

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

RITU RAJ AWASTHI (CJ); KRISHNA S. DIXIT; J, J.M. KHAZI J.

Dated 15th day of March, 2022

**RESHAM V. STATE OF KARNATAKA and Ors.**

### **Facts**

On February 5th 2022, the Karnataka Government issued an order which empowered institutes to prescribe a dress code. As a result of this order, an institute barred students from wearing hijab inside the classrooms. This order was subsequently challenged in the Karnataka High Court. On 11TH February the Court issued an interim order barring all symbols which are considered religious by the masses, including hijab and saffron shawls, inside the classrooms.

### **Issue**

1. Whether wearing hijab/head-scarf is a part of 'essential religious practice' in Islamic Faith protected under Article 25 of the Constitution? Done
2. Whether prescription of school uniform is not legally permissible, as being violative of petitioners Fundamental Rights inter alia guaranteed under Articles, 19(1)(a), (i.e., freedom of expression) and 21, (i.e., privacy) of the Constitution?
3. Whether the Government Order dated 05.02.2022 apart from being incompetent is issued without application of mind and further is manifestly arbitrary and therefore, violates Articles 14 & 15 of the Constitution?
4. Whether any case is made out in W.P.No.2146/2022 for issuance of a direction for initiating disciplinary enquiry against respondent Nos.6 to 14 and for issuance of a Writ of Quo Warranto against respondent Nos.15 & 16?

## **Holding**

1. Wearing of hijab by Muslim women does not form a part of essential religious practice in Islamic faith.
2. The prescription of school uniform is only a reasonable restriction constitutionally permissible which the students cannot object to.
3. The government has power to issue the impugned Order dated 05.2.2022 and that no case is made out for its invalidation.
4. No case is made out in W.P. No.2146/2022 for issuance of a direction for initiating disciplinary enquiry against respondent Nos. 6 to 14. The prayer for issuance of Writ of Quo Warranto against respondent Nos. 15 and 16 is rejected for being not maintainable.

## **Reasoning**

### **CONSTITUTIONAL RIGHT TO RELIGION AND RESTRICTIONS THEREON**

Article 25 of the constitution provides for freedom of conscience and freedom to practice and propagate religion. It however, nowhere defines what religion is. It is also pertinent to note that the free exercise of religion under Article 25 is subject to restrictions imposed by the State on the grounds of public order, morality and health. The restrictions can be imposed on beliefs and practices considered essential by those professing the religion. Further, the freedom of religion is subordinate to other provisions of Part III. Article 25(2)(a) reserves the power of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice. Article 25(2)(b) empowers the State to legislate for social welfare and reform even though by doing so, it might interfere with religious practice.

### **PROTECTION OF ESSENTIAL RELIGIOUS PRACTICE AND THE TEST FOR ITS ASCERTAINMENT**

**In the landmark case of ACHARYA JAGADHISHWARANANDA AVADHUTA, the concept of essential religious practice has been determined and explained.**

**Few excerpts of paragraph 9 (of the ACHARYA JAGADHISHWARANANDA AVADHUTA case) quoted by the Karnataka High Court.**

- *The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion*

- *What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion*

- *Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built,*

- *Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part.*

IN INDIAN YOUNG LAWYERS ASSOCIATION it was undisputedly stated that a religious practice in order to be called an 'essential religious practice' should have the following indicia: **(i) Practice should be fundamental to religion and it should be from the time immemorial. (ii) Foundation of the practice must precede the religion itself or should be co-founded at the origin of the religion. (iii) Such practice must form the cornerstone of religion itself. If that practice is not observed or followed, it would result in the change of religion itself and, (iv) Such practice must be binding nature of the religion itself and it must be compelling.**

## **HIERARCHY OF ISLAMIC SCRIPTURES AND THE HIJAB**

In SHAYRA BANO it was observed that there are four sources for Islamic law- (i) Quran (ii) Hadith (iii) Ijma (iv) Qiyas. The Holy Quran is the "first source of law".

**The court relied upon 'The Holy Quran: Text, Translation and Commentary' by Abdullah Yusuf Ali, (published by Goodword Books; 2019 reprint)** to determine whether Hijab is a Quranic Injunction and an essential religious practice. This particular translation was chosen since there was a broad unanimity at the Bar as to its authenticity & reliability.

Abdullah Yusuf Ali referring to sūra (xxxiii), verse 59, at footnote 3765 in his book states: "**Jilbāb, plural Jalābīb: an outer garment; a long gown covering the whole body, or a cloak covering the neck as bosom.**". In the footnote 3760 to Verse 53, he states: "...In the wording, note that **for Muslim women generally, no screen or hijab (Purdah) is mentioned, but only a veil to cover the bosom, and modesty in dress.** The screen was a special feature of honor for the Prophet's

household, introduced about five or six years before his death...” Added, in footnote 3767 to verse 59 of the same sura, he opines: **“This rule was not absolute: if for any reason it could not be observed, ‘God is Oft. Returning, Most Merciful.’...”** Thus, there is sufficient intrinsic material within the scripture itself to support the view that wearing **hijab has been only recommendatory**, if at all it is.

Thus, it was determined by the court that the Holy Quran does not mandate wearing of hijab or headgear for Muslim women. Women were expected to dress modestly owing to the era of jahiliyat and the culture that sprouted due to continuous veiling to safeguard the body. Hijab was never meant to become a religious symbol. Hijab, if at all, only has a cultural significance and this culture of veiling has been shared by Byzantines, Sassanids. Other cultures in southwestern Arabia practiced veiling in pre-Islamic times too, like the Banū Ismāʿīl and Banū Qaḥṭān. Veiling was also practiced in Mesopotamia and the traces veiling can also be found in the Assyrian law. Veiling is a part of culture and practiced by several different civilizations in different periods of time and is certainly not restricted only to Islam and Muslim females.

The bench thus observed that the era before the introduction of Islam is known as Jahiliya-a time of barbarism and ignorance. The Quran shows concern for the cases of ‘molestation of innocent women’ and therefore, it recommended wearing of this and other apparel as a measure of social security. The veil was a safe measure for women to survive the barbaric times and socio-cultural conditions which have no presence in the present time.

The bench leads another observation that **what is not religiously obligatory, cannot be made a quintessential aspect of religion through public agitations or by the passionate arguments in courts**

**Also, the bench confirmed that** the respondents were justified in contending that the Writ Petitions **lack the essential averments and that the petitioners have not loaded to the record the evidentiary material to prove their case.** The Apex Court in INDIAN YOUNG LAWYERS ASSOCIATION, stated that matters that are essential to religious faith or belief; **have to be adjudged on the evidence borne out by record.** There was absolutely **no material placed on record** to prima facie show that wearing of hijab is a part of an essential religious practice in Islam and that the petitioners have been wearing hijab from the beginning. **It is not that if the alleged practice of wearing hijab is not adhered to, those not wearing hijab become the sinners, Islam loses its glory and it ceases to be a religion.** Petitioners miserably failed to meet the threshold requirement of pleadings and proof as to wearing hijab is an inviolable religious practice in Islam and much less a part of ‘essential religious practice’.

The prescription of a dress code for students does not violate constitutionally protected rights. The prescription of dress code for students is a universal phenomenon and religion neutral here.

The court remarked that the school regulations prescribing dress code for all the students as one homogenous class, serve constitutional secularism. Also, different uniforms, designed on the basis of religion, within an institute would result in '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.

The court ascertained that there was 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.

## **THE HIJAB AND THE RIGHT TO EXPRESS**

Though the Apex Court in NATIONAL LEGAL SERVICES AUTHORITY, said that dressing too is an 'expression' protected under Article 19(1)(a) and therefore, ordinarily, no restriction can be placed on one's personal appearance or choice of apparel. However, this right is "subject to the restrictions contained in Article 19(2) of the Constitution." 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. 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. It was remarked to be too farfetched to argue that the school dress code militates against the fundamental freedoms guaranteed under Articles, 14, 15, 19, 21 & 25 of the Constitution and therefore, the same should be outlawed by the stroke of a pen.

## **RIGHT TO PRIVACY, THE HIJAB AND QUALIFIED PUBLIC PLACES**

A person has a host of rights that are constitutionally guaranteed in varying degrees and they are subject to reasonable restrictions. What is reasonable is dictated by a host of qualitative & quantitative factors. The content & scope of a right, in terms of its exercise are circumstantially dependent. Ordinarily, liberties of a person stand curtailed inter alia by his position, placement and the like. The extent of autonomy is enormous at home, since ordinarily the residence of a person is treated as his

inviolable castle. However, in 'qualified public places' like schools, courts, war rooms, defense camps, etc., the freedom of individuals as of necessity, is curtailed consistent with their discipline & decorum and function & purpose. Prescription of school dress code to the exclusion of hijab, bhagwa, or any other apparel symbolic of religion can be a step forward in the direction of emancipation and more particularly, to the access to education. It hardly needs to be stated that this does not rob off the autonomy of women or their right to education inasmuch as they can wear any apparel of their choice outside the classroom.

## **CHALLENGING THE GOVERNMENT ORDER**

The subject matter of the Government Order was the prescription of school uniform. Power to prescribe, was availed through the scheme of 1983 Act and the Rules promulgated thereunder. Section 133(2) of the Act which is broadly worded empowers the government to issue any directions to give effect to the purposes of the Act or to any provision of the Act or to any Rule made thereunder. This is a wide conferment of power **which includes the authority to prescribe 115 school dress code. It is more so because Rule 11 of 1995 Curricula Rules itself provides for the prescription of school uniform and its modalities.** The Government Order can be construed as the one issued to give effect to this rule itself.

*The court thus determined that since wearing hijab is not an essential religious practice and school uniform to its exclusion can be prescribed. Also, no the petitioners failed to prove the invalidation of the Government order.*

## **WRITS OF QUO WARRANTO AND MANDAMUS**

Petitioners also failed to attach any authentic versions and legal authority to support their argument against the government order which empowers institutions to prescribe a dress code for the students.

Petitioners, while seeking a writ of mandamus, argued that the principal and teachers were violating the departmental guidelines by prescribing a dress code. To this, the bench stated that Departmental Guidelines as having no force of law. Therefore, the question of the said respondents violating the same even remotely does not arise.

The petitioners also sought a writ of Quo Warranto. The same was not issued since the petitioners failed to demonstrate that the concerned respondents held a public post or public office which is a pre-condition for the issuance of the writ.

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#### Personal Remark

The petitions were ill-drafted and the petitioners failed to provide evidentiary proofs which were required quintessentially to argue and form a case. The students of the concerned institute had never worn hijab to the premises. However, in the middle of the academic session, the issue of hijab spread across educational institutes and other states. It also caused distress in the general mass. To quote the bench of this particular case – “The way, hijab imbroglio unfolded gives scope for the argument that some ‘unseen hands’ are at work to engineer social unrest and disharmony.”

Reiterating the court's remark, it seems impossible to ignore the religion and politics from this particular case. Last year, Senior Journalist M P Basheer who was former editorial head of Indiavision disclosed the involvement for foreign funding to advance radical Islam in India. He revealed that Islamic Organizations such as Popular Front of India and Jamaat-e-Islami were being provided with enormous funds and monetary aid to propel their radical agendas ahead. Basheer also disclosed that in an encounter with the secretary-general of Jammata-e-Islami, it was revealed that the organization sent a letter to the King AbdulAziz University in Saudi Arabia, requesting to increase the grant so that they could promote and market Islamic dress code in Kerala and India. One year down the timeline the hijab controversy flared.

The female Muslim students admitted that they began wearing hijab to schools and pleading for the same to be worn in classrooms only in December 2021. The principal of the concerned Institute recounted a similar statement wherein he stated that the girls were allowed to wear the hijab till the premises of the institution but had to take it off in the classrooms and that the girls began to argue and plead for Hijab only in December 2021. Out of 150 female students only the 6 Muslim students had resentment against the dress code. Incidentally, the six protesting girls have also been influenced by PFI, as per their own admission. December 2021 was the month in which POPULAR FRONT OF INDIA (PFI) and CAMPUS FRONT INDIA(CFI) began a drive to admit, campaign and influence the students. The female students had admitted that they were being counseled by the CFI (the student wing of PFI) on the Hijab controversy. Female Muslim students who have become the face of the protest also have family ties which several members of the PFI. Several accounts have been published in

the public domain specifying rewards and gifts by political parties and radical Islamic organizations. Moreover, the controversy has been hijacked by the banned terror outfit- Jamaat-e-Islami, Popular Front of India and Campus Front of India. The same remains to be battled in the Apex Court of India.