal of education is to promote plurality, not promote uniformity or homogeneity, but heterogeneity' and therefore, prescription of student uniform offends the constitutional spirit and ideal, is thoroughly misconceived." (at Page 97)

27. In Fugicha's case the Court held that, *"the High Court and before us, the Church does not seem to have internalized the intrinsic value of heterogeneity and heterodoxy. It has*

not seen difference or diversity as a good to be embraced, celebrated and encouraged. Rather, it has a approached the matter from the rather narrow stricture, prism or blinkers of the need for discipline and uniformity…. to sift out and eliminate difference or plurality in religious expression or manifestation. …It is no answer to say that religion has no room in schools or that those who find difficulty abiding by the restrictions of the school uniform code may well leave and join schools of their own religious persuasion. Such an attitude evinces an intolerable deficit of constitutionalism and, moreover, flies in the face of the guiding principles that govern the provision of basic education in this country. …To our mind this is a duty requiring a sponsor to rise above and go beyond the narrow parochialism and insularity of its own religion or denomination and respect the equal right of others to be different in religious or denominational persuasion. …It is a ***duty to uphold the autonomy and dignity of those whose choices are discordant with ours and acknowledgment of heterodoxy in the school setting as opposed to a forced and unlawful artificial and superficial homogeneity that attempts to suppress difference and diversity.***"

28. Therefore it is imperative that we must remember the words of the South African Constitutional Court in Pillay's case *"the Constitution thus acknowledges the variability of human beings, affirms the right to be different, and celebrates the diversity of the nation."*

Offensive to say that scientific temperament
Not possible with hijab

29. The High Court irrationally concludes that it would become difficult to foster scientific temperament in students if wearing of religious symbols like bhagwa and hijab. It holds:

> "…it is **impossible to instil the scientific temperament**… into the young minds so long as any proposition such as wearing of hijab or Bhagwa are regarded as religiously sacrosanct and therefore, not open to question."

30. In Pillay's case the court disregarding the submission that students held that, *"[107] The other argument raised by the School took the form of a "parade of horribles" or slippery slope scenario that the necessary consequence. …Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression.* ***The possibility for abuse should not affect the rights of those who hold sincere beliefs.*** *Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution.* ***The display of religion and culture in public is not a "parade of horribles" but a pageant of diversity which will enrich our schools and in turn our country.*** *Thirdly, acceptance of one practice does not require the School to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the School, it may refuse to permit it."*

31. Further in Multani's case the Court held that *"78. …An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others."*

Offensive to say that wearing of hijab Would hinder emancipation of women

32. The High Court has concluded, derogatorily so, that allowing hijab would hamper the emancipation of women. It holds:

> "insistence on wearing…of headgear… in any community …**may hinder the emancipation of**… **Muslim women in particular**". (page 124)

33. The High Court places reliance on an excerpt from Dr. BR Ambedkar's "Pakistan or the Partition of India (1945) at Chapter X, Part 1, titled 'Social Stagnation', which to the Petitioners' mind is hurtful, and portrays the religion of Islam in an extremely derogatory and biased light. Dr. Ambedkar states as under:

> "…These burka woman walking in the streets is one of the most hideous sights one can witness in India…The Muslims have all the social evils of the Hindus and something more. That something more is the compulsory system of purdah for Muslim women… Such seclusion cannot have its deteriorating effect upon the physical constitution of Muslim women… Being completely secluded from the outer world, they engage their minds in petty family quarrels with the result that they become narrow and restrictive in their outlook… They cannot take part in any outdoor activity and are weighed

down by a slavish mentality and an inferiority complex…Purdah women in particular become helpless, timid…"

Three landmark decisions protect religious beliefs

Right to autonomy

33. This Hon'ble Court's decision in Bijoe Emmanuel vs. State of Kerala (1986) 3 SCC 615 squarely covers the petitioners' argument about a genuinely held belief as being protected by Article 25 of the Constitution. In deciding whether Article 25 is attracted in a particular situation the question before the Court is not whether a particular religious belief or practice appeals to its reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Reiterating that, this Hon'ble Court held as under:

> "20. …. Davar, J.'s following observations in *Jamshedji v. Soonabai*:
>
> > "…a secular Judge is bound to accept that belief - it is not for him to sit in judgement on that belied, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind.
>
> We do endorse the view suggested by Davar, J.'s observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views

and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the inhibitions contained therein"

34. This Hon'ble Court further reiterating the essence of Article 25 vis-à-vis a genuinely held belief, in Bijoe Emmanuel vs. State of Kerala (1986) 3 SCC 615 held as under:

"24. …After referring to Jackson, J.'s opinion in West Virginia State Board of Education v. Barnette and some other cases, it was further observed:

"For the court to take to itself the right to say that the exercises here in question had no religious or devotional significance might be for the court to deny that very religious freedom which the statute is intended to provide.

It is urged that the refusal of the infant appellants to join in the exercises in question is disturbing and constitutes conduct injurious to the moral tone of the school. It is not claimed that the appellants themselves engaged in any alleged religious ceremonies or observations, but only that they refrained from joining in the exercises in question... To do just that could not, I think be viewed as conduct injurious to the moral tone of the school or class."

35. This Hon'ble Court has enunciated the effect and scope of the protection to religious freedoms in Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282 holding as under:

"17. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. …A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

18. **The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Article 25.**

20. The contention formulated in such broad terms cannot, we think, be supported. **In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.** If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere

fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(*b*). What Article 25(2)(*a*) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices.

23. **As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down."**

36. This Hon'ble Court reaffirming the right to dignity, autonomy and privacy in NALSA vs. Union of India and Ors. held as under:

> "63. …The Supreme Court of the State of Illinois in the City of Chicago v. Wilson et al., 75 III.2d 525(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."
>
> …
>
> 66. …Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans.
>
> …
>
> 69. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In Anuj Garg v. Hotel Association of India (2008) 3 SCC 1 (paragraphs 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in."

Formulations such as "qualified spaces", "derivative rights"

Not found in any Supreme Court judgments

Out-of-the-blue and baseless formulations

37. The High Court uses obscure terms like "qualified spaces", "derivative rights" to conclude that constitutional and fundamental rights are somehow if not absent, are at a lower pedestal in schools, war rooms and defence camps. This argument finds mention in the High Court's decision to justify

the need to maintain order, discipline and rules in school that would, according to the impugned order be somehow threatened by girls wearing the hijab. Making the aforesaid observations the High Court holds as under:

> "As already mentioned above, the Fundamental Rights have relative content and their efficacy levels depend upon the circumstances in which they are sought to be exercised. …However, the petitions we are treating do not involve the right to freedom of speech & expression or right to privacy, to such an extent as to warrant the employment of these tests for evaluation of argued restrictions, in the form of school dress code. The complaint of the petitioners is against the violation of essentially 'derivative rights' of the kind. Their grievances do not go to the core of *substantive rights* as such but lie in the penumbra thereof. So, **by a sheer constitutional logic, the protection that otherwise avails to the *substantive rights* as such cannot be stretched too far even to cover the *derivative rights* of this nature, regardless of the '*qualified public places*' in which they are sought to be exercised.** It hardly needs to be stated that schools are '*qualified public places*' that are structured predominantly for imparting educational instructions to the students. Such '*qualified spaces*' by their very nature repel the assertion of individual rights to the detriment of their general discipline & decorum. Even the *substantive rights* themselves metamorphise into a kind of *derivative rights* in such places. These illustrate this:

the rights of an under – trial detenue qualitatively and quantitatively are inferior to those of a free citizen. Similarly, the rights of a serving convict are inferior to those of an under – trial detenue. **By no stretch of imagination, it can be gainfully argued that prescription of dress code offends students' fundamental right to expression or their autonomy.** In matters like this, **there is absolutely no scope for complaint of manifest arbitrariness or discrimination** *inter alia* under Articles 14 & 15, when the dress code is equally applicable to all the students, regardless of religion, language, gender or the like. It is nobody's case that the dress code is sectarian."

38. The test of manifest arbitrariness opined and laid down by this Hon'ble Court in Shayara Bano vs. Union of India and Ors. (2017) 9 SCC 1 is as under:

> "101. …it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is

> excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

39. This in the Petitioners' submission cannot stand. The rights of school going girls to wear the hijab cannot be said to be at a lower pedestal under the garb of protecting social and public order or morality. Schools in no circumstance can be equated with militaristic settings of war rooms and defence camps, when by the nature of the institution itself, schools are duty-bound to instil the ideals of the constitution, democracy, such as diversity and mutual respect for all cultures and religions. The freedom of expression, conscience, autonomy and privacy is protected by the Constitution and the protection reiterated by this Hon'ble Court in a catena of decisions. Therefore the test of constitutionality ought to be met when such an order of the State is brought into force, and such order is to be struck down by this Hon'ble Court if it is manifestly arbitrary inter alia Articles 14, 19 and 21.

Casual rejection of 3 international Supreme Court decisions

40. The Hon'ble High Court entirely disregards the three international judgements that squarely cover the issue at hand and answer all questions that are associated with the same holding as under:

> "Constitutional schemes and socio-political ideologies vary from one country to another, regardless of textual similarities. A Constitution of a

> country being the Fundamental Law, is shaped by several streams of forces such as history, religion, culture, way of life, values and a host of such other factors. In a given fact matrix, how a foreign jurisdiction treats the case cannot be the sole model readily availing for adoption in our system which ordinarily treats foreign law & foreign judgments as matters of facts. Secondly, the said case involved a nose stud, which is ocularly insignificantly, apparently being as small as can be. By no stretch of imagination, that would not in any way affect the uniformity which the dress code intends to bring in the class room. That was an inarticulate factor of the said judgment. …Malaysia being a theistic Nation has Islam as the State religion and the court in its wisdom treated wearing *hijab* as being a part of religious practice. We have a wealth of material with which a view in respectful variance is formed.
>
> …
>
> Foreign decisions also throw light on the issues debated, cannot be disputed. However, courts have to adjudge the causes brought before them essentially in accordance with native law." (page 110)

41. The Petitioner further submits that the High Court's attention was drawn to the brilliant decisions of the South African Constitution Court in Pillay's case, the decision of the Kenya Court of Appeal in Fugicha's case and of the Canadian Supreme Court in Multani's case. Pillay's case dealt with the Tamil practice of girls wearing a nose stud, Fugicha's case

dealt with the hijab in schools and Multani's case dealt with the wearing of a kirpan in schools. The High Court referred to these decisions and cursorily passes over them. Foreign decisions also throw light on the issues debated, cannot be disputed. However, courts have to adjudge the causes brought before them essentially in accordance with native law.

To sum up

37. The impugned decision of the Karnataka High Court should not be allowed to stand because (1) parts of the judgment are deeply offensive to those who profess and follow the faith of Islam, (2) the judgment runs contrary to at least three landmark judgments of this Hon'ble Court which lay down that bonafide belief in the tenets and practices of religion are protected by Article 25 (3) that the decision substantially nullifies and weakens the protection given by Article 25 which protects the freedom of conscience, free profession, practice and propagation of religion, (4) that the decision manifests an intellectual point of view which would see educational institutions as akin to "war rooms and defence camps" almost like the militarisation of schools and colleges that would impose uniformity of a military kind that would crush all heterogeneity and dissent which are so essential in a democracy, (5) that the impugned judgment introduces all kinds of new formulations that are not to be found in any judgment or in the Constitution and which are likely to cause all kinds of confusion nationwide as these formulations such as "qualified spaces", where democracy apparently cannot have free play, "derivative rights" which are an unheard of inferior form of fundamental rights, and are used without

basis or precedent, (6) the judgment completely disregards the well-known principle of "reasonable accommodation" which the hijab wearing women were asking for in the form of a minor adjustment in the uniform so as to permit the covering of the head, (7) the wrong equation of the wearing of the hijab with the creation of a law and order situation, (8) the shocking formulation that a person wearing a hijab can never be truly emancipated and that scientific temperament is not possible if one stands by the wearing of the hijab, (9) in short, the decision undermines and devalues the right to autonomy, dignity and privacy that have been reiterated time and again in many decisions of the Supreme Court.

Date: 03.09.2022

Place: New Delhi

Filed By:

Satya Mitra
(AOR for the Petitioners)
AOR Code: 1852
576, Masjid Road, Jangpura
New Delhi-110014
9911769905 | satyamitra2003@gmail.com

SLIC
Socio-Legal Information Centre

Mugdha - <mugdha@hrln.org>

Advance Service - Written Submissions in SLP(C) Diary No. 9156 of 2022 - Fathima Jazeela and Ors. vs. State of Karnataka and Ors.

1 message

Mugdha - <mugdha@slic.org.in> Sat, Sep 3, 2022 at 9:32 AM
To: raghupathyvn@gmail.com, vikram@vhlawchambers.in, abhisheksharma.office@gmail.com, shubhranshu.padhi@gmail.com

Dear Sir/Ma'am,

Kindly find attached the Written Submissions SLP (Civil) filed on behalf of Fathima Jazeela, bearing Diary number 9156 of 2022.

Since your respective offices are representing the Respondents in the present case, kindly find the Written Submissions for your reference.

This is on behalf of Advocate Satya Mitra, AOR for the Petitioner. Kindly take note of the same.

Regards,

Mugdha
Advocate for the Petitioner
576, Masjid Road, Bhogal,
Jangpura, New Delhi - 110014
+91 9810025572

Written Submissions on Behalf of the Petitioner in Diary No. 9156 of 2022.pdf
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