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'Review court can refer questions to larger Bench'

Nine-judge SC Bench frames 7 questions on religious rights

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NEW DELHI

A nine-judge Constitution Bench of the Supreme Court on Monday upheld the decision of the five-judge Sabarimala Review Bench to refer to a larger Bench questions on the ambit and scope of religious freedom practised by multiple faiths across the country.

The nine-judge Bench, led by Chief Justice of India (CJI) S.A. Bobde, said a Bench engaged in the review of a particular judgment could indeed refer other questions of law to a larger Bench. Arguments on merits would be heard from February 17.

The Bench also framed seven questions of law which it would decide now. These are: what is the scope and ambit of religious freedom under Article 25 of the Constitution? What is the interplay between religious freedom and rights of religious denominations under Article 26 of the Constitution? Whether religious denominations are subject to fundamental rights? What is the definition of 'morality' used in Articles 25 and 26? What is the ambit and scope of judicial review of Article 25? What is the meaning of the phrase "sections of Hindus"

Setting the agenda

The seven questions that the SC Bench will look into:

- What is the scope and ambit of religious freedom under Article 25 of the Constitution?
- What is the interplay between religious freedom and rights of religious denominations under Article 26?
- Whether religious denominations are subject to fundamental rights?
- What is the definition of 'morality' used in Article 25 and Article 26?
- What is the ambit and scope of judicial review of Article 25?
- What is the meaning of the phrase "sections of Hindus" under Article 25 (2)(b)?
- Whether a person not belonging to a religious group can question the practices and beliefs of that group in a PIL petition?

under Article 25 (2)(b)? Whether a person not belonging to a religious group can question the practices, beliefs of that group in a PIL petition?

On the last day of hearing, Chief Justice Bobde had defended the November 14, 2019, reference made by the Review Bench, led by then CJI Ranjan Gogoi. "By making this reference order [on November 14], the Bench [led by Justice Gogoi] has not prejudicially affected anybody's rights. It may be the most innovative idea, but it has not affected any rights," he had said orally.

On November 14 last year, the Gogoi Bench, in a majority judgment, did not decide

the Sabarimala review cases before it. Instead, it went on to frame "larger issues" concerning essential religious practices of various religions. It further clubbed other pending cases on subjects as varied as female genital mutilation among the Dawoodi Bohras to entry of Parsi women who married inter-faith into the fire temple and Muslim women into mosques and referred them all to a larger Bench.

The reference order also asked the larger Bench to consider the rule pertaining to the prohibition of entry to women of menstruating age into the Sabarimala temple.

'Review court can refer questions to larger Bench'

Chief Justice Bobde, who succeeded Justice Gogoi, set up the nine-judge Bench to hear the reference.

The November 2019 reference hit a bump on Monday last, with senior advocate Fali Nariman objecting to it. He argued that the court could not declare law in thin air. "Fundamental [to judicial process] is you apply law to the facts of cases and not decide the law before looking into the facts... Never indulge in the exposition of law outside the realm of the facts of the case," he said.

The Gogoi Bench's sole task was to review the Sabarimala judgment of September 2018. The major ground for seeking a review was the finding in the judgment that Ayyappa devotees did not form a separate religious de-

nomination, he stated. On November 14, the Review Bench recorded no errors apparent or miscarriage of justice in the 2018 verdict.

'Academic exercise'

"When Ayyappa devotees were not found to be a separate denomination, these reference questions on Article 25 [religious freedom] are purely an academic exercise. It was not necessary to raise these hypothetical questions in reference. The President, and not the CJI, consults the Supreme Court under Article 143 of the Constitution on questions of law and facts," Mr. Nariman had argued.

Senior advocate Shyam Divan had agreed that review jurisdiction did not include "framing a catalogue of questions randomly".