Reserved

In the High Court of Judicature at Allahabad,

Lucknow Bench, Lucknow

O.O.S.No.4 of 1989 (Reg. Suit No.12-61)

1. The Sunni Central Board of Waqfs U.P.

Lucknow, Moti Lal Bose Road, Police Station Kaiserbagh, City Lucknow through Shah Ghyas Alam, Secretary.

2. Molvi Mohammad Qasim, aged about 53 years, son of Sheikh Abdul Razzaq, General Secretary, Jamiatul Ulami Hind, U.P. Bagh Gunge Nawab, Police station Kaserbag, Lucknow

(Deleted vide order dated 9.12.91)

Sd./- 9.12.91

2/1. Mohd. Siddiq alias Hafiz Mohd. Siddiq, aged about 46 years, s/o late Haji Mohd. Ibrahim, resident of Lal Bagh, Moradabad, General Secretary, Jamiatul Ulemai Hind, Uttar Pradesh, Jamiat Building, B.N. Verma Road (Katchehry Road), Lucknow

3. Haji Mohammad Ehtram Ali, aged about 70 years son of Munshi Mohammad Ehtisham Ali deceased, resident of Khayaliganj, police station Kaiserbagh, City Lucknow (Struck off under Court's order D/ 14.3.70. Sd/-)

4. Molvi Mohammad Faiq aged about 55 years, son of Haji Ramzan R/o Mohalla Tehri Bazar, Ajodhiya, pergana Haveli Avadh, Ditt. Faizabad.

(Deleted vide court's order dated 9.12.91)

Sd./- 9.12.91

5. Molvi Mohammad Naseer aged about 58 years, son of Ashiq Ali, resident of village : Ponthar, Pergana Tanda Tahsil Tanda, District Faizabad.

(Deleted vide court's order dated 16.11.92

Sd./- 16.11.92

6. Shahabuddin aged about 42 years, son of Haji Munney Sahib, resident of Angoori Bagh, City Faizabad.

(Deleted vide Court's order dated 9.12.91)

Sd./- 9.12.91

6/1 Ziauddin aged about 46 years, son of Haji Shahabuddin (deceased) resident of Mohalla Angoori Bagh, pergana Haveli Oudh,City and District Faizabad.

(Amended as per court's order dated 23.8.90)

Sd./- 31.8.90

7. Mohammad Hashim aged about 40 years, son of Karim Bux, resident of Mohalla Kutya, Paji Tola, Ajodhiya Pergana Haveli Avadh, Distt. Faizabad.

8. Vakiluddin aged about 55 years son of Ismail, resident of Madarpur, pegana and Tahsil Tanda, District Faizabad.

"8/1. Maulana Mahfoozurahman, aged about 52 years son of late Maulana Vakiluddin, Resident of Village Madarpur, Pergana and Tahsil Tanda, District Faizabad."

(Amended & Added as per Court's

order dated 9.5.95)

Sd./- 9.5.95

9. Mahmud/Ahmad aged about 30 years son of Ghulam Hasan, resident of Mohalla Rakabganj, City Faizabad

(Added under Court's order
dated 4.2.63

Sd./- 5.2.63

10. Zahoor Ahmad, S/o Noor Mohd. Aged about 80 years r/o Mohalla Nau Ghazi Qabar, Ayodhya District Faizabad.

(Deleted vide court's order dated 9.12.91)

Sd./-9.12.91

10/1 Farooq Ahmad, son of Sri Zahoor Ahmad, R/o Mohalla Naugazi Qabar, Ayodhya City, Ayodhya, Distt. Faizabad.

(Added vide court's order dated 9.12.91)

Sd./- 9.12.91 **.....Plaintiffs**

Versus

1. Gopal Singh Visharad, aged about 53 years, son of Thakur Girdhari Singh, resident of Sargaddwar, Ajodhiya, District Faizabad.

(Deleted vide court's order dated 9.12.91)

Sd./-9.12.91

2. Sri Param Hans Ram Chander Das, resident of Ajodhia, Faizabad. (Dead)

2/1. Mahanth SureshDas Chela Sri Param Hans Ram Chander Das resident of Ajodia, city Faizabad.

3. Nkirmohi Akhara situate in Mohalla Ram Ghat City Ajodhiya, District Faizabad, through Mahant Raghunath Dass Chela Mahant Dharm Dass Mahant Raghunath Dass Chela Mahant Dharam Mahant Raghunath Das Chela Mohant Dharam Das Mahant Rameshwar Das Mahnat Sarbarkar, resident of Nirmohi Akhara Mohalla Ramghat, City Ajodhiya Distrit Faizabad.

(Substituted dated 23.7.66) Sd./- 30.7.66

Mahant Pram Dass Chela Mahant Gobardhan Dass

4. Mahant Raghunath Dass Chela Mahant Dharam Dass Mahant and Sarbarakhar Nirmohi Akhaara Mohalla Ram Ghat, city Ajodhiya, District Faizabad.

(Substituted under Court's order dated 23.7.66)

Sd./- 30.7.66

5. The State of Uttar Pradesh through Chief Secretary to the State Government, U.P.

(Amended under court's order dated 8.7.67)
Sd./- 20.7.67
Corrected under court's order
dated 30.1.62 Sd./-

6. The Collector, Faizabad.

7. The City Magistrate, Faizabad.

8. The Superintendent of Police, Faizabad.

9. B. Priya Dutt Son of R.B. Babu Kamlapat Ram, resident of Rakabganj, Faizabad.

10. President, all India Hindu Maha Sabha, Read Road, New Delhi.

Maha Pradeshik Sabha,

11. President All India Arya/ Samaj, Delhi (Dewan Hall)

Baldan Bhawan, Shradhanand Bazar, Delhi.

(Added under court's order dated 20.3.63)
Corrected as per court's order
dated 17.9.92 Sd./- 17.9.92

12. President, All India Sanatan Dharm Sabha, Delhi.

(Added under Court's order dated 20.3.1963)

13. Abhiram Das age 54 years, Sadhak Shesh Sri Baba Sarin Das, R/o Hanuman Garhi, Ayodhya.

(Added under court's order dated 26.4.48 Sd./-
(Deleted vide court's order dated 9.12.91
Sd./- 9.12.91)

13/1 Dharam Das alleged Chela Baba Abhiram Das, R/o Hanuman Garhi, Ayodhya, Faizabad. (Sd./- 27.1.92)

14. Pundrik Misra, age 33 years, s/o Raj Narain Misra, R/o Balrampur Sarai, Rakabganj, Faizabad.

15. Sri Ram Dayal Saran, Chela of late Ram Lakhan Saran, resident of town Ayodhya, District Faizabad.

16. Shab Narain Das Chaila Baba Badri Das Ji Sankatwali, r/o Sri Hanuman Garhi, Ayodhya, Faizabad.

(Deleted vide court's order dated 9.12.91)

Sd./-9.12.91

17. Ramesh Chandra Tripathi aged about 29 years, son of Sri Parsh Rama Tripathi, Resident of village Bhagwan Patti, Pargana Minjhaura, Tahsil Akbarpur, District Faizabad.

(Added under court's order dated 30.4.69)

Sd./- 14.5.69

18. Mahant Ganga Das aged about 45 years, (Chela of Mahant Sarju Dass R/o Mandir Ladle Prasad, City Ayodhya, Faizabad.

Do-

19. Shri Swami Govindacharya, manas martand putra Balbhadar Urf Jhallu, R/o Makan No.735, 736, 737, Katra Ayodhya, Pergana Haveli Audh Tahsil and Zila Faizabad.

20. Madan Mohan Gupta, convener of Akhil Bhartiya Sri Ram Janam Bhoomi Punarudhar Samti, E-7/45 Bangla T.T. Nagar, Bhopal.

(Amended vide order dated 27.1.92) Sd./-27.1.92

(Added by order of court's dated 23.10.89) Sd./-

21. Prince Anjum Qadar, President All India Shia conference, Registered, Qaumi Ghar, Nadan Mohal Road, F.S. Chowk, Lucknow

(Amended vide order dated 27.1.92) Sd./-27.1.92

(Added by court's order dated 8.12.89)

22. Umesh Chandra Pandey, son of Sri R.S. Pandey, R/o Ranupalli, Ayodhya, Distt. Faizabad.

(Added in court's dated 20.1.92) Sd./-23.1.92

……Defendants

J U D G E M E N T

(Delivered by Hon. D.V. Sharma,J.)

It would be expedient to refer the background of the dispute before dealing with the rival submissions of the parties.

O.O.S. No. 1 of 1989, Shri Gopal Singh Visharad Vs. Zahur Ahmad and 8 others, O.O.S. No. 3 of 1989, Nirmohi Aakhada etc. Vs. Baboo Priya Dutt Ram & others, O.O.S. No. 4 of 1989, The Sunni Central Board of Waqfs U.P., Lucknow and others Vs. Gopal Singh Visharad and others and O.O.S. No. 5 of 1989, Bhagwan Sri Ram Virajman at Ayodhya and others vs. Rajendra Singh and Others were filed before the court of Civil Judge, Faizabad. Thereafter, State of

U.P. filed an application (Misc. case No. 29 of 1987) on 10/15 December, 1987 under Section 24 of Code of Civil Procedure read with Section 151 C.P.C. before the High Court on the ground that due to importance of the matter these suits may be withdrawn from the Civil Court, Faizabad to this Court and gave undertaking to meet out expenses of the witnesses etc.

Thereafter, the Division Bench of this Court allowed the above application and directed that these cases may be disposed of by the Full Bench of this Court and place before Hon'ble the Chief Justice for constituting the Full Bench, which is hearing these matters.

These suits were renumbered in High Court as O.O.S. No. 1 of 1989, O.O.S. No. 2 of 1989, O.O.S. No. 3 of 1989, O.O.S. No. 4 of 1989 and O.O.S. No. 5 of 1989. The Original Suit no. 2 of 1989 was subsequently withdrawn, accordingly only four cases are pending for adjudication before this Bench. Original Suit No. 4 of 1989 is the leading case.

The Government of India decided to acquire all area in dispute in the suits pending and issued an ordinance named the Acquisition of Certain Area at Ayodhya Ordinance, 1993 on 7.1.1993 for acquisition of 67.703 acres of land in the Ram Janambhumi-Babri Masjid complex. The said ordinance was later replaced by Act No. 33 of 1993. In view of Sub-Section 3 of Section 4 of the aforesaid Act, all pending suits and legal proceedings abated. Thereafter, Special Reference No. 1 of 1993 was made by President of India under Article

143 of the Constitution of India. The same was challenged by one Dr. Ismail Faruqui in Transferred Case (C) Nos. 41, 43 and 45 of 1993, Jamiat-Ulama-E-Hind and another Vs. Union of India and others in Writ Petition (Civil) No. 208 of 1993, Mohd. Aslam Vs. Union of India and others and in transfer case No. 42 of 1993 Thakur Vijay Ragho Bhagwan Birajman Mandir and another Vs. Union of India and others and in Special Reference No. 1 of 1993, Hargyan Singh Vs. State of U.P. And others.

The Hon'ble Apex Court decided aforesaid matters and referred back these cases for adjudication with certain directions. The case is reported in (**1994) 6 SCC 360**, **Dr. M. Ismail Faruqui and Ors. vs. Union of India and Ors (Annexure-I).**

Looking to the importance, sensitivity and vividness of the matter, it would be appropriate that relevant papers may be kept in different annexures for ready reference along with judgment.

Plaintiffs have filed aforesaid O.O.S. No. 4 of 1989 with following reliefs:-

Annexure-I
Page 51-63

(a) A declaration to the effect that the property indicated by letters A B C D in the sketch map attached to the plaint is public mosque commonly known as ‘Babari Masjid’ and that the land adjoining the mosque shown in the sketch map by letters E F G H is a public Muslim grave yard as specified in para 2 of the

plaint may be decreed.

(b) That in case in the opinion of the Court delivery of possession is deemed to be the proper remedy, a decree for delivery of possession of the mosque and grave yard in suit by removal of the idols and other articles which the Hindus may have placed in the mosque as objects of their worship be passed in plaintiffs' favour, against the defendants.

Amendment/Addition
made as per Court's
order dt.25.5.95 Sd./-

(bb) That the statutory Receiver be commanded to hand over the property in dispute described in the Schedule 'A' of the Plaint by removing the unauthorized structures erected thereon."

(c) Costs of the suit be decreed in favour of the plaintiffs.

(d) Any other or further relief which the Hon'ble Court considers proper may be granted.

The plaint case, in brief, is that in the town of Ayodhya one ancient historic mosque, commonly known as Babri Masjid was built by Emperor Babar more than 433 years ago, after his conquest of India for the use of the Muslims in general, as a place of worship and performance of religious ceremonies. The main construction of the mosque is shown by letters A B C D and the land adjoining the mosque is also shown in the sketch map.

It is further averred that there is ancient grave yard of Muslims, covered by the graves of the Muslims, who lost their lives in the battle between emperor Babar and the previous ruler of Ayodhya. The mosque and the graveyard are vested in the Almighty. The mosque and the graveyard is situated in Mohalla Kot Rama Chander also known as Rama Kot Town, Ayodhya. The Khasra number of the mosque and the graveyard are shown in the suit in schedule attached with the plaint.

For the upkeep and maintenance of the mosque, a cash grant used to be paid from the Royal Treasury. After the annexation of Oudh, the British Government also continued the cash Nankar till 1864 and thereafter instead of cash Nankar revenue free land in village Sholapur and Bahoranpur was granted. In the mosque, but outside the main building of the mosque, there was a Chabutra 17' X 21', on which there is a wooden structure in the form of a tent which is still there. In 1885 Mahant Rghbuar Dass filed a Original Suit No. 61/280 of 1885, Mahant Rghbuar Dass Vs. Secretary of State for India in Council and Mohammad Asghar, Mutawalli of the Babri Mosque, for permission to build a temple on the Chabutra 17' X 21' . The suit was dismissed and appeal (Civil Appeal No. 27 of 1885) from the said decree was also dismissed by the learned District Judge, Faizabad.

It is further contended that in 1934 during the communal riot in Ayodhya, some portions of the Babri Mosque was damaged and they were rebuilt and reconditioned at the cost of Government. In 1936 the

U.P. Muslim Wakfs Act XIII of 1936 was passed and after making an enquiry the Wakfs Commissioner, who was a Sunni Mohammadan held that Babri Mssjid was built by emperor Babar and the Babri Mosque was a public wakf and no suit was filed by the Hindus denying the correctness of the report of the Commissioner. Muslims remained in the peaceful possession of the aforesaid mosque till 23.12.1949 when a large crowd of Hindus, damaged the said mosque and desecrated the mosque by placing idols inside the mosque. Even if a Hindu temple as alleged by the defendants existed on the site of which emperor Babar built the mosque 433 years ago, the Muslims, by virtue of their long and continuous possession perfected their title by adverse possessions and the right, title or interest of the Hindu public is extinguished.

The incident of desecrating the mosque was reported by police constable, Mata Prasad to the police station, Ayodhya and a case was registered. The City Magistrate, Faizabad started proceedings under Section 145 Cr.P.C. and attached the property on 29.12.1949 and handed over possession to Receiver, Sri Priya Dutt Ram. It is further averred that City Magistrate, Faizabad illegally with injustice to the plaintiffs, deprived a large section of Muslim community from exercising their legal rights guaranteed by the Constitution of India.

On 16.1.1950 defendant No. 1 filed Regular Suit No. 2 of 1950 in the court of Civil Judge, Faizabad. Suit No. 25 of 1950 and Suit No. 26 of 1960 were also filed. The instant suit was filed by the

plaintiffs under Order 1 Rule 8 C.P.C. and two months notice was also given to the State of U.P. The plaintiffs are entitled for restoration of the building as it existed on 5.12.1992, which was demolished on 6th December, 1992.

The Mosque is a place where prayers are offered publicly as a matter of right, even the open space where prayers are offered may be a mosque and as such even after the demolition of the mosque the land over which the building stood, is still a mosque and Muslims are entitled to offer prayer thereon.

After the proclamation of Ordinance No. 8 of 1993 on 7th January, 1993, which was substituted by an Act of Parliament, namely, Act No. 33 of 1993, the Commissioner of Faizabad Division is working as Authorized person on behalf of the Government of India. The cause of action arose on 23.12.1949 at Ayodhya District Faizabad within the jurisdiction of this Court when the Hindus illegally desecrated the mosque by placing idols in the mosque and the cause of action arose to the plaintiffs on 29.12.1949, the date on which the City Magistrate, Faizabad attached the mosque.

Annexure-I written statements in O.O.S.No./89 Pages-64-185

On behalf of defendants No. 1 and 2 a joint written statement was filed on 12.3.1962, denying the plaint averments and only

admitted this fact to the extent that Shri Priya Dutt Ram was appointed Receiver by the City Magistrate, Faizabad. It is further submitted that the suit is hopelessly time barred and Muslims have not been in the possession over the property in dispute since 1934 and Hindus are holding the temple in their possession, even prior to 1934 and continuous Hindu puja is being done in the temple and Muslims have never offered prayer since 1934, falsely described as Babri Mosque. It is further averred that the disputed place is a Hindu public charitable institution and is open for worship to all Hindus. The suit is also barred by time as no action was taken in time. On equitable grounds also, the suit deserves to be rejected because Hindu puja is going on in the said temple since 1934 and admittedly from January, 1950 when the City Magistrate directed the defendant No. 9 to carry on Puja as usual in the said temple. **The suit under Order 1 Rule, 8 C.P.C. is bad as no one representing the Hindu community has been made a defendant in the suit** and defendants No. 1, 2, 3, 4 and 9 do not represent the Hindu community.

In the additional written statement, it is further urged that the U.P. Muslim Wakf Act No. XIII of 1936, is ultra vires to the Government of India Act, 1935. The building and land in suit lying in the province of Oudh became subject of Lord Canning proclamations and all previous rights became non existent. No fresh grant in respect of the property in suit having been made after the proclamation, to the plaintiffs or to the Muslim community have no

right to sue. The Commissioner of Wakf is intended to give effect to the scheme of administration under the Muslim Waqfs Act and does not and cannot confer jurisdiction to decide question of title as against non-Muslims under Wakf Act, 1936. The objections were also not invited and no illegal publication was made.

In replication plaintiffs have urged that Hindu public never held the mosque in their possession since 1934 nor holding possession of it as temple since then and they have not completed title by adverse possession. The Muslim community has been in continuous possession and offered prayer at the mosque for the last 450 years since the time the mosque was constructed and Muslim public representing the wakf perfected their title to the property in suit and thus the title or interest if any, of Hindu Public has extinguished.

On 25.1.1963 a separate written statement was filed by Gopal Singh Visharad. He has denied the averments of the plaint and admitted that Receiver was appointed by the City Magistrate, Faizabad of Janamasthan temple. It is further submitted that plaintiffs have no right to make the defendant contest the suit in a representative capacity. Plaint averments have been denied and it is urged that suit was barred by time. It is without any cause of action and Hindus are in possession over the property in suit from 1934. A temple is a public charitable institution and is a place of worship open to all the Hindus and no individual can represent the entire Hindu community about this ancient temple. The plaintiffs cannot claim any right through the

proceeding of U.P. Muslims Waqf Act and the ex parte report is not binding on them. The building in suit is covered by the proclamation of Lord Canning. No fresh grant of property was ever made after the proclamation. Accordingly, the Muslims have no right to sue. The report of Wakf Commissioner was not in accordance with the wakf Act and cannot confer jurisdiction on him to decide the question of title as against Non-Muslims.

The replication was also filed to the statements of defendants No. 1 and 2 by the plaintiffs and it has been urged that Hindu public is not in possession over the property in suit since 1934 and Muslims are in possession of the property of the suit for the last 450 years.

On behalf of defendants no. 3 and 4 separate written statement was filed. It has been urged on behalf of them that plaint averments about battle and construction of mosque by Babar have been coined as a story to give colour to the case. Answering defendants are not aware of the any suit filed by Mahant Raghubar Dass, Mahant of Janmasthan. Mosque was not damaged in 1934. It has further been urged that alleged mosque never existed nor does it exists even now. It is always the temple of Janma-Bhumi with idols of Hindu Gods. Accordingly the entire case as setup in the plaint is false and fabricated. The Muslims have no right to offer prayer in the said temple. On 22.3.1992 local administration demolished Sumitra Bhawan temple. According to the customs of Akhara Rama Janam Bhumi, temple is a holy place of worship and the said temple Ram

Chabutra has an history of judicial scanning since 1885 and Hindus worshiped there. The building in question in suit is the temple of Janam Bhumi is under attachment and accordingly the suit as contemplated under Order 1 Rule 8 C.P.C. is misconceived. The individual plaintiffs are Sunnis and they cannot represent Shia community. Plaintiffs have no cause of action to file a suit. Defendant No. 4 is the Mahant and Sarbarahkar of Nirmohi Akhara has averred that temple Janam Bhumi is the antiquity of Nirmohi Akhara and no Muslim was ever allowed to enter into the said temple. The answering defendants have wrongly been deprived of the said charge and management of the said temple and accordingly the suit no. 25/1958 was filed. In alternative it is urged that even after 1934, 12 years have already been passed and the property remained in continuous possession of Hindus. Accordingly, the plaintiffs are not entitled for reliefs claimed.

Additional written statements of defendants No. 3 and 4 were filed stating that the property in suit is a temple.

On behalf of the plaintiffs, replication was filed reiterating the plaint averments. It has been further averred that Muslims are in continuous possession for the last 450 years and Muslim public as representative of Wakf has perfected the title of the property in suit by their long and undisturbed possession against the interest of Hindu public to their knowledge.

On behalf of defendant no. 3 on 21.8.1995 additional written

statement was filed. It has been urged that prior to this suit a suit no. 256/1922 was filed between Mahanth Narottam Das and Mahant Ram Swaroop Das. Real facts regarding Ram Chabutra are available in that suit. In another suit No. 95 of 1941 between Mahant Nirmohi Akhara namely Ram Charan Das and Raghunath Das a Commission report was prepared, in which complete details were given. The temple of Shri Ram Chabutara and Gufa temple are shown in the map. Defendant no. 3 is the Panchayati Math of Vairagies. Accordingly directions may be issued for handing over all the properties to defendant no. 3.

On behalf of Defendant No. 9, separate written statement was filed only admitting the fact that City Magistrate attached the property in suit under the proceedings of Section 145 Cr.P.C. It is averred that the plaintiffs are not entitled for relief.

On behalf of defendant no. 10 separate written statement was filed stating that the contents of the plaint are false and fabricated. The proceedings of Waqf are not binding on them. Under the Hindu Jurisprudence, the property in question cannot pass in the hands of Muslims. The land and the property in dispute has been throughout in uninterrupted possession of the Hindu community and in ownership of Lord Shri Rama. In additional statement it has been urged that national community of Hindu is being harassed by the plaintiffs. It is further averred that ordinance has been issued against the provisions of the constitution and second ordinance was also issued in the like

manner. **However, it has not been mentioned whether any petition was ever filed challenging the authorization of the aforesaid ordinance by the defendant No. 10.**

The suit is barred by Section 92 of C.P.C. and Section 14 of the Religious Endowment Act. The suit was not properly filed by the Waqf in compliance of the provisions of Section 64 of the Waqf Act and the suit is not maintainable and liable to be dismissed.

Annexure-I
Replication
Pages 185-194

The replication has been filed to the amended written statement of defendant no. 10. The contents have been denied by U.P. Sunni Central Board of Waqf. It has been further averred that version of the plaint is correct and the averments made in the written statement are imaginary and baseless. It has further been averred that plot number in second settlement and first settlement coincide with each other.

Supplementary replication was also filed by the plaintiffs stating that ordinance no. 9 of 1989 is not applicable on the facts of the case. Ordinance no. 9 of 1989 gives unguided and uncontrolled powers to transfer the so acquired property to anybody.

Thereafter on behalf of defendant no. 10, additional written statements were also filed stating that no masjid or Babri Masjid was ever existed on the land in question. Babur was an invader and he had no legal authority to construct any Masjid on the sacred place of

Hindus and Hindus are in possession of the entire area of Ram Janam Bhumi. The entire area covered under Act No. 33 of 1993 belongs to Hindus and the devotees of Shri Ram Lala Virajman. Certain other points have been raised which are connected with the fact in issue relating to the religion and about creation of Pakistan. However, it has been urged that the suit is liable to be dismissed.

Defendant No. 13, Baba Abhiram Dass and Defendant no. 14, Pundarik Mishra filed joint written statement. They have denied the plaint averments and urged that the property belongs to Hindus. The Hindu community is worshiping on the site of Janam Bhumi from time immemorial. Even prior to 1934 daily Hindu puja is being done in the temple and Muslims never offered the prayer since 1934. The suit is bad under order 1 Rule 8 of C.P.C. The plaintiffs have no claim or right under Act no. 13 of 1936 to file instant suit which too is bad for want of any sanction under Section 80A of Government of India Act, 1935. The report of Waqf Commissioner is not binding on the answering defendants. The building in suit does not possess the requirement of a mosque.

Thereafter vide order dated 3rd May, 1989 written statement was filed by Dharam Das, Chela Baba Abhiram Das. He has denied plaint averments and admitted that originally there was a temple and no mosque was ever constructed. Such a building could not be a Masjid according to the tenets of Islam. The deity of Bhagwan Shri Ram Virajman is being worshiped since time immemorial. It has further

been urged that suit no. 2 of 1950 was filed in personal capacity. Suit no. 25/1950 was also filed.

It has further been averred that the building in suit was no mosque and its surrounding is not a graveyard. According to the Islamic laws, mosque built in place of Hindu temple after forcibly demolishing it cannot be a mosque. ALLAH does not accept a dedication of property for purposes recognized as pious and charitable. Accordingly, the property could not be considered as Waqf property and Muslims could never claim a right of worship at a place as a mosque by adverse possession. The Sunni Waqf Board has no jurisdiction to file a suit. The suit as framed under Order 1 Rule 8 C.P.C. is not maintainable and relief for possession and removal of the idols is not maintainable. Accordingly, the suit is liable to be dismissed.

The additional written statement was also filed on behalf of Mahant Dharam Dass and it has been urged on his behalf that the structure of Ram Janam Bhumi, which was demolished on 6th December, 1992 was not a mosque and it has always been a place of worship for Hindus and the suit is liable to be dismissed.

On behalf of defendant no. 17, Ramesh Chandra Tripathi, it is submitted that the contents of paragraph no. 21 is not admitted. The entire area including the plot in question belongs to deity of Bhagwan Shri Ram. Debris of demolished structure show that demolished structure was a temple.

Mahant Ganga Das also filed written statement denying the

plaint averments and stated that the suit is not maintainable and property in question belongs to Lord Rama.

The written statement on behalf of Madan Mohan Gupta revealed that the contents of the plaint are false. The property belongs to Lord Rama and the place in question is being worshiped from time immemorial. He has referred certain gazetteers and books as a piece of evidence to show that the property in suit was never a mosque. It is further submitted that according to Quranic injunctions, no mosque can be constructed at the site of the temple after demolishing it. It is further submitted that the temple or Sthan is always been considered as a place of worship. There was no ouster of Hindus from the Ram Janam Bhumi and birth spot of Ram cannot be shifted. The plaintiffs are not entitled for any relief.

On behalf of defendant no. 20, separate written statement has been filed denying the plaint averments. It has been urged that the Ram Janam Bhumi is a very sacred for the Hindus from the time immemorial. Plaintiffs cannot claim the place of Hindus like Sita Rasoi, Ram Chabutra etc. They are not in possession of the property and the suit is liable to be dismissed.

On the pleadings of the parties, following issues arose for decision:-

Annexure-I
Pages-195-214
Issues and statement under Order X Rule-2

1. Whether the building in question described as mosque in the sketch map attached to the plaint (hereinafter referred to as the

building) was a mosque as claimed by the plaintiffs? If the answer is in the affirmative?

(a) When was it built and by whom-whether by Babar as alleged by the plaintiffs or by Meer Baqi as alleged by defendant No. 13?

(b) Whether the building had been constructed on the site of

an alleged Hindu temple after demolishing the same as alleged by defendant No. 13? If so, its effect?

1(a). Whether the land adjoining the building on the east, north and south sides, denoted by letters EFGH on the sketch map, was an ancient graveyard and mosque as alleged in para 2 of the plaint? If so, its effect?

Deleted vide courts order dated 23.2.96.

1-B (a). Whether the building existed at Nazul plot no. 583 of the Khasra of the year 1931 of Mohalla Kot Ram Chandra known as Ram Kot, city Ahodhya (Nazul estate of Ayodhya ? If so its effect thereon)"

1-B(b). Whether the building stood dedicated to almighty God as alleged by the plaintiffs?

1-B (c). Whether the building had been used by the members of the Muslim community for offering prayers from times immemorial ? If so, its effect?

1-B(d). Whether the alleged graveyard has been used by the members of Muslim community for burying the dead bodies of the members of the Muslim community? If so, its effect?

Issue 1 B (d) deleted vide court order dated 23.2.96.

2. Whether the plaintiffs were in possession of the property in suit upto 1949 and were dispossessed from the same in 1949 as alleged in the plaint?

3. Is the suit within time?

4. Whether the Hindus in general and the devotees of Bhagwan Sri Ram in particular have perfected right of prayers at the site by adverse and continuous possession as of right for more than the statutory period of time by way of prescription as alleged by the defendants?

5(a) Are the defendants estopped from challenging the character of property in suit as a waqf under the administration of plaintiff No. 1 in view of the provision of 5(3) of U.P. Act 13 of 1936? (This issue has already been decided in the negative vide order dated 21.4.1966 by the learned Civil Judge).

5(b). Has the said Act no application to the right of Hindus in general and defendants in particular, to the right of their worship?

5(c). Were the proceedings under the said Act conclusive? (This issue has already been decided in the negative vide order dated 21.4.1966 by the learned Civil Judge.)

5(d). Are the said provision of Act XIII of 1936 ultra-vires as alleged in written statement?
(This issue was not pressed by counsel for the defendants, hence not answered by the learned Civil Judge, vide his order dated 21.4.1966).

5(e). Whether in view of the findings recorded by the learned Civil Judge on 21.4.1966 on issue no. 17 to the effect that, "No valid notification under section 5(1) of the Muslim Waqf Act (No. XIII of 1936) was ever made in respect of the property in dispute", the plaintiff Sunni Central Board of Waqf has no right to maintain the

present suit?

5(f). Whether in view of the aforesaid finding, the suit is barred on accunt of lack of jurisdiction and limitation as it was filed after the commencement of the U.P. Muslim Waqf Act, 1960?

6. Whether the present suit is a representative suit, plaintiffs representing the interest of the Muslims and defendants representing the interest of the Hindus?

7(a). Whether Mahant Raghubar Dass, plaintiff of Suit No. 61/280 of 1885 had sued on behalf of Janma-Sthan and whole body of persons interested in Janma-Sthan?

7(b). Whether Mohammad Asghar was the Mutwalli of alleged Babri Masjid and did he contest the suit for and on behalf of any such mosque?

7(c). Whether in view of the judgment in the said suit, the members of the Hindu community, including the contesting defendants, are estopped from denying the title of the Muslim community, including the plaintiffs of the present suit, to the property in dispute? If so, its effect?

7(d). Whether in the aforesaid suit, title of the Muslims to the property in dispute or any portion thereof was admitted by plaintiff of that suit? If so, its effect?

8. Does the judgment of Case No. 6/281 of 1881, Mahant Raghubar Dass Vs. Secretary of State and others, operate as res judicate against the defendants in suit?

9. Whether the plaintiffs served valid notices under Sec. 80 C.P.C. (Deleted vide order dated May 22/25, 1990).

10. Whether the plaintiffs have perfected their rights by adverse possession as alleged in the plaint?

11. Is the property in suit the site of Janam Bhumi of Sri Ram Chandraji?

12. Whether idols and objects of worship were placed inside the

building in the night intervening 22nd and 23rd December, 1949 as alleged in paragraph 11 of the plaint or they have been in existence there since before? In either case, effect?

13. Whether the Hindus in general and defendants in particular had the right to worship the Charans and 'Sita Rasoi' and other idols and other objects of worship, if any, existing in or upon the property in suit?

14. Have the Hindus been worshipping the place in dispute as Sri Ram Janam Bhumi or Janam Asthan and have been visiting it as a sacred place of pilgrimage as of right since times immemorial? If so, its effect?

15. Have the Muslims been in possession of the property in suit from 1528 A.D. Continuously, openly and to the knowledge of the defendants and Hindus in general? If so, its effect?

16. To what relief, if any, are the plaintiffs or any of them, entitled?

17. Whether a valid notification under Section 5(1) of the U.P. Muslim Waqf Act No. XIII of 1936 relating to the property in suit was ever done? If so, its effect?

(This issue has already been decided by the learned Civil Judge by order dated 21.4.1966).

18. What is the effect of the judgdment of their lordships of the Supreme Court in Gulam Abbas and others Vs. State of U.P. and others, A.I.R. 1981 Supreme Court 2198 on the finding of the learned Civil Judge recorded on 21st April, 1966 on issue no. 17?

19(a). Whether even after construction of the building in suit deities of Bhagwan Sri Ram Virajman and the Asthan Sri Ram Janam Bhumi continued to exist on the property in suit as alleged on behalf of defendant No. 13 and the said places continued to be visisted by devotees for purposes of worship? If so, whether the property in dispute continued to vest in the said deities?

19(b). Whether the building was land-locked and cannot be reached except by passing through places of Hindu worship? If so, its effect?

19(c). Whether any portion of the property in suit was used as a place of worship by the Hindus immediately prior to the construction of the building in question? If the finding is in the affirmative, whether no mosque could come into existence in view of the Islamic tenets, at the place in dispute?

19(d). Whether the building in question could not be a mosque under the Islamic Law in view of the admitted position that it did not have minarets?

19(e). Whether the building in question could not legaly be a mosque as on plaintiffs own showing it was surrounded by a graveyard on three sides.

19(f). Whether the pillars inside and outside the building in question contain images of Hindu Gods and Goddesses? If the finding is in the affirmative, whether on that account the building in question cannot have the character of Mosque under the tenets of Islam?

20(a). Whether the Waqf in question cannot be a Sunni Waqf as the building was not allegedly constructed by a Sunni Mohammedan but was allegedly constructed by Meer Baqi who was allegedly a Shia Muslim and the alleged Mutwalis were allegedly Shia Mohammedans? If so, its effect?

20(b). Whether there was a Mutwalli of the alleged Waqf and whether the alleged Mutwalli not having joined in the suit, the suit is not maintainable so far as it relates to relief for possession?

21. Whether the suit is bad for non-joinder of alleged deities?

22. Whether the suit is liable to be dismissed with special costs?

23. If the wakf Board is an instrumentality of state? If so, whether the said Board can file a suit against the state itself?

24. If the wakf Board is state under under Article 12 of the constitution? If so, the said Board being the state can file any suit in representative capacity sponsering the case of particular community and against the interest of another community)".

25. "Whether demolition of the disputed structure as claimed by the plaintiff, it can still be called a mosque and if not whether the claim of

the plaintiffs is liable to be dismissed as no longer maintainable?"

26. "Whether Muslims can use the open site as mosque to offer prayer when structure which stood thereon has been demolished?"

27. "Whether the outer court yard contained Ram Chabutra, Bhandar and Sita Rasoi? If so whether they were also demolished on 6.12.1992 along with the main temple?"

28. "Whether the defendant No. 3 has ever been in possession of the disputed site and the plaintiffs were never in its possession?"

F I N D I N G S

ISSUE NO.1(b)

Whether the building had been constructed on the site of an alleged Hindu temple after demolishing the same as alleged by defendant No. 13? If so, its effect?

F I N D I N G S

One of the most important issue in the suit is whether there was any temple/structure which was demolished and Mosque was constructed on the disputed site. Thus to adjudicate the basic issue whether there was any Hindu temple or an Hindu religious structure existed and the alleged Babri Mosque was constructed after demolishing the said temple at the site in question was to be resolved by this Court. Accordingly, the Full Bench of this Court on 1.8.2002 decided to take the assistance of Archaeological Science. It is not a matter of dispute now that in the modern age Archaeological Science has achieved the great accuracy. Thus with the assistance of Archaeological Science, one can answer up to the considerable degree of certainty about various past activities of people for which material evidence is available. It was believed that sufficient Archaeological

material is available regarding the temple/mosque issue. Accordingly further excavation was intended. Thus Archaeological Survey of India was directed on 1.8.2002 to survey the disputed site by Ground Penetrating Survey (GPR)/Geo Radiology Survey . On 5.3.2003, the Full Bench of this Court considered the objections of the parties for excavation through Archaeological Survey of India and directed to get the disputed site excavated. This Court further directed that excavation shall be done by excavation branch, specialized in excavation work by providing representation of both the communities in respect of functioning of ASI team and engagement of labourers. The Court further directed certain safeguard to ensure transparency in the task of ASI by permitting the parties or their counsel to remain present on the spot during the course of excavation proceedings. Archaeological Survey of India was directed to photograph and video-graph the process of excavation and to maintain the record pertaining thereto. The Court has also appointed two experienced judicial officers of Faizabad Judgeship as observers and to act whenever needed.

Annexure-III
ASI matter
Pages 1 to 163

In compliance of this Court direction, Director General, Archaeological Survey of India formed 14 member team of both the communities headed by Dr. B.R. Mani and subsequently by Sri Hari Majhi, Director (Antiquity) to supervise the excavation work on the

disputed site. Excavation on the disputed site was carried out by the team from 12th March, 2003 to 7th August, 2003. Eighty two trenches were excavated to verify anomalies mentioned in the report of Ground Penetrating Radar Survey. Eighty two trenches were checked, the anomalies were confirmed in the trenches in the form of Pillar bases, structures, floors and foundation. Besides eighty two trenches a few more making a total of 90 finally were also excavated keeping in view the objective fixed by the Hon'ble High Court to confirm the structures. The result of excavation has been summarized and full report has also been furnished for the perusal of this Court. Thereafter the objections against the report dated 22.8.2003 filed by ASI were invited by the parties concerned. On behalf of the plaintiff's of O.O.S. No. 4 of 1989 and others objections were filed.

Thereafter on 4.12.2006, the Full Bench of this Court disposed of the objection/additional objection against the ASI report, which was filed under sub-rule (1) of Rule 10, of Order XXVI of the Code of Civil Procedure. This Court was concious of this fact that in all these four pending suits, the core issue is whether the disputed structure namely Babri Masjid was built after demolishing a Hindu temple. Relevant extract of the order is as under :-

> *"So we order that this ASI report shall be subject to the objections and evidence of the parties in the suit and all these shall be dealt with when the matter is finally decided".*

During the course of hearing parties were also allowed to adduce evidence for and against ASI report.

Annexure-III
Pages 164-350

Plaintiff's in support of the objections filed against the ASI report, produced Professor Dhaneshwar Mandal, PW-24, Professor Suraj Bhan, PW-16, Dr. Jaya Menon, PW-29, Dr. R.C. Thakran, PW-30, Dr. Ashok Datta, PW-31, Dr. Supriya Varma, PW-32, Haji Mahboob, DW 6/1-1, Mohd. Abid, DW 6/1-2.

Defendants have produced four witnesses in support of the ASI report, they are- Dr. R. Nagaswamy, OPW-17, Arun Kumar Sharma, OPW-18, R.D. Trivedi, OPW-19 and Jayanti Prasad Shivastava, DW-20/5.

Section 75 CPC empowers the court to issue commissions which reads as under;

"Section-75: Subject to such conditions and limitations as may be prescribed, the Court may issue a commission--

(a) to examine any person;

(b) to make a local investigation;

(c) To examine or adjust accounts; or

(d) to make a partition;

[(e) to hold a scientific, technical, or expert investigation;

(f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;

(g) to perform any ministerial act.]"

The detailed provisions for issuing commands are set forth in Order 26 Rule-10A which are as under;

"Rule 10A- Commission for scientific investigation-(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice as to do, issue a Commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9."

Thus Sec 75 , Order 26 Rule-10A provide for the issue of Commission for scientific investigation. A perusal of the rule shows that a discretion has been vested in the Civil Court to get any scientific investigation conducted only if it needs necessary or expedient in the ends of justice. The basic rationale of this provision is that the Commission is going to held in extracting the truth. There is established procedure known to law that the Commissioner's report form part of the record and the same becomes evidence as a whole in the suit.

Sri P.N.Mishra, Advocate has submitted that ASI report may be accepted as a piece of evidence. He has relied over ***AIR 1940 PC 3, Chandan Mull Indra Kumar and others Versus Chimanlal Girdhar***

Das Parekh and another in which the Hon'ble Privy Council held that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness is unquestionable whose careful and laborious execution of task was proved by his report and who had not blankly adopted the assertions of either party. Since ASI was working directly under the control and direction of this Court and their integrity is unquestionable as such the said report is entitled to be accepted in its entirety as an expert scientific report under Order 26 Rule 9 & 10 and 10A as also under Section 75(e) of the Code of Civil Procedure, 1908 as well as under Section 45 of the Evidence Act.

Another ruling cited by Sri P.N.Mishra is ***Vareed Jacob Versus Sosamma Geevarghese, 2004(6) SCC 378*** in which Hon'ble apex court held that incidental or ancillary proceedings are taken recourse to in aid of the ultimate decision of the suit and any order passed therein would have a bearing on the merit of the matter. Sri P.N.Misra has also cited G.L.Vijan Versus K.Shanker, (2006) 13 SCC 136 in which Hon'ble Supreme Court held that incidental power is to be exercised in aid to the final proceedings. In other words an order passed in the incidental proceedings will have a direct bearing on the result of the suit. In AIR ***1924 Cal.620, Amrita Sundari Versus Munshi,*** the Calcutta High Court held that the Commissioner whose integrity is unquestionable his elaborate report cannot be overruled by the Court.

As the ASI is a reputed institution and integrity of its team cannot be questioned the report submitted by the ASI is to be accepted. In ***AIR 1979 Cal.50, M/s Roy and Co. and another Versus Nanibala Dey and others***, Calcutta High Court held that the Court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned and who did not blindly accept the assertion of either party. In AIR 1940 PC 3 (supra) it was decided that Commissioner's report should not be rejected except on clearly defined and sufficient grounds; the court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned and who did not blindly accept the assertion of either party. In AIR 1997 Cal.59, Amena Bibi Versus Sk.Abdul Haque, Calcutta High Court held that the Commissioner's report even if accepted by itself does not however, mean that the parties are precluded from challenging the evidence of the Commissioner or assailing the report by examining any other witness to counter the effect of the report.

In support of ASI report learned counsel Sri M.M.Pandey has placed reliance on the following case laws.

The Hon'ble Apex Court in (2010) 3 SCC 732, Victoria Memorial Hall Versus Howrah Ganatantrik Nagrik Samity, took a view that it is normally be wise and safe for the courts to leave the decision to experts. Para-37 reads as under;

“Para-37- The Constitution Bench of this Court in ***University of***

Mysore V. C.D.Govinda Rao held that “normally the courts should be slow to interfere with the opinions expressed by the experts.” It would normally be wise and safe for the courts to leave the decision to experts who are more familiar with the problems they face than the courts generally can be. This view has consistently been reiterated by this Court as is evident from the judgments in State of Bihar V. Dr.Asis Kumar Mukherjee, Dalpat Abasaheb Solunke V. Dr.B.S.Mahajan, Central Areca Nut & Cocoa Mktg.& Processing Coop.Ltd. V. State of Karnataka and Dental Council of India V. Subharti K.K.B Charitable Trust.”

Hon'ble Apex Court in ***1988 (2) SCC 292, Southern Command Military Engineering Services Employees Coop.Credit Society Versus V.K.K.Nambia***r, at para-1 held as under;

> “After hearing learned Counsel for the parties, we are satisfied that interference by the High Court with the findings of fact recorded by the lower appellate Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution was wholly unwarranted and in excess of its jurisdiction. The High Court was obviously in error in its view that the Commissioner's report could not be acted upon or be treated as legal evidence. The Commissioner's report tends to show that the demised premises are no longer in occupation of the respondent but in occupation of strangers which fact does se

an inference of subletting as held by the lower appellate Court."

Hon'ble Apex Court in ***1995 Supp (4) SCC 600, Misrilal Ramratan and others Mansukhlal and others***, at para-1 held as under;

"Shri Sundaravaradan, learned Senior Counsel appearing for the appellants has contended that the approach of the High Court is manifestly illegal. We find no force in the contention. It is now settled law that the report of the Commissioner is part of the record and that therefore the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as a witness since it is part of the record of the case."

In A***IR 1976 Allahabad 121, State of U.P. Versus Smt.Ram Sri and another***, para-33 the Court held as under;

" 33. Order XXVI Rule 10 (2) of Civil P. C. lays down that the report of the commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. It is, therefore, clear from the aforesaid provision that it is not necessary in order that the report becomes evidence that the statement of the commissioner should also be made in the court for the purpose of proving it. It is up to the choice of the party to examine a commissioner in respect of the matters referred to him or mentioned in his report. But the examination of the commissioner is not at all required by the aforesaid provision for the purpose of proving the report."

Sri Ravi Shanker, Senior Advocate has submitted that

excavation report of the Archaeological Survey of India being a scientific report of the experts against whom bias or malafide have not been proved, is liable to be admitted and relied on as a piece of evidence:

In ***AIR 1940 PC 3 (Chandan Mull Indra Kumar & Ors. V. Chimanlal Girdhar Das Parekh & Anr.)*** the Hon'ble Privy Council held that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness is unquestionable whose careful and laborious execution of task was proved by his report and who had not blankly adopted the assertions of either party. Relying on the said judgment, it is respectfully submitted that the report of the Archaeological Survey of India is an elaborate report and the persons comprising excavation team of the ASI were working directly under the control and direction of this Hon'ble Court. And their integrity is unquestioned as such the said report is entitled to be accepted in its entirety as an expert scientific report under Order 26 Rule 9 & 10 & 10A as also under Section 75(e) of the Code of Civil Procedure, 1908 as well as under Section 45 of the Evidence Act, 1872. Relevant paragraph from page 6 of the said judgement reads as follows:

> "It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined land sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the

> elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.
> This in their Lordships' judgment is a correct statement of the principle to be adopted in dealing with the commissioner's report.”

In ***2004(6) SCC 378 (Vareed Jacob v. Sosamma Geevarghese)*** the Hon’ble Supreme Court held that “incidental” or “ancillary” proceedings are taken recourse to in aid of the ultimate decision of the suit and any order passed therein would have a bearing on the merit of the matter. “Supplemental proceedings”, however, mean a separate proceeding in an original action in which the court where the action is pending is called upon to exercise its jurisdiction in the interest of justice. Supplemental proceedings may not affect the ultimate result of suit and a supplemental order can be passed even at the instance of the defendants. Relying on the said judgment it is submitted that as Section 75(e) is being part and parcel of Part-III titled as incidental proceedings of the Code of Civil Procedure, 1908 whereunder the order was passed by this Hon’ble Court to carry out the excavation work and submit the report before this Hon’ble court and the report submitted in compliance of said order of the Hon’ble Court is a scientific report under Section 45 of the Evidence Act, 1872. The said report is reliable and admissible valuable piece of evidence. Relevant paragraph Nos.29 to 33 and 54 of the said judgment read as follows:

> “**29.** The Code of Civil Procedure uses different expressions in relation to incidental proceedings and supplemental proceedings. Incidental proceedings are

> referred to in Part III of the Code of Civil Procedure whereas supplemental proceedings are referred to in Part VI thereof.
>
> **30.** Is there any difference between the two types of proceedings?
>
> **31.** A distinction is to be borne in mind keeping in view the fact that the incidental proceedings are in aid to the final proceedings. In other words, an order passed in the incidental proceedings will have a direct bearing on the result of the suit. Such proceedings which are in aid of the final proceedings cannot, thus, be held to be at par with supplemental proceedings which may not have anything to do with the ultimate result of the suit.
>
> **32.** Such a supplemental proceeding is initiated with a view to prevent the ends of justice from being defeated. The supplemental proceedings may not be taken recourse to as a routine matter but only when an exigency arises therefor. The orders passed in the supplemental proceedings may sometimes cause hardships to the other side and, thus, are required to be taken recourse to when a situation arises therefor and not otherwise. There are well-defined parameters laid down by the court from time to time as regards the applicability of the supplemental proceedings.
>
> **33.** Incidental proceedings are, however, taken recourse to in aid of the ultimate decision of the suit which would mean that any order passed in terms thereof, subject to the rules prescribed therefor, would have a bearing on the merit of the matter. Any orders passed in aid of the suit are ancillary powers. Whenever an order is passed by the court in exercise of its ancillary power or in the incidental proceedings, the same may revive on revival of the suit. But so far as supplemental proceedings are concerned, the court may have to pass a fresh order.
>
> **54.** Parliament consciously used two different expressions "incidental proceedings" and "supplemental proceedings" which obviously would carry two different meanings."

In ***(2006) 13 SCC 136 (G.L. Vijan v. K. Shankar)*** the Hon'ble Supreme Court held that incidental power is to be exercised in aid to the final proceedings. In other words an order passed in the incidental proceedings will have a direct bearing on the result of the suit. Such proceedings which are in aid of the final proceedings, cannot, thus, be

held to be on par with supplemental proceedings which may not have anything to do with the ultimate result of the suit. Relying on the said judgment it is submitted that since the ASI report is result of an incidental proceeding which is in aid of the final proceeding the said report is reliable to do the ultimate justice. Relevant paragraph no.11, 13 & 14 of the aforesaid judgment read as follows:

> **"11.** Such a supplemental proceeding is initiated with a view to prevent the ends of justice from being defeated. Supplemental proceedings may not be taken recourse to in a routine manner but only when an exigency of situation arises therefor. The orders passed in the supplemental proceedings may sometimes cause hardships to the other side and, thus, are required to be taken recourse to when it is necessary in the interest of justice and not otherwise. There are well-defined parameters laid down by the Court from time to time as regards the applicability of the supplemental proceedings.
>
> **13.** The expression "ancillary" means aiding; auxiliary; subordinate; attendant upon; that which aids or promotes a proceeding regarded as the principal.
>
> **14.** The expression "incidental" may mean differently in different contexts. While dealing with a procedural law, it may mean proceedings which are procedural in nature but when it is used in relation to an agreement or the delegated legislation, it may mean something more; but the distinction between an incidental proceeding and a supplemental proceeding is evident.

In ***AIR 1924 Cal 620 (Amrita Sundari v. Munshi)*** the Hon'ble Calcutta High court held that the Commissioner whose integrity is unquestioned his elaborate report cannot be overruled by the Court. Relying on the said judgment it is submitted that as the ASI is a reputed institution and integrity of its team cannot be questioned, the report submitted by the ASI is to be accepted.

In ***AIR 1979 Cal 50 (M/s. Roy & Co. & Anr. v. Nanibala Dey &***

Ors.) the Hon'ble Calcutta High Court held that the Court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned and who did not blindly accept the assertion of either party. Relying on the said judgment it is humbly submitted that here there are only wild allegations that the ASI people acted under the influence of the then BJP Government and the then Hon'ble Human Resources Development Minister Mr. Murali Manohar Joshi which has not been substantiated by giving cogent evidence and the plaintiffs had several opportunities to make applications before this Hon'ble court impeaching the integrity of the ASI archaeologists but in spite of that opportunity they did not do anything and when after submission of the report of the ASI they found that there is finding of the ASI team that on the disputed site there was temple. They filed the objection which cannot be accepted and is liable to be rejected. Relevant paragraph no.7 of the aforesaid judgment reads as follows:

> "7. Then about the report of the Pleader Commissioner. Reference may be made to the famous decision of the Judicial Committee in Chandan Mull's case reported in 44 Cal WN 205 at p. 212 : (AIR 1940 PC 3, at pp. 5, 6) to show that the Commissioner's report should not be rejected except on clearly defined and sufficient grounds. The Court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned and who did not blindly accept the assertion of either party. Here the Pleader Commissioner's honesty has not been challenged. He did not blindly adopt the assertion of the plaintiff. As stated before, several chances were given to the defendant-appellants to assail the Commissioner's report, but no objection was filed. Hence at this stage this objection against the Commissioner's report cannot be accepted."

In ***2006 (4) Bom LR 336 (Bapu Dhopndi Devkar v. S. Najaokar)*** the Hon'ble Bombay High Court held that a document can be sent to the experts for examination and opinion about the date of printing and the period when it was circulated. Relying on the said judgment it is submitted that as the report of Forensic Science Laboratory, which has stated that there is interpolation in the relevant documents and Babri Masjid is later insertion by the different person in different handwriting in different inks the said report is reliable and the revenue records submitted by the plaintiffs are liable to be discarded and they should be read in the light of the report of Foreignsic laboratory. Relevant extract of the said judgment as quoted in Sarkar's Code of Civil Procedure, Vol-2 10th Edn. reads as follows:

> "Under Rule 10A, a document, in the instant case a revenue stamp, can be sent to the General Manager Indian Security Press for examination and opinion about the date of printing and the period when it was circulated."
>
> (*Ibid.* p.1789)

In ***AIR 1997 Cal 59 (Amena Bibi v. Sk. Abdul Haque)*** the Hon'ble Calcutta High Court held that the Commissioner's report even if accepted by itself does not however, mean that the parties are precluded from challenging the evidence of the Commissioner or assailing the report by examining any other witness to counter the effect of the report. The said Hon'ble Court has also held that the parties having participated in the enquiry made by the Commissioner should not be allowed to turn around and say that the entry was biased and prejudicial. Relying on the said judgment it is submitted that as

the plaintiffs, their experts, nominees, advocates have participated in excavation proceedings and the excavation proceedings was done in presence and under observation of the observers appointed by this Hon'ble Court now the ASI report which reveals that there was a temple, the plaintiffs cannot be allowed to raise objection and their objection is liable to be rejected. Moreover, as the parties have already examined several experts to countermand the effect of the ASI report the ASI report is liable to be admitted and taken as a valuable piece of evidence. Relevant paragraph no.6 & 7 of the aforesaid judgment read as follows:

> "6. On a careful reading of the above decision it indicates that the valuation of the property for which the prayer under S. 4 of the Partition Act is made, has to be fixed on the prevalent market value at the time of filing an application under S. 4 of the Partition Act. On reading the impugned order, it is implicit that the learned Court below has meticulously examined the merits of the contention of petitioners and rejected those objections inasmuch as the Commissioner had met those points raised by the revision petitioner. It appears that the Commissioner fixed the valuation after taking the evidence from the parties. The petitioners having participated in the enquiry should not be allowed to turn round and say that the enquiry was biased and prejudicial.
>
> 7. Mr. Mukherjee, the learned counsel appearing for the opposite party No. 1, has seriously challenged about the maintainability of the revisional application. It is highlighted that the Commissioner's report should not be rejected except on clearly defined and sufficient grounds. The court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned. In support of his contention Mr. Mukherjee relied on a decision reported in AIR 1979 Cal 50 (M/s. Roy and Co. v. Smt. Nani Bala Dey). The Court held :--
> "The Commissioner's report should not be rejected except on clearly defined and sufficient grounds. The

Court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned and who did not blindly accept the assertions of either party. "

Admittedly the petitioners have not challenged either the integrity of the Commissioner or his carefulness. In another decision reported in AIR 1940 PC 3 in the case of Chandan Mull Indra Kumar v. Chinman Lal Girdhar Das Parekh. It was held :-

"Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party."

From the ratio of the above decision, it is (sic) that the revisional court would be slow and war while entertaining the objection regarding the acceptance of the Commissioner's report in a revisional application. The Commissioner's report even if accepted by itself does not, however, mean that the parties are precluded from challenging the evidence of the Commissioner or assailing the report by examining any, other witnesses to countermand the effect of the report. It has been held in a decision reported in AIR 1966 Orissa 121 in the case of Harihor Misra v. Narhari Setti Sitaramiah (para 4) :---

"Rule 10 of O. 26 does not make the report of the Commissioner as concluding the question of valuation. On the contrary, the rule gives clear indication that the report of the Commissioner is only one of the pieces of evidence amongst other evidence to be led by the parties for determination of the issue on valuation of the suit. When the parties file no objection to the Commissioner's report, the court rightly accepts the report. Its acceptance by itself does not, however, mean that parties are precluded from challenging the evidence of the Commissioner and the witnesses examined by him or by giving any other evidence to countermand the effect of the Commissioner's report. "

Thus, from the underlying principle emerging from the above cases, it is manifest that the party objecting to the Commissioner's report can lead best possible evidence at the time of hearing to countermand the report even if the same was accepted earlier. The Court on taking the comprehensive view decide the point at issue and arrive at right conclusion I do not find at this stage any justification to interfere with the findings of the learned

trial court order accepting the Commissioner's report."

In ***AIR 1976 Alld. 121 (State of U.P. v. Smt. Ram Sree & Anr.)*** the Hon'ble Allahabad High Court held that it is not necessary in order that the report becomes evidence the statement of the commissioner should also be made in the court for the purpose of proving it. It is up to the choice of the party to examine the commissioner in respect of the matters, referred to him or mentioned in his report. But the examination of the Commissioner is not at all required by the provisions of Order XXVI Rule 10(2) of Civil Procedure Code for the purpose of proving the report. Relying on the said judgment, it is respectfully submitted that as none of the parties made application for examination of the ASI's archaeologists/experts who took part in excavation proceeding and prepared the report thereon, for the purpose of proving the said report there is no need of examination of the ASI's team of archaeologist and the said report is liable piece of evidence. Relevant paragraph no.33 of the aforesaid judgment reads as follows:

> "33. Order XXVI Rule 10 (2) of Civil P. C. lays down that the report of the commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. It is, therefore, clear from the aforesaid provision that it is not necessary in order that the report becomes evidence that the statement of the commissioner should also be made in the court for the purpose of proving it. It is up to the choice of the party to examine a commissioner in respect of the matters referred to him or mentioned in his report. But the examination of the commissioner is not at all required by the aforesaid provision for the purpose of proving the report. The case relied upon by the learned counsel for the respondent in Haji Kutubuddin v. Allah Banda (AIR 1973, All. 235) is not at all relevant on the above controversy. In this case,

> the High Court did not hold that the statement of the commissioner was necessary in order to prove it or that without such a statement the same could not be read in evidence. We, therefore, do not accept the submission of the learned counsel for the respondent that the report of the first commissioner was not admissible as he had not been produced as a witness."

In ***AIR 1976 Del 175 (Harbhajan Singh v. Smt. Sakuntala Devi Sharma & Anr)*** the Hon'ble Delhi High Court held that the Commissioner's report is admissible as evidence even as substantive evidence without examination of commissioner. In the said judgment it has also been held that before relying on report the authority is bound to consider and decide objections. Relying on the said judgment, it is humbly submitted that before relying on the said ASI report, this Hon'ble Court is to reject the objections of the plaintiffs and as none of the parties have made application for examination ASI archaeologists' report is a substantive evidence and is fit for being admitted without examination of the archaeologists of the ASI. Relevant paragraph no.5 & 7 of the aforesaid judgment read as follows:

> "5. The first contention urged on behalf of the tenant is that the report of the Commissioner and the evidence recorded by him and enclosed with the report did not constitute legal evidence and could not, therefore, be considered by the Authority unless the Commissioner had proved the report as a witness and had been subjected to cross-examination. This contention, to my mind, is untenable because on the principle incorporated in Rule 10 (2) of Order 26 of the Code of Civil Procedure, the report and the evidence would be evidence in the proceedings in which the Commissioner is appointed. Sub-rule (2) of Rule 10 is in the following terms:-
> "The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be

> evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation."
> It is obvious from the aforesaid sub-rule that the report of the Commissioner and the evidence, although not the evidence without the report, would be evidence in the proceedings in which the Commissioner is appointed although the Court has the power, as indeed, the parties a right to examine the Commissioner personally in the Court touching any of the matters referred to by him in the report or as to the manner in which he has made the investigation. In the present case, the Commissioner had been appointed in the presence of both the parties. The parties were, therefore, aware that the Commissioner had been deputed to make a local investigation. The report of the Commissioner along with the evidence had been duly submitted in the Court. Although the tenant submitted his objections to the report but made no attempt either to summon the Commissioner or to seek an opportunity to cross-examine the Commissioner.
>
> 7. It is next contended that, in any event, the report and the material enclosed by the Commissioner with it could not be substantive evidence and at best could be utilised to corroborate other evidence on the question in controversy. This contention seems to be untenable because if the report of the Commissioner and the material enclosed with it constituted legal evidence, and I have held above that it did, I do not see how it could not be used as a substantive piece of evidence to base the finding. The Authority had appointed the Commissioner to inspect the spot, to make an investigation and to submit a report and the Authority was entitled to accept the same and base its finding on such material.”

In ***AIR 1973 AP 168 (Vemusetti Appayyamma v. Lakshman Sahu)*** the Hon’ble Andhra Pradesh High Court held that report of Commissioner is a part of record and can be considered as evidence irrespective of the fact that the commissioner is examined as witness or not. Relying on the said judgment, it is submitted that the report of

the ASI is fit for being considered as evidence in spite of the fact that the persons who have taken part in excavation process and in preparation of the report have not been examined as none of the parties had made application for their examination. Relevant paragraph no.6 of the aforesaid judgment reads as follows:

> "6. The learned counsel for the appellant however, objects to the Commissioner's report being accepted and acted upon without its being marked and without the Commissioner being examined. But when the Court appoints a Commissioner under O. 26, R. 9, C.P.C. for making a local inspection and to submit a report, the Commissioner is given the discretion to make a local inspection and record evidence if necessary and submit a report together with such evidence as he thinks fit. Under sub-rule (2) of Rule 10 of Order 26, C.P.C., the report of the Commissioner and the evidence taken by him form part of the record. When the Rule lays down that it forms part of the record irrespective of whether it is marked or not, the Court is bound to take that evidence into consideration. The failure to mark it as a document on behalf of the parties does not exclude it from the record. Sub-rule (2), however, lays down that either the Court or any of the parties may examine the Commissioner but if the Commissioner is not examined, the report submitted by him does not cease to form part of the record. It is nowhere laid down that unless the Commissioner is examined and through him his report is marked as an exhibit, the report of the Commissioner cannot be acted upon. That being so, the lower Appellate Court was right in considering the Commissioner's report and in, accepting the defendant's evidence and rejecting that of the plaintiff's witnesses in the light of that. The finding whether the plaintiff is in possession of the plaint schedule site or not is a finding of fact which is supported by the evidence on record and is binding on this Court in Second Appeal."

In ***AIR 1985 Guj 34 (Jagat Bhai Punja Bhai Palkhiwala & Ors. v. Vikram Bhai Punja Bhai Palkhiwala & Ors.)*** the the Hon'ble Gujrat High Court held that where the Commissioner was appointed to make inventory only and he was not appointed to take possession of

the documents even if he was appointed to take possession of the documents, it would not have made any difference under Order 26 Rule 10B. The appointment is to perform merely a ministerial act and only those acts which are covered by sub-r.(1) i.e. ministerial acts, to which only sub-r.(2) would apply so as to attract the application of sub-r.10(2). Therefore, the report of the Commissioner for the performance of that ministerial act and the evidence if he had recorded himself would be evidence under Rule 10(2) but not whatever documents that may be incidentally or in course of the ministerial duty come to his notice and he may take possession there. Such collection of document is not recording of evidence and he was not appointed for that purpose. Relying on the said judgment it is submitted that the ASI excavation team was not appointed to collect the bones from the different strata and get those bones chemically examined. As such though the ASI excavation team has collected bones and made inventory thereof which was not necessary for drawing the conclusion that whether there was any existing structure prior to 16th century or not. As such challenge to the ASI report on this superficial ground is liable to be rejected. Relevant paragraph no.11, & 17 of the aforesaid judgment read as follows:

> "11. Since sub-r.(2) applies the provisions of R.10(2) that also may be reproduced here for easy reference.
> Rule-10(2) "The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form the part of record, the Court or with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or

> as to his report, or as to the manner in which he has made the investigation"
>
> 17. Moreover, the Commissioner was appointed to make inventory only and he was not appointed to take possession of the documents. Even if he was appointed to take possession of the documents, it would not have made any difference. Under O.26 R.10B the appointment is to perform merely a ministerial act and only those acts which are covered by sub-r.(1) i.e. ministerial acts, to which only that sub-r.(2) will apply so as to attract the application of sub-r.10(2). Therefore, the report of the Commissioner for the performance of that ministerial act and the evidence if he has recorded himself would become the part of the record in the suit under R.10(2), but not whatever documents that may be incidentally or in course of the ministerial duty come to his notice and he may take possession thereof. Such collection of documents is not recording of evidence and he was not appointed for that purpose and if the appointment is construed to such an extent as contended by the petitioners, such appointment would be ultra vires the scope of R.10 B. R.10 B read with R.10 does not make any radical departure suggested by the learned Counsel for the petitioners. In fact their contention is against the common sense and ordinary rules of convenience and proper conduct of a litigation. Neither the language nor the spirit nor the purpose of R 10B justifies such radical departure from the ordinary rules of procedure and evidence which are meant to facilitate convenient trial and fair opportunity to the other side."

In ***AIR 1994 KERALA 179 "C.K. Rajan v. State"*** the Hon'ble High Court Kerala held that The provisions of O. XXVI, R. 10 of the Civil P.C. is inapplicable to proceedings under Art. 226 of the Constitution of India. However, the Court, in exercising the powers under Art. 226, can appoint a Commissioner. The Commissioner so appointed by the Court must be responsible persons who enjoy the confidence of the Court and who are expected to carry out the assignment objectively and impartially without any predilection or

prejudice. The report of the Commissioner should be served on all the parties or made known to the public. If any person wants to dispute any of the fact or data stated in the report, he may take steps in that regard by filing an affidavit or by leading evidence. If the Commissioner so appointed by the Court to hold enquiry, considered facts and circumstances and made local inspection and discussed the matter with the parties and submitted a report containing reasoned findings, prima facie it constitutes evidence which can be acted by a Court of law. Interference with the result of a detailed and careful report so submitted should be made only for cogent and compelling reasons. In a case where an elaborate report is filed by the Commissioner, whose integrity, credibility and carefulness are not questioned, whose careful and laborious execution of his task is proved by the report itself, interference will be made only in exceptional circumstances, in cases where convincing evidence contra is available before Court. Relying on said judgment it is submitted that as no compelling reasons and convincing evidences contra are available before this Hon'ble Court the said report constitutes evidence which can be acted by a Court of law. Relevant paragraph nos. 18 and 19 of the said judgment read as follows:

> "18. We shall now inform ourselves as to the value and weight to be placed on the report submitted by the Commissioner appointed by this Court, Shri Krishnan Unni, District Judge. Shri Krishnan Unni is a senior Selection Grade District Judge with considerable experience and background. He is a judicial officer of repute and credibility. None of the parties, who appeared before us, at any point of time, questioned the capacity, credibility and

integrity of Shri Krishnan Unni. The Commissioner has submitted fifteen interim reports and the final report in two volumes. He has taken enormous pains to meet various persons, gather details and discuss all aspects that arose for consideration. He took the trouble for personally inspecting very many places on many occasions. A bare perusal of the fifteen interim reports and the final reports, which contain more than 500 pages, will go to show that the Commissioner has done the job entrusted to him with remarkable ability and skill. The Commissioner has posed the question that arose for consideration in a straight forward manner and in the real perspective. The details of all aspects that arose for consideration were adverted to and the pros and cons were considered with remarkable ability. After a discussion of various aspects and perusal of various materials that were available, the Commissioner has entered specific findings and has made specific recommendations. It is true that the provisions of O. XXVI, R. 10 of the Code of Civil Procedure is inapplicable to proceedings under Art. 226 of the Constitution of India. Even before the Code of Civil Procedure came into force, the Judicial Committee of the Privy Council had occasion to remind the Courts in India about the approach to be made regarding a Commissioner's report made on local enquiry. In Ranee Surut Soondree Debea v. Baboo Prosanna Coomar Tagore, (1869-70) 13 Moo Ind App 607 at page 617, the Judicial Committee of the Privy Council after stating that interference with the result of a local enquiry should be only upon clearly defined and sufficient grounds, stated the law thus :

"The integrity of the Ameen (Commissioner) is unquestioned; this careful and laborious execution of his task is proved by his report; he has not blindly adopted the assertions of either party; and without going minutely into details, Their Lordships think it sufficient to say that they see no ground for impugning the accuracy of his conclusion upon what they conceive to be the broad and cardinal issue upon which the determination of this case depends."

In Chandan Mull v. Chiman Lal, AIR 1940 PC 3 at page 6, the Judicial Committee again laid down the correct statement of the principle to be adopted in

dealing with the Commissioner's report. It was observed :

"It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined and sufficient ground is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party."

The above is the position in law uninfluenced in any manner by the provisions of the Code of Civil Procedure.

19. The Supreme Court of India had occasion to consider the jurisdiction of the Courts in exercising the powers under Articles 32 and 226 of the Constitution of India in appointing Commissioners and the evidential value of such reports in such proceedings. The matter arose in a public interest litigation. In Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802, Bhagwati, J. at page 816 (paragraph 14) of the judgment stated thus :

"The report of the Commissioner would furnish prima facie evidence of the facts and data gathered by the Commissioner and that is why the Supreme Court is careful to appoint a responsible person as Commissioner to make an enquiry or investigation into the facts relating to the complaint. It is interesting to note that in the past the Supreme Court has appointed sometimes a district Magistrate, sometimes a district Judge, sometimes a professor of law, sometimes a journalist, sometimes an officer of the Court and sometimes an advocate practising in the Court, for the purpose of carrying out an inquiry or investigation and making report to the Court because the Commissioner appointed by the Court must be a responsible person who enjoys the confidence of the Court and who is expected to carry out his assignment objectively and impartially without any predilection or prejudice. Once the report of the Commissioner is received, copies of it would be supplied to the parties so that either party, if it wants to dispute any of the facts or data stated in the Report, may do so by filing an affidavit and the Court then consider the report of the Commissioner and the affidavits which may have been filed and

proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the Commissioner and to what extent to act upon such facts and data. But it would not be correct to say that the report of the Commissioner has no evidentiary value at all, since the statements made in it are not tested by cross-examination."

At page 817 of the judgment, in paragraph 15, the learned Judge said thus :

"We may point out that what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Art. 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide terms as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Article 226. In fact, the jurisdiction of the High Courts under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights."

Pathak, J. in concurring the judgment, observed at page 845 (paragraph 70) thus :

"It is true that the reports of the said Commissioners have not been tested by cross-examination, but then the record does not show whether any attempt was made by the respondents to call them for cross-examination. The further question whether the appointment of the Commissioners falls within the terms of Order XLVI of the Supreme Court Rules, 1966 is of technical significance only, because there was inherent power in the Court, in the particular circumstances of this case to take that action."

Amarendra Nath Sen, J. in a concurring judgment, at page 849 (paragraph 81) stated the law thus :

"The power to appoint a commission or an investigating body for making enquiries in terms of directions given by the Court must be considered to be implied and inherent in the power that the Court

has under Article 32 for enforcement of the fundamental rights guaranteed under the Constitution. This is a power which is indeed incidental, or ancillary to the power which the Court is called upon to exercise in a proceeding under Art. 32 of the Constitution. It is entirely in the discretion of the Court, depending on the facts and circumstances of any case, to consider whether any such power regarding investigation has to be exercised or not. The Commission that the Court appoints or the investigation that the Court directs while dealing with a proceeding under Art. 32 of the Constitution is not a Commission or enquiry under the Code of Civil Procedure. Such power must necessarily be held to be implied within the very wide powers conferred on this Court under Art. 32 for enforcement of fundamental rights. I am, further of the opinion that for proper exercise of its powers under Art. 32 of the Constitution and for due discharge of the obligation and duty cast upon this Court in the matter of protection and enforcement of fundamental rights which the Constitution guarantees, it must be held that this Court has an inherent power to act in such a manner as will enable this Court to discharge its duties and obligations under Art. 32 of the Constitution properly and effectively in the larger interest of administration of justice, and for proper protection of constitutional safeguards. I am, therefore, of the opinion that this objection is devoid of any merit."

The latest decision on this subject is Delhi Judicial Service Association Tis Hazari Court v. State of Gujarat, 1991 AIR SCW 2419 : (1991) 4 SCC 406. We are of the view that the above decisions establish that the Court, in exercising the powers under Article 226 of the Constitution of India, can appoint a Commission. The Commission so appointed by the Court must be responsible persons who enjoy the confidence of the Court and who are expected to carry out the assignment objectively and impartially without any predilection or prejudice. The report of the Commission should be served on all the parties or made known to the public. If any person wants to dispute any of the fact or data stated in the report, he may take steps in that regard by filing an affidavit or by leading evidence. If the Commission so appointed by the Court to hold enquiry,

> considered facts and circumstances and made local inspection and discussed the matter with the parties and submitted a report containing reasoned findings, prima facie it constitutes evidence which can be acted by a Court of law. Interference with the result of a detailed and careful report so submitted should be made only for cogent and compelling reasons. In a case where an elaborate report is filed by the Commissioner, whose integrity, credibility and carefulness are not questioned, whose careful and laborious execution of his task is proved by the report itself, interference will be made only in exceptional circumstances, in cases where convincing evidence contra is available before Court."

In ***(2003) 4 SCC 493 (Sharda v. Dharmpal)*** the Hon'ble Supreme Court has held that the primary duty of a Court is to see that truth is arrived at. Under Section 75(e) of the Code of Civil Procedure and Order XXVI Rule 10A of the Code of Civil Procedure, the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation. In certain cases scientific examination by the experts in the field may not only be found to be leading to the truth of the matter, but may also lead to removal of misunderstanding between the parties. Relying on said judgment, it is respectfully submitted that the ASI report is a scientific report of experts which has removed misunderstanding between the parties by giving scientific record that beneath the then existing disputed structure there was remains of temples of Northern Indian Hindu temples of 12th century over which the disputed structure was erected by utilizing material of the said temple. As such the said report is liable to be considered in the true letter and spirit of the aforesaid

judgment of the Hon'ble Supreme Court. Relevant paragraph no.32-37 of the aforesaid judgment read as follows:

> **"32.** Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.
>
> **33.** Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.
>
> **34.** In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.
>
> **35.** Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.
>
> **36.** In matrimonial disputes, the court has also a conciliatory role to play — even for the said purpose it may require expert advice.
>
> **37.** Under Section 75(*e*) of the Code of Civil Procedure and Order 26 Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation."

In ***1995 Supp (4) SCC 600 (Misrilal Ramratan v. A.S. Sheik Fathimal)*** the Hon'ble Supreme Court held that it is settled law that the report of the Commissioner is part of the record and that therefore, the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as witness since it is part of the record. Relying on the said judgment, it is respectfully submitted that on the ground of non-examination of the archaeologists of the ASI team the said report cannot be overlooked and rejected and as in view of settled law, the said scientific report is part of the record. The report is liable to be considered for drawing of the inferences.

Relevant paragraph no.3 of the aforesaid judgment reads as follows:

> **"3.** Shri Sundaravaradan, learned Senior Counsel appearing for the appellants has contended that the approach of the High Court is manifestly illegal. We find no force in the contention. It is now settled law that the report of the Commissioner is part of the record and that therefore the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as a witness since it is part of the record of the case. We have gone through the report submitted by Shri Sundaravaradan and the High Court is clearly right in its conclusion that the age of the building as per the sanctioned plan of 1928 is 70 years and the building requires demolition. In fact, it is undisputed that the landlord obtained sanction from the Municipal Corporation for demolition of the building. What was lacking thereafter was that he did not obtain sanction for reconstruction. This is one of the grounds for rejecting the application for eviction. Undertaking was given that within six months from the date of the construction, he would obtain necessary sanction. Under these circumstances, we find that the High Court is right in reaching the conclusion that the landlord has established the need for demolition of the building for reconstruction as envisaged under Section 14(1)(*b*) of the Act. The appeals are dismissed. However three months' time is granted to the appellants for vacating the premises with usual undertaking. The undertaking shall be filed within one month from today."

In ***(1988) 2 SCC 292 (Southern Command M.E.S. Employees' Cooperative Credit Society v. V.K.K. Nambiar)*** the Hon'ble Supreme Court held that the High Court was obviously in error in its view that the Commissioner's report could not be acted upon and be treated evidence. Relying on said judgment, it is submitted that as the Commissioner's report is a legal evidence, it is liable to be considered by this Hon'ble Court as a piece of evidence. Relevant paragraph no.1 of the aforesaid judgment reads as follows:

> **"1.** After hearing Learned Counsel for the parties, we are

> satisfied that interference by the High Court with the findings of fact recorded by the lower appellate court in exercise of its supervisory jurisdiction under Article 227 of the Constitution was wholly unwarranted and in excess of its jurisdiction. The High Court was obviously in error in its view that the Commissioner's report could not be acted upon or be treated as legal evidence. The Commissioner's report tends to show that the demised premises are no longer in occupation of the respondent but in occupation of strangers which fact does raise an inference of subletting as held by the lower appellate court."

The main ground of the objection of the plaintiffs specifically the plaintiff no.1's objection dated 8th October, 2003 as contained in its paragraph no.1 that the ASI report has been prepared with a prejudice mind and with one-sided presentation of evidence. In other words it can be said that the ground is of biased and mala fide as it has been elucidated in supplementary objection of the defendant no.6/1 & 6/2 of the OOS no.3 of 1989 dated 03/11/2003 wherein in paragraph nos.1 and 6 it has been stated that the said report is meant to strengthen the design of the communal combine RSS, BJP, VHP. The ASI department is under the control of Central Government. At that time the then Prime Minister Shri Atal Behari Bajpayee, Deputy Prima Minister Sri L.K. Advani and HRD Minister Sri M.M. Joshi all were of the BJP as such the ASI excavation team acted under their instruction and behest. As such said report being biased and mala fide is liable to be rejected.

In 1992 Supp (1) 222 (*State of Bihar & Anr. v. P.P. Sharma, IAS & Anr.)* the Hon'ble Supreme Court held that mala fides means want of good faith, personal bias, grudge, oblique or improper motive or

ulterior purpose. The administrative action must be said to be done in good faith, if it is in face done honestly, whether it is done negligently or not. The determination of a plea of mala fide involves two questions namely, whether there is a personal bias or an oblique motive and whether the administrative action is contrary to the objects, requirements and conditions of valid exercise of power. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrative either by admitted or proved facts and circumstances obtainable in given case. Relying on said judgment it is submitted that the objectors failed to prove the mala fide either by admitted or proved facts and circumstances as such their objection is liable to be rejected. Relevant paragraph 50-52 of the said judgment read as follows:

> **"50.** Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely (*i*) whether there is a personal bias or an oblique motive, and (*ii*) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.
>
> **51.** The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is

> established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand.
>
> **52.** Public administration cannot be carried on in a spirit of judicial detachment. There is a very wide range of discretionary administrative acts not importing an implied duty to act judicially though the act must be done in good faith to which legal protection will be accorded. But the administrative act de hors judicial flavour does not entail compliance with the rule against interest and likelihood of bias. It is implicit that a complainant when he lodges a report to the Station House Officer accusing a person of commission of an offence, often may be a person aggrieved, but rarely a pro bono publico. Therefore, inherent animosity is licit and by itself is not tended to cloud the veracity of the accusation suspected to have been committed, provided it is based on factual foundation."

In (2008) 7 SCC 639 (*H.V. Nirmala v. Karnataka State Financial Corporation)* the Hon'ble Supreme Court held that where a party did not raise any objection in regard to the appointment of the enquiry officer and participated in the enquiry proceeding without any demur whatsoever and failed to establish that any prejudice has been caused by reason of appointment of a legal adviser as an enquiry officer such party cannot be permitted to raise the said contention. Relying on said judgment it is submitted that the ASI was appointed to carry out the excavation work by this Hon'ble High Court and no objection was raised with regard to such appointment of ASI rather the objectors, their observers, their nominees and other parties duly participated in the excavation proceeding and they have also failed to establish that appointment of ASI caused any prejudice to them their such contention is liable to be rejected. Relevant paragraph 10 of the said judgment reads as follows:

> **"10.** The appellant did not raise any objection in regard to the appointment of the enquiry officer. She participated in the enquiry proceeding without any demur whatsoever. A large number of witnesses were examined before the 644 enquiry officer. They were cross-examined. The appellant examined witnesses on her own behalf. The learned Single Judge as also the Division Bench of the High Court opined that the appellant has failed to establish that any prejudice has been caused to her by reason of appointment of a legal advisor as an enquiry officer and as the appellant has participated in the enquiry proceeding, she could not be permitted to raise the said contention."

In ***(2006) 3 SCC 56 (Ceat Ltd. v. Anand Abasaheb Hawaldar & Ors.)*** the Hon'ble Supreme Court held that in order to establish favouritism or partiality mental element of bias must be established by cogent evidence. Relying on said judgment it is submitted that the objectors have failed to establish mental element of bias of the members of the ASI excavation team as such their objection is liable to be rejected. Relevant paragraph 11 to 16 of the said judgment read as follows:

> **"11.** In Item 5 of Schedule IV to the Act, the legislature has consciously used the words "favouritism or partiality to one set of workers" and not differential treatment. Thus, the mental element of bias was necessary to be established by cogent evidence. No evidence in that regard was led. On the contrary the approach of the Industrial Court and the High Court was different. One proceeded on the basis of breach of assurance and the other on the ground of discrimination. There was no evidence brought on as regards the prerequisite i.e. favouritism or partiality. Favouritism means showing favour in the matter of selection on circumstances other than merit. (Per *Advanced Law Lexicon* by P. Ramanatha Aiyar, 3rd Edn., 2005.) The expression "favouritism" means partiality, bias. Partiality means inclination 61 to favour a particular person or thing. Similarly, it has been sometimes equated with capricious, not guided by steady judgment, intent or purpose. Favouritism as per *Webster's' Encyclopaedic Unabridged Dictionary of the*

English Language means the favouring of one person or group over others having equal claims. Partiality is the state or character of being partial, favourable, biased or prejudiced.

12. According to *Oxford English Dictionary*, "favouritism" means—a deposition to show, or the practice of showing favour or partiality to an individual or class, to the neglect of others having equal or superior claims; under preference. Similarly, "partiality" means the quality or character of being partial, unequal state of judgment and favour of one above the other, without just reason. Prejudicial or undue favouring of one person or party: or one side of a question; prejudice, unfairness, bias.

13. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially:

"If however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices." (Per Frank, J. in *Linahan,* F 2d at p.652.)

14. It is not every kind of differential treatment which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest — whether pecuniary or personal.

15. Because of this element of personal interest, bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.

16. As we have noted, every preference does not vitiate an action. If it is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. The above position was highlighted in *G.N. Nayak* v. *Goa University*."

In (2005) 5 SCC 363 (*People's Union for Civil Liberties v. Union of India)* the Hon'ble Supreme Court held that public displeasure is not confined to the police force only but this displeasure is reflected against many a department of the government including constitutional bodies and if public displeasure or perception were to be the yardstick to exclude people from holding constitutional or statutory offices then many such posts in the country may have to be kept vacant. Relying on said judgment it is submitted that as at that time there was BJP government, it cannot be said that all the branches and department of the government were working dishonestly at the behest of the BJP government. As such the objection which is based on such hypothetical wild allegations is liable to be rejected. Relevant paragraph nos.10 to 12 of the said judgment read as follows:

> **"10.** While we cannot take exception in regard to the remarks made against the police in each one of the above cases relied on by the learned counsel for the petitioner, we certainly feel that these remarks cannot be so generalised as to make every personnel of the force, consisting of nearly 2.2 million people, violators of human rights solely on the ground that out of thousands of cases investigated and handled by them, in some cases the personnel involved have indulged in violation of human rights. Learned counsel for the petitioner, however, contended that the judgments apart, the public perception of the Indian police force as a whole is so poor that it considers the police as an organisation to be a violator of human rights. Therefore, selecting a retired police officer as a member of the Commission would lead to erosion of confidence of the people in the Commission. We are sincerely unable to gauge this public perception or its magnitude so as to import this concept of institutional bias. There are no statistics placed before 370this Court to show that there has been any census or poll conducted which would indicate that a substantial majority of the population in the country considers the police force as an

institution which violates human rights nor do we think that by such generalisations we could disqualify a person who is otherwise eligible from becoming a member of the Commission.

11. Public displeasure as presently perceived is not confined to the police force only. The views expressed in the media very often show that this displeasure is reflected against many a department of the Government including constitutional bodies and if public displeasure or perception were to be the yardstick to exclude people from holding constitutional or statutory offices then many such posts in the country may have to be kept vacant.

12. Then again what is the yardstick to measure public perception. Admittedly, there is no barometer to gauge the perception of the people. In a democracy there are many people who get elected by a thumping majority to high legislative offices. Many a times public perception of a class of society in regard to such people may be that they are not desirable to hold such post but can such a public opinion deprive such people from occupying constitutional or statutory offices without there being a law to the contrary? There is vast qualitative difference between public prejudice and judicial condemnation of an institution based on public perception. At any rate, as stated above, public perception or public opinion has no role to play in selection of an otherwise eligible person from becoming a member of the Commission under the Act."

In (2001) 1 SCC 182 *(Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant)* the Hon'ble Supreme Court held that the word 'bias' include the attributes and broader purview of the word 'malice' which means and implies 'spite' or 'ill-will' and it is now well-settled that mere general statement will not be sufficient for the purposes of indication of ill-will, there must be cogent evidence available on record to come to the conclusion as to whether in face there was existing a bias which resulted in miscarriage of justice. Relying on said judgment it is submitted that the objectors have failed to establish ill-will by cogent evidence as such their objection is liable to be

rejected. Relevant paragraph no.10, 26 & 32-35 read as follow:

> "10**.** The word "bias" in popular English parlance stands included within the attributes and broader purview of the word "malice", which in common acceptation means and implies "spite" or "ill-will" (*Stroud's Judicial Dictionary,* 5th Edn., Vol. 3) and it is now well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice.
>
> 26**.** "Bias" in common English parlance means and implies — predisposition or prejudice. The Managing Director admittedly, was not well disposed of towards the respondent herein by reason wherefor, the respondent was denuded of the financial power as also the administrative management of the department. It is the selfsame Managing Director who levels thirteen charges against the respondent and is the person who appoints the enquiry officer, but affords a pretended hearing himself late in the afternoon on 26-11-1993 and communicates the order of termination consisting of eighteen pages by early evening, the chain is complete: prejudice apparent: bias as stated stands proved.
>
> 32**.** Lord Hutton also in *Pinochet case*16 observed:
>
> "There could be cases where the interest of the Judge in the subject-matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation."
>
> 33**.** Incidentally in *Locabail [Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.]* the Court of Appeal upon a detail analysis of the oft-cited decision in *R.* v. *Gough* together with the *Dimes case*, *Pinochet case*, Australian High Court's decision in the case of *J.R.L., ex p C.J.L.,* as also the Federal Court in *Ebner,* and on the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa* v. *South African Rugby Football Union* stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything

will depend upon facts which may include the nature of the issue to be decided. It further observed:

"By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakuta* v. *Kelly*; or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

34**.** The Court of Appeal judgment in *Locabail* though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case — a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient.

35**.** The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances

> must and ought to be collated and necessary conclusion drawn therefrom — in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in *Locabail case*."

In ***(2001) 2 SCC 330 (State of Punjab v. V.K.Khanna)*** the Hon'ble Supreme Court held that the test is as to whether there is a mere apprehension or there is a real danger of bias and it is on this score that on the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. If allegations pertain rather fanciful apprehension in administrative action question of declaring them to be unsustainable on the basis therefore would not arise. Action not bona fide by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act. Relying on said judgment, it is submitted that the objectors have failed to prove and establish the aforesaid ingredients of prejudice and mala fide as such their objections are liable to be rejected. Relevant paragraph no.8 and 25 of the said judgment read as follows:

> "5**.** Whereas fairness is synonymous with reasonableness — bias stands included within the attributes and broader purview of the word "malice" which in common acceptation means and implies "spite" or "ill will". One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general

statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a mala fide move which results in the miscarriage of justice (see in this context *Kumaon Mandal Vikas Nigam Ltd.* v. *Girja Shankar Pant*). In almost all legal inquiries, "intention as distinguished from motive is the all-important factor" and in common parlance a malicious act stands equated with an intentional act without just cause or excuse. In the case of *Jones Bros. (Hunstanton) Ltd.* v. *Stevens* the Court of Appeal has stated upon reliance on the decision of *Lumley* v. *Gye* as below:

"For this purpose maliciously means no more than knowingly. This was distinctly laid down in *Lumley* v. *Gye* where Crompton, J. said that it was clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring and keeping the servant after he has quitted his master during his period of service, commits a wrongful act for which he is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excuse: *Bromage* v. *Prosser*. 'Intentionally' refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though sometimes, as for instance to rebut a plea of privilege in defamation, malice in fact has to be proved."

6**.** In *Girja Shankar Pant case* this Court having regard to the changing structure of the society stated that the modernisation of the society with the passage of time, has its due impact on the concept of bias as well. Tracing the test of real likelihood and reasonable suspicion, reliance was placed in the decision in the case of *Parthasarathi* (*S. Parthasarathi* v. *State of A.P.*) wherein Mathew, J. observed: (SCC pp. 465-66, para 16)

"*16*. The tests of 'real likelihood' and 'reasonable suspicion' are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right-minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must

exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* (WLR at p. 707)]. We should not, however, be understood to deny that the court might with greater propriety apply the 'reasonable suspicion' test in criminal or in proceedings analogous to criminal proceedings."

7**.** Incidentally, Lord Thankerton in *Franklin* v. *Minister of Town and Country Planning* opined that the word "bias" is to denote a departure from the standing of even-handed justice. *Girja Shankar case* further noted the different note sounded by the English Courts in the manner following: (SCC pp.199-201, paras 30-34)

"*30*. Recently however, the English courts have sounded a different note, though may not be substantial but the automatic disqualification theory rule stands to some extent diluted. The affirmation of this dilution however is dependent upon the facts and circumstances of the matter in issue. The House of Lords in the case of *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)* observed:

'... In civil litigation the matters in issue will normally have an economic impact; therefore a Judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a Judge applies just as much if the Judge's decision will lead to the promotion of a cause in which the Judge is involved together with one of the parties.'

31. Lord Brown-Wilkinson at p. 136 of the report stated:

'It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25-11-1998 would lead to a position where Judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a Judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (*1*) that A.I. was a party to the appeal; (*2*) that A.I. was joined in

order to argue for a particular result; (*3*) the Judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a Judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a Judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the Judge would be well advised to disclose a possible interest.'

32. Lord Hutton also in *Pinochet case* observed:

'There could be cases where the interest of the Judge in the subject-matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.'

33. Incidentally in *Locabail* [*Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.*] the Court of Appeal upon a detail analysis of the oft-cited decision in *R.* v. *Gough* together with the *Dimes case*, *Pinochet case*, Australian High Court's decision in the case of *J.R.L., ex p C.J.L.,* as also the Federal Court in *Ebner,* and on the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa* v. *South African Rugby Football Union* stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything will depend upon facts which may include the nature of the issue to be decided. It further observed:

'By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of

the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakuta* v. *Kelly*); or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.'

34. The Court of Appeal judgment in *Locabail* though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case — a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient."

8**.** The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor, would not arise.

9**.** It is in the same vein this Court termed it as reasonable likelihood of bias in *Rattan Lal Sharma case (Rattan Lal Sharma* v. *Managing Committee Dr Hari Ram (Co-Education) Higher Secondary School* wherein this Court was pleased to observe that the test is real likelihood of bias even if such bias was, in fact, the direct cause. In *Rattan Lal Sharma case* real likelihood of bias has been attributed a meaning to the effect that there must be at

> least a substantial possibility of bias in order to render an administrative action invalid. *Rattan Lal Sharma case* thus, in fact, has not expressed any opinion which runs counter to that in *Girja Shankar case* and the decision in the last-noted case thus follows the earlier judgment in *Rattan Lal case* even though not specifically noticed therein.
>
> 10**.** Before adverting to the rival contentions as raised in the matter, it would also be convenient to note the other perspective of the issue of bias to wit: mala fides. It is trite knowledge that bias is included within the attributes and broader purview of the word "malice"."

The conclusion of the ASI report submitted before this Hon'ble Court is that there was a temple. In Chapter VI of the said report Sri L.S. Rao, Sri A.R. Siddiqui and Sri Sujeet Narayan, the archaeologists record their inferences as follows:

> "A noteworthy aspect of some of these architectural members is the presence of mortises/open grooves of varying dimensions on the body of slabs which serve the purpose of providing dowels/clamps as binding factor. In many a cases iron dowels have been found *in situ.* Besides, there are also symptomatic features to the effect of reusing the earlier architectural members with decorative motifs or mouldings by re-chiseling the slab (Pls.79-80, Fig.59). A few intact architectural members like Amlaka (Pl.81, Fig.59) pillar with *Ghata-pallava* base with dwarf beings as weight-bearers and *Kirtimukhas* (Pls.82-83, Fig.59) to mention a few, have also been recovered. Besides, there are a member of architectural members which have been decorated with deeply carved foliage motifs. This pattern is a distinct one resembling like that of "stencil" work (Pls.86-87). It may be pointed out that the various architectural members with similar decorative designs have been found used in the foundation of one of the major brick structures (wall 16) (see Chapter-IV-Structure) exposed in these excavations.
>
> The aforesaid pillars and other decorative architectural members of this site like fragment of broken jamb with semi circular pilaster (Pl.85), fragment of lotus medallion motif (Pls.89-90) emphatically speak about their association with the temple architecture. Stylistically, these architectural members in general and pillars in particular may be placed in a time bracket of

tenth-twelfth Century A.D. It is also pertinent to note that there are a few architectural members (Pls.92-94), which can clearly be associated with the Islamic architecture on stylistic ground, which might belong to sixteenth century A.D. onwards."

(ASI report vol.I p.121 - 122)

The ASI report submitted before this Hon'ble Court in its Chapter-IV Sri B.R. Mani, Sri D.K. Singh, Sri Bhuvan Vikrama, Sri Gajanan L. Katade, Sm. Prabash Sahu and Sri Zulfeqar Ali the archaeologists record their inferences as follows:

a) "Two decorated sand stone blocks from an earlier structure, one having the damaged figure of a possible foliated *makara-pra□ala* were found re-used in the foundation of wal 5 on its outer face (Pls.22-23)"

(ASI report, Ch.IV Vol.I p.52)

b) "The decorated octagonal sand stone block on pillar base 32 having floral motif on four corners in trench F7 in the southern area is the unique example at the site (Pl.39) which definitely belongs to the 12th century AD. as it is similar to those found in the *Dharmachakrajijna Vihara* of Kumaradevi at Sarnath (Pl.40) which belongs to the early 12th century AD."

(ASI report, Ch.IV, Vol.I p.56)

c) "A partly damaged east facing brick shrine, structure 5 (Pls.59-60, Fig.17, 24 & 24A) was noticed after removal of baulk between trenches E8 and F8. It is a circular structure with a rectangular projection in the east ...

Thus on stylistic grounds, the present circular shrine can be dated to c. tench century A.D. when the Kalachuris moved in this area and settled across river Sarayu. They possibly brought the tradition of stone circular temples transformed into brick in Ganga-Yamuna valley."

(ASI Report, Ch. IV Vol. I, p.70 & 71)

"***The Ram Chabutra***

The excavation revealed that the *Ram Chabutra* or structure 1 (Fig.3) has got no less than five different structural phases of its construction (Pl.15). Its original use is not certain and there is possibility of its being a water tank in its original shape. The chabutra which looked a small platform in its final form at the time of its last use, was found to be a fairly large structure when its

core was exposed besides outer phases wherever where possible for excavation. In its enlarged form it was a structure nearly 22 m in east-west and about 14m in north-south orientation.

The base of the structure has been found to be no less than 2.67 m deep, constructed of 7 levels, each having calcrete blocks in one course with joints filled up with lime-surkhi mortar. These courses of the foundation levels were found still continuing downwards. Above this base was constructed a tank like structure of eight levels (Pl.16) having in its each level one course of calcrete blocks topped by two courses of bricks set in lime mortar. Above each level the walls were plastered with lime mortar. In its original form it had perhaps four projections in the middle of its four walls, but later it was raised upon the height of 2.41 m having eight levels in all and a projection of 76 m with the length of 1.67 m on its eastern and western sides in the middle of the wall. The inner measurements of this structure are 4.08 m in north-south and 4.30 m in east-west directions without their projection on either sides of east and west.

In the third stage of its use the structure was filled up with debris consisting of calcrete blocks and brick-bats upto its surface level. Afterwards throughout on the surface a course of calcrete blocks was spread with brick-bats mixed with lime-surkhi mortar above which was placed a squarish masonry platform at the spot where the western projection of the structure was located (Pl./17).

The quarish masonry platform was a solid structure 40 cm in height and 1.50 m in east-west and 1.55 m in north-south direction with its 7 cm top plastered cleanly with fine lime mortar. The top part was found projected over the surface (Pl,18) below which one more course of calcrete blocks and brick-bats etc., as in the lower course below it, were found laid and set in lime-surkhi mortar. Thus the total height raised over the tank like structure was 75 cm. This seems to have been the earliest form of the *Ram Chabutra* seems to match with the description of a square box elevated 5 inches above the ground level covered with lime stone or vedi (bedi) which was circumambulated thrice and saluted by people by prostrating on ground as given by the Austrian traveller Joseph Tieffenthaler who visited the site around 1766-71 and whose account was published in Latin and translated in French in 1786 under the title *Description historique et geographique de l` Inde.*

It is quite apparent that in due course of time the height of the *Ram chabutra* was further raised in two phases first having three levels of calcrete blocks mixed

with brick-bats, terracotta objects and potsherds of earlier period set in like-surkhi mortar, each level divided by well plastered surface. Finally, on the top, four courses of lakhauri bricks, brick-bats of earlier bricks set in like-surkhi mortar, were laid, probably during the late Mughal period over which cement plaster was done at a later date in which were fixed memorial or decorative slabs as evident fro the impressions available over the plaster (Pl.19). thus the minimum height of the structure was found to be no less than 7.40 m. In the extended part of the *Ram Chabutra* in the west its retaining wall has damaged the pillar bases 30, 33, 36, 39 and 42 of the Period VII. (Fig.3B)"

(ASI report, vol.I, p.49 – 51)

d) During the excavation 62 human and 131 animal figurines were found. In the consonance with the prevailing practice in the Gangetic valley, these figurines are the products of both handmade as well as moulding techniques. These terracottas are assignable from the pre-Mauryan to the previous century. They are both religious as well as secular, the former being represented as cult objects viz. mother-goddess.

(ASI report, vol.I,Ch. VII p.174)

The said ASI report records its findings of temple as follows:

"The Hon'ble High Court, in order to get sufficient archaeological evidence on the issue involved "whether there was any temple/structure which was demolished and mosque was constructed on the disputed site" as stated on page 1 and further on p.5 of their order dated 5 march, 2003 had given directions to the Archaeological Survey of India to excavate at the disputed site where the GPR Survey has suggested evidence of anomalies which could be structure, pillars, foundation walls, slab flooring etc. which could be confirmed by excavation. Now, viewing in totality and taking into account the archaeological evidence of massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patterns, *amalaka, kapotapali* doorjamb with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having *pranala* (waterchute) in the north, fifty pillar bases in association of the huge structure, are indicative of

> remains which are distinctive features found associated with the temples of north India."

The Gazetteer of India, Vol.-II, 3rd Edn. 1990, published by Director Publications Division, Govt. of India, Delhi also records that *amalaka* is characteristic feature of north Indian i.e. Nagara style temples. Relevant extracts from the said gazetteer reads as follows:

> "The three lower ones are square in cross section while the mastaka, of which the topmost part is the amalaka, is circular. Each of these sections has further subdivisions of which those of the *bada* may be useful for a study of the evolutionary sequence."
>
> (*Ibid.* P.224)

> "...In the Brahmesvara the *jagamohana* roof is surmounted by a domical member with the *amalaka* as its crown."
>
> (*Ibid.* P.225)
>
> "...Another typical feature is supplied by *amalakas* forming the crowning member of the principal *sikhara* and of the *anga-sikharas."*
>
> (*Ibid.* P.227)
>
> "...in a few instances, of such Central Indian features as extensions of pagas double *amalaka."*
>
> (*Ibid.* P.229)
>
> "...Such temples bear the characteristic features of the early *Nagara* temple, though the attenuated and globular shape of the *amalaka* provides a significant divergence."
>
> (*Ibid.* P.231)

Mohammad Abid, as an expert witness deposed in Hindi as DW 6/1-2 relevant portions of his deposition reads as follows:

> "a). I am well acquainted with the standard, technique as well as scientific and practical system and procedure of the archaeological excavation (ibid P. 2 – 3 para 3 specially line 5 and 6 of p. 3).
> b). Pillar base as it is seen in Plate 48 exactly same pillar base was found and no addition or alteration was made to it. (ibid p.25 L.10-12)
> c). In Ayodhya at the time of excavation scientific method was adopted. (ibid p.57 L. 8-9)
> d). It is correct that amongst the artefacts found in excavation, a divine couple was also found. (ibid p.65

L. 1-2)
e). It is correct that Toran – Ganapati, Prakar Mandir and yantra are found in a temple but not in a mosque. (ibid p.65 L.11-16)

Professor Dhaneshwar Mandal, as an expert witness deposed in Hindi as PW -24 relevant portions of his deposition read as follows:

"a). I don't think that during my stay archaeologists had constructed any pillar etc. In my presence there was no such happening that said archaeologist manufactured anything in concealed manner or by force. During excavation I had seen that the artefacts found in course of excavation were segregated. This is also correct to say that during the excavation human deposits were being found from the trenches. (ibid p. 161 L.5-9)

b). If at any place there is a kitchen then naturally at that place food would have been prepared but if really food would have been prepared, then according to archaeology finding of furnace / oven from that place is essential. In the collection of ASI's report Volume II (Plates) in Plate No. 3 oven and furnace have been shown and I myself has also seen the oven and furnace on excavation-site. (ibid p. 191 L. 9-15)

c). In the Plate no.39 it looks as a stylistic elephant's trunk (*Ibid* p.250 L.6 & 7)

d). In Plate no.37 of the aforesaid report one pillar base of a definite form is appearing, There are stones on both side to support it. There is no such construction in Plate no.42. In this Plate the visible upper portion on which is marked F2 construction thereof is like the construction which is seen in aforesaid Plate no.37 & 38. The pillar-base which is visible in Plate no.47 construction thereof is different from the pillar-base of the aforesaid Plates. The pillar-base which is visible in Plate no.44 construction whereof is also different from the aforesaid pillar-bases. The pillar-base which is visible in Plate no.45, construction thereof is different from the construction of the pillar-bases which are visible in Plate no.37 & 38. The pillar-base which is in Plate no.46, construction thereof is different from the aforesaid pillar-bases. The construction of the pillar-base visible in Plate no.46 is similar to the construction in Plate no.42. The construction of the pillar-base visible in Plate no.47 is similar to the construction of

the pillar-bases visible in Plate no.42 & 46. In Plate no.48 pillar-base of circular type is visible. (*Ibid* p.262 L.2-17)

e)It is correct to say that floral motif is mostly used in Hindu temples. In Plate no.62 brick wall is visible beneath which in foundation some decorated stone pieces are connected. These stone which are visible in Plate no.37 & 38. The pillar-base which is in Plate no.46, construction thereof is different from the aforesaid pillar-bases. The construction of the pillar-base visible in Plate no.46 is similar to the construction in Plate no.42. The constructio pieces are also re-used. Floral motifs are also carved thereon. Mostly the floral motif are made in Hindu temples. The pillar-base which is visible in Plate no.30 is similar to the pillar-bases which are visible in Plate no.42 & 46. In the Plate no.22 a figure made on a stone-slab is *Maker Pranal.* In the Plate no.23 its close up has been given. *Makar* are abundantly made in Hindu tem which are visible in Plate no.37 & 38. The pillar-base which is in Plate no.46, construction thereof is different from the aforesaid pillar-bases. The construction of the pillar-base visible in Plate no.46 is similar to the construction in Plate no.42. The constructioples. The stones whereon flower, leaf, animal figurines, *Kalash* are engraved those are used in Hindu temples but it can be brought from somewhere else also and they might be of that place were they are entangled. Thus there are both possibilities. (*Ibid* p.263 L.5 – 16)

f). Such pillar-bases has also been found wherein orthostate has been used. Mainly these are situated in the Northern direction of the make-shift-structure. Such orthostatic pillar-base has not been found in the South. The orthostatic pillar-bases which have been found in the North wards of the make-shift-structure, I recognize them pillar-bases. I cannot say how many pillar-bases are on the North wards and how many pillar-bases are on South wards but the number of orthostate pillar-bases is 11. (I) recognize orthostatic pillar-bases as load bearing pillar-base but possibly their date is of post Mughal period. If in any pillar-base its foundation is of brick-bats and above which is orthostat, then I will recognize such pillar-base as load bearing pillar-base. In the Northern direction few pillar-base have been found. Such pillar-base have been found in the North the foundation whereof or brick bats and above that orthostate have been found. (*Ibid* p.288 L.16 – 24 and p.289 L.1 – 4)

> g). During the excavation at disputed site in Ajodhya small idols have been found. (*Ibid* p.310 L.11 – 12)
>
> h).In this Plate (Plate no.129 of ASI's report volume 2) Cobra-hood is visible. (*Ibid* p.310 L.16 & 17).
>
> i) I have earlier also seen the Plat which are visible in Plate no.37 & 38. The pillar-base which is in Plate no.46, construction thereof is different from the aforesaid pillar-bases. The construction of the pillar-base visible in Plate no.46 is similar to the construction in Plate no.42. The constructioe no.235 (of volume no.2 of ASI report). In a figure of this Plate which is on left-side portion of waist is visible wherein some article like ornament is visible but looking it, it cannot be said that whether this figure is of male or female. (*Ibid* p.320 Last line and p.321 L.1 – 4).

In the ASI's report Vol. II Plate 67 is photograph of "Garud-dhwaj" Plate No. 88 is photograph of "Srivatsa". These religious symbols of the Hindu Temple have been found during excavation at disputed site in Ayodhya. In Sri Bhagawat-Puran. 1.18.16; Sri Mahabharat Anushasan Parva.149. 51 & Shanti-parva Garud-dhwaj have been mentioned as one of the thousand names of the Lord of Universe Sri Vishnu which means in the Flag of Lord Vishnu emblem of Garud finds place. In Sri Valmiki Ramayana Yuddh-Kanda.111.13 & 132; Sri Mahabharat| Anushasan Parva.149.77; Sri Ramcharitamanas Balkanda.146.6 Sri Vatsa has been mentioned as a holy mark on the chest of the Lord of Universe Sri Vishnu. Finding of these holy religious symbols related to the Lord of Universe Sri Vishnu leaves no doubt that the structure in question was a Vaishnav Temple.

In the ASI's report Vol.1 a chart of the Architectural Members

have been given on pages 122-152 wherein on Sl which are visible in Plate no.37 & 38. The pillar-base which is in Plate no.46, construction thereof is different from the aforesaid pillar-bases. The construction of the pillar-base visible in Plate no.46 is similar to the construction in Plate no.42. The constructio. No.130 at page 129 Ghata Pallava & Srivatsa; on Sl. No.148 at page 130 Divine Couple in alingana mudra; on Sl. No.123 at page 140 Couching Ganas(human beings) & Kirtimukhas; on Sl. No.125 at page 141 Amalaka; on Sl. No.225 at page 148 ghata-pallav, kirtimukhas, human miniature details have been given. ... In the said ASI's report Vol.1 a chart of the Miscellaneous Objects have been given wherein on pages 219-267 on Sl. No.58 at page 252 *Swastika* have been described.

In the book 'A Dictionary of Hindu Architecture' by Prasanna Kumar Acharya published by Low Price Publication first published in 1934 and reprint in 2008 on page nos.17 to 43 *Adhishthana* have been described in detail. On its page no.109 and 110 *Kapota* and *Kapota-Pallika* have been defined. On its page nos.121 to 124 *kalas* has been defined, on its page no.246 *Torana,* has been defined. On its page no.361 *Pranal* has been defined, *Prasad* has been described on page no.396. On its page no.598 *Sri-vatsa* have been described and defined. On its page nos.644 to 704 *Stambha* i.e. pillars/orthostate has been described and defined. On page nos.732 and 738 *Svastika* has been described and defined. From the aforesaid objects found during the excavation and their association with the temples as it is proved by the authentic dictionary and books of the Hindu architecture as well as

Gazetteer of India makes it beyond doubt that the disputed structure was a temple.

The Commissioner in his report filed in Suit No. 1 of 1989 in the year 1950 has reported the presence of *Samadhis* of the Sages namely Sri Angira, Sri Markendey, Sri Sanak, Sri Sanandan and Sri Sanat attached to the disputed Structure of Sri Ramajanamasthan. As all four types of disposal of bodies i.e. cremating, drowning, burying and setting up (on hills etc.) have been described in the Divine Holy Sri Atharv-ved (18.2.34; 18.2.50-52 and 18.4.66). According to The Hindus' tradition and law the bodies of the Saints are either buried in earth which is known as *Khanans / Samadhi* or scattered in water which is known as *Jal-samadhi*. the Divine Holy Sri Atharv-ved (18.2.34) and its translation in Hindi and English read s as follows:

ये निखा॑ता॒ ये परो॑प्ता॒ ये दु॒ग्धा ये चो॒द्धि॒ताः ।
सर्वा॒स्ताना॑ग्ने॒ आ व॑ह पि॒तॄन् ह॒विषे॒ अत्त॑वे ॥ ३४ ॥

[अग्ने] हे अग्नि ! [ये निखाताः] जो पितर जमीनमें गाड़े गए हैं और [ये परोप्ताः] जो पितर दूर बहा दिए गए हैं तथा (ये दग्धाः) जो जला दिए गए हैं (च) और (ये उद्धिताः) जो पितर जमीनके ऊपर इमारतें बने गए हैं, (तान् सर्वान्) उन सब पितरों को तू (हविषे अत्तवे) हवि भक्षणार्थ (आ वह) ले आ ॥ ३४ ॥

34. They that are buried, and they that are scattered (*vap*) away, they that are burned and they that are set up (*úddhita*) — all those Fathers, O Agni, bring thou to eat the oblation.

Be it mentioned herein that offering flesh to manes and to the gods and goddesses in altar and taking flesh sanctified by Vedic hymns was religious practices of Hindus which is evident from Sri Manusmrity Discourse III.266-275 and Discourse V.26-44. Manes are worshiped in the form of the Lord of Universe Sri Vishnu and the Scriptures prescribe offering of various meat to "*Pitri roop*

Janardanah". Even nowadays sacrifices are done in certain temples. The Lords of Ram Himself used to hunt in course whereof he was deceived by Marich who was in disguise of golden deer. Saints, cows, parrots etc. attached to a temple are buried in temple compound. As such bone can be found only at Hindu Shrine not at Mosque because building mosque over bones is strictly prohibited.

In temple cooking is must to feed the deity while it is prohibited in mosque. As during excavation oven and furnace have been found which are self evident of its being a temple.

AIR 1958 SUPREME COURT 731 "Mohd. Hanif Quareshi v. State of Bihar" held that the animals were used for the purpose of Sacrifices by the Hindus. In the ASI Excavation at disputed sites the bones have been found in and from the layer of the Gupta's period when the Islam had not come into existence from which fact it is crystal clear that the user of the flesh of those creatures if any were not the Muslims. Non-application of chemical examination of the bones will not vitiate report as this Hon'ble Court's direction was to excavate the site attesting the statement of GPR Survey the exact nature of anomalies/objects by systematic truthing such as provided by archaeological trench and to ascertain that fact chemical examination of the bones was not essential. Relevant paragraph 22 of the said judgment reads as follows:

> "22. The avowed object of each of the impugned Acts is to ensure the preservation, protection, and improvement of the cow and her progeny. This solicitude arises out of the appreciation of the usefulness of cattle in a predominantly agricultural

society, Early Aryans recognised its importance as one of the most indispensable adjuncts of agriculture. It would appear that in Vedic times animal flesh formed the staple food of the people. This is attributable to the fact that the climate in that distant past was extremely cold and the Vedic Aryans had been a pastoral people before they settled down as agriculturists. In Rg. Vedic times goats, sheep, cows, buffaloes and even horses were slaughtered for food and for religious sacrifice and their flesh used to be offered to the Gods. Agni is called the "eater of ox or cow" in Rg. Veda (VIII. 43, 11). The slaying of a great ox (Mahoksa) or a "grate goat" (Maharaja) for the entertainment of a distinguished guest has been enjoined in the Satapatha Brahmana (III. 4. 1-2). Yagnavalkya also expresses a similar view (Vaj. 1. 109). An interesting account of those early days will be found in Rg. Vedic Culture by Dr. A. C. Dass, Chapter 5, pages 203-5 and in the History of Dharamasastras (Vol. II, Part II) by P. V. Kane at pages 772-773. Though the custom of slaughtering of cows and bulls prevailed during the Vedic period, nevertheless, even in the Rg,. Vedic times there seems to have grown up a revulsion of feeling against the custom. The cow gradually came to acquire a special sanctity and was called "Aghnya" (not to be slain). There was a school of thinkers amongst the Risis, who set their face against the custom of killing much useful animals as the cow and the bull. High praise was bestowed on the cow as will appear from the following verses from Rg. Veda, Book VI, Hymn XXVIII (Cows) attributed to the authorship of Sage Bhardvaja:

"1. The kine have come and brought good fortune; let them rest in the cow-pen and be happy near us.

Here let them stay prolific, many coloured, and yield through many morns their milk for Indira.

6. O Cows, ye fattene'ene the worn and wasted, and make the unlovely beautiful to look on.

Prosper my house, ye with auspicious voices, your power is glorified in our assemblies.

7. Crop goodly pasturages and be prolific; drink pure sweet water at good drinking places.

Never be thief or sinful man your master, and may the dart of Rudra still avoid you."

(Translation by Ralph Griffith). Verse 29 of hymn 1 in Book X of Atharva Veda forbids cow slaughter in the following words:

"29. The slaughter of an innocent, O Kritya, is an awful deed, Slay not cow, horse, or man of ours."

Hymn 10 in the same Book is a rapturous glorification of the cow:

"30. The cow is Heaven, the cow is Earth, the cow is Vishnu, Lord of life.

The Sadhyas and the Vasus have drunk the outpourings of the cow.

34. Both Gods and mortal men depend for life and being on the cow.

She hath become this universe; all that the sum surveys is she."

P. V. Kane argues that in the times of the Rg. Veda only barren cows, if at all, were killed for sacrifice or meat and cows yielding milk were held to be not fit for being killed,. It is only in this way, according to him that one can explain and reconcile the apparent conflict between the custom of killing cows for food and the high praised bestowed on the cow in Rg. Vedic times. It would appear that the protest raised against the slaughter of cows greatly increased in volume till the custom was totally abolished in a later age. The change of climate perhaps also make the use of beef as food unnecessary and even injurious to health. Gradually cows became indicative of the wealth of the owner. The Neolithic Aryans not having been acquainted with metals, there were no coins in current use in the earlier stages of their civilisation, but as they were eminently a pastoral people almost every family possessed a sufficient number of cattle and some of them exchanged them for the necessaries of their life. The value of cattle (Pasu) was, therefore, very great with the early Rg. Vedic Aryans. The ancient Romans also used the word pecus or pecy (Pasu) in the sense of wealth or money. The English words, "pecuniary" and "impecunious", are derived from the Latin root pecus or pecu, originally meaning cattle. The possession of cattle in those days denoted wealth and a man was considered rich or poor according to the large or small number of cattle that he owned. In the Ramayana King Janaka's wealth was described by reference to the large number of herds that he owned. It appears that the cow was gradually raised to the status of divinity. Kautilya's Arthasastra has a special chapter (Ch. XXIX) dealing with the: "superintendent of cows" and the duties of the owner of cows are also referred to in Ch. XI of Hindu Law in its sources by Ganga Nath Jha. There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots .It

> is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions."

ASI submitted report for the perusal of the Court. This report is data based. It is a piece of evidence which comes within the piece of substantive evidence. High Court has appointed ASI to inspect the spot and to make investigation and submit a report. Thus the High Court is entitled to accept the same and base its finding on such material for want of any other evidence to contradict the same even without examination of the Commissioner.

At this out set, it may be clarified that in view of Section 45 of Evidence Act, only opinion of expert witnesses in such type of matters are relevant. As regard the opinion of expert, Section 45 of Indian Evidence Act is relevant, which reads as under :-

Section 45 Indian Evidence Act *is an exception to the rule as regards the exclusion of opinion evidence. Opinions of experts are relevant upon a point of (a) foreign law, (b) science, (c) art, (d) identity of handwriting, and (e) finger impression.*

It is "a general rule that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, this is so when it so far partakes of the character of a science or

art as to require a course of previous habit or study to obtain a competent knowledge of its nature (vide Taylor, 12th Edn., s.1418, p.902)

Both under this section and S. 47 A the evidence is of an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience.

In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon (vide Fakhruddin v. State of M.P., AIR 1967 SC 1326).

PHIPSON ON EVIDENCE (15th Edn. (2000), P.921 Para 37-09) states as follows:

> *"Even at common law the opinions of skilled witnesses are admissible wherever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience. The terms on which expert evidence is admissible is governed in civil cases by the Civil Evidence Act, 1972 and the CPR (Civil Procedure Rules)".*

At [Page 962, para 37-46, 15th Edn. (2001)] PHIPSON states : "Though the expert must be "skilled", by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility ..... Equally, one can acquire experts knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not form formal training."

HALSBURY observation (vide 4th Ed, Vol. 17, page 61 (para 83) Courts frequently have to decide upon matters requiring specialised knowledge and, in appropriate cases, a party will need to call an expert or experts in support of his case. When such a person is called as a witness in civil proceedings, his opinion is admissible on any relevant matter, including an issue in the proceedings, on which he is qualified to give expert evidence.

It was laid down in Dolgobinda v. Nimai Charan Misra, AIR 1959 SC 914 that what is relevant is the opinion expressed by conduct and opinion means something more than mere relating of gossip or or hearsay; it means judgment or belief, that is, a belief or conviction resulting from what one thinks on a particular question. The section does not make the evidence of mere general reputation admissible as proof of relationship. It is the conduct or outward behaviour which must be proved in the manner laid down in Section 60.

The Court cannot substitute its own opinion for that of an expert (vide T. Veerabhadrappa v. Ministry of Mines &Steel, New Delhi, AIR 1998 Kant 412 (para 9)

An 'Expert' witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible, to enable the tribunal to come to a satisfactory conclusion (vide POWELL, 10th Edn., p. 39). The opinion of the expert is only opinion evidence . It does not help the Court in interpretation (vide Forest Range Officer v. P. Mohammed Ali, AIR 1994 SC 120 (para

8). The Court is not bound to follow it blindly. The expert cannot act as a judge or jury and the final decision is to be made by the judge.

All persons who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required. It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered, is sufficient to entitle him to be considered as an expert.

As a general rule, the opinion of a witness on a question whether of fact or of law, is irrelevant. A witness has to state the facts which he has seen, heard or perceived, and not the conclusions which he has formed on observing or perceiving them. The function of drawing inferences from facts is judicial function and must be performed by the court. If a witness is permitted to state not only the facts which he has perceived but also the opinion which he has formed on perceiving them, it would amount to delegation of judicial functions to him and investing him with the attributes of a judge.

To this general rule, however, there are some important exceptions, which are enacted in this set of sections. When "the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it", or when "it so far partakes of the character of a science or art as to require a course of previous habit or study", the opinions of persons having special knowledge of the subject-matter of inquiry become relevant; for it is very difficult for the Court to form a correct opinion on a matter of this

kind, without the assistance of such persons.

Matters for expert testimony; competency to depose as an expert

Opinions of experts become relevant only when the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions. This section is, therefore, exhaustive of the matters on which expert testimony can be given, though the expression "science or art" would include almost all branches of human knowledge requiring special study, experience or training. So that a witness may be competent to depose as an expert, he must be shown to have made a special study of the subject or acquired a special experience therein. In such cases, the question is: "Is he peritus? Is he skilled? Has he adequate knowledge?" An expert is a person who has special knowledge and skill in the particular calling to which the inquiry relates. In law, and as applied to a witness, the term "expert" has a special significance, and no witness is permitted to express his opinion, unless he is an expert within the terms of section 45. The fact that the evidence of an expert was accepted in one case is no ground for accepting his evidence in every other case.

The term "expert" has a special significance and no witness is permitted to express his opinion unless he is an expert within the meaning of the term under section 45 Evidence Act. In each case, the Court has to decide whether a person said to be an expert, is really an expert taking into account his skill, study and experience. In many cases, persons having no educational qualification but having knowledge of high order have been treated to be experts. In Baldev Raj

v. Urmila Kumari, AIR 1979 SC 879, opinion of a doctor who had not specialised in gynecology but had knowledge of high order of midwifery as an obstetrician, was accepted as an expert. Clearly, therefore, what is admissible is the opinion of such an expert in the field in which he or she has acquired special knowledge. Outside specialised field, the opinion of the expert would cease to be expert opinion and fall outside the purview of section 45 of the Evidence Act. In Deeks v. Wells, AIR 1933 PC 26, it was held that depositions of expert witnesses as to result of their opinions, and as to the effect of them, do not come within the domain of expert evidence at all. In State v. Gaspar,AIR 1971 Goa 3, opinion of Medical Officer as to mental condition of accused on a particular date on the basis of testimony of witnesses to acts of accused on that date, was not held as the expert opinion but his presumption. There can, however, be no dispute that an expert's evidence is a good evidence and cannot be rejected simply because it may not be decisive. In spite of it, the Court is not bound by the expert opinion though it is bound to consider the same along with other evidence and circumstances appearing in a particular case. In Haji Mohd. v. State of West Bengal, AIR 1959 SC 488, the Court held that in the circumstances of a case, the Court can refuse to place any reliance on the opinion of an expert which is unsupported by any reasons. As far as medical evidence is concerned, it has never been considered to be substantive evidence of the charge, but has been accepted as corroborative of the charge. It has been accepted since long that knowledge of medicine and human body is a matter of science and,

hence, Courts have treated expert medical opinion with respect. In spite of it, a medical man cannot be allowed to give his opinion on matters, which are within the province of the Courts to decide.

In order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.

Opinions of authors in text books

Though opinions expressed in text books by specialist authors may be of considerable assistance and importance for the court in arriving at the truth, cannot always be treated or viewed to be either conclusive or final as to what such author says to deprive even a court of law to come to an appropriate conclusion of its own on the peculiar

facts proved in a given case. In substance, though such views may have persuasive value cannot always be considered to be authoritatively binding, otherwise reasonably required of the guilt of the accused in a given case. Such opinions cannot be elevated to or place on higher pedestal than the opinion of an expert examined in court and the weight ordinarily to which it may be entitled to or deserves to be given.

Opinion of the expert.

The Madras High Court observed that even though there is no bar for the court to compare the admitted signatures with the disputed signatures to come to its conclusion it would be prudent to require assistance of the expert witness. In fact all the judgments cited by both the parties related to signatures and not thumb impressions. It cannot be disputed that thumb impressions would stand on a different footing, when compared to signatures and the variations, in thumb impression cannot be easily judged by naked eyes. The Court remanded the appeal back to the lower court for sending the documents for the opinion of the expert and thereupon take evidence if necessary only in the context of the opinion of the expert and record his findings thereon.

Court acting as an expert

The opinion of the Court, itself untrained in medicine and without trained assistance, on questions of medicine is valueless. On questions of handwriting also, the practice of the Court itself acting as an expert has been disapproved. But there is nothing in the so-called science of finger prints which need deter a Court from applying its own

magnifying glass or its own eyes and mind to the evidence and verifying the results submitted to it by the witnesses. In trial with the aid of jury, a question of handwriting or thumb-impression is entirely a matter for the jury.

I have considered the rival submissions, gone through the objections and the statement of the witnesses. The contention of Sri M.M. Pandey, Advocate, repeals the arguments of Sri Z. Jilani, Advocate for the plaintiffs. There is nothing on record to show that the report was biased. The massive structure theory was not based on imagination. Evidence of bones found from different levels postulate the fact that Hindus also used to perform sacrifices of animals to please the Gods. About pillar bases there is nothing on record to suggest as to how the construction can be disbelieved. The main thrust of the plaintiffs is that there was a structure which was not a Hindu religious structure is not believable for the reasons that certain images were found on the spot were there. Hundreds of artefacts which find mention in the report were recovered during the excavation that denote the existence of Hindu religious structure.

It is not disputed that the Archaeological Survey of India submitted four reports during the years 1862, 1863, 1864 and 1865. Thereafter also they were entrusted with the task to organize archaeological researches and protection of the cultural heritage of the nation. Maintenance of ancient monuments and archaeological sites and remains of national importance is the prime concern of A.S.I. It regulates all archaeological activities in the country as per the

provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958.

It also regulates Antiquities and Art Treasure Act, 1972 or the maintenance of ancient monuments and archaeological sites and remains of national importance the entire country is divided into 24 Circles. The organization has a large work force of trained archaeologists, conservators, epigraphist, architects and scientists for conducing archaeological research projects through its Circles, Museums, Excavation Branches, Prehistory Branch, Epigraphy Branches, Science Branch, Horticulture Branch, Building Survey Project, Temple Survey Projects and Underwater Archeology Wing.

In this context, it would be useful to refer to the various provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (No. 24 of 1958). This Act provides for the preservation of ancient and historical monuments and archaeological sites and remains of national importance for the regulation of archaeological excavations and for the protection of sculptures, carvings and other like objects.

Thus, under the Ancient Monuments and Archaeological Sites and Remains Act, 1958, excavations of ancient monuments etc. have to be regulated under the law of A.S.I. Thus A.S.I. is recognized expert body under the law and has been entrusted with various duties and entrusted functions including that of excavations. They have wide experience of excavation at different places of the country. At this stage, it may further be clarified that there was no even iota of

evidence to suggest that 14 members team consisting of officers of highly repute, seniority and expertise, were coming from both the communities . Even the Muslims members have also signed over the report of A.S.I. Thus the cumulative effect is that it is unbiased report based on scientific investigation and without any influence on the body of expert which conducted excavation. The Court is taken full care and issued specific directions to maintain transparency. Two judicial officers remain posted there. The excavation was conducted in presence of the parties, lawyers and their nominees. Thus, no body can raise a finger about the propriety of the report on the ground of bias. There is nothing on record to suggest that the scientific report is incorrect. I have already referred to the statement of witnesses in another volume, which is a part of the judgment. Thus I am not referring them. It transpires from the report that it is without any bias. The only objection that has come prominently from the side of plaintiff is that A.S.I. team has worked under the pressure of the Central Government. It has nowhere been mentioned that who was the person in Central Government exercising any influence over 14 members team that excavated the site. The bald allegations cannot be accepted.

Sri Haji Mahboob Ahmad, D.W. 6/1-1 has failed to substantiate his allegations. He has not adduced any evidence in support of his contention as to who was the person interested in the Central Government and exercising influence over A.S.I. team.

Thus, on conjectures and on false allegations a scientific report

submitted by a team which was working under the direct control of this Court, cannot be supposed to act under the influence of any Government or any person. It is a data based report. Videography and photograph were also conducted during excavation. On behalf of the plaintiffs, it has not been suggested that the report is against any of the videography film or photography film. These films are preserve. Thus, without any material on record, it cannot be said, at this stage, that the version of Sri Hazi Mahboob Ahmad, DW-6/1-1 may be accepted as truthful.

It does not believe to reasons that the Central Government can influence the body of experts conducting archaeological excavations with transparency and which was reducing everything in writing and preparing photography report as well as also conducting videography in presence of both the parties. It is also not worth believable that certain Muslims members of the team could be forced by the Central Government to sign over the report against their wishes and against the data collected by them.

It may further be clarified that all the members signed the report over and not even a single member objected to it. Thus, the pillar bases were found at the archaeological site. The observers were present there. Thus the objection to this effect that these pillar bases were coined out by the team is of no avail because old structure cannot be considered to have been formulated by a team which is not supposed to construct anything during excavation in presence of parties. There is not even a single complaint against the archaeological

team that they expended the sphere of their working or acted contrary to the duties assigned to them. Thus, this Court has to trust the scientific team which was functioning under the direct control of this Court. The team was functioning with transparency and furnished his data based report. At the cost of repetition I may further refer that archaeological excavation under the law has been entrusted by the Parliament to A.S.I., which is the expert body and functions under the Ancient Monuments and Archaeological Sites and Remains Act, 1958.

Thus from all angle on flimsy grounds not based on any scientific report to contradict the report of A.S.I. and this Court has to rely over this scientific report. There is nothing on record to contradict the report of A.S.I. There was no request from the side of plaintiff to call any other team to substantiate the objections against A.S.I. report except by producing certain witnesses to contradict the same. It has never been pointed out before this Court that the report of ASI should further be rechecked by any other agency. No request further been made to issue another commission to re-examine the whole issue and furnish the report against the report of A.S.I. Thus, I find that the statement of Sri Hazi Mahboob Ahmad, DW-6/1-1, at this stage, should not be accepted as truthful. ASI was also not not working under the pressure of the Central Government. I may further refer that Dr. R. Naga Swami, OPW-17, Sri Arun Kumar Sharma, OPW-18, Sri Rakesh Dutta Trivedi, OPW-19, Sri Jayanti Prasad Srivastava, DW-20/5 in material particulars corroborated the finding of ASI which is data based report. Dr. R. Naga Swami, OPW-17 has a wide experience of

excavation and he was associated with ASI. Above named witnesses have stated before this Court the reasons as how the report of ASI is truthful. On a detailed examination, there is nothing to doubt their competence and expertise of the officers of A.S.I. team. They have a better experience of excavation then the witnesses produced by the plaintiff. It may further be necessary to refer that Prof. Suraj Bhan, P.W.-16 alone has an idea of excavation and rest of the witnesses, Prof. D. Mandal, PW-24, Dr. R.C.Thakarwal, Dr. Supriya Verma, PW-32 and Mohd. Abid, DW-6/1-2 have absolutely no idea for excavation. They were never associated with Archaeological Survey of India. Simply because of the fact that at few sites some of the witnesses produced by the plaintiff remain present would not make them expert. The team of ASI which is functional under the statute was working transparently under the directions of this Court.

The evidence adduced by the plaintiffs against ASI report is based on surmises and conjectures and in a non-scientific manner. Data based report cannot be contradicted by adducing oral evidence without any scientific investigation. There was no request from the side of the plaintiff to re-check the scientific report by another body of the experts. Probably, this was not done by the plaintiff for the reasons that it was not possible for them to contradict the data based report.

This Court took the assistance of the team of experts working under ASI which is entrusted under the law to excavate archaeological sites with the ends in view to obtain an impartial, fair and scientific

report on the point whether the disputed structure, namely, Babari Masjid was built after demolishing the Hindu temple. ASI has answered the core issue which was referred to it on the basis of scientific evidence that a massive structure just below the disputed structure was of the 10th century. The relevant extract of gist of report is reproduced as under:

> " Whether there was any temple/structure which was demolished and mosque was constructed on the disputed site as stated on page 1 and further on P. 5 of their order dated 5th March, 2003, had given directions to the Archaeological Survey of India to excavate at the disputed site where the GPR Survey has suggested evidence of anomalies which could be structure, pillars, foundation walls, slab flooring etc. which could be confirmed by excavation. Now, viewing in totality and taking into account the archaeological evidence of a massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards up to the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patterns, *amalaka, kapotapali doorjamb* with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having *pranala* (waterchute) in the north, fifty pillar bases in association of the huge structure, are indicative of remains which are distinctive features found associated with the temples of north India"".

From the bare reading of the objections, it transpires that there was a structure beneath the disputed structure. The only dispute that it was not a temple or a religious structure. There is sufficient evidence before this Court that it was a religious structure. Certain data based findings of ASI is available to establish that there was a temple and a place of worship of Hindus. ASI has reported that the structural phases from the 10th century and onwards are available. It is obligatory

on the part of this Court to further observe that under the Ancient Monuments and Archaeological Sites and Remains Act, 1958. After due excavation conducted ancient monuments covered under the definition as contained in Section 2(a) & (d) read as under:

> "**2(a) "Ancient Monument"** means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith which is of historical, archaeological or artistic interest and which has been in existence for not less than 100 years and includes-
>
> (i) remains of an ancient monument,
>
> (ii) site of an ancient monument,
>
> (iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and
>
> (iv) the means of access to, and convenient inspection of, an ancient monument;
>
> **(d) "archaeological site and remains"** means any area which contains or is reasonably believed to contain ruins or relics of historical or archaeological importance which have been in existence for not less than one hundred years, and includes-
>
> (i) such portion of land adjoining the area as may be required for fencing or covering in or otherwise preserving it, and
>
> (ii) the means of access to, and convenient inspection of the area;

Accordingly, all ancient historical monuments and archaeological sites have to be declared.

Needless to say, at this stage, that the Archaeological Survey of India in its report found a massive structure of religious importance. I avail this opportunity to request the Government of India to maintain this national monument under The Ancient Monuments and Archaeological Sites and Remains Act, 1958 to ensure that they are properly maintained. At the cost of repetition, I may further refer that it is mandatory on the part of the Central Government to act in accordance with the provisions of the Ancient Monuments and Archaeological Sites and Remains Act (No.24 of 1958) and ensure to maintain the dignity and cultural heritage of this country. The aforesaid request has been made to the Central Government in consonance with the directions of this Hon'ble Apex Court in case of **Rajeev Mankotia vs. Secretary to the President of India and others, AIR 1997 SC 2766** in para 21 which reads as under:-

> **"21.**It is needless to mention that as soon as the Indian Institute of Advance Studies vacates the building and hands it over to the Archaeological Department, the Government should provide the necessary budget for effecting repairs and restoring to the building its natural beauty and grandeur. It is also necessary that it proper maintenance and preservation is undertaken as an on-going process to protect the historical heritage and needed repairs are effected from time to time. We avail this opportunity to direct the Government of India to maintain all national monuments under the respective Acts referred to above and to ensure that all of them are properly maintained so that the cultural and historical heritage of India and the beauty and grandeur of the monuments, sculptures secured through breathless and passionate labour workmenship, craftsmanship and the skills of the Indian architects, artists and masons is continued to be preserved. They are pride of Indians and places of public visit. The tourist visitors should be

properly regulated Collection of funds by way of admission/entrance free should be conscientiously accounted for and utilised for their upkeep and maintenance under respect regulations/rules. Adequate annual budgetary provisions should be provided. In this behalf, it may not be out of place to mention that if one goes to Williamsburg in United States of America, the first settlement of the Britishers therein is preserved as a tourist resort and though it is one in the row, its originality is maintained and busying business activity goes on in and around the area attracting daily hundreds of tourists from all over the world. Similar places of interest, though of recent origin, need to be preserved and maintained as manifestation of our cultural heritage or historical evidence. Similar efforts should also be made by the Government of India, in particular the Tourism Department, to attract foreign tourists and to give them good account of our past and glory of the people of India as message to other countries and territories. Equally all the State Governments would do well vis-a-vis monuments of State important, thought given power under Entry 12, List II of the Seventh Schedule to the Constitution. From this perspective, the petitioner has served a great cause of national importance and we place on record his effort to have the Viceregal Lodge preserved and maintained; but for his painstaking efforts, it would have been desecrated into a five Star Hotel and in no time, "We, the people of India" would have lost our ancient historical heritage."

The Hon'ble Apex Court has held in the case of ***Southern Command Military Engineering Services Employees coop. Credit Society Vs. V.K.K. Nambiar (since deceased) by legal representative Madhvi Devi, (1988) 2 SCC 292*** that the Commissioner's report is a legal evidence. Relevant extract of para-1 of the aforesaid case is reproduced as under:-

> *"**1.** ..... The High Court was obviously in error in its view that the Commissioner's report could not be acted upon or be treated as legal evidence."*

It is a settled proposition of law that the report of the Commissioner and the evidence would be evidence in the proceedings

in which the Commissioner is appointed. In the present case, the Archaeological Survey of India (ASI) was appointed in the presence of both the parties. Accordingly ASI functioned as Commissioner in this case. The report of ASI along with other relevant material had been duly submitted in this court. The report and material submitted along with it have been used for the purpose of proceedings. The report of the Commissioner and the material enclosed with it constituted legal evidence and I do not see how it should not be used as substantive piece of evidence to base the findings. ASI was appointed to excavate the site and to make investigation and also to submit a report, accordingly this Court is entitled to accept the report and base its findings on such material. Even on the basis of report and material submitted along with it by ASI, the finding on the question is based on cogent evidence.

The excavation report of the ASI is a scientific report of experts against whom bias and malafide has not been proved. Accordingly it has been relied upon as a piece of evidence on the basis of the case law referred to above.

Vis-a-vis in the sequence of events, referred to above, and on the basis of the report, it can conclusively be held that the disputed structure was constructed on the site of old structure after the demolition of the same. There is sufficient evidence to this effect that the structure was a Hindu massive religious structure. Accordingly, issue no. 1(b) is decided in favour of the defendants and against the plaintiffs.

ISSUE NO. 1-B (a)

Whether the building existed at Nazul plot No. 583 of the Khasra of the years 1931 of Mohalla Kot Ram Chandra known as Ram Kot, city Ayodhya (Nazul estate of Ayodhya ? If so its effect thereon)"

FINDINGS:

It is admitted between the parties that disputed structure existed at Nazul plot No. 583 of Khasra of year 1931 of Mohalla Kot Ram Chandra known as Ram Kot, city Ayodhya. The only dispute between the parties is with regard to the nature of the structure. The Hon'ble Apex Court has also in Dr. M. Ismail Farooqui's Case has limited the scope of the case by confining it in outer and inner courtyard. Thus the revenue entries may be presumed to be correct as none of the parties adduced any evidence against them. The property could not be demarcated, but it is admitted that the same was acquired. In view of the aforesaid circumstances, it can be said that the property existed on Nazul plot No. 583. Issues no. 1-B(a) is decided accordingly.

ISSUE NO.1- B(b)

Whether the building stood dedicated to almighty God as alleged by the plaintiffs?

FINDINGS:

Plaintiffs have come out with a case that property in suit was dedicated to almighty and that is how the mosque came into existence. Plaintiffs have relied over certain documents to show that mosque was in existence.

On behalf of the defendants, it is urged that the waqf cannot be

created against the Quranic commands. The holy Quran has already prohibited that building over the land of a temple is not a mosque and the owner of the land is entitle for restoration of possession with liberty to worship therein. It is further submitted that Waqif must be the owner and for creating valid waqf. Emperor Babar was not the owner of Hindu Shrine Shri Ram Janam Sthan. Accordingly, neither he nor his commander had any right to erect mosque and building by creating a waqf against the tenets of Islam.

To consider the rival submissions of the parties, it would be necessary to consult muslim religious books on the subject.

QURANIC COMMANDS ABOUT WAQF

The holy Quran has given a vivid description about waqf. In this reference following aspects are relevant and are read as under :-

1. Art. (1) Quranic Commands.-"... But it is righteousness.... to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity....."

Quran-Sura 2 : Aayat 177

"..... And establish regular prayers and give regular charity; and loan to God a beautiful loan"

Quran- Sura 73 : Aayat 20.

" And be steadfast in prayer and regular in charity....."

Quran-Sura 2 : Aayat 110

"By no means Shall ye attain righteousness unless ye give (freely) of that which you love, and whatever ye give, of a truth God knoweth it well."

Quran-Sura 3 : Aayat 92 etc.

In all countries where Muslim law is applicable, law of Waqfs is given much importance. In India Shariat Act (Section 2) gives legal sanctity to Waqfs. This is so because of commands of Quran and traditions of Prophet had encouraged Muslims to make Waqfs. Though it was not compulsory for every Muslim to make Waqfs of their properties but traditions of Prophet encouraged Muslims the world over to make Waqfs for different purposes. He said, "there is one Dinar which you have bestowed in the road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children, that is the greatest Dinar in point of reward which you gave to your family." As in the sequence of giving alms to needy, ones family has been ordered to be put in top place.

Quran is very emphatic and it could be found almost after few pages that a man should give charity to poor, from what he has and it has become characteristic of Islam.

Thus, according to the Quranic injunctions a Waqif must be the owner of the property for creating waqf. To resolve the controversy, it would be expedient to have a glimpse over the historical events as well as Islamic injunctions with regard to creation of Waqf including the Farman issued by Mughal Emperor Shah Jahan, which reads as under:-

Farman of the emperor Shahjahan held that the building over the land of a temple is not a mosque and owner of the temple is entitled for restoration of possession with liberty to worship therein according to his own religion has force of law:

1. In AIR 1963 SC 1638 (*Tilkayat Shri Govindalalji Maharat etc.. v. State of Rajasthan & Ors.)* the Bench comprised of Hon'ble Five-Judge of the Hon'ble Supreme Court has held that the *Farman* issued by an absolute ruler like the *Maharana* of Udaipur in 1934 is a law by which the affairs of the Nathdwara temple and succession to the office of the Tilkayat were governed after its issuance. Relying on said judgment it is submitted that the Farman of the Emperor Shahjahan wherein it has been held that a building constructed over the land of the temple of other person can not be a mosque is admissible as ratio of Law of Shar so far it doesn't contradict the law of Shar, and it is further submitted that any addition, alteration or modification made by any Rulers arbitrarily in violation of the law for the time being in force cannot convert Sri Ramajanmasthan Temple into an alleged mosque. Relevant paragraphs 32 and 33 of the aforesaid judgment reads as follows:

> "32. In appreciating the effect of this Firman, it is first necessary to decide whether the firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. This position is

> covered by decisions of this court and it has not been disputed before us, vide Madhaorao Phalke v. State of Madhya Bharat, 1961-1 SCR 957 : (AIR 1961 SC 298). Ameer-un-Nissa Begum v, Mahboob Begum, AIR 1955 SC 352 and Director of Endowments, Government of Hyderabad v. Alkram Alim (S) AIR .1956 SC 60.
>
> 33. It is true that in dealing with the effect of this Firman, the learned Attorney-General sought to raise before us a novel point that under Hindu law even an absolute monarch was not competent to make a law affecting religious endowments and their administration. He suggested that he was in position to rely upon the opinions of scholars which tended to show that a Hindu monarch was competent only to administer the law as prescribed by Smgritis and the oath which he was expected to take at the time of his coronation enjoined him to obey the Smritis and to see that their injunctions were obeyed by his subject. We did not allow the learned Attorney-General to develop this point because we hold that this novel point cannot be accepted in view of the well-recognised principles of jurisprudence. An absolute monarch was the fountain-head of all legislative, executive and judicial powers and it is of the very essence of sovereignty which vested in him that he could supervise and control the administration of public charity. In our opinion there is no doubt whatever that this universal principle in regard to the scope of the powers inherently vesting in sovereignty applies as much to Hindu monarchs as to any other absolute monarch. Therefore, it must be held that the Firman issued by the Maharana of Udaipur in 1934 is a law by which the affairs of the office Nathdwara. Temple and succession to the office of the Tilkayat were governed after its issue."

2. In AIR 1961 SC 298 (*Madha Rao Phalke. v. Land of Madhya Bharat & Anr.)* a Bench comprised of Hon'ble five-Judges the Hon'ble Apex Court has held that the orders issued by absolute Monarch ruler of Guwalior State at force of law and would amount to existing law. Relevant paragraphs 11, 12, 14 and 18 of the said judgment reads as follows:

> "11. In dealing with the question as to whether the orders issued by such as absolute monarch amount to a law or

regulation having the force of law, or whether they constitute merely administrative orders, it is important to bear in mind that the distinction between executive orders and legislative commands is likely to be merely academic where the Ruler is the source of all power. There was no constitutional limitation upon the authority of the Ruler to act in any capacity he liked; he would be the supreme legislature, the supreme judiciary and the supreme head of the executive, and all his orders, however issued, would have the force of law and would govern and regulate the affairs of the State including the rights of its citizens. In Ameer-un-Nissa Begum v. Mahboob Begum, AIR 1955 SC 352, this Court had to deal with the effect of a Firman issued by the Nizam, and it observed that so long as the particular Firman issued by the Nizam, held the field that alone would govern and regulate the rights of the parties concerned though it would be annulled or modified by a later Firman at any time that the Nizam willed. What was held about the Firman about all the Nizam would be equally true about all effective orders issued by the Ruler of Gwalior (Vide also : Director of Endowments, Government of Hyderabad v. Akram Ali, (S) AIR 1956 SC 60).

12. It is also clear that an order issued by an absolute monarch in an Indian State which had the force of law would amount to an existing law under Art. 372 of the Constitution. Article 372 provides for the continuance in force of the existing laws which were in force in the territories of India immediately before the commencement of the Constitution, and Art,. 366(10) defines an existing law, inter alia, as meaning any law, ordinance, order, rule or regulation passed or made before the commencement of the Constitution by any person having a power to make such law, ordinance order, rule or regulation. In Edward Mills Co., Ltd., Beawar v. State of Ajmer, (S) AIR 1955 SC 25, this Court has held that "there is not any material difference between the expressions 'existing law', and the 'law in force'. The definition of an existing law in Art. 366 (10) as well as the definition of an Indian law contained in Sec. 3(29) of the General Clauses Act make this position clear". Therefore, even if it is held that the Kalambandis in question did not amount to a quanun or law technically so called, they would nevertheless be orders or regulations which had the force of law in the State of Gwalior at the material time, and would be saved under Art. 372. The question which then arises is whether these Kalambandis were regulations having the force of law at the material time.

> 18. It is not disputed that if the Kalambandis on which the appellant's right is based are rules or regulations having the force of law the impugned executive order issued by respondent 1 would be invalid. The right guaranteed to the appellant by an existing law cannot be extinguished by the issue of an executive order. In fact on this point there has never been a dispute between the parties in the present proceedings. That is why the only point of controversy between the parties was whether the Kalambandis in question amount to an existing law or not. Since we have answered this question in favour of the appellant we must allow the appeal set aside the order passed by the High Court and direct that a proper writ or order should be issued in favour of the appellant as prayed for by him. The appellant would be entitled to his costs throughout."

3. In AIR 1955 SUPREME COURT 352 "Ameer-un-Nissa Begum v. Mahboob Begum" the Hon'ble Supreme Copurt held that the firmans were expressions of the sovereign will of the Ruler and they were binding in the same way as any other law; nay, they would override all other laws which were in conflict with them. So long as a particular firman held the field, that alone would govern or regulate the rights of the parties concerned, though it could be annulled or modified by a later Firman at any time. Relevant paragraph 15 of the said judgment reads as follows:

> "15. The determination of all these questions depends primarily upon the meaning and effect to be given to the various 'Firmans' of the Nizam which we have set out already. It cannot be disputed that prior to the integration of Hyderabad State with the Indian Union and the coming into force of the Indian Constitution, the Nizam of Hyderabad enjoyed uncontrolled sovereign powers. He was the supreme legislature, the supreme judiciary and the supreme head of the executive, and there were no constitutional limitations upon his authority to act in any of these capacities. The 'Firmans' were expressions of the sovereign will of the Nizam and they were binding in the same way as any other law; - nay, they would override all

> other laws which were in conflict with them. So long as a particular 'Firman' held the field, that alone would govern or regulate the rights of the parties concerned, though it could be annulled or modified by a later 'Firman' at any time that the Nizam willed."

It transpires from the aforesaid judgment that Farman issued by Shah Jahan were considered to be the law applicable in those days and the Indian Courts have always recognized the Farman of Shah Jahan that the building constructed over the land of a temple of other persons, cannot be a mosque, cannot be brushed aside because the principle is based on the law of Shar, which is based on divine law. Thus looking to both the versions, it transpires that it was not possible for Emperor Babar and its commanders or anybody to dedicate the land or the building to almighty. It is not covered under the valid waqf.

Thus, in view of the circumstances referred to above, it transpires that according to the historical document it may conclusively be observed that the property in suit was in the control of Ibrahim Lodi and Hindus claim that they were having the temple over the property in dispute and Babur cannot acquire title of the said temple at Ayodhya. In this regard, according to the principles of Shar which is applicable in the matters of dedication of mosque and waqf cannot be over-looked.

According to holy Quran and subsequently according to the traditions, it was mandatory on the part of the muslim, firstly to become the owner of the property and thereafter waqf the property. Since Emperor Babar was a Hanafi Muslim and there is nothing on

record to suggest that he acquired the title of the temple. Accordingly, the divine law, he was not in a position to erect a mosque against the tenets of Islam referred to above. Thus against the injunctions of Quran and Hadith, if anything has been done against the spirit of Islam, this Court is not in a position to recognize under the law, even the Farman of Shah Jahan and further relevant books written by certain authors like Mulla and others, leave no room for doubt that the property dedicated by way of waqf must belong to the waqif at the time of dedication. Even latest enactments referred to above are based on the same theory and they have been enacted just to give effect to the spirit of Islam, accordingly in this case to my mind a conqueror was not in a position to erect a building contrary to the religious mandate of Islam. Thus it cannot be construed that there was any valid dedication to the almighty and the building can be treated to be a waqf property or a valid mosque in accordance with Islam. If anything has been done against the tenets of Islam, it looses the significance under the Mohammedan law. Thus, if at all plaintiffs' version is accepted, it would be presumed that the property in dispute was dedicated to almighty against the divine law of Shar and against the Hanafi principles of law referred to above.

Thus, the waqf was not created in accordance with the spirit of Islam and it was done against the Islamic injunctions and contrary to the practice that was performed by holy Prophet. Even the Quranic injunctions are against the creation of such a waqf, which is against the religious norms.

Thus, in view of the circumstances referred to above, issue no. 1-B(b) is decided against the plaintiffs and this Court is of the view that the building was not dedicated to the almighty as alleged by the plaintiffs contrary to the injunctions of Quran and other religious material referred to above.

ISSUE NO. 1-B(c)

Whether the building had been used by the members of Muslim community for offering prayers from times immemorial ? If so its effect?

FINDINGS:

Muslims claim that the disputed structure stood dedicated to almighty God. It has been shown in the sketch map. In Dr. M. Ismail Farooqui's case, the Hon'ble Apex Court decided to divide the property into outside courtyard i.e. the open place and inner place i.e. covered place known as building. There is no evidence worth the name that muslims used to offer Namaz in the outside courtyard. The building is also not in existence. The Hon'ble Apex Court has directed to decide the title of respective parties over the land in dispute. The disputed structure has already been demolished. Consequently, there is no building there. It is a open place. The Hon'ble Apex Court in ***Dr. M. Ismail Farooqui Vs. Union of India (1994) 6 SCC 360*** at para-70 held as under:-

> "**70.** In Mosque known as Masjid Shahid Ganj and Ors. v. Shiromani Gurdwara Prabandhak Committee, Amritsar AIR 1938 Lahore 369, it was held that where a mosque has been adversely possessed by non-Muslims, it lost its sacred

character as mosque. Hence, the view that once a consecrated mosque, it remains always a place of worship as a mosque was not the Mahomedan Law of India as approved by Indian Courts. It was further held by the majority that a mosque in India was an immovable property and the right of worship at a particular place is lost when the right to property on which it stands is lost by adverse possession. The conclusion reached in the minority judgment of Din Mohd., J. is not the Mahomedan Law of British India. The majority view expressed by the learned Chief Justice of Lahore High Court was approved by the Privy Council in AIR 1940 PC 116, in the appeal against the said decision of the Lahore High Court. The Privy Council held:

> ...It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with the religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as "mosque" or unless the building is razed to the ground or loses the appearance which reveals its original purpose."

Thus a mosque if adversely possessed by a Non-Muslim, it will loose it sacred character as a mosque. The plaintiffs are not in

possession over the property in suit and filed the suit for recovery of the possession. There is no reliable evidence that the prayers were offered by Muslims from times immemorial. Plaint averments are contrary to the same. Issue No.1-B(c) is decided against the plaintiffs.

ISSUE NO. 3

Is the suit within time?

FINDINGS:

It is alleged by the plaintiffs that in the town of Ayodhya there exists an ancient historic mosque, commonly known as Babri Masjid, built by Emperor Babar more than 433 years ago, after his conquest of India and his occupation of the territories including the town of Ayodhya, for the use of the Muslims in general, as a place of worship and performance of religious ceremonies.

The cause of action for the suit against the Hindu public arose on 23.12.1949 at Ayodhya, district Faizabad within the jurisdiction of this Hon'ble Court when the Hindus unlawfully and illegally entered the mosque and desecrated the mosque by placing idols in the mosque thus causing obstruction and interference with the rights of the Muslims in general, offering prayers and performing other religious ceremonies in the mosque. The Hindus are also causing obstructions to the Muslims in the graveyard, (Ganj-Shahidan) in reciting Fatiha to the dead persons buried therein. The injuries so caused are continuing injuries and the cause of action arising therefrom is renewed de-die-indiem and as against defendants 5 to 9 the cause of action arose to the plaintiffs on 29.12.1949, the date on which the defendant No.7, the

City Magistrate Faizabad-cum-Ayodhya attached the mosque in suit and handed over possession of the same to Sri Priya Dutt Ram, defendant no.9 as the receiver, who assumed charge of the same on January 5, 1950.

The State Government and its officials, defendants 6 to 8 failed in their duty to prosecute the offenders and safeguard the interests of the Muslims.

The plaintiffs claim the following reliefs :--

"(a) A declaration to the effect that the property indicated by letters A B C D in the sketch map attached to the plaint is public mosque commonly known as 'Babri Masjid' and that the land adjoining the mosque shown in the sketch map by letters E F G H is a public Muslim graveyard as specified in para 2 of the plaint may be decreed.

(b) That in case in the opinion of the Court delivery of possession is deemed to be the proper remedy, a decree for delivery of possession of the mosque and graveyard in suit by removal of the idols and other articles which the Hindus may have placed in the mosque as objects of their worship be passed in plaintiff's favour, against the defendants. **(Amended on 25.5.95)**

(bb) That the statutory Receiver be commanded to handover the property in dispute described in the Schedule 'A' of the Plaint by removing the un-authorised structures erected thereon.

(c) Costs of the suit be decreed in favour of the plaintiffs.

(d) Any other or further relief which the Hon'ble Court

considers proper may be granted."

On behalf of the defendant nos.1 & 2 it has been urged that the suit is time barred as no action was taken in time from the orders of the City Magistrate u/s 145 Cr.P.C; plaintiffs were never in possession over the temple in dispute since 1934 and the Hindus were holding it adversely to them, overtly and to their knowledge; Puja is going on in the said temple from the past at best 28 years i.e. 1934 and admittedly from January, 1950 when the City Magistrate directed the defendant No.9 to carry on puja as usual in the said temple.

Both the parties have advanced their arguments. Sri Zafaryab Jilani has urged that the suit is not barred by time and in view of the provisions of Article 142 and 144 of the Indian Limitation Act, 1908 the suit has been filed within 12 years. Accordingly with no stretch of imagination it can be said that plaintiffs are not entitled to maintain the present suit. On the contrary, learned counsel for the opposite parties have urged that the suit is barred by Article 120 of the Indian Limitation Act, 1908 and Articles 142 and 144 of the said Act are not applicable in the instant matter as the plaint was amended and prayer (b) was added on 25.5.95 after 33 years of the filing of the suit.

It is further averred that suit property was attached in the proceedings under Section 145 Cr.P.C. vide order dated 29.12.1949 and the instant suit was filed on 18.12.1961 i.e. after 12 years. Thus the instant case falls within the purview of Article 120 of Limitation Act and Articles 142 and 144 of the said Act are not applicable in the instant matter. In this context Sri Z.Jilani has urged that the suit is not

barred by time and in view of the provisions of Articles 142 and 144 of the Indian Limitation Act the suit has been filed within 12 years and with no stretch of imagination it can be said that the plaintiff is not entitled to maintain the present suit.

On behalf of the plaintiffs, it has been claimed that Article 142 of the Limitation Act applies in this case or in alternative Article 144 may be applied by this Court and Article 120 is not applicable in the instant matter.

Sri P.N.Mishra, learned Senior Advocate submitted that the suit is barred by Article 120 of the Indian Limitation Act,1908:

1. As the Suit property was attached in the proceeding under Section 145 of the Criminal Procedure Code, 1898 in 1949 vide order dated 29th December, 1949 passed by the Ld. City Magistrate Faizabad & Ayodhya and; the instant suit was filed on 18th December, 1961; the instant case falls within the perview of Article 120 of the Limitation Act, 1908. Article 142 and 144 of the said Act are not applicable in the instant matter. The above referred Articles reads as follows:

"

Description of Suit	Period of limitation	Time from which period begins to run
120. Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
142. For possession of immovable property when the plaintiff while in possession of the property has been	Twelve years	The date of the dispossession or discontinuance.

dispossessed or had discontinued the possession.		
144. For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

2. In AIR 1936 Oudh 387 Partab Bahadur Singh Vs. Jagatjit Singh the said Hon'ble Court held that where an order under Section 145 Criminal Procedure Code, 1898 was made by the Magistrate for attachment of the disputed property and the Tahsildar was appointed as receiver of the property, the possession of the receiver in the eye of the law was the possession of the true owner therefore in such suit Article 120 of the Limitation Act, 1908 is applicable and a suit brought within six years of the last invasion is in time. Relevant portion of the said Judgement from its page 395 reads as follows:

> "For the present it would be enough to say that in our opinion the attachment made in 1932 in pursuance of the order passed in the proceedings under S. 145, Criminal P. C., clearly gave rise to an independent cause of action for the plaintiff instituting the present suit for a declaration and the said suit having been throught within six years of the attachment is not barred by Art. 120, Limitation Act, if it is found that he had a subsisting title on the date of attachment. Next it was contended that the suit was governed by Art. 142 Sch. 1, Limitation Act, and that the plaintiff's suit had rightly been dismissed because he had failed to prove his possession within limitation. The Subordinate Judge also has laid great emphasis on it and his decision appears to be mainly based on this ground. In our opinion this position is altogether untenable. It is common ground between the parties that in S. 145 Criminal P. C., proceedings the Magistrate passed an order for attachment of the property. The Tahsildar

> who was appointed receiver took possession of the property on 23rd February, 1932. The property was admittedly in possession of the Tahsildar as receiver at the time when the present suit was instituted. The possession of the receiver was in the eye of the law the possession the true owner. In the circumstances the plaintiff could undoubtedly maintain a suit for a mere declaration of his title and it was not necessary for him to institute a suit for possession. The suit is neither in substance nor in form a suit for possession of immoveable property. Art. 142 has therefore no application."

3. In AIR 1942 PC 47 Raja Rajgan Maharaja Jagatjit Singh Vs. Raja Partab Bahadur Singh the said Hon'ble Court upheld the ratio of law as laid down in AIR 1936 Oudh 387 Partab Bahadur Singh Vs. Jagatjit Singh. The Hon'ble Privy Council affirmed that in a suit for a declaration of plaintiff's title to the land in possession of the receiver under attachment in proceeding under Section 145 of the Criminal Procedure Code, 1898 by virtue of the Magistrate's order, Articles 142 and 144, the Limitation Act, 1908 do not apply and the suit is governed by Article 120 of the Limitation Act, 1908. Relevant portion of the said Judgement from its page 49 reads as follows:

> "In the first place, their Lordships are clearly of opinion, contrary to the view of the Subordinate Judge, but in agreement with the view of the Chief Court, that it was for the appellant to establish that the title to the lands in suit held by the respondent's predecessor under the first settlement of 1865 had been extinguished under S. 28, Limitation Act, by the adverse possession of the appellant or his predecessors for the appropriate statutory period of limitation, completed prior to the possession taken under attachment on 23rd February 1932, by the Tahsildar, who thereafter held for the true owner. Their Lordships are further of opinion that the present suit, which was subsequently instituted, was rightly confined to a mere

declaration of title, and was neither in form nor substance a suit for possession of immovable property.

In the second place, on the question of the errors of procedure of the Subordinate Judge in placing the burden of proving his possession within the limitation period on the respondent and ultimately refusing to allow the respondent to lead evidence in rebuttal of the appellant's evidence of adverse possession, it is enough to say that the appellant's counsel felt constrained to state that he could not defend the exclusion of evidence by the learned Judge, and that, if otherwise successful in his appeal, he should ask that the case should be remanded in order to give the respondent the opportunity which was so denied to him. The Chief Court held that the appellant had failed to prove adverse possession, and found it unnecessary to remand the case.

With regard to the statutory period of limitation, Art. 47 of the Act does not apply, as there has been no order for possession by the Magistrate under S. 145, Criminal P. C. As the suit is one for a declaration of title, it seems clear that Arts. 142 and 144 do not apply, and their Lordships agree with the Chief Court that the suit is governed by Art. 120. This leaves for consideration the main issue of proof of adverse possession by the appellant and his predecessors, and the appellant is at once faced by a difficulty which proved fatal to his success before the Chief Court, viz., that unless he can establish adverse possession of the lands in suit as a whole, he is unable, on the evidence, to establish such possession of identified portions of the lands in suit. Before their Lordships, the appellant's counsel conceded that, in order to succeed in the appeal, he must establish adverse possession of the lands in suit as a whole. He further conceded that his case on that point rested either (a) on the Habibullah decision of 1899, on which he succeeded before the Subordinate Judge, or (b) on the compromised proceedings under S. 145 in 1903. He conceded that neither the Habibullah decision nor the boundary proceedings in 1903 amounted to a judicial decision. The appellant maintained that the Habibullah decision, given under S. 23 of the Act of 1876, was good evidence of the state of possession at that time, and of the possession of the whole of the land in dispute by Kapurthala. He maintained that it must be assumed that Mr. Habibullah did his duty and that the decision was based on actual possession; under S. 35, Evidence Act, it was good evidence of the fact of possession. Unfortunately for this contention it appears on the face of the judgment that possession was only proved in respect of land under cultivation, and that the

> boundary line laid down by Mr. Habibullah was largely an arbitrary line, and, at least to that extent, was not based on actual possession by Kapurthala, and it is well established that adverse possession against an existing title must be actual and cannot be constructive."

4. In ILR 26 Mad 410 RAJAH OF VENKATAGIRI –VS- ISAKAPALLI SUBBIAH AND OTHERS Certain lands were attached by a Magistrate, in 1886, under section 146 of the Code of Criminal Procedure, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realised some income from them. Both claimants instituted, in 1847, suits in which each claimed the lands as his own, end sought to obtain a declaration of title to them, as well as to the accumulated income, with a view to obtaining possession of the lands and money from the Magistrate. On the question of limitation being raised, the Hon'ble Madras High Court held, that in so far as the suits were for declaration of title to immoveable property and the profits therefrom, they were governed by article 120 of schedule II to the Limitation Act and Article 142 and 144 were not applicable. Relevant portion of the said Judgement from its pages 415 and 416 reads as follows:

> " In the present case the Magistrate acted in due course of law and, either because he found that neither party was in possession or because he was unable to satisfy himself as to which of them was then in possession, he has simply attached the property. Such attachment operates in law for purposes of limitation simply as detention or custody of the property by the Magistrate who, pending the decision by a Civil Court of competent jurisdiction, holds it merely on behalf of the party entitled, whether he be one of the actual parties to

the dispute before him or any other person. For purposes of limitation the seizin or legal possession will, during the attachment, be in the true owner and the attachment by the Magistrate will not amount either to dispossession of the owner, or to His discontinuing possession.

In each of the present suits, the plaintiff claims as the true owner and as being in legal possession – the physical possession by the Magistrate being one on behalf of the true owner- and prays for a declaration of his title, as against the defendant (the plaintiff in the other suit) who denies his title and claims the property as his own. Under section 146, Criminal Procedure Code, the Magistrate is bound to continue the attachment and have statutory possession of the lands for purposes of continuing the attachment until a competent Civil Court determines the rights of the parties to the dispute before him or the person entitled to the possession of the lands and he cannot deliver the property to any of the parties or other person without an adjudication by a Civil Court. During the continuance of the attachment, the legal possession for purposes of limitation will constructively be in the person who had the title at the date of the attachment and such title cannot be extinguished by the operation of section 28 of the Limitation Act, however long such attachment may continue.

In the above view article 144 will be even less applicable to the suit than article 142.

The suits, therefore, are essentially suits for declaration of title to immoveable property and the profits thereof which are in deposit, the plaintiffs respectively claiming to be in legal possession thereof and the period of limitation applicable is therefore the period of six years prescribed by article 120 of the second schedule to Act XV of 1877, which period is to be reckoned from the time when the right to sue accrued (Pachamuthu Vs Chinnappan (1), Puraken V. Pareathi(2) and Muhammad Baqar V. Mango Lal(3). In this view it is immaterial whether the Rajjah of Venkatagiri (the plaintiff in Appeal No. 149) was or was not actually a party to the dispute before the Magistrate in 1886. The right to sue certainly accrued on the date of the attachment, the 5th May, 1886, which is rightly given as the date of the cause of action in both the suits. The alleged wrongful denial, by the defendants in each case, of the plaintiff's title and possession and the procuring by such denial of the attachment by the Magistrate, in the cause of action for

> the declaratory suit and it is impossible to hold that there is a 'continuing wrong' within the meaning of section 23 of the Indian Limitation Act, during the time that the attachment continues so as to give for the purpose of reckoning the period of limitation a fresh starting point at every moment of the time during which the attachment continues."

5. In AIR 1925 Nagpur 236 Yeknath Vs. Bahia the said Hon'ble Court held that where there was a dispute between the parties regarding the land in suit and in proceedings under Chapter XII of the Criminal Procedure Code, 1898 the Magistrate attached the land under Section 146 and appointed a Receiver thereof, and where a suit was brought by the plaintiff for a declaration that he was the owner of the land Article 120 of the Limitation Act, 1908 applied to the suit and the period of Limitation starts from the date of the order of the attachment. Full text of the said Judgement from its page 236 reads as follows:

> "In 1908 there was a dispute between the parties to the suit out of which this appeal arises regarding the land in suit and in proceedings under Ch. XII of Cr. P.C. Magistrate attached the land under S. 146 and appointed a Receiver thereof referring the parties to the Civil Court for the determination of their rights. The present suit was brought in 1920 by the plaintiff for a declaration that he was the owner of the land. The lower Appellate Court dismissed the suit on the ground that it was time-barred. The plaintiff challenges that finding in second appeal. The parties are agreed that Article 120 of the 1st Schedule, Limitation Act, applies to this case. The plaintiff however contends that the case being one of a continueing wrong the suit is within time. Brojendra Kishore Roy Chaudhury V. Bharat Chandra Roy(1), has been relied on by the plaintiff for the contention that there is a continuing wrong. But in that case it was found as a fact that the plaintiffs were in possession that the defendants attempted to interfere with their possession and a

> breach of the peace bad become imminent when the property was attached by the Magistrate. In Panna Lal Biswas V. Panchu Ruidas (2), which is also relied on, the plaintiff was deprived of possession by the defendants two months prior to the attachment. There is no finding of either of these kinds in this suit. We do not know whether it was the plaintiff or the defendant who was guilty of interference with possession or dispossession. In the absence of all evidence as to the events preceding the attachment all that one can say as to what led the Magistrate to take possession is that it was either his inability to decide who was in actual possession or his decision that neither party was in possession. Neither of these can be said to be a wrong by the defendant. The alleged wrongful denial of the plaintiff's title was not what led the Magistrate to attach the property. The cases cited therefore do not help the plaintiff. In the circumstances of these cases it is the attachment by the Magistrate and not any wrongful act of the defendants that gave rise to the right to sue and the right accrued when the attachment was made. In this view no fresh period of limitation began to run under S. 23 of the Limitation Act after the date of the attachment by the Magistrate in 1908. The suit therefore was barred by time and was rightly dismissed. The appeal is dismissed with costs."

6. In AIR 1935 Madras 967 Ponnu Nadar and others vs. Kumaru Reddiar and others the said Hon'ble Court held that the real cause of action was the date of the order of the Magistrate and limitation started from the date of order and Article 120 of the Limitation Act, 1908 was applicable not the Section 23 of the said Act. The relevant portions of the said Judgement from its pages 970 and 973 read as follows:

> "The question which we have to decide is one of limitation. The dispute has a somewhat long history, and we have to go back to 1900, when the Nadars of Mela Seithalai village at tempted to carry a corpse in procession over the same route. The police reported that there was likely to be resistance on the part of the other caste people, and a breach of the peace, and accordingly the Joint Magistrate, Mr. Vibert, I.C.S.,

passed an order directing that no organized procession of Shanars or Christians should pass along those streets until a Civil Courts had declared that there was a right to do so. It is not disputed that this order was passed under S. 147, Criminal P. C., although it may be open to some question whether the occasion was really appropriate for an order of this character, nor is it contended that the order was without jurisdiction and therefore a nullity. The contention of the defendants in the present suit is in brief that this order being still in force and no suit having been filed within the prescribed period by the Nadars to establish the right in question the present claim is time-barred. This point has been decided against the plaintiffs by the Courts below and the plaintiffs accordingly appeal. ……..

In the present case it is no doubt arguable that some analogy exists between an order which bars a right to take a procession and an obstruction which bars a right of way. Both in a sense create a state of affairs which continues to exist. What we have to find however is the existence of a "continuing wrong," a wrong, that is, originated by and kept in existence by the opposite party. What in fact appears to have given rise to the Joint Magistrate's order was a police report of an apprehended breach of the peace between the rival factions and all that the opposite party did was to adopt an attitude which gave rise to that apprehension. So far as that attitude itself is concerned, it is impossible to find in it a continuing wrong, nor do we find it easier to hold that when the Joint Magistrate passed the order with a view to prevent a breach of the peace there was a "continuing wrong" caused by the defendants' party. There is nothing to show that it was passed at their instance and even if it were, responsibility for passing it must be taken by the Court and not laid upon the party. Again, once an order was passed, the matter was taken out of the hands of the defendant party, and it lay with the Nadars themselves to establish their right by suit.

From this point of view too we are not disposed to hold that even if there was a continuing wrong the defendant party was responsible for its continuance. Where the applicability of S. 23, Lim. Act, is doubtful the proper course must be, we think, to enforce against the plaintiffs the ordinary principles of limitation, and in the present case to apply art. 47 would be applied to the case of an order under S. 145, Criminal P.C., time

> being taken to run from the date of the order. Adopting this view, the persons affected by the order of 1900 had a period of six years within which to establish their right, and we are not greatly impressed by the argument that, if the right itself may be indestructible, the remedy ought not to have been permanently lost by their failure to take action within that time. We must hold in agreement with 26 Mad 410(1) that the suit is barred under Art. 120, Limitation Act. The second appeal is dismissed with costs of the contesting respondents. We certify for a fee of Rs. 150 under R. 46, Practitioners' Fees Rules.

7. In AIR 1930 PC 270 (*Mt. Bolo. v. Mt. Koklan)* the said Hon'ble Court held that there can be no "right to sue" untill there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. And in such suit limitation starts from the date of unequivocal threat to infringe the right for the purpose of limitation, the suit is governed under Article 120 of the Limitation Act, 1908. In the instant case, the plaintiffs' averment is that they were dispossessed in the night of 22/23rd December, 1949 and it is also admitted fact that an order of attachment in respect of the suit property was passed on 29th December, 1949 as such at least a clear and unequivocal threat to infringe the right of the plaintiffs to use the disputed structure as Mosque materialized in the night of 22/23rd December, 1949. On that date right to sue was arisen. Relevant paragraph of the said judgment from its page 272 reads as follows:

> "There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by

> the defendant against whom the suit is instituted. No doubt Mt. Koklan's right to the property arose on the death of Tara Chand, but in the circumstances of this case their Lordships are of opinion that there was no infringement of, or any clear and unequivocal threat to her rights till the year 1922, when the suit, as stated above, was instituted."

8. In AIR 1931 PC 9 (*Annamalai Chettiar & Ors. v. A.M.K.C.T. Muthukaruppan Chettiar & Anr.)* the Hon'ble Privy Council has held that in case of an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted for the purpose of limitation Article 120 of the Limitation Act, 1908 is applied. Relevant paragraph of the said judgment from page 12 reads as follows:

> "In their Lordships view the case falls under Art. 120, under which the time begins to run when the right to sue accrues. In a recent decision of their Lordships' Board, delivered by Sir Binod Mitter, it is stated, in reference to Art. 120"

9. In AIR 1960 SC 335 (*Rukma Bai. v. Lala Laxminarayan)* the Hon'ble Supreme Court held that where there are successive invasion or denials of right, the right to sue under Article 120 accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question where that threat effectively invites or jeopardizes the said right. Relevant paragraph 33 of the said judgment reads as follows:

> "33. The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said, right."

10. In AIR 1961 SC 808 (*C. Mohammad yunus. v. Syed Unnissa & Ors.)* the Hon'ble Supreme Court has held that a suit for declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Article 120. Under the said Article there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right. Relevant paragraph 7 of the said judgment reads as follows:

> "7. The surplus income of the institution is distributed by the trustees and the plaintiffs are seeking a declaration of the right to receive the income and also an injunction restraining the defendant from interfering with the exercise of their right. The High Court held that plaintiff No. 1 was at the date of the suit 19 years of age and was entitled to file a suit for enforcement of her right even if the period of limitation had expired during her minority within three years from the date on which she attained majority by virtue of Ss. 6 and 8 of the Indian Limitation Act, Apart from this ground which saves the claim of the first plaintiff alone, a suit for a declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Art. 120 of the Limitation Act and in such a suit the right to sue arises when the cause of the action accrues. The plaintiffs claiming under Fakruddin sued to obtain a declaration of their rights in the institution which was and is in the management of the trustees. The trial judge held that the

> plaintiffs were not "in enjoyment of the share" of Fakruddin since 1921 and the suit filed by the plaintiffs more than 12 years from the date of Fakruddin's death must be held barred but he did not refer to any specific article in the first schedule of the Limitation Act which barred the suit. It is not shown that the trustees have ever denied or are interested to deny the right of the plaintiffs and defendant No. 2; and if the trustees do not deny their rights, in our view, the suit for declaration of the rights of the heirs of Fakruddin will not be barred under Art. 120 of the Limitation Act merely because the contesting defendant did not recognise that right. The period of six years prescribed by Art. 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right. If the trustees were willing to give a share and on the record of the case it must be assumed that they being trustees appointed under a scheme would be willing to allow the plaintiffs their legitimate rights including a share in the income if under the law they were entitled thereto, mere denial by the defendants of the rights of the plaintiffs and defendant No. 2 will not set the period of limitation running against them."

11. In AIR 1970 SC 1035 (*Garib Das. v. Munish Abdul Hamid)* the Hon'ble Supreme Court has held that in a suit for recovery of possession after cancellation of sale deed in favour of the defendants on the ground that a previous valid wakf had been created, Article 142 was not applicable and the suit was to be filed within a period of six years that is to say Article 120 was applicable. Relevant paragraph 13 of the said judgment reads as follows:

> "13. The fourth point has no substance inasmuch as Article 142 of the Limitation Act was not applicable to the facts of the case. The suit was filed in 1955 within six years after the death of Tasaduk Hussain who died only a few months after the execution of the documents relied on by the appellants."

12. In AIR 1973 All 328 (*Jamal Uddin. v. Mosque, Mashakganj)* the Hon'ble Allahabad High Court has held that in a suit for possession, the plaintiff specifically alleged that they had been dispossessed by the defendant before filing of the suit, the suit would be governed by Article 142 and the residuary Article 144 would have no application, then the burden in such a case was on the plaintiffs to prove their possession within 12 years before the suit. That case is distinguishable from this case because in that case no order of attachment was passed by the Magistrate, but in the instant case order of attachment was passed by the Magistrate and, as such, in the instant case Article 120 of the Limitation Act, 1908 is applicable. Relevant paragraph Nos.29 and 31 of the said judgment read as follows:

> "29. The next point that was urged by the counsel for the appellants was that the courts below committed a legal error in applying Art. 144 of the Limitation Act, 1908, to the suit and placing the burden on the defendants to prove their adverse possession for more than twelve years, while the suit on the allegations contained in the plaint clearly fell within the ambit of Art. 142 and the burden was on the plaintiffs to prove their possession within twelve years. This contention also is quite correct. It was clearly alleged by the plaintiffs that they had been dispossessed by the contesting defendants before the filing of the suit. As such, the suit would be governed by Article 142 and the residuary Article 144 will have no application. The courts below have unnecessarily imported into their discussion the requirements of adverse possession and wrongly placed the burden on the defendant to prove those requirements. Now the trial Court has approached the evidence produced by the parties would be evident from the following observation contained in its judgment.
> "The onus of proving adverse possession over the disputed land lies heavily upon the defendants and their possession has to be proved beyond doubt to be

notorious, exclusive, openly hostile and to the knowledge of the true owner as laid down in AIR 1938 Mad 454."
After a consideration of the documentary and oral evidence produced by the defendants to prove their possession the trial Court has opined that the document on record do not prove the title and possession of the defendants to the hilt in respect of the disputed land. So far as the plaintiffs' evidence is concerned it was disposed of by the trial Court with the following observations :
"..... No doubt, the oral evidence of the plaintiffs about the use of the land for saying the prayers of 'Janaze Ki namaz' and about the letting out of the land in suit for purposes of 'D or Sootana' is equally shaky and inconsistent. But as already pointed out above the plaintiffs have succeeded in proving their title over the disputed land and as such possession would go with the ownership of the land. The defendants cannot be allowed to take advantage of the plaintiffs faulty evidence and it was for them to prove beyond any shadow of doubt that they were actually in possession over the disputed land as owners and that they exercised this right openly hostile to the plaintiffs with the latter's knowledge. Judged in this context, the evidence of the defendant falls short of this requirement."

31. The learned Civil Judge has noted in his judgment that this land was enclosed by walls which were occasionally washed away during rains but were rebuilt though it was not clear from the Commissioner's report as to when the existing walls had been constructed. It has also been found that the defendant-appellants and their predecessors had set up a barber's stall on this land by placing wooden Takhat on it on which they used to shave their customers and sleep thereon in the night. But they were of the opinion that these acts did not amount to dispossession of the plaintiffs. It was not noticed by them that it is an admitted fact that some windows of the mosque opened towards this land and so any activity of the defendant-appellants or their predecessors on this land could escape the notice of plaintiff No. 2 or his predecessor. According to the plaintiffs' allegations the defendants had simply started digging foundation on this land when they treated this act of theirs as amounting to their dispossession and filed their suit out of which this appeal has arisen. It is therefore clear that if the evidence had been appraised from a correct angle that the burden under Article 142 is on the plaintiffs, a finding could not be recorded in favour of the plaintiffs. On the other hand, from the facts and circumstances of the case, it was

> evident that the plaintiffs or their predecessors-in-interest had no possession over the land within twelve years prior to the suit. The suit was therefore barred by limitation under Article 142."

13. In AIR 2004 SC 1330 (*Chairman & MD, N.T.P.C. Ltd.. v. M/s. Reshmi Construction Builders & Contractors)* the Hon'ble Apex Court has held that no one can be allowed to approbate and reprobate at the same time. In view of such principle of law, the plaintiffs are estopped from relying on applicability of Article 142 on one hand and Article 144 on the other. Article 142 is applicable for recovery of possession of immovable property when the plaintiff's possession of the property has been dispossessed or had discontinued. Under this Article the burden of proof lies upon the plaintiffs to prove their possession within 12 years before the suit. While Article 144 is a residuary and which is applicable for recovery of possession of immovable property or an interest therein not specifically provided for by the Act and in that case burden of proof lies upon the defendants to prove their possession within 12 years before the suit. Relevant paragraph Nos.36 and 37 of the said judgment read as follows:

> "36. In Halsbury's Laws of England, 4th Edition, Vol. 16 (Reissue) para 957 at page 844 it is stated :
> "On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions :
> (1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
> (2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first

pursued and with which his subsequent conduct is inconsistent."

37. In American Jurisprudence, 2nd Edition, Volume 28, 1966, pages 677-680 it is stated :

"Estoppel by the acceptance of benefits :

Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience."”

14. In AIR 1983 SC 684 = (1983) 3 SCC 118 (*State of Bihar. v. Radha Krishna Singh)* the Hon’ble Supreme Court has held that the statement made *post litem motam* is inadmissible on the ground the same thing must be in controversy before and after the statement is made. In view of the said judicial pronouncement, the statements of the plaintiffs which have been made in their written statement filed in the year 1950 in O.S. No.1 of 1989 to the effect that last *namaz* was offered on 16th December, 1949 and thereafter no *namaz* was offered is *ante litem motam*. In the same suit same thing is/was in controversy before and after the statement was made. The plea taken in the plaint of the instant suit being O.S.No.4 of 1989 to the effect that the disputed structure was used as Mosque till 22/23rd December, 1949 and on that date last *namaz* was offered is *post litem motam* which is inadmissible. As such on the basis of admission of the plaintiffs they have admitted that they

discontinued in possession on or after 16th December, 1949 and, as such limitation starts from that day. Relevant paragraph Nos.132 and 138 of the said judgment read as follows:

> "132. Same view was taken by a Full Bench of the Madras High Court in Seethapati Rao Dora v. Venkanna Dora (1922) ILR 45 Mad 332 : (AIR 1922. Mad 71), where Kumaraswami Sastri. J. observed thus :
> "I am of opinion that Section 35 has no application. to, judgments, and a judgment which would not be admissible under Sections 40 to 43 of the Evidence Act would not become relevant merely because it contains a statement as to a fact which is in issue or relevant in a suit between persons who are not parties or privies. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments in Courts of justice."
>
> 138. In Hari Baksh v. Babu Lal AIR 1924 PC 126, their Lordships observed as follows:
> "It appears to their Lordships that these statements of Bishan Dayal who was then an interested party in the disputes and was then taking a position adverse to Hari Baksh cannot be regarded as evidence in this suit and are inadmissible."

Admittedly, the plaintiffs filed the suit for declaration in the year 1961 and afterwards beyond the period of limitation and amended the suit after 33 years to cover the case under Article 142 and 144 beyond the period of limitation. Thus, the suit was barred by limitation even at the time of filing the suit and was not cognizable.

I have given anxious thought to the rival submissions of the parties. It transpires that Article 142 provides a limitation of 12 years to file the suit. The date of dispossession or discontinuance of possession as alleged is 23.12.1949 and 29.12.1949. Accordingly the plaintiff's claimed that their case is covered by Article 142 of the Act not at the time of filing the suit but through amendment of 1995. It is

settled proposition of law that onus under Article 142 lies on the plaintiff and the plaintiff has to prove the assertions. As regards the scope of Article 142 and its applicability the question is mostly one of pleadings. In this context it would be expedient to refer the earliest Privy Council's case in which Article 143 of Act IX of 1871 came in consideration along with Article 144 of the Act. In the case of Bibi Sahodra Versus Rai Jang Bahadur it has been observed that Article 143 (now Article 142) refers to a suit for possession of immovable property, where the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and it allows twelve years from the date of the dispossession or discontinuance. But in order to bring the case under that head of schedule, he must show that there has been a possession or discontinuance. This Article was not applied where pleadings distinctly showed that there was no dispossession or discontinuance of the plaintiff. In Karan Singh Versus Bakar Ali Khan, there was a question of the application of Article 145 of Act IX of 1871 (now Art.144), and Sir B.Peacock, pointed out the difference of the provision from the rule formerly in force under Act XIV of 1859. Under the old law, the suit must have been brought within twelve years from the time of the cause of action; but under the Act of 1871, it might be brought within 12 years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff.

Thus Article 142 applies to actions of ejectment and where the plaintiffs allege that they have been dispossessed is required to prove

possession and dispossession within 12 years of the suit. The full bench of Calcutta High Court in Mohd.Ali Khan Versus Khwaja Abdul Gunny and Others (1883) ILR 9 Cal. 744 held that where the suit is for possession, and the cause of dispossession or discontinuance, the plaintiff is bound to prove this event from which limitation is declared to run having, occurred within 12 years of the suit. Thus Article 142 applies only to suits for possession of an immovable property. In all cases in which the applicability of Article 142 or 144 is in controversy it is necessary to scrutinize the pleadings of the plaintiff and the relief sought by him. In a suit governed by Article 142 the question is to be decided where the plaintiff directly and strictly has been in possession within 12 years of the suit and it does not matter if within the period continuous exclusive possession adverse to him has been one or of a trespasser.

After going through the pleadings of the parties on the basis of arguments advanced by the learned counsel for the plaintiffs when he has relied over Article 144 of the Limitation Act, it has to be seen whether the case comes within the purview of Article 144 or not. Article 144 of Limitation Act, 1908 is the general residuary article for suits for possession of immovable property as is indicated by the words “not hereby otherwise specially provided for”. This article does not apply where the suit is otherwise specially provided for by some other Article referring to possessory suits in Sch.-I of the Limitation Act. It applies to suits for possession, not invariably meaning a suit for actual physical possession. Article 144 contemplates that if on the

allegations made in the plaint the suit falls under Article 142, there is no justification for taking it out of that article for applying Article 144. Article 144 restricted to suits which are in terms and is in substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. It is also a settled proposition that where the plaintiff bases his claim on his title with regard his possession or dispossession, the case falls under Article 144.

Article 120 is a residuary article before applying it the Court has to be satisfied that no other provision of the Limitation Act can be applicable. The scheme of Limitation Act provides a general residuary article for all suits not covered by specific article. The residuary article is applicable to every variety of suits not otherwise provided for. It should be applied only as a last resort, if no other article is applicable. The function of the residuary article is to provide for cases, which could not be covered by the exact words used in both the columns one & three of an Article. As a general principle of construction of statute, if there be two articles which may cover the case, the one, however, more general and the other more particular or specific, the more particular and specific article ought to be regarded as the one governing the case. The Rule is well established that if there is no specific or less general article applicable, this omnibus article applies. There are numerous decisions to the effect that, unless it is clear that no other specific article is applicable, the Courts ought not to apply Article 120 of the Limitation Act. Article 120 comes into operation

only when no other article is applicable to a suit. It should never be invoked if there is any other article in the schedule which upon reasonable interpretation of its language covers the particular suit with which the Court is dealing. Wherever a specific article is shown and applicable in all its bearing, Article 120 would apply. If the plaintiff for any reason wishes to avoid the application of Article 120, it is for him to show which other article fits his claim. Where an attempt is made to secure a longer period of limitation under this article by drafting the plaint so as to evade a particular provision of the Limitation Act, with a lessor prescribed period. It is for the plaintiff to establish that Article 120, 142 or Article 144 fits his claim. In this context, undoubtedly regard should be had to the essence of the suit rather than to the particular colouring sought to be put upon it by the plaintiff.

It is not disputed between the parties that the property was attached by the City Magistrate, Faizabad/Ayodhya on 29.12.1949. After invoking his powers under Section 145 Cr.P.C. he attached the property on 29.12.1949 and handed over the possession of the suit property to Priya Dutt Ram, defendant no.9 who assumed the charge of the same on January 5, 1950. The plaintiffs have sought the relief of declaration, delivery of possession and further prayed for a command to Receiver to hand over the property in dispute described in Schedule-A of the plaint, by removing the unauthorized structure existed thereon. In this context, it transpires that on the basis of the pleading of the parties, learned counsel for the plaintiffs have simply

pointed out that the case falls either within the purview of Article 142 or 144, accordingly, the suit is within time. On the contrary, defendants contested the case on the ground that the suit is barred by limitation. Sri P.N. Misra, Advocate, has urged that Article 142 and 144 of Limitation Act, 1908 have no application in this case and the case falls within the purview of Article 120 of the Limitation Act for which the period of limitation is six years. Thus, from the date of attachment of the property, the suit ought to have been filed within six years and not within 12 years as claimed by the plaintiff.

In ***AIR 1936 Oudh 387 Partap Bahadur Singh Vs. Jagatjit Singh*** where this Court held that where an order under Section 145 Criminal Procedure Code, 1898 was made by the Magistrate for attachment of the disputed property and the Tahsildar was appointed as Receiver of the property, the possession of the Receiver was in the eye of the law was the possession of the true owner therefore, in such suit Article 120 of the Limitation Act, 1908 is applicable and a suit brought within six years of the last invasion is in time. In the circumstances, the plaintiff could undoubtedly maintain a suit for a mere declaration of his title and it was not necessary for him to institute a suit for possession. Thus, with no stretch of imagination it may be deem to be suit for possession for immovable property. Accordingly, Article 142 has no application.

In ***AIR 1942 PC 47 Raja Rajgan Maharaja Jagatjit Singh Vs. Raja Partab Bahadur Singh.*** The said Hon'ble Court has upheld the ratio of law as laid down in the case of Partap Bahadur Singh (supra),

the Privy Council affirmed that in a suit for a declaration of plaintiff's title to the land in possession of the Receiver under attachment in proceeding under Section 145 of the Criminal Procedure Code, 1898 by virtue of the Magistrate's Order, Article 142 and 144, the Limitation Act, 1908 do not apply and the sit is governed by Article 120 of the Limitation Act.

Further in ***ILR 26 Mad 410 Rajah of Venkatagiri vs. Isakapalli Subbiah and others.*** In this case certain lands were attached by a Magistrate, in 1886, under Section 146 of the Code of Criminal Procedure, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realised some income from them. The suit was instituted by rival claimants for realization of the amount. On the question of limitation being raised the Madras High Court took a view that a suit for declaration of immovable property and the profits therefrom, they were governed by Article 120 of of Schedule II to the Limitation Act and the case does not fall within the ambit of Article 142 and 144 of the Limitation Act.

In ***AIR 1925 Nagpur 236, Yeknath Versus Bahia*** wherein the Magistrate attached the land under Section 146 and appointed a Receiver thereof, and where a suit is brought by the plaintiff for a declaration that he was the owner of the land Article 120 of the Limitation Act applies and the period of limitation starts from the date of the order of the attachment.

In ***AIR 1935 Madras 967, Ponnu Nadar and others Versus Kumaru Reddiar and others***, Madras High Court held that the real

cause of action was the date of the order of the Magistrate and limitation started from the date of order. There is no other article which can be applied in such a case and accordingly the case falls within the ambit of Article 120 of the Limitation Act and not u/s 23 of the Limitation Act.

In ***AIR 1930 PC 270 (Mt. Bolo v. Mt. Koklan)*** Hon'ble Court held that there can be right to sue until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted and in such suit limitation starts from the date of unequivocal threat to infringe the right for the purpose of limitation and the suit is governed by Article 120 of the Limitation Act. On behalf of the defendants, it has been urged that this case has full application in the instant case. According to plaintiffs, they were dispossessed in the night of 22/23rd December, 1949. It is also admitted for the plaintiff that an order of attachment in respect of the suit property was passed on 29.12.1949, as such at least a clear and unequivocal threat to infringe the right of the plaintiff's to use the disputed structure as Mosque materialized in the night of 22/23rd December, 1949 and on that date the right to sue was arisen. In ***AIR 1931 PC 9 (Annamalai Chettiar & Ors. v. A.M.K.C.T. Muthukaruppan Chettiar & Anr.),*** the Privy Council has held that in case of an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat Article 120 of the Limitation Act would apply. The Hon'ble Apex Court also considered the scope

of Article 120 in ***AIR 1960 SC 335 (Rukma Bai v. Lala Laxminarayan)*** and held that where there are successive invasion or denials of right, the right to sue under Article 120 accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. As such in this case, the right to sue under Article 120 of the Limitation Act accrues. The Hon'ble Apex Court in ***AIR 1961 SC 808 (C. Mohammad Yunus v. Syed Unnissa & Ors.)*** held that a suit for declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Article 120. In ***AIR 1970 SC 1035 (Garib Das v. Munish Abdul Hamid)*** the Apex Court further held that in a suit for recovery of possession after cancellation of sale deed in favour of the defendants on the ground that a previous valid wakif had been created only Article 120 would apply and Article 142 in such a case is not applicable. In ***AIR 2004 SC 1330 (Chairman & MD, N.T.P.C. Ltd., v. M/s Reshmi Construction Builders & Contractors)*** the Hon'ble Apex Court held that no one can be allowed to approbate and reprobate at the same time. Thus, in this case the plaintiffs are estopped from relying on applicability of Article 142 on one hand and Article 144 on the other hand. Article 142 is applicable for recovery of possession of immovable property when the plaintiffs were dispossessed or had discontinued from the property in suit while under Article 144 a residuary which is applicable for recovery of the above property or an interest therein not specifically provided by the Act. The case of the plaintiffs, according to the defendants, does not fall

within the purview of Article 142 or 144 of the Limitation Act.

Sri M.M.Pandey, learned counsel for the opposite parties has urged that in view of the plaint averments the case does not fall within the purview of Article 142 or Article 144 of Indian Limitation Act. The case falls within the purview of Article 120 of Limitation Act. It has further been submitted that after the attachment of the property, the disputed property was in custodia legis and the Receiver was holding the possession on behalf of the parties whom the Magistrate finds to have been in possession. Thus the Magistrate after the attachment was holding the property through the Receiver and accordingly the matter falls within the purview of Article 120 of the Act as there is no other provision under the Limitation Act. Accordingly, Article 120 has the application. In view of the submissions of Learned counsel Sri M.M. Pandey, there is no doubt that the property under attachment under Section 145 is in custodia legis. Thus the relief of declaration is required in this case which is covered under Article 120 of the Limitation Act. Sri M.M.Pandey has further relied upon the case reported in ***2008 SC 363, C.Natarajan Versus Ashim Bai and another*** according to him the view of the Hon'ble Apex Court on the subject is that it was obligatory on the part of the plaintiffs to aver and plead that they not only have title over the property but also are in possession of the same for a period of more than 12 years in consonance of terms of Article 142 and 144 of the Limitation Act. In this case after the attachment, Article 142 or 144 of the Limitation Act have no application. He has further relied over the

case reported in (***1995) 1 SCC 311, Shyam Sunder Prasad and others Versus Rajpal Singh and another*** wherein the Hon'ble Apex Court held that the plaintiff before claiming any relief under Article 142 and 142 of the Limitation Act must prove not only his title to the property but also that he was dispossessed or had discontinued his possession within 12 years from the date of filing of the suit. In this case, the property was attached by the Magistrate. Consequently the question of dispossession does not arise. According to the learned Advocate, Article 142 and 144 of the Limitation have no application in this case. Further reliance has been placed on ***AIR 1922 Calcutta 419, Panna Lal Biswas Versus Panchu Raidas*** in which it has been held that after attachment under Section 146 Cr.P.C., suit for recovery of possession should be treated as one for declaration and only Article 120 applies. Reliance has further been placed on ***AIR 1959 SC 798, Balakrishna Versus Shree D.M.Sansthan*** stating that in a case of declaration only Article 120 applies. Further reliance has been placed on ***AIR 1928 Oudh 155, Abdul Halim Khan Versus Raja Saadat Ali Khan & others*** wherein it has been held that possession against a person not entitled to claim possession is not adverse. Lastly reliance has been placed on ***AIR 1916 Calcutta 751, Brojendra Kishore Roy Chawdhury & others Versus Bharat Chandra Roy and others*** wherein when the property was attached under Section 146 Cr.P.C., Article 120 was held to be applicable and it was a continuing wrong.

I have given anxious thought to the rival submissions of the parties. Article 120 of the Limitation Act corresponds to Article 113 of

Limitation Act, 1963 but only the period of limitation has been reduced to three years from six years. The scheme of Limitation Act is to provide a general residuary article for all suits not covered by a specific article. It is often spoken of as the omnibus article. Article 120 was final and residuary article like the present article 113 and includes all suits not specially provided for i.e. all action except those which are specifically provided in the statute are governed by Article 113, which corresponds to Article 120 of the Act. Admittedly, the plaintiff has filed the declaratory suit after the attachment of the suit by the Magistrate. He has brought the suit to recover the property which is custodia legis. It is a settled law that such a suit is considered as a suit for declaration as there is no continuing wrong. Accordingly, if the suit is brought for declaration after six years from the attachment after applying Article 120, it has to be held to be barred by Limitation. Article 120 (now Article 113) leaves no room for doubt that after attachment if a Magistrate appoints a Receiver and the parties referred to civil court for determination of their rights, such a suit for declaration after the attachment by the Magistrate falls under Article 120 of the Old Act (now under Article 113) and after the date of attachment by the Magistrate no fresh period of limitation began to run under Section 22, Limitation Act, there being no continuing wrong in such a case vide AIR 1942 PC 47 Raja Rajgan Maharaja Jagatjit Singh Vs. Raja Partab Bahadur Singh. For the purpose of limitation, possession during the period during which a disputed property is kept under attachment under Section 145 (4) Cr.P.C., is in law the

possession of the party whom the Magistrate as a result of the proceeding finally declares to be entitled to retain possession as the party who was in possession on the date of the proceeding.

Thus, in view of the decision in the case of AIR 1942 PC 47 (supra) the property in the hands of Receiver in the proceedings under Section 145 Cr.P.C. in a suit for declaration of title before passing of the order of the possession shall come within the purview of Article 120 and Article 142 and Article 144 of the Act has no application in that case. Accordingly, admittedly the property was attached in this case in a proceeding under Section 145 Cr.P.C. Thereafter the instant suit has been filed to establish his right by the plaintiff and accordingly it has to be covered by Article 120 of the Limitation Act.

In view of the rival submissions of the parties, I am of the view that the object of the proceedings under Section 145 Cr.P.C. being to determine as to which party was in possession on the date of the proceedings and to declare such party to be entitled to retain possession, the possession of the Court during the attachment in the course of the proceedings ensures for the benefit of such parties in whose favour such a declaration has to be made. Accordingly, Article 142 and 144 of the Limitation Act have no application in this case. Moreover Article 142 applies only where the plaintiff while in possession has been dispossessed or discontinued possession. In this case since the property was attached, the question of dispossession does not arise. The reference of dispossession by the plaintiffs after the attachment and to file thereafter a suit for declaration of the right

to property is not a suit for possession in case of custodia legis. Article 142 and 144 do not apply where the relief of possession is not the primary relief claimed. Here in this case the primary relief is of declaration. Consequently, Article 120 of the Limitation Act would apply.

Admittedly, the property in suit was attached in criminal proceedings u/s 145 Cr.P.C. The plaintiffs have brought the suit for declaration of their title in the year 1961 and for the recovery of possession over the property in suit was claimed in the year 1995. Thus at the time of filing of the suit it was barred by time.

In this context it would be relevant to refer the view of Full Bench of Kerala High Court in the case of ***Pappy Amma vs. Probhakaran AIR 1972 Ker 1 (FB)*** wherein it has been held that the order passed by the Magistrate under Section 145 Cr.P.C. is only a police order and is in no sense final. The property concerned may be attached and placed in charge of a Receiver. Such possession of the Receiver appointed by the Criminal Court merely passes the property in custodia legis and is not dispossession within the meaning of this article. Consequently, the contention of the learned counsel for the plaintiff that they were dispossessed does not arise. Accordingly, Article 142 and 144 have no effect to the case and with full force Article 120 is applicable. Therefore, a suit after more than six years of the attachment, if filed, for declaration is barred by Article 120 of the Limitation Act as held in the case of Ambica Prasad vs. R.Iqbal AIR 1966 SC 605.

Vis-a-vis the sequence of events and the law referred to above which leaves no room for doubt that the instant suit for declaration of title to the property attached under Code of Criminal Procedure is governed by Article 120 and not by Articles 142 and 144 of the Limitation Act. It is also settled proposition of law that after the attachment of the property under Section 145 Cr.P.C. and once a Receiver is appointed in respect of it, it passes into legal custody for the benefit of the true owner as the parties being referred to Civil Court for determination of their rights. In a suit falling under Article 120 together with Article 113 of the Limitation Act, the right to sue accrues when the attachment is made and not by any wrongful act of the defendant. Consequently, after the date of attachment by the Magistrate no fresh period of limitation began to run under Section 123 of the Limitation Act. There being no continuing wrong in such a case and it does not amount to dispossession or discontinuance of his possession as the property is under anticipation of an order, in which the right of title is to be declared by a competent court and possession of the Court should ensure for the benefit of a party in whose favour the Court would make a such declaration. Accordingly, the instant suit which has been filed after six years of the attachment is definitely barred by Limitation.

The Hon'ble Apex Court in ***AIR 1990 SC 10, S.S. Rathore vs. State of M.P.,*** held that Article 113 of the Act corresponding to Section 120 of the Act is a general one and would apply to suits to which no other article in the schedule applies. Thus, the statute of limitation Act

provides a time limit for all suits conceivable.

It is the clear contention of the defendants that the plaintiffs' suit is barred by limitation being a suit for right to worship and not a suit for immovable property as is being made out by the plaintiff and therefore is governed by Article 120 of the Limitation Act, 1908 and not Articles 144 or 142 of the Limitation Act, 1908 therefore suit can only be filed within 6 years.

Under the above-mentioned circumstances it is very apparent that the suit of the plaintiffs is actually a suit for declaration which is governed by Art.120 of the Limitation Act, 1908 and not governed by Art. 142 or 144 of the said Limitation Act.

It is an admitted fact that the Muslims had not been in possession of the said property from 22nd / 23rd December, 1949 and, therefore, any suit which had to be filed would have to be filed within 6 years and not within 12 years being under Art. 120. The plaintiffs filed the suit on18th December, 1961 much beyond the limitation period of 6 years. The suit, therefore, is clearly barred by limitation.

Reliance has been placed on the following cases;

AIR 1929 Madras 313 – Raja Ramaswamy Vs. Govinda Ammal, Para 19 to 25 *states that "It is not the form of the reliefs claimed which determines the character of the suit for the purposes of ascertaining under which Article of the Limitation Act the suit falls."*

"19. As regards the first point, it has been well-settled by several decisions of their Lordships of the Privy Council that

it is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining under which article of the Limitation Act the suit falls. Though the relief claimed in the suit is possession of immovable property, yet if the property sued for is held by the contesting defendant under a sale or other transfer which is not void, but only voidable, and he cannot obtain possession without the transfer being set aside, the suit must be regarded as one brought to set aside the transfer though no relief in those terms is prayed for, but the prayer is only for possession of the property. It has been so held with reference to Article 12, Limitation Act, where the defendant is in possession under a sale held in execution of a decree of a Court and also as to Article 91 where the instrument under which the defendant claims is one which is prima facie binding on the plaintiff. The same view was also taken with regard to the article in the old Limitation Act relating to suits brought to set aside an adoption. Their Lordships held in Jagadamaba Chowdhrani v. Dakhina Mohun Roy (1886) 13 Cal. 308 that even when the plaintiff did not in terms sue to set aside an adoption but only to recover possession of property on his prima facie title as reversionary heir he was bound to bring his suit within the time allowed by Article 129, Act 9 of 1871, provided the defendant was in possession by virtue of an apparent adoption; and the

plaintiff was not at liberty to bring his suit within the time allowed to reversionary heirs by Article 142 of that Act. As regards Article 12, Lim. Act, which relates to suits to set aside a sale in execution of a decree of a civil Court the leading case is Mallkarjun v Narhari (1901) 25 Bom. 337 . Their Lordships in that case held that though the suit was brought for redemption of a mortgage of immovable property for which the period of limitation is 60 years, yet as the defendant the mortgagee had purchased the equity of redemption in a judicial sale which was operative against the plaintiff, though liable to be set aside for due cause, the suit is governed by Article 12 and must be brought within the period of one year prescribed by that article. At p. 350 after referring to the case in Jagadamba Chaudrani v. Dakhina Mohun Roy Chaudhri, as supporting that view their Lordships observe with regard to that case:

There was difficulty in the case because the expression "set aside an adoption" is inaccurate. An adoption cannot be set aside though its validity may be impeached and in fact the language was altered in 1877 before the appeal was heard.

In **AIR 1969 SC 843 – Pierce Leslie & Co. Ltd. vs. Miss Violet Ouchterlony Wapshare, Para 7:** The plaintiffs claim declaratory reliefs, a decree vesting or re-transferring the properties to the old company or to the plaintiffs and

accounts. Such a suit is governed by Article 120. Even if the suit is treated as one for recovery of possession of properties it would be governed by Art. 120 and not by Art. 144. The old company could not ask for recovery of the property until they obtained a re-conveyance from the new company."

"Para 7. The next question is with regard to limitation. The conveyances in favour of the new company were executed on January 14, 1939, and May 15, 1939. Simultaneously with the execution of the conveyances the new company entered into possession of the properties. Even before that date by January 10, 1938, the appellant-company had taken possession of the properties. The suit was filed on December 21, 1950, when the Indian Limitation Act, 1908, was in force. The plaintiffs cannot claim relief on the ground of fraud and, consequently, Article 95 has no application. Section 10 does not apply as the properties are not vested in the new company for the specific purpose of making them over to the old company or to the plaintiffs. Article 144 does not apply for several reasons. In the plaint there is no prayer for recovery of possession. The plaintiffs claim declaratory reliefs, a decree vesting or re-transferring the properties to the old company or to the plaintiffs and accounts. Such a suit is governed by Article 120. The High Court passed a decree for money and

not for recovery of immovable properties. A suit for such a relief would be governed by Article 120. Even if the suit is treated as one for recovery of possession of the properties, it would be governed by Article 120 and not by Article 144. The old company could not ask for recovery of the properties until they obtained a reconveyance from the new company. The cause of action for this relief arose in 1939 when the properties were conveyed to the new company. A suit for this relief was barred under Article 120 on the expiry of six years. After the expiry of this period the old company could not file a suit for recovery of possession. In Chhatra Kumari Devi v. Mohan Bikram Shah the Privy Council held that in a case where the property was not held by the trustee for the specific purpose of making it over to the beneficiary and the trust did not fall within Section 10, a suit by the beneficiary claiming recovery of possession from the trustee was governed by Article 120. Sir George Lowndes said:

> " The trustee is, in their Lordships' opinion, the 'owner' of the trust property, the right of the beneficiary being in a proper case to call upon the trustee to convey to him. The enforcement of this right would, their Lordships think, be barred after six years under Article 120 of the Limitation Act, and if the beneficiary has allowed this period to expire without suing, he cannot

afterwards file a possessory suit, as until conveyance he is not the owner."

It follows that the suit is barred by limitation.

In **(1888) ILR 15 Cal 58 – Janki Kunwar Vs. Ajit Singh, Para 8:** *"It was not a suit for possession of the immovable property to which this limitation of 12 years is applicable. The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced..."*

8. Both the lower Courts seem to have treated this question in a manner which cannot be regarded as satisfactory. The District Judge, having stated the previous proceedings, says: "Under these circumstances I think it but just that she" that is, the present appellant- "should be allowed to count her limitation from the 31st of May 1881, the date on which the District Judge decided her husband had been defrauded in the cases then before him." He takes no notice of the fact that Bijai was also a party to the suit, and that his knowledge was a material matter to be regarded, and he fixes, apparently in a somewhat arbitrary manner, on the 31st of May 1881, the date of the decision of the District Judge in the former suits, as that from which the period of limitation would run. That ground cannot be

supported. The District Judge has not directed his mind to the real question, which is when the circumstances that are said to constitute the fraud became known to Bijai. Then the Judical Commissioner deals with the case in a different way. He says the suit is essentially a suit for the possession of immoveable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immoveable property in the sense to which this limitation of 12 years is applicable. The immoveable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs. 1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Article. 91 of the Act XV of 1877, and is therefore barred.

In **AIR 1937 Cal 500 – Jafar Ali Khan & Ors. Vs. Nasimannessa Bibi; para 7 "**It may be taken to be established now that where there is a suit for recovery of possession there is an obstacle in the way of granting relief in the shape of gift or settlement, the plaintiff cannot get any relief until such instrument is set aside; and asset has been said, if it is too late for setting aside the document suit for possession would also fail."

“14. The question of limitation arises for consideration in the case. In view of the conclusion arrived at by the Judge in the Court below that there was delivery of possession of the property covered by the deed of settlement (Nirupanpatra) executed by Saheb Jan Khan, it could not, in our judgment, be said that the plaintiff had no knowledge of the document she wanted to avoid. The Hebanama executed by her on the same date as the deed of settlement executed by Saheb Jan, contained a recital to this effect: "I have given my consent to the deed of settlement executed (this day) by my husband Saheb Jan Khan in your favour (that is, in favour of Jafar Ali Khan, defendant 1 in the suit) and I am bound by that." We have in the case giving rise to Appeal from Original Decree No. 43 of 1934, held that the Hebanama could not be avoided as the document was executed by the plaintiff with full knowledge of its contents. Our decision therefore must be, and it is, that the plaintiff had knowledge of the deed of settlement at the time of the execution of the Hebanama and of the deed of settlement executed on the same date-one by the plaintiff herself and the other by her husband Saheb Jan Khan, on 27th January 1929. With reference to the application of Article 91, Schedule 1, Lim. Act, we have given our decision in our judgment in the connected Appeal No. 43, and for the reasons stated in that judgment, Article 142, Sch. 1, Lim.

Act, cannot apply to this case. The plaintiff's suit was barred by limitation and it must be dismissed on that ground."

In view of the discussions, referred to above, it transpires that the claim of the plaintiffs is governed by Article 120 of the Limitation Act, 1908 and not by Articles 142 and 144 of the Limitation Act,1908. Therefore, the suit could only be filed within 6 years, therefore, the suit is barred by limitation. Issue No.3 is decided against the plaintiffs and in favour of the defendants.

ISSUE NO. 5(a)

Are the Defendants estopped from challenging the character of property in suit as a waqf under the administration of plaintiff' No. 1 in view of provision of 5(3) of U.P. Act 13 of 1936?

FINDINGS:

This issue has already been decided in the negative vide order dated 21.4.1966 by the learned Civil Judge.

ISSUE NO. 5(b)

Has the said Act no application to the right of Hindus in general and defendants in particular to the right of their worship?

FINDINGS:

It has been urged on behalf of the defendants that U.P. Act No. 13 of 1936 United Provinces of Waqf Act, 1936 has no application to the rights of Hindus in general and defendants in particular and the rights of Hindus of worship is not affected by it. Muslim side has not advanced any argument against the aforesaid submissions. It

transpires from the bare reading of the Act that it was enacted with a view that it should apply to all the Waqfs whether created before or after commencement of this Act. It does not affect the right of worship of Hindus. It does not deal with the right of Hindus about their worship. Consequently, U.P. Act No. 13 of 1936 has no application to the right of Hindus about their worship. Issue No. 5(b) is decided against the plaintiffs and in favour of the defendants.

ISSUE NO. 5(c)

Were the proceedings under the said Act conclusive?

FINDINGS:

This issue has already been decided in the negative vide order dated 21.4.1966 by the learned Civil Judge.

ISSUE NO. 5(d)

Are the said provision of Act XIII of 1936 ultra vires as alleged in written statement?

FINDINGS:

This issue was not pressed by counsel for the defendants, hence not answered by the learned Civil Judge, vide his order dated 21.4.1966.

ISSUES NO. 5(e) and 5(f)

5(e). Whether in view of the findings recorded by the learned Civil Judge on 21.4.1966 on issue no. 17 to the effect that, "No valid notification under Section 5(1) of the Muslim Waqf Act (No. XIII of 1936) was ever made in respect of the

property in dispute", the plaintiff Sunni Central Board of Waqf has no right to maintain the present suit?

5(f). Whether in view of the aforesaid finding, the suit is barred on account of lack of jurisdiction and limitation as it was filed after the commencement of the U.P. Muslim Waqf Act, 1960?

FINDINGS:

Both issues are connected with each other and conveniently be disposed of at one place. On 21.4.1966, learned Civil Judge has already decided issue no.17 that no valid notification was made in respect of the property in dispute. The relevant extract of the said order is reproduced as under:-

"In view of the facts and reasons discussed above, I hold under issue no. 17 that no valid notification under Section 5(1) of U.P. Muslim Waqf Act No. XIII of 1936 was ever made so far relating to the specific disputed property of the present suits at hand. The alleged Government Gazette Notification Paper No.243/C read with the list paper No.243/1A do not comply with the requirements of a valid notification in the eyes of law and equity as I have already discussed above. The aforesaid two papers, therefore, serve no useful purpose to the plaintiffs of the leading case."

In view of my above findings I hold that the bar provided in Section 5 (3) of U.P. Act No. XIII of 1936 does not hit the defence of the defendants of the leading case and their suits which are connected with the aforesaid leading case. Issue No. 17 is answered

accordingly."

In view of the aforesaid findings, the attention of this Court was invited to this effect that the Waqf was registered under the Muslim Waqf Act No. XIII of 1936. Without any valid notification and registration the Waqf is not in accordance with the provisions of the Act of under Section 5(1) of the Muslim Waqf Act (No. XIII of 1936) and as such even for want of pleadings Sunni Central Board of Waqf has no right to maintain the present suit in view of Section 87(1) of the Muslim Waqf Act, 1995. Learned counsel for the plaintiffs has refuted the aforesaid argument and has urged that Section 87 of the Waqf Act, 1995 is not applicable in the instant case. Plea of registration of Waqf has not been denied and there being no allegation about the non-registration of the Waqf, no issue was framed in this respect. As such Section 87 cannot be invited that there being any factual foundation for such plea. Thus to resolve the controversy it is necessary to go through the United Provinces Muslim Waqfs Act, 1936. Section 5 reads as under:-

> *"5. Commissioner's report:-(1) The local Government shall forward a copy of the Commissioner's report to each of the Central Boards constituted under this Act. Each Central Board shall as soon as possible notify in the Gazette the waqfs relating to the particular sect to which, according to such report, the provisions of this Act apply.*
>
> *2. The mutwalli of a waqf or any person interested in a waqf or a Central Board may bring a suit in a civil court of competent jurisdiction for a declaration that any transaction held by the Commissioner of waqfs to be a waqf*

is not a waqf, or any transaction held or assumed by him not to be a waqf is a waqf, or that a waqf held by him to pertain to a particular sect does not belong to that sect, or that any waqf reported by such Commissioner as being subject to the provisions of this Act is exempted under section 2, or that any waqf held by him to be so exempted is subject to this Act:

Provided that no such suit shall be instituted by a Central Board after more than two years of the receipt of the report of the Commissioner of waqfs, and by a mutawalli or person interested in a waqf after more than one year of the notification referred to in sub clause (1):

Provided also that no proceedings under this Act in respect of any waqf shall be stayed or suspended merely by reason of the pendency of any such suit or of any appeal arising out of any such suit.

3. Subject to the final result of any suit instituted under sub section (2) the report of the Commissioner of waqfs shall be final and conclusive.

4. The Commissioner of waqfs shall not be made a defendant to any suit under sub-section (2) and no suit shall be instituted against him for anything done by him in good faith under colour of this Act."

The parties have failed to produce any notification under Section 5(1) of the Muslim Waqf Act, 1936 before this Court. Consequently, the finding recorded by civil judge on 21.4.1966 is factually correct. Thus, without any valid notification under Section 5(1) of the Muslim Act, 1936 the property in suit was registered as Waqf. It is also a settled proposition of law 'if a thing has to be done, it should be done in accordance with law or otherwise not'. Thus the registration of the Waqf was required to be done only in accordance with the provisions of U.P. Muslim Act, 1936. Thus without any notification under Section 5(1) legally it was not possible to register

the property in suit as a Waqf by the Board. Thus in this case since there is no Gazette notification under Section 5(1). Accordingly, the registration of the property as Waqf property cannot be deemed to be legal registration under the Act. There is nothing in the Act which overcomes the provision of Section 5(1) of the Act. There is no provision under the Act to dispense with the requirement of Section 5(1) of the Waqf Act, 1936. Thus the registration is made in contravention of the provisions of Section 5(1) of the Act, 1936 and on the basis of registration plaintiffs cannot successfully plead before this Court that Section 87(1) of Waqf Act, 1935 (Act No. 43 of 1995) has no application in this case.

Let me understand the provisions of Section 87 of Waqf Act, 1995 which reads as under:-

"87. Bar to the enforcement of right on behalf unregistered wakfs.— (1) Notwithstanding anything contained in any other law for the time being in force, no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any wakf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any Court after the commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted or commenced before such commencement, no such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any court after such commencement unless such wakf has been registered, in accordance with the provisions of this Act.

(2) The provisions of sub-Section (1) shall apply as far as may be, to the claim for set-off or any other claim made on behalf of any wakf which has not been registered in accordance with the provisions of this Act."

Shri P.N. Misra, Advocate has submitted that in view of findings of the learned Civil Judge dated 21.4.1966 **Sunni Central Board of Waqf has no right to maintain the present suit** and the present suit is liable to be dismissed. His submissions are as under:-

INSTANT SUIT IS BARRED BY SECTION 87(1) OF THE WAQFS ACT, 1995:

1. In view of the findings recorded by the Learned Civil Judge on 21.04.1966 in deciding the issue no. 17 to the effect that. "No valid notification under Section 5(1) of the Muslim Act (No. XIII of 1936) was ever made in respect of the property in dispute" ; **the plaintiff Sunni Central Board of Waqf has no right to maintain the present suit and the present suit is liable to be dismissed under Section 87 of the Waqf Act, 1995** (Act No. 43 of 1995) which reads as follows :

> "**87. Bar to the enforcement of right on behalf unregistered wakfs.-**
>
> (1) Notwithstanding anything contained in any other law for the time being in force no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any wakf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any court after the commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted or commenced before such commencement, no such suit appeal or other legal proceeding shall be continued, heard, tried or decided by any court after such commencement unless such wakf has been registered, in accordance with the provisions of this Act.
>
> (2) The provisions of sub-section (1) shall apply as far as may be, to the claim for set-off or any other claim made on behalf of

any wakf which has not been registered in accordance with the provisions of this Act,

2. As the said Section 87(1) of the Wakf Act, 1995 contains a non-obstante clause which shall not only prevail over the contract but also other laws in view of the judicial pronouncement made in the Union of India & Ors Vs. SICOM Ltd. & Anr. Reported in 2009 AIR SCW 635 as also in 2009 CLC 91 (Supreme Court) relevant portion of paragraph 3 whereof (at page SCW 638) reads as follows:

"3. Mr. Shekhar Naphade, Learned senior counsel appearing on behalf of the respondent, on the other hand, submitted that principle that a crown debt prevails over other debts is confined only to the unsecured ones as secured debts will always prevail over a crown debt. Our attention in this behalf has been drawn to the non obstante clause contained in Section 56 of the 1951 Act. It was furthermore contended that for the self-same reason Section 529A in the Companies Act was inserted in terms by way of special provisions creating charge over the property and some of the State Governments also amended their Sales Tax Laws incorporating such a provision. The Central Government also with that view, amended the Employees' Provident Funds and (Miscellaneous) Provisions Act, 1952 and employees' State Insurance Act, 1948.

The learned counsel appears to be right."

3. In State Bank of India Vs. Official Liquidator of Commercial Ahmedabad Mills Co. & ors. Reported in 2009 CLC 73 (Gujrat High Court) it has also been held that a non-obstante clause would override

all other provisions of the Act as well as any other law in force in the said date. Paragraphs 13, 14, and 17 of the said judgement read as follows:

> **"13.** Section 529-A of the Act opens with a non obstante clause and stipulates that notwithstanding anything contained in any other provisions of the Act or any other law for the time being in force in the winding up of a Company, workers' dues and debts due to secured creditors, shall rank pari passu and shall be paid in priority to all other debts. Therefore, the said provision has an overriding effect not only qua the provisions of the Act but also any other law for the time being in force. Section 529-A of the Act was inserted on the statute book vide Act No. 35 of 1985 with effect from 24.5.1985 and, therefore, would override all other provisions of the Act as well as any other law in force on the said date.
>
> **14.** Therefore, prima facie, provisions of Section 42 of ULC Act cannot claim primacy over provisions of Section 529-A of the Act considering the fact that ULC Act was brought on statute in 1976 while Section 529-A of the Act is a subsequent legislation brought on statute book in 1985. Possibly this aspect of the matter, may not have been brought to the notice of the Company Court. However, the jurisdiction vested in a Company Court is a special jurisdiction and considering the true scope and object of the provisions of Section 529-A of the Act, Official Liquidator functions under the directions of the

Company Court and acts for and on behalf of the company Court, primarily to ensure that the interest of workmen of a company (in liquidation) do not go unrepresented and are taken care of. This salutary feature of functioning of Company Court could not have been overlooked by the Company Court while determining the issue in question.

17. Thus, what is the effect of provisions of Section 529-A of the Act have to be necessarily considered by the Company Court in every matter where the properties/assets of the Company (in liquidation) are claimed by a person other than secured creditors and workmen. The Company Court could not have decided the matter as if the issue was only a dispute between the land owner and the competent authority under the ULC Act. It is equally well settled in law that though procedural compliance is required to be established in justification of an action, yet at the same time, mere form over substance cannot be preferred."

4. The bar to the enforcement of right on behalf of the unregistered wakfs imposed under Section 87(1) of the Wakf Act, 1995 is clearly reasonable and in the interest of the general public in view of the judicial pronouncement of the Hon'ble Supreme court of India in bhandar District Central Cooperative Bank Ltd. & ors. Vs. State of Maharashtra & Anr. Reported in 1993 Supp (3) SCC 259 wherein the provisions of Section 145 of Maharashtra Cooperative Societies Act, 1996 which barred an unregistered society from using the word 'co-operative' in its name or title, was held reasonable and in the interest

of the general public as the purpose of said Section 145 was to ensure that the general public had adequate notice that a society they might have to deal with, was unregistered. Paragraph 3 of the said judgement reads as follows:

> **"3**. According to the case of the petitioners, the designated officers are entitled to manage the affairs of the co-operative societies as entrusted to them by the members, without any interference by the legislature, and the restrictions imposed by the impugned provisions are violative of their fundamental rights as protected by Articles 19(1)(c) and (g) of the Constitution. The members of a co-operative society, according to the argument, are entitled to conduct the affairs of the society in accordance to their choice and any interference in this is uncalled for. We were not able to fully appreciate this argument, and so we pointed out to Mr. Anil B. Divan, the learned Counsel for the petitioners (that is, the appellants in Civil Appeal No. 2706/88), that there was no impediment in the running of the societies, and the impugned provisions are attracted only in such cases where the societies are desirous of being registered under the Act with a view to take advantage of the provisions thereunder. The Act does not place any restriction on the formation of any association or union for carrying on any trade or business, nor does it require such unions or societies to be registered under the Act. The petitioner-societies were free to proceed as they wished (of course, they could 'not be allowed to

contravene any law) without being subjected to any condition placed by the Act, but in that case they would not be entitled to the benefits of the Act. Mr. Divan appreciating the situation, explained his point by saying that as a consequence of Section 145 of the Act an unregistered society is not entitled to use the word "co-operative" in its name or title (without the sanction of the State Government) and this by itself puts the society under a disadvantage, affecting its trade and business. The learned Counsel fairly conceded that he is not in a position to rely on any other circumstance in support of his argument based on Articles 19(1)(c) and (g). We do not find any merit in this point which is solely based on the ban of the use of the word "co-operative", by Section 145. The restriction is clearly reasonable and in the interest of the general public and is, therefore, saved by Clause (6) of Article 19. The purpose of Section 145 is to ensure that the general public has adequate notice that a society they may have to deal with, is unregistered and, therefore, not amenable to the provisions of the Act, before taking a decision about their relationship with the same. The persons desirous of running such a society have been placed under an obligation to publicly declare that their society is not registered under the Act, and we do not see any valid objection to this course. The main argument of Mr. Divan is, therefore, overruled.

5. In AIR 1958 A.P. 773 (Pamulapati Buchi Naidu College Committee Nidubroly & Ors. V. Government of Andhra Pradesh &

ors.) the Hon'be Andhra Pradesh High Court held that if a society is not registered under the Act, it would have the character of an association which cannot sue or be sued except in the name of all the members of the association. The registration of the society confers on it certain advantages. Once the society is registered it enjoys the status of a legal entity apart from the members constituting the same and is capable of suing or being sued. Relying on said judgment, it is humbly submitted that similar fate is of unregistered waqf. Registration of waqf confers right upon the Central Board of Waqfs to sue or be sued in respect of the affairs and properties of the registered waqf while in case of unregistered waqf of alleged Babri Masjid the Sunni Central Board of Waqfs has no right to maintain instant suit as such the instant sit is liable to be dismissed. Relevant extracts from paragraph 19 of the said judgment reads as follows:

> "(19) The basic assumption made by the learned counsel for the petitioner that the registration of society can be equated to the granting of a Royal Charter, does not rest on a solid foundation. A society registered under the Societies Registration Act is an association of individuals which comes into existence with certain aims and objects.
>
> If it is not registered as a society under the Act, it would have the charter of a association which cannot sue or be sued except in a name of all the members of the association. The registration of the Society confers on it certain advantages. The members as well as the Governing body of the Society are not always the

same. Even though the members of the Society or the Governing body fluctuate from time to time, the identity of the society is sought to be made continuous by reason of the provisions of the Societies Registration Act.

The Society continues to exist and to function as such until its dissolution under the provisions of the Act. The properties of the society continue to be vested in the trustees or in the governing Body irrespective of the fact that the members of the society for the time being are not the same as they were before; nor will be the same thereafter.

By reason of the provisions of the Societies Registration Act, once the society is registered with the Registrar, by the filing of the memorandum and certified copy of the rules and regulations and the Registrar has certified that the society is registered under the Act, it enjoys the status of a legal entity apart from the constituting the same and is capable of suing or being sued.

But the fact to be noted is that what differentiates a society registered under the Act of 1860 from a company incorporated under the Companies Act is that the latter case the share-holders of the company hold the properties of the company as their own whereas in the case of a society registered under the Act of 1860, the members of the society or the members of the governing body do not have any proprietary or beneficial interest, in the property the society holds.

Having regard to the fact that the members of the general body

of the society do not have any proprietary or beneficial interest in the property of the society, it follows that upon its dissolution, they cannot claim any interest in the property of the dissolved society. The Societies Registration Act, therefore, does not create in the members of the registered society any interest other than that of bare trustees. What all the members are entitled to is the right of management of the properties of the society subject to certain conditions.

6. In ***AIR 1959 MP 172 (Radhasoami Satsang Sabha Dayalbag V. Hanskumar Kishanchand)*** the Hon'ble Madhya Pradesh High Court held that the registration under the Societies Registration Act, confers on a society a legal personality and made it corporation or quasi-corporation capable of entering into contracts. Relying on said judgment it is submitted that unregistered alleged Babri Mosque waqf Cannot confer any right upon the Sunni Central Board of Waqfs to make them competent to maintain the instant suit for and on behalf of such unregistered waqf. Relevant paragraph 13 of the said judgment reads as follows:

> "**13.** It is not disputed that the plaintiff society being a registered society under the Societies Registration Act is a corporation or a quasi-corporation capable of entering into a contract. The registration confers on the plaintiff Sabha a legal personality and consequently any contract entered into by it would bo legally enforceable, unless it was vitiated by an illegality or was shown to be void for any other reason."

7. The United Provinces Muslim Waqfs Act, 1936 provides that under its Section 4(1) within three months of the commencement of the said Act, the local Government shall by notification in the gazette appoint for each District Commissioner of Waqfs for the purpose of making a survey of all waqfs in such district and to submit his enquiry report to the local Government under Section 4(5) of the said Act. Section 5(1) of the said Act provides that the local Government shall forward a copy of the Commissioner's report to each of the Central Boards and each Central Board shall, as soon as possible, notify in the gazette the waqfs relating to the particular sect to which, accordingl to such report, the provisions of that Act apply. Only after such notification a waqf can be registered under Chapter III. As such, after declaration of the notification under Section 5(1) of the said Act invalid by the learned trial Judge in disposing of the issue No. 17 in the instant wuit vide His order dated 21.04.1966, the registration of the waqf based on said notification became ab initio null and void.

8. The relevant provisions of the United Provinces Muslim Waqfs Act, 1936 read as follows:

> **"4. (1)** Within three months of the commencement of this Act the Local Government shall by notification in the Gazette appoint for each district a gazette officer, either by name or by official designation, for the purpose of making a survey of all waqfs in such district, whether subject to this Act or not. Such Officer shall be called "Commissioner of Waqfs.
>
> a.....

5) The Commissioner of Waqfs shall submit his report of inquiry to the Local Government.

(5). (1) The Local Government shall forward a copy of the Commissioner's report to each of the Central boards constituted under this Act. Each Central Board shall as soon as possible notify in the Gazette the waqfs relating to the particular sect to which, according to such report, the provisions of this Act apply.

38. (1) Every waqf whether subject to this Act or not and whether created before or after the commencement of this Act shall be registered at the office of the Central Board of the sect to which the waqf belongs.

(2) The mutwalli of every such waqf shall make an application for registration within three months of his entering into possession of the waqf property, or in the case of waqf existing at the time of formation of the first Central Board, within three months of the formation of such Central Board.

(3) Application for registration may also be made by a waqif or his descendants or a beneficiary of the waqf, or any Muslim belonging to the sect to which the waqf belongs.

(6) On receipt of an application for registration the Central Board may before registering the waqf make such inquiries as it thinks fit in respect of its genuineness and validity and the correctness of any particulars in the statement filed with the application and when the application is made by any person other than the person holding possession of any property or

properties belonging to the waqf, the Central Board shall give notice of the application to the person in possession and hear him, if he desired to be heard, before passing final orders.

40. The Central Board may direct a mutawalli to apply for the registration of a waqf, or to supply any information regarding a waqf or may itself collect such information and may cause the waqf to be registered or may at any time amend the register of waqfs."

9. Sections 18(1) and 18(2)(e) & (g) of the United Provinces Muslim Waqfs Act, 1936 provide that the Central Board can maintain suit in respect of administration and recovery of lost properties only of those waqfs to which the provisions of the said Act applies. As the provisions of the said Act does not apply to the waqf inrespect whereof notification under Section 5(1) has not been made and in furtherance whereof has not been registered under Section 38 or Section 40, as the case may be. Be it mentioned herein that Section 38(1) which is a mandatory provision provides that the mutawalli of every waqf whether created before or after the commencement of that Act shall make an application for registration within three months of its entering into possession of the waqf property or in the case of waqf existing at the time of formation of the first Central Board within three months of jthe formation of such Central Board. Sections 18(1), 18(2)(e), (f) & (g) of the said Act read as follows:

"18. (1) The general superintendence of all waqfs to which this Act applies shall vest in the Central Board. The Central Board shall do all things reasonable and necessary to ensure that waqf or endowments under its superintendence are properly maintained, controlled superintendence are properly maintained, controlled and administered and duly appropriated to the purposes for which they were founded or for which they exist.

(2) Without prejudice to the generality of the provisions of sub-section (1) the powers and duties of the Central Board shall be---

(e) to institute and defend suits and proceedings in a Court of Law relating to

administration of waqfs,

taking of accounts,

appointment and removal of mutawallis in accordance with the deed of waqf if it is traceable,

putting the mutawallis in possession or removing them from possession,

settlement or modification of any scheme of management,

(f) to sanction the institution of suits under Section 92 of the Code of Civil Procedure, 1908, relating to waqfs to which this Act applies;

(g) to take measures for the recovery of lost properties;

…."

10. Prior to 21.4.1966 that is the date of invalidating the notification

under Section (51) of the United Provinces Muslim Waqfs Act, 1936 by the learned trial Judge in the instant suit, the Uttar Pradesh Muslim Wakfs Act, 1960 (Act No. XVI of 1960) had already come into force wherein under Section 6(2) the Commissioner of Wakfs was empowered to make inquiries in respect of wakfs and to send his inquiry report to each of the Boards and State government under Section 6(4) of the said Act for its notifying the same in official gazette. Thereafter the notified wakfs were to be registered under Section 29 or 31 as the case may be. The aforesaid provisions of the said Act read as follows:

6. Survey of Wakfs.-(1) …

(2) The Commissioner of wakfs shall after making such inquiries as he may consider necessary, ascertain and determine-

(a) the number of all wakfs in the area showing the Shia wakfs and Sunni wakfs separately,

(b) the nature and objects of each wakf,

(c) the gross income of the property comprised in each wakf,

(d) the amount of revenue, cesses, rates taxes and surcharge payable to the Government or the local authority in respect of each wakf property,

(e) expenses incurred in the realization of the income and the pay or other remuneration of the mutawalli of each wakf,

(f) [omitted by U.P. Act 28 of 1971]

(g) such other particulars relating to each wakf as may be prescribed,

Provided that where there is a dispute as to whether a particular wakf is a Shia wakf or Sunni wakf and there are clear indications in the recitals of the deed of wakf as to the sect to which it pertains, such dispute shall be decided on the basis of such recitals.

…...

(4) The Commissioner, the Additional Commissioner of wakfs or Assistant Commissioner of Wakfs shall submit his report of enquiry containing the particulars mentioned in sub-section (2) above to each of the Boards and the State Government and the State Government shall, as soon as possible, notify in the official Gazette the wakfs relating to particular sect, to which, according to such report, the provisions of this Act apply.

29. Registration.- (1) Every other wakf, whether subject to this Act or not and whether created before or after the commencement of this Act shall be registered at the office of the Board of sect to which the wakf belongs.

(2) Application for registration shall be made by the mutawalli within three months of his entering into possession of the wakf property.

Provided that such application may be made by the wakif or his descendants or a beneficiary of the wakf or any Muslim belongint to the sect to which the wakf belongs.

…...

(7) On receipt of an application for registration, the Board may

before the registration of the wakf, make such inquiries as it thinks fit in respect of its genuineness and validity and the correctness of any particular therein, and, when, the application is made by any person other than the person registering the wakf, give notice of the application to the person administering the wakf property and shall, after affording him a reasonable opportunity of hearing pass such orders as it may deem fit.

(8) Any person aggrieved by an order of the Board under sub-section (7) may, by application within 90 days from the date of that order refer the dispute to the tribunal which shall give its decision thereon."

31. Power to cause registration of wakf and to amend register.- The Board may direct a mutawalli to apply for the registration of a wakf, or to supply any information regarding a wakf or may itself collect information and cause the wakf to be registered or may at any time amend the register of wakf."

11. As after invalidation of notification under Section 5(1) of the United Provinces Act, 1936 neither fresh survey of the waqf in question was caused under Section 6 of the Uttar Pradesh Muslim Wakfs Act, 1960 nor application for registration was made under Section 29 (2) of the said Act of 1960 within a period of three months nor the Board did take any steps for registration of the said wakf under Section 31 of the said Act of 1960. The alleged wakf remained unregistered wakf to which neither 1936 Act nor 1960 Act or 1995 Act are applicable as such the Plaintiff Wakf board has no locus standi and

instant Suit is hit by the provision of Section 87(1) of the Wakf Act, 1995. As such, the instant suit is not fit for being continued, heard, tried or decided and is liable to be dismissed on this score alone.

12. Be it mentioned herein that in the Wakf Act, 1954 since repealed Section 66.E had also provision similar to Section 87(1) of the Wakf Act, 1995. Section 66.E of the Wakf Act, 1954 reads as follows:

> **66.E. Institution of suit or legal proceedings in certain cases.-** Notwithstanding anything contained in any other law for the time being in force, no suit or legal proceeding in respect of the administration or management of wakf, or any other matter or dispute for the determination or decision of which provisions have been made in this Act, shall be instituted in any court or Tribunal except under, and in accordance with, the provisions of this Act.

13. It is also note worthy that Section 6 of the Societies Registration Act, 1860 and Section 69(2) of the Partnership Act, 1932 filing of suits by or against the registered Societies or Registered Firms respectively and thereby debar office bearer or partner of unregistered Society or Firm for or on behalf of such Societies or Firms allows. For the purpose of interpretation intention of the legislatures may be inferred by importing form those provisions.

> Section 6 of the Societies Registration Act, 1860 reads as follows:
>
> Suits by and against societies.- Every society registered under this Act may sue or be sued in the name of President, Chairman,

or Principal Secretary, or trustees, as shall be determined by the rules and regulations of the society and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion:

Provided that it shall be competent for any person having a claim, or demand against the society, to sue the President or Chairman, or Principal Secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

Section 69 (1) & (2) of the Partnership Act, 1932 reads as follows:

"69. Effect of non-registration.- (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on a behalf of any persons suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm : Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third

party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

14. In AIR 1961 SC 808 (C. Mohammad Uunus V. Syed Unnissa & Ors.) the Hon'ble Supreme court has held that under Section 2 of the Shariat Act, 1937 in questions relating to charities and charitable institutions and charitable and religious endowments, a custom or usage would prevail. But Section 2 of the as amended by Madras Act, XVIII of 1949 the rule of decision even in matters regarding wakf relating to above subject is the Muslim personal law notwithstanding a custom or usage to contrary. Though the provision affect vested rights of the parties, the intention of the legislature was clear and the act applied to all cities and provinces pending even in appeal on the date when the Act was brought into operation. Relevant paragraph Nos. 9 and 10 of the said judgment read as follows:

"9. Under the Shariat Act, 1937, as framed, in questions relating to charities and charitable institutions and charitable and religious endowments, the custom or usage would prevail. But the Act enacted by the Central Legislature was amended by Madras Act 18 of 1949 and s. 2 as amended provides :

"Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract, or gift or any other provision of personal law, marriage, dissolution of marriage, including Tallaq, ila,

zihar, lian, Khula and Mubarrat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

10. Manifestly by this act, "the rule of decision" in all questions relating to intestate succession and other specified matters including wakfs where the parties to the dispute are Muslims is the Muslim Personal Law. The terms of the Act as amended are explicit. Normally a statute which takes away or impairs vested rights under existing laws is presumed not to have retrospective operation. Where vested rights are affected and the question is not one of procedure, there is a presumption that it was not the intention of the legislature to alter vested rights. But the question is always one of intention of the legislature to be gathered from the language used in the statute. In construing an enactment, the court starts with a presumption against retrospective if the enactment seeks to affect vested rights : but such a presumption may be deemed rebutted by the amplitude of the language used by the Legislature. It is expressly enacted in the Shariat Act as amended that in all questions relating to the matters specified, "the rule of decision" in cases where the parties are Muslims shall be the Muslim Personal Law. The injunction is one directed against the court : it is enjoined to apply the Muslim Personal Law in all cases relating to the

matters specified notwithstanding any custom or usage to the contrary. The intention of the legislature appears to be clear; the Act applies to all suits and proceedings which were pending on the date when the Act came into operation as well as to suits and proceedings filed after that date. It is true that suits and proceedings which have been finally decided would not be affected by the enactment of the Shariat Act, but if a suit or proceeding be pending even in appeal on the date when the Act was brought into operation, the law applicable for decision would be the Muslim Personal Law if the other conditions prescribed by the Act are fulfilled. In our view, the High Court was right in holding that it was bound to apply the provisions of the Shariat Act as amended by Madras Act 18 of 1949 to the suit filed by the plaintiffs.

15. In the application for registration of waqf made under Section 38 of the United Provinces Muslim Waqfs Act, XIII of 1936 being exhibit 38 on pages 199 to 205 of the volume No. 11 of the documents filed in the instant suit by the Plaintiffs in its column no. 3 it has been stated that there is no waqf but the waqifs are Emperor Babar and Nawab S'-a-Dat Ali Khan. Below column no. 16 there is a note which says that the claim of the alleged Mutwalli's family is that within mentioned property said to be granted for maintenance of the alleged Babari Mosque at somewhere else is not a waqf but a Service Grant in their favour. The aforesaid application tells Emperor Babar and Nawab Sa'-a-Dat Ali Khan as joint waqifs which is quite impossible

because the Emperor Babar died in 1530 AD while Nawa Sa'-a-Dat Ali Khan ascended on throne in 1732 AD as such the persons who were not contemporary and there was a gap of 202 years between the former and latter they cannot be joint waqifs of same and one waqf alleged to be Babri Masjid Waqf. This fact alone totally falsify the claim of the plaintiffs that the alleged waqf was created by the Emperor Babar. The grant in question was also a service grant not a waqf. The person who made application namely, Syed Kalbe Hussain had also his vested interest as it appears from the note of the application that his intention was to file a case against the persons who were enjoying their property claiming the same to be a service grant; from being motivated with such spirit and he made the aforesaid application for registration making fraudulent dishonest false and frivolous statements.

16. Be it mentioned herein that the plaintiffs have used fraud upon this Hon'ble Court by producing wrong transliteration of the note contained in said application for registration. Though in its original Urdu text it has been recorded that the persons recorded in revenue records do not consider it waqf but in Hindi transliteration thereof the plaintiffs by deleting the word 'nahi' of vital importance which finds place in between the words 'waqf' and 'tasleem' have made it meant that those persons says that it is waqf and *nankar mafi*. This fact came into light when the original text was read over in open Court by the Hon'ble Justice S.U. Khan, J. during my argument.

17. In the list of Sunni Waqfs published in supplement to the

Government Gazette of United Provinces dated 26th February, 1944 under Section 5 of U.P. Muslim Waqfs Act, XIII of 1936 to which, according to the report of the Commissioner of waqfs, the provisions of the said Act apply; on page 11 at serial no. 26 (being the volume No. 12 of the documents filed in the instant suit) it has been notified that Babri Mosque is located at Qasba shahnawa not at Ramkot in ayodhya. Hindi transliteration of relevant page of the said gazette notification containing the name of Badshah Babar on serial No. 26 is on page no. 341 to 345 of volume 12 of the documents filed in the instant suit. Hindi Transliteration of the proforma of the list as well as the entries against item no. 26 of the said reads as follows:

	नामे वाकिफ या वक्फ	नाम–मतवली मौजूदा	नौ इयते जायदाद मकूफा
26	बदशाह बाबर	सैयद मोहम्मद जकी मतबली मस्जिद बाबरी कस्बा शाहनबा डाकखाना दर्शनगर	

From the above Gazette notification dated 26th February, 1944 it appears that badshah Babar had erected a Mosque in Shahnawa town within the postal jurisdiction of Darshan Nagar of which Syed Mohammed Zaki was Mutawalli. The said gazette notification did not say that there was a mosque in Ramkot Pargana Havelli, Ayodhya in the district of Faizabad. As such said Babri Mosque Waqf cannot be construed to be waqf of any other Babri Mosque located anywhere else.

18. In the said gazette notification dated 26th February, 1944 (on page 479 of the volume 12 of the documents filed in the instant suit) another Babri Mosque along with the Mausoleum of the Emperor

Babur has been mentioned in some other district perhaps in the district of Knapur. It is well known recognized and admitted fact that the Mausoleum of the Emperor Babur is in Kabul, Afghanistan not in India. This is glaring example of the facts of fraud, forgery and fabrication.

19. From the above mentioned relevant entries of the list of the gazette notification dated 26th February, 1944 it becomes clear that the waqf commissioners had not discharged their duties as it was cost upon them under the provisions of the United Provinces Muslim Waqfs Act, 1936 and in very casual manner either on hearsay they have listed several properties as of waqfs or the concern Waqf commissioner were active participant in the fraud, forgery and fabrication.

20. The Waqf Commissioner Faizabad's report dated 8th Fibruary, 1941 says that it appears that in 935 A.H. Emperor Babar built Babari or Janam Asthan Mosque at Ajudhya and appointed one Syed Abdul Baqi as the Mutwalli and khatib of the Mosque and for its maintenance an annual grant of Rs. 60 was allowed by the said emperor which continued till the fall of the Mughal kingdom. Later on said grant was increased by Nawab Sa-a-Dat Ali Khan to Rs. 302/3/6 but no original papers about this grant by the king of Oudh are available. Relevant extract of said report reads as follows:

> "It appears that in 935 A.H. Emperor Babar built this mosque and appointed Syed Abdul Baqi as the mutwalli and khatib of

the Mosque (vide clause 2 statement filed by Syed Mohammad Zaqi to whom a notice was issued under the wakf Act.) An annual grant of Rs. 60/- was allowed by the Emperor for maintenance of the mosque and the family of the first mutwalli Abdul Baqi. This grant was continued till of the fall of the Moghal Kingdom at Delhi and the ascendancy of the Nawabs of Oudh.

According to Cl. 3 of the written statement of Mohammad Zaki nawab Sa'adat Ali Khan, King of Oudh increased the annual grant to Rs. 302/3/6. No original papers about this grant by the king of Oudh are available."

From the aforesaid extract it is crystal clear that the Commissioner on the basis of mere statement of Syed Mohammed Zaki found that the Disputed Janam Asthan Structure was a mosque built by emperor Babar which is in total discard to his duty cast upon him under said Act XIII of 1936.

21. Commissioner's said report dated 8th Feb. 1941 says that after the mutiny the British Govt. continued the above grant in cash upto 1864 and in the later year in lieu of cash some revenue free land in village Bhuraipur and Sholeypur was granted. The said report further records that Syed Mohammed Zaki produced a copy of the grant order of the British Govt. which was made on condition that Rajab Ali and Mohammad Asghar would render Police, Military or Political service etc. thereafter the commissioner records that the above-mentioned

object is elucidated in Urdu translation as follows:

> "After the Mutiny, the British Government, also continued the above grant in cash upto 1864, and in the latter year in lieu of the cash grant, the British Government ordered the grant of some revenue free land in villages Bhuraipur and Sholeypur. A copy of this order of the British Government has been filed by the objector Syed Mohammad Zaki (vide Flag A). this order says that 'the Chief Commissioner under the authority of the Governor General in Council is pleased to maintain the Grant for so long as the object for which the grant has been made is kept up on the following conditions'. These conditions require Rajab Ali and Mohammad Asghar to whom the sunned was given, to perform duties of land holder in the matter of Police Military or political service etc. The object mentioned above is elucidated in the Urdu translation as follows:-
>
> Thus the original object of the state grant of emperor Babar and nawab Sa'adat Ali Khan is continued in this Sunnad by the British government also i.e. maintenance of the mosque. The Nankar is to be enjoyed by the grantees for so long as the object of the grant i.e. the mosque is in existence."

22. In fact, this Urdu elucidation is creation of the said Waqf Commissioner as it is not in the alleged Sunned being page 33 of the volume 6 of the documents filed in the instant suit. Hindi transliteration and meaning of the said elucidative Urdu text as

incorporated in the Waqf Commissioner said report reads as follows:

उस नानकार को जबतक कि मस्जिद जिसके वास्ते ये नानकार दी गयी थी बरकरार है। हसबे शरायत, दर्ज जैल कायम फरमाते हैं (जो शर्ते लिखी गयी हैं उसे कहते हैं)

A handwritten copy of the said Sunnad with some error has been reproduced at page 27 of volume 10 of the documents filed in the instant suit. In the said alleged original version of the grant Urdu elucidation did not find place. From the said alleged original version of the alleged grant, it becomes crystal clear that the grant, if any, it was a service grant for rendering police, military and political services to the British Govt. against the enemies of the British Govt. Be it mentioned herein that in those days in the eyes of the Britishers the persons who were fighting against them for liberation of their motherland i.e. India they were considered to be mutineers and enemies of the Britishers. As such it can be inferred that the said service grant was given for helping the Britishers to defeat and rout the freedom fighters, not for a good cause of maintaining any Mosque. Full text of the alleged SUNNAD from page 33 of Vol. 6 (hand written copy on page 27 of Vol. 10 that is not accurate) is reproduced as follows:

Chief Commissioner

> "It having been established after due enquiry, that Rajub ally and Mohamad Usgar received a Cash Nankar of (Rs. 302.3.6) Rupees three hundred two and three annas and six pie from Mouzah Shanwah Zila Faizabad from former government. The Chief Commissioner, under the authority of the Governor

General in Council is pleased to maintain the grant for long as the object for which the grant has been made is kept the following conditions. That they shall have surrendered all sunnads, title deeds, and other documents relative to the grant. That they and their successor shall strictly (illegible) all the duties of land-holder in matter of police, and an (torn) or political service that they may be required of them by the Authorities and that they shall never fall under the just suspicion of favouring in any way designs of enemies of the British Government. If any one of these conditions is broken by Rajub ally and Mohamad Usgar or their successor the grant will immediately resumed."

23. From the aforesaid alleged to be original text of the grant as produced by the plaintiffs it becomes crystal clear that Urdu interpolation has been done by the said Commissioner with sole motive to deprive the hindus from their sacred shrine of Sri Ramjanamsthan which has been described as Babri Mosque in the plaint as well as Janam Asthan Mosque in the said commissioner's report. From the words 'Janam Asthan Mosque' itself it becomes clear that the alleged Mosque was erected over the birth place of someone, and since time immemorial said place is being worshiped by the Hindus asserting that it is the birth place of the Lord of Universe Sri Ram it is needless to say that according to the said Commissioner, the alleged Mosque was erected over the janamsthan of Sri Ramlala.

24. The said Waqf Commissioner after recording the facts that Syed

Mohammed Zaki had submitted before him that the said British grant was a service grant in favour of his predecessors for rendering police, military and political services to the Britishers subject to resumption on nonfulfilment of the aforesaid conditions thus it was not a waqf property granted for maintenance of the alleged mosque; the commissioner without any cogent evidence rejected his said contention simply stating that he did not agree to that view because the grant was not originally granted by the Britishers but it was continuation of original grant granted by the Muslim rulers as also for the reasons that after the Ajodhya riot of 1934 Syed Mohammad Zaki had presented an application to Deputy Commissioner in which he has described himself as Mutawalli or trustee of the mosque and of the trust attached thereto. In fact, prior to coming on this reference, in the preceding paragraphs of his said report the said commissioner himself has recorded that no paper of old grant even of the Nawabs of Oudh was available and placed before him. It is contrary to the law of evidence to draw inference on the basis of the statement of a person whose credibility was found suspicious, doubtful and non-reliable. As in his report the commissioner records that said Syed Mohammed Zaki was an opium addict and most unsuited for the proper performance of the duties expect of a Mutawalli of an ancient and historical mosque, which was not kept even in proper repairs for which reason he recommended to discharge the said Mutwalli. Relevant extract from said report is reproduced as follows:

> “Syed Mohammad Zaki, the objector, who is know as the

Mutwalli of the Babari mosque, and also calls himself as such raises an objection to the land in Sholeypur and Bhuranpur being regarded as a waqf, because he says the grant has been made for his substenance only (in Urdu). I do not agree with this view of his. The written statement filed by Mohammad Zqki himself is sufficient to show that the grant has been continued ever since 935 A.H. Only because he and his ancestors were required to look after the mosque and keep it in proper condition out of the income allowed to them and also to provide for the maintenance of himself and his ancestors out of a part of the same grant.

Clearly then the grant of land to Mohammad Zaki must be regarded as a Waqf, the purpose of which is the maintenance of the religious building know as the Babari Mosque.

The learned counsel for Mohammad Zaki has also argued.

1) That the particular grant of land in Sholeypur and Bhrepur has been made by the british Government. A Non-Muslim body and hence the grant cannot be regarded as Muslim Waqf.

2) That the grant is a conditional one, being subject to resumption on non-fulfillment by the grantee of any of the police Military or duties enjoined in the Sunnad, and that on account of these conditions the grant cannot be classed as Muslim Waqf.

I do not agree with either view. Firstly the British Government only continued a grant which had been made by the Muslim Government originally and in these circumstances, I cannot but

regard the grant as a waqf.

3) As for the second point the conditions have been imposed upon the grantee, and not upon the way in which the grant to be utilized, which latter purpose is recognized as maintenance of the mosque. It is clear that if the conditions are broken the enjoyment of the grant by the Mutwalli himself for his sustenance is to be withdrawn apparently implying that any other mutwalli will then be appointed to administer the grant for the original purpose of maintaining the mosque. I am strengthened in this view because I find the mention of the object of the grant i.e. maintenance of the mosque at the very outset of the Sunnad and the desirability thereof seems to be clear from the whole Sunnad.

I also find that after the Ajodhya riot of 1934, Syed Mohammad Zaki presented an application (Flag Ex.A) to Deputy Commissioner, in which he clearly described himself as Mutwalli or trustee of the mosque, pay of Imam Muezzin and the provisions of Iftari etc., during Ramzan after deduction of Rs. 20/- per month for sustenance of the Mutwalli himself. The pay of the Mutwalli spends a much greater portions of the income on his own personal needs."

25. The Waqf Commissioner Faizabad in his said report dated 8th Feb. 1941 ways that he examined Abdul Ghaffar, the then Pes Niwaz who deposed that the imam was not being paid for last 11 years and thereafter the said commissioner says that the then Syed Mohammad

Zaki was an opium addict and most unsuited to the proper performance of the duties expected from a Mutwalli of an ancient and historical mosque, thus he was liable to be discharged from his duties. Relevant extract from the said report which is on page nos. 45 to 48 of the volume No. 6 of the documents filed in the instant suit read as follows:

> "The present Mutwalli is of course a Shia. There is no information as to the sect to which Abdul Baqi himself belonged, but the founder Emperor Babar was admittedly a Sunni, the Imam and Muezzin at the mosque are Sunni and only Sunnis say their prayer in it. Abdul Ghaffar the present Pesh niwaz was examined by me. He swear that the ancestors of Mohammad Zaki were Sunnis who latter on was converted to Shia. He further said that he did not receive his pay during the last 11 years. In 1936 the Mutwalli executed a pronote promising to pay the arrear of pay by installment but upto this time nothing actually was done. I think therefore that this should be regarded as a Sunni Trust.
>
> I must say in the end that from the reports that I have heard about the present Mutwalli, he is an opium addict (vide his statement flag Ez) and most unsuited to the proper performance of the duties expected of a Mutwalli of an ancient and historical mosque, which is not kept even in proper repairs. It is desirable that, if possible, a committee of management should be appointed to supervise the proper maintenance and repairs of

the mosque and discharge of his duties by the Mutwalli."

26. From the second report of the Commissioner of Waqf, Faizabad being report dated 8th February, 1941 it becomes clear that the Imam was not being paid since 1930 and the alleged Mutwalli was an opium addict and most unsuitable person and in 1934 riots on 27th March, the alleged Mosque was demolished it can be safely inferred that Sri Ramjanamsthan temple structure was being used by the Hindus as their sacred place of worship and it was not being used as a mosque because it cannot be imagined that a person will discharge duty of imam without getting salary for such a long period as according to Islamic law, only salary is the prescribed means of livelihood no imam can survive for want of salary as such in fact neither there was any mosque nor there was any mutwalli or imam.

27. From exhibit-62 being page nos. 367 to 405 of volume 12 of the documents filed in the instant suit which is a report of the four historians it becomes crystal clear that how said report has been prepared having some design in mind or inadvertently and negligently which reflects from page 397 of the said volume where the dimension of the vedi described by Tieffenthaler has been wrongly reproduced as "a square platform 5 inches above ground, 5 inches long and 4 inches wide, constructed of mud and covered with lime. The Hindus call it Bedi, that is to say, the birth place. The reason is that here there was a house in which Beschan (Bishan=Vishnu) took the form of Ram." though correct dimension given by Tiffenthaler reads "a square chest, raised five inches from the ground, covered with lime, about five ells

in length by not more than four in breadth. The Hindoos call it bedi, the cradle; and the reason is, that there formerly stood here the house in which Beshan (Vishnoo) was born in the form of Ram." This correct translation is given in the book "Modern Traveller" volume 3, published by James Duncan in 1828. It is crystal clear that in the report of said historians the word 'ells' has been translated as 'inches' in fact, ells means yards which has been correctly translated in the translation made available by the Govt. of India to this Hon'ble Court. Tieffenthelar has not stated that the Bedi was of mud, it is creation of the mind of the aforesaid historians, as such said report of the historians is not reliable for the reasons of being prepared by incompetent persons or for being biased, motivated.

28. The page no. 155 of colume 6 of the documents filed in the instant suit purported to be copy of a folio of a register contains a pedigree wherein it has been written that the mafi was created for the muezzin and khattib of masjid Babari of Oudh date and year of the waqf is unknown to Syed Baqi thereafter his son Syed (illegible) Ali, his son Syed Hussain Ali who was in possession for about 60 years now his son-in-law Rajab Ali and his daughter's son Muhammad Asgar are in existence and were in receipt of cash from village Shahnawa vide receipt (illegible) till fasali year 1263. In the year 1264 fasali enquiry about mafi was started but riot took place (illegible) crop (illegible year 63 fasali was found (illegible) original (illegible) of and is document (illegible) in respect of mafe (illegible) settlement of village versus (illegible). A copy of the said contents has

also been compiled in the said volume no. 6 of the documents filed in the instant suit on its page nos. 157 to 161.

29. From the said enquiry report it appears that during the period of 332 years people of five generations incouding Syed Baqi held the office of muezzin and khattib of alleged Babri mosque during the period of 1528 to 1860 which means 66½ years was average of each generation which is quite impossible as according to Life Insurance Corporation's assessment average span of a change of generation is 26 years. And this pedigree is completely false, forged and fabricated one. During this period 16 generations of the Mughal rulers elapsed average whereof comes about 20¾ years. In the matter of Radha Krishna V. State of Bihar the Hon'ble Supreme Court has laid down the principle of law to evaluate and judge authenticity of a pedigree which has been reproduced in this argument at relevant place.

30. The alleged documents and/or transliteration thereof being page nos. 53 to 61 of the volume no. 6 of the documents filed in the instant sit tells that the alleged Babri Mosque was demolished by the rioters and Bairagis on 27th March, 1934. The damaged domes were beyond repair. The alleged list of damages says that apart from damaging the building, the Hindus either burnt or took away with them three pieces of mats, six pieces of mattress, one piece of box, two pieces sandal, six pieces of curtains, five pieces of pitchers, hundred pieces badhana mitti four pieces of small earthen pot, one piece chahar, water pot, (illegible) three pieces, Kasauti Patthar Tarikhi, 3x1½ sq. ft. one piece, ladder two pieces, large iron jar two pieces. From the said list it is

crystal clear that no engraved stone i.e. inscription was either carried away by the rioters or destroyed by the rioters. As such the story of the destruction of inscription is wholly concocted and the inscription which was prepared by the contractor was done at the instance of the Britishers to deprive the Hindus from their religious place and make the said place as bone of contention between Hindus and Muslims to facilitate their policy of divide and rule. As it has been written in the East India Gazetteer 1828 p. 352 2nd column las tpara as well as the preface of the Neil B.E. Baillie's Digest of Moohummudan Law Vol.2 Edn. 1875| Instruction p. xi & xii.

31. In Waqf Commissioner's report dated Feb. 8 1941, it has been recorded that the alleged Babri Mosque was built by one Abdul Baqi on being ordered to do so by the Emperor Babur. He records that there is no document to show that grant was sanctioned to the said Mosque either by the Mughal Emperors or Nawabs of Oudh, but as in 1864 a sunnud was issued stating that the grant was given to the grantee for rendering military, police and political services. It may be presumed that it was granted in continuance of the grants of Mughal Emperors to Nawabs of Oudh right from the Emperor Babur. The said Commissioner in his waqf report has committed forgery and fabrication by inserting certain words in Urdu transcript to show that the grant was give for maintenance of the alleged Babri Mosque. In fact, said sunnud is on record and entire sunnud is in English language and nothing is written in the said sunnud in Urdu transcript as such question of grant for maintenance of Babri Mosque cannot and does

not arise at all. He says that some return submitted in the office of Tahsildar in 1995 shows that though major expenses was done by the grantee for his own maintenance, but a portion thereof was spend on maintaining alleged Babri mosque its account would have been submitted to the District Civil court which was made mandatory under the provisions of the Mussalman Wakf Act, 1923 under Section 3 of the said Act. Report also says that the Imam was not paid for last 11 years i.e. since 1930 as also that the Mutwalli is a drug addict and the alleged Mosque is in not good condition as such Mutwalli should be removed. Relevant portion of the said report read as follows: A copy of the said report is on pages 44 to 48 of the Vol. 6 of the documents filed in the instant Suit by the plaintiff's: Relevant extract from the said report reads as follows:

32. Section 3 of the Musslaman Wakf Act, 1923 (Act No. 42 of 1923) reads as follows:

> **"3. Obligation to furnish particulars relating to wakf.-** (1) Within six months from the commencement of this Act every mutwalli shall furnish to the Court within the local limits of whose jurisdiction the property of the wakf of which he is the Mutwalli is situated or to any one of two more such Courts, a statement containing the following particulars, namely:--
>
> (a) a description of the wakf property sufficient for the identification thereof;
>
> (b) the gross annual income from such property;
>
> (c) the gross amount of such income which has been

collected during the five years preceding the date on which the statement is furnished, or of the period which has elapsed since the creation of the wakf, whichever period is shorter;

(d) the amount of the Government revenue and cesses, and of all rents, annually payable in respect of the wakf property;

(e) an estimate of the expenses annually incurred in the realisation of the income of the wakf property, based on such details as are available of any such expenses incurred within the period to which the particulars under clause (c) relate;

(f) the amount set apart under the wakf for--

(i) the salary of the mutwalli and allowances to individuals;

(ii) purely religious purposes;

(iii) charitable purposes;

(iv) any other purposes; and

(g) any other particulars which may be prescribed.

(2) Every such statement shall be accompanied by a copy of the deed or instrument creating the wakf or, if no such deed or instrument has been executed or a copy thereof cannot be obtained shall contain full particulars, as far as they are known to the mutwalli, of the origin, nature and objects of the wakf.

(3) Where--

(a) a wakf is created after the commencement of this Act, or

(b) in the case of a wakf such as is described in section 3 of the Wakf Validating Act, 1913, the person creating the wakf

or any member of his family or any of his descendants is at the commencement of this Act alive and entitled to claim any benefit thereunder.

The statement referred to in sub-section (1) shall be furnished, in the case referred to in clause (a), within six months of the date on which the wakf is created or, if it has been created by a written document, of the date on which such document is executed, or, in the case referred to in clause (b), within six months of the date of the death of the person entitled to such benefit as aforesaid' or of the last survivor of any such persons as the case may be."

The Hon'ble Apex Court in the case of ***The Premier Automobiles Ltd. Vs. Kamlakar Shantaram Wadke and others, AIR 1975 SC 2238,*** on page 2244 at paragraph No. 10 approved the earlier quote words:-

Para-10 *In Doe V. Bridges, (1831) 1 B & Ad. 847 at page 859 are the famous and oft quoted words of Lord Tenterden, C.J. saying:*

"Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot ber enforced in any other manner."

This passage was cited with approval by the Earl of Halsbury, L.C. In Pasmore V. The Oswaldtwistle Urban Disteict Council 1898, AC 387 and by Lord Simonds at ;. 407 in the case of Cutler V. Wandsworth Stadium Ltd. 1949 AC 398.

Thus, in view of the decision of the Hon'ble Apex Court, it transpires that United Provinces Muslim Waqf Act, 1936 is an Act,

which creates an obligation and enforces the performance in a specified manner. Under Section 5 of the aforesaid Act, it was necessary to make a publication before making any registration. Thus, it was incumbent upon the authorities to act in accordance with law and should have performed the duties in the manner provided under the law.

Thus, in this case the procedure as contemplated under Section 5(1) of Waqf Act was not complied with and the registration was made ignoring the provision, accordingly it has no relevance. It may further be clarified that it makes not difference whether the registration was challenged or not. When it is apparent that the obligation to enforce the Act was not performed in the manner provided under the law by complying the provisions of Section 5 by the Board. In that event the registration has no effect and it does not bind with properties. It may further be clarified that once the Board has tried to get the Waqf registered and after enquiry the registration was not completed, it make no difference whether two other modes were applied or not for registration. Other modes of registration could have been applied in accordance with law only. It is not the case where it has been urged that besides two other modes, the 3rd mode was adopted. The sole mode that was adopted to register this Waqf as Sunni Waqf by holding an enquiry and without making any publication. Thus in view of the decision of the Apex Court, the registration is not in accordance with law.

I have given my anxious thought to the facts of the case. I am of

the view that since there is no valid notification under Section 5(1) of the Muslim Waqf Act, 1936 in respect of the property in dispute. The registration though is not disputed and pleadings can be looked into by this Court. It further transpires that the registration was done by ad-hearing the provisions of the Act and accordingly it cannot be deemed to be a valid registration. The registration does not confer any right to the Waqf Board to maintain the present suit without complying with the valid required notification. The registration can be done in accordance with law after adhering the provisions of the Waqf Act, 1936. Thus the registration was not made in accordance with the provision of Section 5(1) of the Muslim Waqf Act, 1936. It cannot be deemed to be a valid entry, the Board has no right to maintain the suit and the same is barred by time.

In view of the finding of issue no. 5(e) it transpires that since the Waqf Board has no right to maintain the present suit, the suit was not maintainable under U.P. Muslim Waqfs Act, 1960 also. The plea that under Section 19(q) of Waqf Act, the suit could be filed by the Board is of no avail for the reasons that the property was not validly registered by complying with the provisions of Section 5(1) of Muslim Waqf Act, 1936. Issue No. 5(e) and 5(f) are decided against the plaintiffs.

ISSUE NO.6

Whether the present suit is a representative suit, plaintiffs representing the interest of the Muslims and defendants representing the interest of the Hindus ?

FINDINGS:

The instant suit has been filed by moving an application under Order 1 Rule 8 C.P.C. by the plaintiff's. The court has permitted the plaintiff's to file the suit and after complying of the provisions of Order 1 Rule 8 C.P.C., the court gave the permission for institution of the suit to the plaintiff's. This order was not challenged by the defendants. Accordingly, I hold that the present suit is a representative suit and plaintiff's are representing the interest of Muslims and defendants have been arrayed representing the interest of Hindus. On behalf of defendants no legal remedy was availed challenging the order passed by the learned Civil Judge dated 8.8.62 through which the permission to institute the suit was granted in terms of the provisions of Order 1 Rule 8 C.P.C.

Issue no. 6 is accordingly decided in favour of plaintiff's and against the defendants.

ISSUE NO.7(a)

Whether Mahant Raghubar Dass, plaintiff of Suit No.61/280 of 1885 had sued on behalf of Janma-Sthan and whole body of persons interested in Janma-Sthan?

FINDINGS:

It has been urged on behalf of the plaintiffs that Mahant Raghubar Das filed suit no. 61/280 of 1885 on behalf of Janma Sthan and whole body of person interested in Janmsthan were the consenting parties and accordingly the suit should be treated as representative

suit. On behalf the defendants the assertion has been refuted and it has been urged before this Court that the suit was not a representative suit, it was filed by Mahant Raghubar Das in his personal capacity and whole body of persons of Hindu interested in Janmsthan had no concern with the aforesaid proceedings. It has further been submitted that in a representative suit two or more persons having interest in the matter after obtaining the leave of the Court, can file the representative suit. While in this case admittedly Mahant Raghubar Das was the sole plaintiff. Neither Raghuvar Dass or two or more persons having interest in the property in suit obtained the leave of the Court to file the same. Consequently, the suit cannot be treated as representative suit. It may be noticed that Section 92 C.P.C. and Order 1 Rule 8 C.P.C. are applicable in such type of cases and after legislative changes the gist remains the same. Section 92 C.P.C. corresponds with section 539 of the Code of 1983 which provides that with the consent of Advocate General or Collector of a District the suit may be filed in representative capacity. The main purpose of Section 539 of the Code of 1983 is to give protection to the public trust of religious nature from being subjected to harassment by suits being filed against them. That is why it was provided that the suit be filed by two persons having the interest in the trust with the written consent of the Advocate-General or of the Collector of the District. It was incumbent upon the Advocate-General before giving consent to satisfy himself that prima facie there was either breach of trust and necessity of obtaining directions from the Court. Thereafter the suit could have

been filed with the leave of the Court. After going through the plaint of R.S. No. 61/280 of 1885, Mahant Raghubar Das vs. Secretary of State of India and Mohd. Asghar Khateeb, it transpires that the suit was not filed in accordance with the provisions of Section 539 of the Code of 1883. Thus the suit was filed in the individual capacity by Mahant Raghubar Das and with no stretch of imagination it can be considered as a representative suit. It further transpires that even at the stage of deciding the civil appeal no. 27 of 1885 the procedure adopted under Section 539 of the Code of 1883 was not made applicable. Consequently, the suit cannot be regarded as representative suit. Thus the judgment in R.S. No. 61/280 of 1885 and civil appeal no. 27 of 1885 leave no room for doubt that Mahant Raghubar Das filed suit in his personal capacity and accordingly the judgment cannot be considered as judgment in rem under Section 41 of Indian Evidence Act, 1872. It will be considered as judgment in personam under Section 43 of Indian Evidence Act. Learned counsel for the plaintiff has failed to demonstrate any material to show that the procedure as provided under Section 539 of Code of 1883 was followed at the time of filing R.S. No.61/280 of 1885. It is a settled proposition of law that the burden lies on the plaintiffs to show as how the whole body of persons interested in Janmsthan were interested in the suit and how the suit can be treated as representative suit. Since the plaintiffs have failed to discharge his obligation and provided no material before the Court and on the basis of the plaint of R.S No. 61/280 of 1885 and the judtment of trial court and appellate court leave no room for doubt that

the suit was filed by Mahant Raghubar Das in his personal capacity and not on behalf of Janmsthan and whole body of the person interested in Janmsthan cannot be treated as interested person at the time of filing the suit or they may be treated to be in representative capacity under Section 539 of the Code of 1883. Accordingly I hold that Mahant Raghubar Das filed the suit in his personal capacity. Issue no. 7(a) is decided against the plaintiffs and in favour of the defendants.

ISSUE NO.7(b)

Whether Mohammad Asghar was the Mutwalli of alleged Babri Masjid and did he contest the suit for and on behalf of any such mosque?

FINDINGS:

It has been contended that Mohd. Asghar or Mutwalli of Babri Masjid contested the suit on behalf of such mosque. At the cost of repetition, I may again refer that in view of Section 539 of the Code of 1883. The procedure was not adopted by Mahant Raghubar Das for filing any representative suit. Accordingly, Mohd. Asghar was contesting the case in his personal capacity. It further transpires from the trial court judgement and also of appellate court judgment that under no event Mohd. Asghar made any objection that the suit should be dismissed as it has a representative capacity. Suit was not filed in the representative capacity by Mahant Raghubar Das and procedure as provided under Section 539 of the Code of 1883 was not adopted. Thus, it may conclusively be said that the plaintiffs have failed to

point out that Mohd. Asghar was contesting the case in representative capacity, but on the other hand he was contesting the case in his personal capacity. Issue No. 7(b) is also decided against the plaintiffs and in favour of the defendants.

ISSUE NO.7(c)

Whether in view of the judgment in the said suit, the members of the Hindu community, including the contesting defendants, are estopped from denying the title of the Muslim community, including the plaintiffs of the present suit, to the property in dispute ? If so, its effect?

FINDINGS:

Learned counsel for the plaintiffs has raised the plea and the Court accordingly framed the issue to this effect that in view of the judgment in R.S. No. 61/280 of 1885, the members of the Hindu community including the contesting defendants are estopped from denying the title of the Muslim community.

At the cost of repetition, it may be further referred that in the above suit, the procedure so was not adopted for filing a representative suit as contemplated under Section 539 of the Code of 1883. There is not even iota of evidence to suggest that any point of time two or more persons along with Mahant Raghubar Das took permission from the Advocate General or Collector of the district to file the suit on behalf of Hindu community and the leave was obtained by them before the institution of the suit. On being specifically questioned, learned counsel for the plaintiffs could not show any paper to establish the

aforesaid contention. Thus it transpires that Mahant Raghuvar Das had not filed the above suit in representative capacity. So far as the question of issue estoppel is concerned, it transpires that the learned counsel for the plaintiffs have failed to establish any circumstance under which the principle of issue estoppel apply in this case. It is a settled proposition of law that the onus to prove that the suit was instituted in representative capacity is on the plaintiffs who assert the same. The burden of proof does not lie on the respondents. The contention of the plaintiffs cannot be considered as good in law in view of the discussion referred to above. It cannot be regarded at this stage that whole body of Hindu community was interested in the outcome of the result or they were at all interested in maintaining the suit. Thus the question of resjudicata or issue estoppel in this case does not arise. Thus the factual finding relating to the nature and character of the suit leave no room for doubt that on the basis of governing legal principles as well as for non-observance of the procedure under Section 539 of the Code of 1883, it cannot be re-agitated on behalf of the plaintiffs successfully that the suit was a representative suit and principle of issue estoppel apply on the Muslim community and Hindu community both. Thus, looking to the case from all or any angle, it transpires that this is not a case of representative suit, accordingly the Hindu and Muslim community are not bound by the decision in R.S. No. 61/280 of 1885. This was simply a personal dispute between Mahant Raghubar Das and the defendant. The judgment that was rendered by the trial court as well as

by the appellate court can be treated as a judgment in rem. Under section 43 of Indian Evidence Act it would be treated as judgement in personam. Consequently, the question of issue estoppel or of filing a suit in representative capacity is not evident from the facts of the case and plaintiffs have failed to discharge his onus to provide any material to substantiate his version before this Court. Accordingly, issue no.7(c) is decided against the plaintiffs.

ISSUE NO.7(d)

Whether in the aforesaid suit, title of the Muslims to the property in dispute or any portion thereof was admitted by plaintiff of that suit? If so, its effect?

FINDINGS:

Learned counsel for the plaintiffs has pointed out that in R.S. No. 61/280 of 1885 plaintiff Mahant Raghubar Das admitted the title of Muslim in the property in suit. It has further been suggested that in one portion or the other the plaintiffs admitted the possession of the Muslim community. According to the learned counsel for the plaintiffs in view of principle of issue estoppel the defendants now cannot re-agitate the issue before this Court and the judgment is not binding on them. At this outset, it may be clarified that in view of the foregoing discussion on above issues, it has been made abundantly clear that neither any permission was obtained from Advocate General or from the Collector of the District by Mahant Raghubar Das before filing the suit in terms of Section 539 of the Code of 1883.It further transpires that the suit was filed in his personal capacity, consequently

there is nothing on record to suggest that it was a representative suit. Consequently, if at all there is any admission on the part of Mahant Raghubar Das, it would not have binding effect on the Hindu community or Muslim community. This is not a case where a judgment in rem was passed by the Court and the suit can be termed as representative suit. Consequently, there was a personal dispute between Mahant Raghubar Das and Mohd. Asghar. State was also arrayed as a party. Consequently, there is no effect on the present suit of the proceedings that took place earlier before the competent Court in personal dispute between Mahant Raghubar Das and Mohd. Asghar, the defendant. Learned counsel for the plaintiffs has further failed to point out as to which is the portion of the property in suit which was admitted by Mahant Raghubar Das, plaintiff of the suit belonging to the Muslim community. After going through the record, it transpires that the site plan annexed with the plaint of R.S. No.61/280 of 1885 has no bearing on the facts of the case. After considering the entire material on record, it further transpires that section 115 of Indian Evidence Act, 1872 has no application to the facts of the case for the reasons that only to describe the topography certain places were shown in the site plan without asking any relief in the plaint. In this context, the decision in civil appeal no. 27 of 1885 dated 18.03.1886 reveals that the Deputy Commissioner contended that the civil court was not competent to adjudicate the aforesaid matter for want of jurisdiction. The relief asked for was in contravention of the clause D of Section 56 of the Act No. 1 of 1877. Consequently, it can be

inferred from the appellate court judgment that the appeal was also dismissed by the district judge accepting the contention of the Deputy Commissioner that the matter was not cognizable by the civil court under Cause (d) of Section 56 of Act No. 1 of 1877 to set aside any order passed in criminal proceedings by a Magistrate. Thus with no stretch of imagination it can be gathered that the civil court entertained the suit and decided it. On the contrary, it transpires from the bare reading of the judgment of the appellate court that the civil court refrained to give any finding and refuse to set aside the order passed by a Magistrate on the ground that the suit was not cognizable by the civil court. Thus the effect in such a circumstance would be that neither the suit was cognizable by the civil court nor civil court entertained the suit nor the decision has any effect like estoppel or issues estoppel. It would also not operate as resjudicata between the parties. Moreover, I have also considered the aspect of Section 539 of the Code of 1883 and I am sure that the suit was also not filed in representative capacity. Thus the admission of Mahant Raghubar Das cannot operate as issues estoppel or stopped the defendants to believe and refute the averments made in the plaint. Moreover there is nothing on record to suggest that except topography of the property in suit, there is nothing which is material before this court to demonstrate that after admitting the claim of the Muslims, the land in suit with no stretch of imagination without calling for any relief can be considered as a matter which was binding for consideration before the Court. Thus, if at all there is any admission of plaintiff Mahant Raghubar

Das, it would not stop Hindu community and Muslim community both to raise issues before this Court as suit is not in the nature of representative suit. Issue No.7(d) is accordingly decided against the plaintiffs and in favour of the defendants.

Learned counsel for the plaintiffs has heavily relied over the decision of R.S. No. 61/280 of 1885, Mahant Raghubar Das vs. Secretary of State of India and on its strength has submitted that the judgment operates as resjudicata against the defendants. At the cost of repetition I may refer that in view of Section 539 of the Code of Civil Procedure of 1883 which corresponds to Section 92 of the present C.P.C. it transpires that without adhering any procedure in accordance with Section 539 of the above code, the above regular suit was filed. I have already given my finding on issue no.7 that it was not a representative suit. It further transpires that the judgment was not judgment in rem but it was judgement in personam. Consequently the judgment would have a binding effect only on the parties referred in the plaint and arrayed as parties. It further transpires that Section 18 of the Indian Evidence Act, 1972 has full bearing on the facts of the case for convenience it is reproduced as under:-

> "*S.18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.*
> *Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character."*

Thus, in view of provisions of Section 18 of Indian Evidence

Act even in a case of representative character statements made by the parties to the suits, suing or sued are not admissions unless there were made while the party making them held that character. It is not disputed by the plaintiff that defendants were not holding the character while it is clear from the finding on issue no.7 that the suit was not of a representative character. Thus, question of issue estoppel does not arise. Plaintiffs have also failed to substantiate before this Court that the defendants are the persons from whom the parties to the suit have derived their interest in the subject matter of the suit. Consequently, at this stage, it can not be said that the defendants of the present suit are the successor of Mahant Raghubar Das. It has nowhere been mentioned in the plaint that the defendants have derived the interest in the subject matter from Mahant Raghubar Das, the plaintiff of the suit. Consequently, for want of any evidence before this Court, it is not possible to accept the contention of the plaintiffs that Mahant Raghubar Das could in any way be said to be the predecessor in title of the defendants and the defendants derived their interest in the said matter through him. Consequently, neither this is a suit of representative character nor this is a suit in which it has been alleged by the plaintiffs that the defendants have derived their title from Mahant Raghubar Das. Thus, with no stretch of imagination he can be said to be predecessor in suit. Consequently, admissions if any made in R.S. No. 61/280 of 1885, Mahant Raghubar Das vs. Secretary of State of India would not bind the defendants.

ISSUE NO.8

Does the judgment of Case No.6/281 of 1881, Mahant Raghubar Dass Vs. Secretary of State and others, operate as res judicata against the defendants in suit ?

FINDINGS:

Issue No.8: It is admitted between the parties that prior to this litigation one case bearing no.61/280 of 1885, Mahant Raghubar Das Versus Secretary of State and others, was filed. Plaintiffs have come out with a case that it shall operate as resjudicata against the defendants.

I have already considered the scope of the earlier suit. This Court has already given finding that this suit is not a representative suit and it was an individual suit between Mahanth Raghubar Das and Mohd.Asghar who was the Mutwalli of the mosque. In view of the provision of Section 539 of CPC of 1883 the suit has no binding effect on the members of Hindu community as well as on Muslim community. It is also nobodies' case that the present defendants are the successors of Mahanth Raghubar Das. Thus there is no material that Mahanth Raghubar Das was the predecessor in title of the defendants. There is no averment in the plaint itself. Consequently defendants of this suit have not derived a title from Mahanth Raghubar Das. Consequently they cannot be treated to be party to the earlier suit.

Sri Mushtaq Ahmad Siddiqui, learned counsel for the plaintiffs has submitted that in view of the plaint averments it is very much established that the suit was filed for the benefit of entire Hindu community, having faith in Lord Ram. Hindus wanted to construct a

temple over Chabutra treating it as a sacred place. Hence, the case falls within Explanation 6 to Sec.11 CPC. It is further submitted that the judgment is binding on all the Mahanth and Shebait of Janam Asthan of Nirmohi Akhara. It is further submitted that in the year 1885 Order-1 Rule-8 CPC was not there. Accordingly in view of Explanation 6 of Section-11 the principle of resjudicata will operate. It is further submitted that in view of issue estoppel principal of res judicata shall operate against the defendants in suit. Learned counsel for the plaintiff has relied over Explanation 4 and 6 of Section-11 CPC. On the contrary it is submitted by the defendants that neither the procedure as provided u/s 573 of CPC of 1883 was adhered to nor there is anything to show that the suit was filed by Mahanth Raghubar Das in representative capacity. Consequently the suit is not barred by principle of res judicata.

Let me read Section-11 of the CPC as under;

"Section-11: Res judicata- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in Issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

> Explanation I.--The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
>
> Explanation II.--For the purposes of this section, the

competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.--Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.--Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.--Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.--The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.--An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]"

I have gone through the following rulings placed by Sri M.A. Siddiqui, learned counsel for the plaintiffs;

1. Talluri Venkata Versus Thadikonda, AIR 1937 PC 1.
2. Kumara Vellu Versus T.P.Ramaswami, AIR 1933 PC 183.
3. Mst.Sudehaiya Kumar and another Versus RamDass Pandey and others, AIR 1957 Alld.270 (DB)
4. Vidhu Mukhi Dasi Vs.Jitendra Nath, Indian Cases 1909

Cal.H.C.442.

5. Madhav Versus Keshvan, 40 ILR Madras Series 191.
6. Lal Chand Versus Radha Kishan, AIR 1977 SC 789
7. Smt.Dhana Kuer Versus Kashi Nath, 1967 AWR High Court 290.
8. Sharad Chandra Ganesh Vs.State, AIR 1996 SC 61
9. Shiromani Gurudwara Vs. Mahant, AIR 2003 SC 3349
10. Waqf Khudawand Tala Vs.Seth Mohan Lal, 1956 ALJ 225.

On behalf of defendants reliance have been placed on the following case laws;

1. Satyadhyan Ghosal and others Versus Smt.Deorajin Debi and another, AIR 1960 SC 941.
2. Ferro Alloys Corpn.Ltd and another Versus U.O.I.and others AIR 1999 SC 1236.
3. Sulochana Amma Vs. Narayanan Nair, 1994 SC 152, Lonankutty Vs. Thomman and another, AIR 1976 SC 1645, Raj Lakshmi Dasi and others Versus Banamali Sen and others, AIR 1953 SC 33.

   Sajjadanashin Sayed MdB.E.Edr.(D) By Lrs Vs. Musa Dadabhai Ummer and others, AIR 2000 SC 1238, Gram Panchayat of Village Naulakha Vs. Ujagar Singh and others, AIR 2000 SC 3272
4. State of Punjab and others Vs.Amar Singh and another, AIR 1974 SC 994.
5. M/s International Woolen Mills Vs. M/s Standard Wool (U.K.)Ltd., AIR 2001 SC 2134.
6. P.K.Vijayan Vs.Kamalakshi Amma and others, AIR 1994 SC 2145.
7. Chandrabhai K.Bhoir and others Vs.Krishna Arjun Bhoir and others, 2009 AWC(1) 715.
8. Ramchandra Dagdu Sonavane by Lrs and others Versus Vithu Hira Mahar (dead) by Lrs. and others, AIR 2010 SC 818.

Thus, according to the defendants, decision in regular suit no.61/280 of 1885, Mahanth Raghubar Das Versus Secretary of State and others for permission to construct a Mandir on chabutra situated in

outer courtyard will neither operate as res judicata nor the principles of constructive res judicata are applicable because neither any finding on issues involved in this case were recorded by the court nor the same was between the parties. Same parties means parties are persons whose names are on record at the time of the decision vide Baisu Reddi Versus Janardan Rao, AIR 1968 AP 306. The principle of res judicata and constructive res judicata were discussed by the Hon'ble Supreme Court in several decisions wherein the dispute must be between the same parties and it must be shown that same plea was required to be raised by the contesting parties. Matter must be directly and incidentally in issue between the same parties and there is some final decision on any particular issue and the matter ought to have been raised and decided. Thus in the present case none of the aforesaid conditions are complied with. Accordingly the suit is not hit by the principle of res judicata and constructive res judicata.

I have given anxious thoughts to the rival submissions and perused the case laws, referred to above. In this context I have to add as under;

Historical Aspects of Res Judicata.

"Res judicata Pro Veritate Accipture" is the full maxim which has, over the years, shrunk to mere Res Judicata vide Deva Ram v. Ishwar ChandA.I.R.1996 S.C.378 and Kunjan Nair Shivaraman Nair v. Narayanan Nair A.I.R. 2004 S.C. 1761, which expression means a matter already decided. It has a very ancient history. It was known to

ancient Hindu Law as Purva Nyaya. The plea of former Judgment has been illustrated in the text of Katyayana thus, "If a person though defeated at law sues again, he should be answered 'you were defeated formerly" (vide Raj Lakshmi Dasi v. Banamali Sen, AIR 1953 SC 33 and Sheoparsan Singh v. Ramnandan Singh [1916] 43 I.A. 91).

This principle was also known to Roman law as 'exceptio res judicatae'. Julian defined the principle thus, "and generally the plea of former Judgment is a bar whenever the same question of right is renewed between the same parties by whatever form of action -- Et generaliter (ut julianus definit) exceptio rel judicatae obstat, quotisns inter easdem personas esdem quaestio revocator, vel alio genere judicli.) This doctrine was adopted by the countries on the European continent which had modelled their civil law on the Roman pattern. In France, the doctrine is known as 'Chose jugee' -- thing adjudged. This principle of preclusion of re-litigation, or the conclusiveness of Judgment, has struck deep roots in Anglo-American jurisprudence and is equally well-known in the Commonwealth countries which have drawn upon the rules of Common law. The doctrine of res judicata is recognised as a principle of universal jurisprudence forming part of the legal systems of all civilised nations.

Section 11 of Code of Civil Procedure, 1908, contains the rule of conclusiveness of the Judgment which is- based partly on the maxim, of Roman jurisprudence. "interest republicae ut sit finis litium" (It concerns the State that there be an end to law suits) and partly on the maxim "nemo debet bis vexari pro Una et eadem causa"

(no man should be vexed twice: over for the same cause). The section does not affect the jurisdiction of the Court but operates as a bar to the trial of the suit or issue, if the matter in the previous suit between the same parties litigating under the same title in a Court, competent to try the subsequent suit in which such issue has been raised. The rule of res judicata "while founded on ancient precedent is dictated by a wisdom which is for all time' and that the application of the rule by the Courts "should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

Res judicata is a doctrine based on the larger public interest. It is well settled that Section 11 of the Code of Civil Procedure, 1908 (hereinafter, "the Code of Civil Procedure") is not the foundation of the principle of res judicata, but merely statutory recognition thereof and hence, the Section is not to be considered exhaustive of the general principle of law. The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to re-agitate the matter again and again. The rule of res judicata contained in Section 11 of the Code has some technical aspects, the general doctrine is founded on considerations of high public policy to achieve two objects namely (i) that there must be a finality to litigation and (ii) that individuals should not be harassed twice over with the same kind of litigation.

The object of introducing Section 11 in the Code of Civil Procedure is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest (Ram Bhaj v.

Ahmad Saidakhtar Khan). Once the matter which was the subject matter stood determined by a competent Court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment. Res judicata is a rule of procedure and it cannot change the law of the land as applicable to specific parties by decisions of Courts vide Mathura Prasad v. Dossibai, AIR 1971 SC 2355. Section 11 of the Code of Civil Procedure recognizes this principle and forbids a Court from trying any suit or issue, which is res judicata, recognizing both 'cause of action estoppel' and issue estoppel.

The principle of res judicata is conceived in the larger public interest which requires that all litigation must sooner than later, come to an end. The principle is also founded on equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. It is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. The principle of res judicata envisages that a Judgment of a Court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another Court, where the said plea seeks to raise afresh the very point that was determined in the earlier Judgment. The principles of res judicata as contained in Section 11 Code of Civil Procedure bars any Court to try any suit or issue in which the matter

directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. A finding which has attained finality operates as res judicata.

It is a doctrine applied to give finality to 'lis' in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice over. The literal meaning of res is everything that may form an object of rights and includes an object, subject-matter or status and res judicata literally means: 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by Judgment.

Res judicata is meant to avoid conflict in decisions - it is now settled principle that even ex-parte decree does constitute res judicata if issue involve is one which constitutes basis or foundation of decree. But to this the qualification must be added that, if such a party is to be bound by a previous Judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. In an issue, which is not adjudicated before the Court, the provisions of Section 11 of the Code of Civil Procedure cannot be invoked.

The principle of res judicata also comes into play when by the Judgment and Order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence 'if it is not applied'.

If a suit is based on an earlier declaratory decree and such decree is contrary to the law prevailing at the time of its consideration as to its legality or is a decree granted by a Court which has no jurisdiction to grant such decree, principles of res judicata under Section 11 of the Code of Civil Procedure will not be attracted and it is open to the Defendant in such suits to establish that the declaratory decree relied upon by the Plaintiff is not based on a good law or Court granting such decree did not have the jurisdiction to grant such decree vide Shakuntla Devi v. Kamla, (2005) 5 SCC 390.

Plea of res judicata, when to be taken

It is stated that the best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the Judgments which operate as res judicata. Where the pleadings of the suits instituted by the parties have not at all been filed on the Court record, the Court had to rely upon the facts stated in the Judgment. It is well settled that the pleadings cannot be proved merely by recitals of the allegations mentioned in the

Judgment vide Mohd. S. Labbai v. Mohd. Hanifa, AIR 1976 SC 1569.

The plea of res judicata has to be specifically and expressly raised. The foundation of the plea of res judicata must be laid in the pleadings. Not only the plea has to be taken, but also it has to be substantiated by producing the copies of the pleadings, issues and Judgment in the previous case. May be in a given case only copy of Judgment in previous suit is filed in proof of plea of res judicata and the Judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof Vide V. Rajeshwari v. T.C. Saravanabava, (2004) 1 SCC 551. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the Judgment. If this was not done, no party would be permitted to raise it for the first time at the stage of the appeal. The Constitution Bench in Gurbux Singh v. Bhooralal, placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the pleadings in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. The only exception to this requirement is when the issue of res judicata is in fact argued before the lower Court.

Exceptions to the doctrine of Res judicata

Broadly stated, the doctrine of res judicata operates when there

occurs identity of subject-matter, of the cause of action; of parties or their privies; of capacity or jurisdiction. This is only a general statement admitting of limitations and exceptions. The doctrine, though sanctified by age, is not without its oodles features. If the rule of estoppel prevents a man from speaking the truth, the rule of res judicata prohibits a party from questioning the truth of everything contained in the Judgment. In other words, if a former Judgment perpetrates an error, the doctrine of res judicata perpetuates it. The principle, however, has been eulogised as salutary. A party whose interests have once been placed in jeopardy, has a right to judicial immunity from the consequences of the same matter being raked up again regardless of the fact whether the former Judgment was right and just. Emphasis is laid on rule of repose rather than on the absolute justness of the conclusion. Once a dispute has been concluded, then, that conclusion is right and just. The advantage to the society is that the doctrine of res judicata not only puts an end to strife, but also it produces certainty as to individual rights. The general welfare requires that litigation ought not to be interminable. It is said "Ne lites sint immorta-les, dum litantes sunt mortales, (since litigants are mortals, let litigation not continue for ever vide Mt. Lachhmi v. Mt. Bhulli, AIR 1927 LAH 289.

To this salutary rule, four specific exceptions are indicated. Firstly, the obvious one, that when the cause of action is different, the rule of res judicata would not be attracted.

Secondly, where the law has, since the earlier decision, been

altered by a competent authority. Thirdly, where the earlier decision between the parties related to the jurisdiction of the Court to try the earlier proceedings, the same would not be allowed to assume the status of a special rule of law applicable to the parties and therefore, the matter would not be res judicata. Fourthly, where the earlier decision declared valid a transaction which is patently prohibited by law, that is to say, it sanctifies a glaring illegality vide The State of Punjab v: Nand Kishore, AIR 1974 P & H 303 and Shakuntla Devi v. Kamla, Manu/SC/0277/2005.

As and when the Court is examining the question of any right having emanated from a Judgment of the High Court and the said Judgment squarely having emanated; on following an earlier Judgment of the said Court, without any further reasoning advanced and no question of facts involved but purely a question of constitutionality of an Act, the moment the earlier Judgment of the High Court is reversed by the Supreme Court, that becomes the law of the land, binding on all parties vide Director of Settlements, A.P. v. M.R. Appa Rao, AIR 2002 SC 1598. The first writ was on the ground of apprehended bias. In the present case the allegation is actual bias. Also, the subject matter of both proceedings is different. Held, the second writ application is competent vide G.N. Nayak v. Goa University, AIR 2002 SC 790.

Essentials for res judicata.

The general principle of res judicata is embodied in its different forms in three different Indian major statutes--Section 11 of the Code

of Civil Procedure, Section 300 of the Code of Criminal Procedure, 1973 and Sections 40 to 43 of the Indian Evidence Act, yet it is not exhaustive. Here, we are concerned only with Section 11 of the Code of Civil Procedure. Following conditions must be proved for giving effect to the principles of res judicata under Section 11:

(i) that the parties are same or litigating under same title,

(ii) that the matter directly and substantially in issue in the subsequent suit must be same which was directly and substantially in issue in the former suit,

(iii) that the matter in issue has been finally decided earlier and

(iv) that the matter in issue was decided by a Court of competent jurisdiction.

If any one or more conditions are not proved, the principle of res judicata would not apply vide Life Insurance Corpn. of India v. Ganga Dhar v. Ranade, AIR 1990 SC 185 and Syed Mohd. S. Labbai v. Mohd. Hanifa, Manu/SC/0510/1976.

Where all the four conditions are proved, the Court has no jurisdiction to try the suit thereafter as it becomes not maintainable and liable to be dismissed. For application of principle of res judicata, existence of decision finally deciding a right or a claim between party is necessary vide M/s. International Woolen Mills v. M/s. Standard Wool (U.K.) Ltd., AIR 2001 SC 2134.

Res judicata is a mixed question of fact and law vide Madhukar

D. Shende v. Tarabai Aba Shedage, AIR 2002 SC 637. It is dictated by wisdom which is for all times. It does not draw sustenance from any statute nor should any statutory provision be easily construed to render it ineffective vide Balbir Kaur and another v. Gram Panchayat Village Jalabehra and another, 1986 R.L.R. 112.

(a) There must be two suits: One former suit and the other subsequent suit and Explanation I

The bar only applies if the matter directly and substantially in issue in the former suit has been heard and finally decided by a Court competent to try such suit. This clearly means that on the matter or issue in question there must have been an application of the judicial mind and a final adjudication has been made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res judicata vide State of Maharashtra v. M/ s. National Construction Co., AIR 1996 SC 2367.

Meaning of "Suit"

The plain and grammatical meaning of the word "suit" occurring in clause "in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised" of Section 11 of Code of Civil Procedure includes the whole of the suit and not a part of the suit, so that giving the word "suit" its ordinary meaning it is difficult to accept the argument that a part of the suit or an issue in a suit is intended to be covered by the said word in the material clause vide Gulab Bai V. Manphool Bai, AIR 1962 SC 214.

Having regard to the legislative background of Section 11, there can be no hesitation in holding that the word 'suit' in the context must be construed liberally and it denotes the whole of the suit and not a part of it or a material issue arising in it vide Mirza Abid Kazim Husain v. Mirza Nasir Husain, AIR 1977 All. 201. Section 11 is now made applicable by the Explanations and interpretation to certain proceedings giving more extensive meaning to the word 'suit'. In its comprehensive sense the word 'suit' is understood to apply to any proceeding in a Court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between parties in a Court of justice the proceeding by which the decision of the Court is sought may be a suit. But if the proceeding is of a summary nature not falling within the definition of a suit, it may not be so treated for the purpose of Section 11 vide Pandurang Ramchandra Mandlik v. Shantibai Ramchandra Ghatge, AIR 1989 SC 2240.

Explanation I

In view of the risk of rigid application of the rule of res judicata defeating the ends of justice, several important exceptions have been recognised. One of the rules of guidance is that former Judgment, on the basis of which the plea of res judicata is rested, is to be construed with strictness in order to ascertain compliance with the requirements of the principle. The rule, therefore, assumes that at the earlier stage, the parties had effective opportunity to litigate the same matter in a Court of competent jurisdiction on issues which were directly in point

and properly before the Court. This precaution cannot be overlooked, for, a decision, which has the force of res judicata, can "make the white black, the black white; the crooked straight, the straight crooked--res judicata facit ex alba nlgrum, ex nigro album, ex curvo rectum, ex recto curvum". A Judgment which is erroneous on facts or law, is, nevertheless, res judicata so long as it is not vacated or reversed by a superior Court. In other words, a suitor is entitled to one fair trial of his case and no one is permitted to harass another a second time, or take the time of the Court, for agitating the some controversy. Once a final Judgment is obtained, the same matter cannot be canvassed anew in another action, but it has to be a decision on merits by a competent tribunal between parties over whom it has jurisdiction vide Jaljodhan Singh v. Kirpa Singh, 1963 P&H 178.

(b) Same parties or parties under whom they claim to litigate Section 11 requires that former suit which has been adjudicated upon must have been between same parties or between parties under whom they or any of them claim, litigating under same title. In other words in Order to make a person bound by res judicata it must be proved that he was in some way a party to the suit decided for a Judgment binds only parties and privies vide Ishwar Das v. State of M.P., AIR 1979 SC 551 e.g. If a karta of joint Hindu family property was party to a suit decided, a suit filed by another coparcener regarding same matter in issue is barred by res judicata vide Amrit Sagar v. Sudesh Behari, AIR 1970 SC 5. It is not necessary that parties should be common. Where a person is properly represented in a suit by another either by act of

parties or by operation of law, he can be presumed to be a party to such suit. However, where after the finding or decision on a preliminary issue, new Defendant is added to a suit, such finding would not operate as res judicata against that Defendant vide S. Mohd. Ismail v. S. Anwar Ali, AIR 1991 Cal. 391. Similarly, where a decree is passed against a minor who was not properly represented, the principle of res judicata would not bar such person from contesting fresh suit. But a transferee is bound by the decree passed against transferor in respect of property transferred except where, the transfer has taken place before the former suit was filed.

In an earlier proceeding the wakf in question was described as "private", under law as it stood then in a subsequent proceeding that wakf was declared as public after commencement of Bombay Public Trusts Act. It was held, the earlier decision will not operate as res judicata in litigation filed subsequent to the second decision vide Sajjadanashin Sayed v. Musa Dadabhai Ummer, AIR 2000 SC 1238. In a case dispute between labour and Electricity Co. was referred to High Court. Subsequently, the Electricity

Company was amalgamated with State Electricity Board and the dispute was referred to the High Court. It was held that subsequent reference had nothing to do with the earlier reference. Principles of res judicata had no application vide Karnataka Power Transmission Corporation Ltd. v. Amalgamated Electricity Co. Ltd., AIR 2001 SC 291. However, in another case it was held that once the issue was directly and substantially involved in earlier proceedings and which

was raised by the "forum", it is not permissible for the forum to once again raise the same issue in subsequent proceedings by coming under the "cloak" of the forum vide Junior Telecom Officers v. Union of India, AIR 1993 SC 787.

One of the pre-conditions for attraction of Section 11 for an issue to be barred by res judicata, is that, it must arise between the same parties and decided by a Court of competent jurisdiction. Section 11 does not encompass a situation where one of the parties to the subsequent suit was aware of the earlier suit and the question arising therein. It is also futile to submit that the Plaintiff ought to have got himself pleaded to the earlier suit. There is no compulsion on a person to get himself impleaded to any Court proceedings. As such, there cannot be any consequence of a person not volunteering for being impleaded to a suit. But, there are definite consequences provided for in the Code of Civil Procedure for not joining a proper or a necessary party to the proceedings vide Shri Narendra Akash Maharaj Petkar v. Shri Shahaji Baburao Petkar and The Saraswat Employee Co-op. Hsg. Soc. Ltd. v. Shri Shahaji Baburao Petkar.

Direct and Substantial as distinct from Incidental and Collateral. The effect of res judicata is, confined to the matter which was "directly and substantially in issue in the former litigation inter panes. A matter which is collaterally or incidentally in issue for the purposes of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. The question has to be decided on the pleadings, the issues and the findings given in that case vide

Isher Singh v. Sarwan Singh, AIR 1965 SC 948. If the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would be "directly and substantially in issue. A collateral or incidental issue is one that is incidental to a direct and substantive issue vide Sajjadanashin Sayed v. Musa Dadabhai Ummer, AIR 2000 SC 1238 being incidental only to the substantial issue, cannot operate as res judicata in a subsequent suit in which question of issue is directly raised vide Ganga Bai v. Chhabubai, AIR 1982 SC 20. In other words, when the question raised in the subsequent proceeding have no bearing on the finding made in the earlier proceedings the principle of res judicata is not applicable vide State of U.P. v. Rup Lal Sharma, (1997) 2 SCC 62. If the finding is given incidentally while determining another issue which was directly and substantially in issue, such finding cannot be said to be on an issue which was directly and substantially in issue in the former suit. Undoubtedly, the question whether a matter is "directly and substantially in issue" would depend upon whether a decision on such an issue, would materially affect the decision of the suit vide Bhai Hospital Trust v. Parvinder Singh, AIR 2002 Del. 311. When a finding as to title to immovable property is rendered by a Court of Small Causes res judicata cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In Order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the Court trying such

suit. A matter collaterally or incidentally in issue for the purposes of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. It has long been held that a question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as res judicata in a subsequent suit in which the question of title is directly raised vide Gangabai v. Chhabubai, AIR 1982 SC 20.

In this context I would like to refer that the plaintiffs have failed to prove the conditions which give effect to the principle of res judicata under Section 11, which are as under;

(I) that the parties are same or litigating under the same title.

(II) that the matter directly and substantially in issue in the subsequent suit.

It is also settled proposition of law that if both the conditions are not proved, the principle of res judicata would not apply vide Life Insurance Corporation of India Versus Ganga Dhar Versus Ranade, AIR 1990 SC 185

It is settled proposition of law vide **AIR 1960 SC 941, Satyadhyan Ghosal and Ors. v. Sm. Deorajin Debi and Anr.** that the dispute must be between the same parties. It is clear from the judgement in suit no.61/280 of 1885, Mahant Raghubar Das vs. Secretary of State and others that the parties to the present suit are different and accordingly the suit is not hit by res-judicata. It is also clear that the dispute in the earlier suit of 1885 was with respect to Chabutra only while in this case the plaintiffs have sought different

reliefs. Thus same plea was not taken before this Court. It is also not clear from the averment of the plaint as to how the same plea was required to be raised by the contesting parties when in a different context the present suit has been filed by the Sunni Central Waqf Board. It crystal clear that the matter in issue in 1885 case was with respect to Chabutra and not the matter with respect to other dispute as shown in the plaint. There is no final decision on any particular issue in the earlier suit which bind the parties and there is nothing on record to suggest that the matter might or ought to have been raised earlier. Consequently, the plaintiffs have failed to substantiate that the earlier judgment shall operate as res judicata against the defendants in the suit. Issue No. 8 is decided accordingly against the plaintiffs.

ISSUE NO. 9

Whether the plaintiff's served valid notices under Section 80 C.P.C.

FINDINGS:

Deleted vide order dated May, 22/25, 1990).

ISSUE NO. 17

Whether a valid notification under Section 5(1) of the U.P. Muslim Waqf Act No. XIII of 1936 relating to the property in suit was ever done? If so, its effect?

FINDINGS:

This issue has already been decided by Civil Judge, Faizabad on 21.4.66. The finding has become final between the parties and is

binding on the parties.

ISSUE NO. 18:

What is the effect of the judgdment of their lordships of the Supreme Court in Gulam Abbas and others Vs. State of U.P. and others, A.I.R. 1981 Supreme Court 2198 on the finding of the learned Civil Judge recorded on 21st April, 1966 on issue no. 17?

FINDINGS:

Admittedly, Civil Judge recorded finding on issue no. 17 on 21.4.66. It has been urged on behalf of the plaintiffs that the judgment of the Hon'ble Apex Court in ***Ghulam Abbas Vs. State of U.P., AIR 1981 SC 2198*** has an impact on the finding of the learned Civil Judge on issue no. 17. It has not been argued from the side of the plaintiffs that how finding on issue no. 17 was not be deemed to be final between the parties. It further transpires in Ghulam Abbas's case that there was a dispute between Shia and Sunni Muslims. The executive machinery was directed to act in accordance with the provisions of Section 144 Cr.P.C. The petition was filed before the Apex Court by a party, which was not a party to the suit. Thus, the effects of Ghulam Abbas's case do not apply in this case. However, at the cost of repetition, it may be referred that the finding on issue no. 17 is final between the parties and is not liable to be questioned by the plaintiffs while they have failed to get it set aside through proper forum. Thus there is no effect of the judgment of Ghulam Abbas's case on the finding of Civil Judge recorded on 21.4.1966 on issue no. 17. Issue

no. 18 is decided accordingly in favour of the defendants and against the plaintiffs.

ISSUE NO. 19(b):-

Whether the building was land-locked and cannot be reached except by passing through places of Hindu worship? If so, its effect?

FINDINGS:

It has been pointed out by the defendants that the disputed structure was surrounded by temples and other Hindu places of worships and it was not possible for the Muslims to reach at the disputed structure except by passing through places of Hindu worship. Thus, the building was land locked. Thus according to the map prepared by Sri Shiv Shankar Lal, Pleader in O.O.S. No. 2 of 1950 that the disputed structure was surrounded from all the sides and there were Hindu religious place of worship. It transpires that towards rest there was a Parikrama Asthal and one Chabutra towards east there was Ram Chabutra and Hanumat Dwar towards south Chabutra and Samadhi of Markendey Angira and towards east there were Samadhi of Sanak Nandan and others alongwith Sita Rasoi. Thus, the building was land locked and it was only possible to reach inside the disputed place through the places of Hindu worship. Consequently, according to the tenets of Islam there cannot be any mosque in the vicinity of Hindu place of worship where the bells are rung and prayers are offered. It is also admitted fact that at Hindu place of worship ringing of bell is integral part of worship. Thus according to the Islamic tenets

such a vicinity cannot be a mosque.

In vicinity of bells there cannot be a mosque because it is revelation of the holy prophet that bell is abode of saitan, contrary to it bell is integral part of religious customs of worship of the Hindus as such as all along bells remained in the disputed site it can't be a mosque:

1. In a Hindu Temple ringing of bell is integral part of worship while according to *Shar* bell is considered to be an instrument of Saitan and angels do not enter in such a house where bell is rung as such, a place where angels do not enter can't be a Masjid. As it is evident from the Gazetteer of 1877-78 and Millet's Settlement Report that till 1855 Hindus were worshipping in the same and one building which was allegedly known as Babri Mosque said to be erected by Moghul Emperor Babur over the sacred site of Sri Ramajanamsthan by demolishing Hindu temple of that shrine and on annexation of Oudh to British India (on 13th February, 1856 and Lord Canning's proclamation on 15th March, 1859, confiscating all proprietary rights in the soil of the Oudh Province) the Administration made an enclosure bifurcating the Temple compound and thereby ordered Hindus not to enter inside the said building inconsequence whereof Hindus erected a Platform in the Temple compound just after enclosure and started worshiping thereon, but from the several applications of the persons claiming to be Mutavallis/ Muezzins/ Khattibs it is

very much apparent that even after 1855 and onwards Hindus were continuously worshipping in the said temple and, from their application of 1883 it becomes crystal clear that in addition to performing Idol worship in the said disputed building Hindus were celebrating their festivals as such for all practical purposes said building was a Hindu temple and according to Musalman Law due to presence of Idols & Bells it was not at all a Masjid.

2. The Sacred Compilation Hadith Sahih Muslim (Vol.-III) 2113 and 2114 reveal that the Holy Prophet had said that Angels do not accompany the person who has with him a bell because the bell is the musical instrument of the Saitan. The said Hadiths read as follows:

[2113] Abu Huraira reported Allah's Messenger (may peace be upon him) had said: Angels do not accompany the travellers who have with them a dog and a bell(1).

[2114] Abu Huraira reported that Allah's Messenger (may peace be upon him) had said: The bell is the musical intrument of the Satan.

3. The Sacred Compilation Hadith Sahih Muslim (Vol.-I) 377 as well as Jami' At-Tirmidhi (Vol.-1) 190 reveal that the Holy Prophet did not approve the method of giving Ajan/Adhan by ringing the bell like the persons of other faith; of course, reason behind this was that it was an instrument of Saitan. Said Hadiths read as follows:

> "[377] Ibn Umar reported: When the Muslims came to Mediha, they gathered and sought to know the time of prayer but no one summoned them. One day they

> discussed the matter, and some of them said: Use something like the bell of the Christians and some of them said: Use horn like that of the Jews. Umar said: Why may not a man be appointed who should call (people) to prayer? The Messenger of Allah (may peace be upon him) said: O Bilal, get up and summon (the people) to prayer."
>
> (Hadith Sahih Muslim (Vol.-I) 377 at page 256)
>
> "**190.** Ibn Umar narrated: "When the Muslims arrived in Al-Madinah, they used to assemble for the *Salat,* and guess the time for it. There was no one who called for it (the prayers). One day they discussed that some of them said that they should use a bell like the bell the Christians use. Others said they should use a trumpet like the horn the Jews use. But Umar [bin Al-Khattab] said, 'Wouldn't it be better if we had a man call for prayer?' He said, 'So Allah's Messenger said: 'O Bilal! Stand up and call for the *Salat.*"
>
> (Jami' At-Tirmidhi (Vol.-1) 190 at page 215)

4. In 'Ibn Battuta' Travels in Asia and Africa' (1325-1354) on page 142 Ibn Battuta writes that he became surprised when he heard bells ringing on all sides of the mosque wherein he was staying. In his note on page 357 of the said book the editor/translator explains that the Muslim hold the ringing of bells in the greatest abhorrence and believe that the angels will not enter in the house wherein bells are rung. As the suit premises was surrounded by all sides from the temples and even in the alleged Temple -Mosque building Hindus were worshiping by ringing bells, according to *Shar* it cannot be termed as mosque. Relevant extracts from the said book read as follows:

We stayed at Kafá in the mosque of the Muslims. An hour after our arrival we heard bells ringing on all sides. As I had never heard bells before,[19] I was alarmed and bade my companions ascend the minaret and read the Koran and issue the call to prayer. They did so, when suddenly a man entered wearing armour and weapons and greeted us. He told us that he was the qádí of the Muslims there, and said "When I heard the reading and the call to prayer, I feared for your safety and came as you see."

[19] Muslims hold the ringing of bells in the greatest abhorrence, and attribute to the Prophet the saying: "The angels will not enter any house wherein bells are rung."

5. The Sacred Compilation Hadith Sahih Muslim (Vol.-II) 851 & 851R3 reveal that it was commanded by the Holy Prophet that Muslims must observe silence during sermon on Friday. The said Hadiths read as follows:

[851] Abū Huraira reported what Allah's Messenger (SAW) had said: If you ask your companion to be quiet on Friday while the Imām is delivering the sermon, you have in fact chattered (3)

[851R3] On the authority of Abu Huraira that the Holy Prophet said: "If you said to your companion: Be quiet, on Friday, and the Imam is delivering the sermon, you have in fact chattered.

From the aforesaid Hadith it becomes clear that in the noisiest place where bells were/are being rung and Conch Shells were/are being blown prayer could not be offered. As it is admitted by the then alleged Mutawalli that Conch Shell was being blown by the Pujari Neehang Singh even in 1861 said Structure can't be a Masjid but for all practical purposes it was/is only Temple.

Since the structure has already been demolished but the report of Commissioner is available on record. Accordingly, the disputed structure cannot be deemed to be a mosque according to the tenets of Islam. Thus, Issue no.19(b) is decided in favour of the defendants and against the plaintiffs.

ISSUE NO. 19 (d):

Whether the building in question could not be a mosque under the Islamic Law in view of the admitted position that it did not have minarets?

FINDINGS:

On behalf of defendants it is contended that the building in question was not a mosque under the Islamic Law. It is not disputed that the structure has already been demolished on 6.12.1992. According to Dr. M. Ismail Faruqui and others vs. Union of India and others case, 1994 (6) SCC 360, the Hon'ble Apex Court held at para 70 that the sacred character of the mosque can also be lost. According to the tenets of Islam, minarets are required to give Azan. There cannot be a public place of worship in mosque in which Provision of Azan is not available, hence the disputed structure cannot be deemed to be a mosque.

According to Islamic tenets, there cannot be a mosque without place of Wazoo and surrounded by a graveyard on three sides. Thus, in view of the above discussions, there is a strong circumstance that without any minaret there cannot be any mosque. Issue no.19(d) is decided accordingly, against the plaintiffs and in favour of the

defendants.

ISSUE NO. 19(e):

Whether the building in question could not legaly be a mosque as on plaintiffs own showing it was surrounded by a graveyard on three sides.

FINDINGS:

It is not disputed that alleged mosque was surrounded by a graveyard from three sides. Defendants contend as below :-

There can not be a mosque in a place surrounded by graves as facing towards graves Namaz can not be offered:

1. In the schedule of the plaint the suit premises has been shown to be surrounded on all four sides by the graves, and sacred Hadiths prohibit from - offering prayers towards graves, visiting the graves of strangers, sitting on graves and erecting tent over a grave as such according to Islamic Law and tenets the Scheduled Premises was never appropriate place for offering prayers to Merciful Almighty Allah. As such no declaration of Mosque as prayed for can be granted.

2. The Sacred Compilation Jami‘ AT-Tirmidhi (Vol.-2) Hadith 1050 reveals that the Holy Prophet has commanded not to sit on the graves nor perform Salat i.e. prayer towards graves .

> **“1050.** Abu Marthad Al-Ghanawi narrated that the prophet said: “Do not sit on the graves nor perform Salat towards them.” (Sahih) (He said) There are narrations on Amr bin Hazm, and Bashir bin Al-Khasasiyyah.

(Another route) with the chain, and it is similar."

3. The Sacred Compilation Jami' AT-Tirmidhi (Vol.-2) Hadith1054 and ibid (Vol.1) Hadith 230 reveal that the Holy Prophet had prohibited Muslims from visiting the graves except the grave of their mothers. The said Hadith reads as follows:

> **"1054.** Sulaiman bin Buraidah narrated from his father that the Messenger of Allah said: "I had prohibited you from visiting the graves. But Muhammad was permitted to visit the grave of his mother: so visit them, for they will remind you of the Hereafter."
>
> Jami' AT-Tirmidhi (Vol.-2) Hadith 1054

> "320. Ibn 'Abbas narrated: "Allah's Messenger cursed the women who visit the graves, and those who use them as Masajid and put torches on them." **(Da'if)**
>
> Jami' At-Tirmidhi (Vol.1) Hadith 230

As such to go an alleged Mosque surrounded on all three sides by graveyards means to visit the graves of strangers every day which act has been prohibited in Islam wherefrom it can be safely inferred that the Muslims are forbidden from offering prayers in a graveyard-locked place/building.

4. The Sacred Compilation Jami' AT-Tirmidhi (Vol.-5) Hadith 2890 reveals that even a tent cannot be erected over the grave as it invites sin.

> "**2890**. Ibn Abbas narrated: "One of the Companions of the Prophet put up a tent upon a grave without knowing that it was a grave. When he realized that it was a person's grave, he

recited Surat Al-Mulk until its completion. Then he went to the Prophet and said, 'O Messenger of Allah [Indeed] I erected my tent without realizing that it was upon a grave. So when I realized there was a person in it I recited Surat Al-Mulk until its completion.' So the Prophet said: 'It is a prevention, it is a salvation delivering from the punishment of the grave." **(Da'if)"**

5. Neil B.E. Baillie in his Book 'A Digest of Mahommedan Law' Part- First (Second Edition 1875) containing the doctrines of the Hanifeea Code of Jurisprudence at page 621-22 records that the bodies buried in the ground can be exhumed by the rightful owner if the land was usurped. Relevant extract from the above referred pages reads as follows:

When a body has been buried in the ground, whether for a long or short time, it cannot be exhumed without some excuse. But it may be lawfully exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption.

Be it mentioned herein that the Plaintiffs' witnesses have admitted that the graves were dug up by the Hindus after purchasing the lands wherein graves were located. It is settled law that public Graveyard can not be sold wherefrom it becomes crystal clear that it was not a public Graveyard meant for the Muslims.

6. The Sacred Compilation Jami' AT-Tirmid (Vol.-2) Hadith 1052 reveals that the Holy Prophet had prohibited plastering graves, writing on them, building over them and treading on them.

1052- Jabir narrated: "The Messenger of Allah prohibited plastering graves, writing on them, building over them, and treading on them." (Sahih)

As such it cannot be inferred that the plastered graves mentioned in Commissioner's report in 1950 were built by Emperor Babur of his soldiers who died in alleged war between him and the then ruler of Ajodhya because the Emperor Babur was a scholar of Hanafi School of Islamic Law which does not permit to build plastered graves of soldiers.

I have gone through site plan prepared by Advocate Commissioner in suit no. 2 of 1950, which goes to show that towards east, there is a graveyard for which there is controversy. Muslims claim in the plaint that this graveyard was used for the burial of soldiers, who fought from the site of Babur Army during the scuffle between Shaikh Bayazid, previous ruler of Ayodhya and Babur. It has been submitted on behalf of the plaintiffs that the said graveyard is Gang-e-Shahidan where certain muslims were buried, who were killed during the battle with Hindus that took place in Hanuman Garhi. Hindus claim that there is a kuti and chabutra towards east. Definitely there is a graveyard for which there is controversy to whom the same belongs.

Towards north and south of the disputed structure there are certain plastered graves, which are said to be Samadhi of Hindu saints and towards west there is open place.

In view of the circumstances referred to above, Hindus claim

that namaz cannot be offered in a graveyard. Accordingly the case as set up in the plaint is contrary and the plaintiff's are not entitled for any relief .

Having regard to the rival submissions, it is clarified that the entire graveyard has already been acquired by the Central Government and the action has been upheld by the Hon'ble Apex Court in ***Dr. M. Ismail Faruqui Vs. Union of India, (1994) 6 SCC 360.***

According to the tenets of Islam since there was no place of wazu and the disputed structure, which was surrounded by three sides by the graveyard, could not be a functional mosque.

As there was no provision of water for wazu in the disputed structure it can't be a mosque:

As there was no provision for Azan without minarets in the disputed structure, it can't be a mosque.

1. Without performing *wazu* by pure water in a mosque one cannot offer prayer. One Hadith says that for Friday's prayer one should take a bath in his house and thereafter perform *wazu* in a Mosque and then he should offer prayer from which it becomes crystal clear that performing *wazu* in a mosque is mandatory pre condition for offering one's prayer to Almighty Merciful *Allah*. As Friday's prayer is offered in congregation at least on that day huge quantity of water is required but in the alleged Temple-Mosque premises there was no such provision of water for Muslims for performing *wazu* from which it can be safely inferred that said structure was neither meant for offering

Namaz nor was a Masjid at all but all along it was a temple as such the same cannot be declared *Baburi Masjid*.

2. The Sacred Compilation Hadith Sahih Muslim (Vol.-II) 844 & 845 reveal that before offering Friday's prayer one should take a bath in his house and thereafter perform *Wazu* in a Mosque. Said Hadiths read as follows:

[844] 'Abdullah reported that he heard Allah's Messenger (SAW) who said: When any one of you intends to come for Friday prayer, he should take a bath.

[845] 'Abdullah (b. 'Umar) reported from his father, that while be was addressing the people on Friday (sermon), a person, one of the Companions of the Messenger of Allah (SAW), entered (the mosque). 'Umar said to him loudly: What is the time hour (for attending the prayer)? He said: I was busy today and I did not return to my house when I heard the call (to Friday prayer), but I perfomed ablution (only). Upon this 'Umar said: Just ablution! You know that the Messenger of Allah (SAW) commanded (us) to take a bath (on Friday).

3. The Sacred Compilations Hadith Sahih Muslim (Vol.-I) 225; (Vol.-II) 844-847R1 and Jami' At-Tirmidhi (Vol.-1) Hadiths 1-5, 90, 200-201, 497-498 say that prior to offering prayer performance of *Wazu* by pure water is necessary and for Friday's prayer it is must to take bath in one's house then visit the *Masjid* and perform *Wazu* in it by water prior to offering prayer.

[225] Hammām b. Munabbih, who is the brother of Wahb . Munabbih, said: This is what has been transmitted to us by Abū Huraira from Muhammad, the Messenger of Allah (SAW), and then narrated a hadīth out of them and observed that the Messenger of Allah (SAW) said: The prayer of no one amongst you would be accepted in a state of impurity till he performs ablution (1).

[846] Abu Sa'id Al-Khūdrī reported what Allah's Messenger (SAW) had said: Taking a bath on Friday is essential[1] for every adult person.

[847] 'Ā'isha reported: The people came for Friday prayer from their houses in the neighbouring villages dressed in woollen garments full of dust which emitted a foul smell. A person among them (those who were dressed so) came to the Messenger of Allah (SAW) while he was in my house. The Messenger of Allah (SAW) said to him: Were you to cleanse yourselves on this day.

[847R1] 'Ā'isha reported: The people (mostly) were workers and they had no servants. Bad-smell thus emitted out of them. It was said to them: If you were to take bath on Friday.

1. Ibn 'Umar narrated that the Prophet ﷺ said: "*Ṣalāt* will not be accepted without purification, nor charity from *Ghulūl*[1] ." **(*Ṣaḥīḥ*)**

2. Abū Hurairah narrated that Allāh's Messenger ﷺ said: "When a Muslim, or believer, performs *Wuḍū'*, washing his face, every evil that he looked at with his eyes leaves with the water – or with the last drop of water, or an expression similar to that – and when he washes his hands, every evil he did with his hands leaves with the water – or with the last drop of water – until he becomes free of sin." **(*Ṣaḥīḥ*)**

3. 'Alī narrated that the Prophet ﷺ said: "The key to *Ṣalāt* is the purification, its *Taḥrīm* is the *Takbīr*, and its *Taḥlīl* is the *Taslīm*."[1] **(*Ḥasan*)**

4. Jābir bin 'Abdullāh, may Allāh be pleased with them, narrated that Allāh's Messenger ﷺ said: "The key to Paradise is *Ṣalāt*, and the key to *Ṣalāt* is *Wuḍū'*." **(*Ḥasan*)**

5. Anas bin Mālik said: "When the Prophet ﷺ entered the toilet he would say: 'O Allāh! Indeed I seek refuge in You.'"
Shu'bah (one of the narrators) said: "Another time he said: 'I seek refuge in You from *Al-Khubthi* and *Al-Khabīth*.' Or: '*Al-Khubthi* and *Al-Khabā'ith*.'"[1] **(*Ṣaḥīḥ*)**

90. Ibn 'Umar narrated: "A man greeted the Prophet ﷺ (with *Salām*), and he was urinating, so he did not respond to him." **(*Ṣaḥīḥ*)**

200. Abū Hurairah narrated that Allāh's Messenger ﷺ said: "None should call the *Adhān* except for one with *Wuḍū'*." (*Ḍa'īf*)

201. Ibn Shihāb narrated that Abū Hurairah said: "None should call for the prayer except for one with *Wuḍū'*." (*Ḍa'īf*)

497. Samurah bin Jundab narrated that Allāh's Messenger ﷺ said: "Whoever performs *Wuḍū'* on Friday, then he will receive the blessing, and whoever performs *Ghusl* then *Ghusl* is more virtuous." (*Ḥasan*)

498. Abū Hurairah narrated that Allāh's Messenger ﷺ said: "Whoever performs *Wuḍū'*, performing his *Wuḍū'* well, then he comes to the Friday (prayer), and gets close, listens and is silent, then whatever (sin) was between that and (the last) Friday are forgiven for him, in addition to three days. And whoever touches the pebbles, he has committed *Laghā* (useless activity)." (*Ṣaḥīḥ*)

4. Holy Quran Surah 5 Al-Ma'idah Ayat 6 and the Sacred Compilation Hadith Sahih Muslim (Vol.-I) 367-370 provides that Tayammum i.e. purification by clean earth can be done only in extreme exigency at the time of travelling or war campaign when water is not available otherwise *Wazu* must be performed by water.

6. O you who believe! When you intend to offer *As-Salât* (the prayer), wash your faces and your hands (forearms) up to the elbows, rub (by passing wet hands over) your heads, and (wash) your feet up to the ankles[1]. If you are in a state of *Janâba* (i.e. after a sexual discharge), purify yourselves (bathe your whole body). But if you are ill or on a journey, or any of you comes after answering the call of nature, or you have been in contact with women (i.e. sexual intercourse), and you find no water, then perform *Tayammum* with clean earth and rub therewith your faces and hands.[2] Allâh does not want to place you in difficulty, but He wants to purify you, and to complete His Favour to you that you may be thankful.

[367] Ā'isha reported: We went with the Apostle of Allah (may peace be upon him) on one of his journeys (3) and when we reached the place Baidā'or Thāt Al - Jaish (4), my necklace was broken (and fell some where). The Messenger of Allah (may peace be upon him) along with other people stayed there looking for it. There was neither any water at that place nor was there any water with them (the Companions of the Holy Prophet). Some people came to my father Abū Bakr and said: Do you see what' Āisha has done? She has detained the Messenger of Allah (may peace be upon him) and the people accompanying him, and there is neither any water here or with them. So Abū Bakr came there and the Messenger of Allah (may peace be upon him) was sleeping with his head on my thigh. He (Abū Bakr) said: You have detained the Messenger of Allah (may peace be upon him) and the people and there is neither water here nor with them. She (Āisha) said: Abū Bakr scolded me and uttered what Allah wanted him to utter and nudged my hips with his hand. And there was nothing to prevent me from stirring but the fact that the Messenger of Allah (may peace be upon him) was lying upon my thigh. The Messenger of Allah (may peace be upon him) slept till it was dawn at a waterless place. So Allah revealed the verses pertaining to Tayammum (1) and they (the Holy Prophet and his Companions) performed Tayammum. Usaid b. Al- Hudair who was one of the leaders (2) said: This is not the first of your blessings, O Family of Abū Bakr (3). Āisha said: We made the camel stand which was my mount and found the necklace under it.

[368] Shaqiq reported: I was sitting in the company of Abdullah and Abū Mūsā, when Abū Mūsā said: O'Abdel - Rahmān (kunya of Abdullah b. Mas'ūd), what would you like a man to do about the prayer if he experiences a seminal emission or has sexual intercourse but does not find water for a month(4)? Abdullah said: He should not perform Tayammum even if he does not find water for a month. Abdullah said: Then what about the verse in Sūra Mā'ida: «If you do not find water, betake yourself to clean with dust»? Abdullah said: If they were granted concession on the basis of this verse, there is a possibility that they would perform Tayammum with dust on find-

ing water very cold for themselves. Abū Mūsā said to Abdullah: You have not heard the words of Ammār: The Messenger of Allah (may peace be upon him) sent me on an errand and I had a seminal emission, but could find no water, and rolled myself in dust just as a beast rolls itself. I came to the Messenger of Allah (may peace be upon him) and mentioned that to him and he (the Holy Prophet) said: It would have been enough for you to do this. Then he struck the ground with his hands once and wiped his right hand with the help of his left hand and the exterior of his palms and his face[1]. Abdullah said: Didn't you see that Umar was not fully satisfied with the words of Ammār only[2]?

[369] Umair, the freed slave of Ibn' Abbās, reported: I and Abdel - Rahmān b. Yasīr, the freed slave of Maimūna, the wife of the Apostle (may peace be upon him). came to the house of Abu'l -Jahm b. Al - Hārith Al-Simma Ansāri and he said: The Messenger of Allah (may peace be upon him) came from the direction of A-Jamal well and a man met him; he saluted him but the Messenger of Allah (may peace be upon him) made no response, till the Holy Prophet came to the wall, wiped his face and hands and then returned his salutations.

[370] Ibn Ymar reported: A man happened to pass by the Messenger of Allah (may peace be upon him) when he was making water and saluted him, but be did not respond to his salutation.

Since there was no provision of water reservoir in the disputed premises, the question of performing wazu by huge crowd for Friday's prayer did not arise at all in other words the said structure could not be used as Masjid for offering congregational prayer on Friday. In view of Islamic tenets, the property cannot be deemed to be a mosque.

In view of the photographs shown in the album, it is established that on the pillars, there were certain images of gods and other religious pictures of Hindu religion. Thus according to the following tenets of Islam a building cannot be treated to be a mosque. The Islamic tenets are as under:-

Structure **having images/idols and designed one cannot be a masjid under law of shar** as such the disputed structure as it was can not be termed as a mosque:

1. The Holy prophet has said that angels do not enter in a house which has images, portraits, pictures, idols etc. and even the

designed garments detract attention from prayer and, for that reason prohibited to decorate a mosque with pictures. As the disputed structure on its columns and other parts had engraved/chiseled images/idols of Load-bearing *Yakshas*, *Devis*, Divine - couples, *Kalash,* Lotus, Leaves, *Varah, Swastiks, Srivatsa, Kapot-pallis, etc.* it does not come within the definition of Masjid according to Muslim Religious Law and belief but it comes within the definition of a Hindu Temple according to Hindu Personal Religious Law and belief.

2. The Sacred Compilation Hadith Sahih Muslim(Vol.-I) 528 reveals that the Holy Prophet prohibited to decorate Mosques with pictures. Said Hadith reads as follows:

[528] Ā'isha reported: Umm Habiba and Umm Salama mentioned before the Messenger of Allah (may peace be upon him) a church which they had seen in Abyssinia and which had pictures in it. The Messenger of Allah (may peace be upon him) said: When a pious man amongst them (among the religious groups) dies they build a place of worship on his grave, and then decorate it with such pictures. They would be the worst of creatures on the Day of Judgment in the sight of Allah(1).

From the aforesaid Hadith it is crystal clear that there is forbiddance in Islam to decorate the Mosque with pictures. As such a building decorated with pictures can't be declared as a Masjid.

3. The Sacred Compilations Hadith Sahih Muslim (Vol.-III) 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111 and 2112 as well as Jami' At-Tirmidhi (Vol.-V) Hadith 2804 reveal that the Holy Prophet had acknowledged that the Angels do not enter a house

in which there is an object of images or a dog. Said Hadiths read as follows:

(Set out Hadith Sahih Muslim from running page 101 to 107)

"**2804.** Ibn abbas narrated: "I heard Abu Talhah saying: ' I heard the Messenger of Allah, saying: "The angels do not enter a house in which there is a dog or an object of images." ***(Sahih)***

Comments:
The taking or drawing of a picture is not allowed, keeping it is also not permissible, and whoever does so is deprived of the blessed and merciful supplications of the angels; while a person is in need of mercy and blessing at every moment. Likewise, a dog is an impure animal and some are of a satanic nature and the angels despise the devil."

(Jami' At-Tirmidhi (Vol.-V) Hadith 2804)

From the aforesaid Hadiths it is crystal clear that a building which contains images or Gods does not come within the definition of an "Abode of Angels" for the reasons of such building being hated by the angels.

4. The Sacred Compilation Hadith Sahih Muslim (Vol.-I) 556 reveals that the Holy Prophet prohibited to use designed garment at the time of prayer. Said Hadith reads as follows:

[556] Ā'isha reported: The Apostle of Allah (may peace be upon him) p ayed in a garment which had designs over it, so he (the Holy Prophet) said: Take it to Abū Jahm and bring me a plain blanket from him, becuase its de- s gns have distracted me.

From the aforesaid Hadiths it is known that designs detract attention from prayer wherefrom it can be necessarily inferred that a Masjid wherein prayer is offered to Almighty must not have design in it otherwise it will detract the attention of the worshippers from prayer

and lose its status of being a Masjid.

5. The Muwatta:Imam Malik 1743 reveal that the Holy Prophet declined to use a pillow (mattress) painted with pictures and said that no angels enter the house that contains a picture as also that the makers of pictures will suffer punishment on the day of judgment said Muwatta 1743 reads as follows:

(1743) 'Ã'ishah reported that she bought a pillow (mattress) on which were painted pictures. When the Messenger of Allah (may peace be upon him) saw it, he kept standing at the door of her apartment and did not enter and his face showed signs of displeasure. She said : Messenger of Allah, I repent and ask forgiveness of Allah and His Messenger ; what fault is mine ? He asked : What pillow (mattress) is this ? She said : I bought it, so that you may sit on it, recline on it. The Messenger of Allah (may peace be upon him) said : The makers of pictures will suffer punishment on the Day of Judgment. They will be told to give life to what they had painted in the world. Then he added : No angels enter the house that contains pictures.

The defendants have proved through the tenets of Islam that the disputed structure was surrounded by grave yard from three sides. There was no place of Wazoo. There was no separate entrance in the disputed structure, i.e, mosque and further there was no minarets in the disputed structure . It is settled proposition of Mohammedan Law that mosque is a public place. Minarets are required to give Azan.

There should be separate entrance in a mosque which may be used by the public to enter into the mosque. There can not be any idol or image inside the mosque like pillars which were found inside and outside the mosque on which there were certain images of Hindu Gods and Goddesses. Muslims observe prayer and also following formalities; (I) Wazoo (ii) There must be recital of Azan or Ikamat by Pesh Imam or Moazzin and single Muslim can also offer prayer

inside the house but if there is public place, there should be minarets to give Azan. A.S.I. also found that the disputed structure was raised on an earlier wall which was prior to construction. It was a long wall which indicates that the mosque was constructed on some of the portions of the earlier building against the tenets of Islam.

In view of the aforesaid discussion, the building in question could not be legally a mosque and was constructed against the tenets of Islam. Issue no. 19 (e) is decided against the plaintiffs.

ISSUE NO. 19 (F)

Whether the pillars inside and outside the building in question contain images of Hindu Gods and Goddesses? If the finding is in the affirmative, whether on that account the building in question cannot have the character of Mosque under the tenets of Islam?

FINDINGS:

It is not disputed between the parties that there were 14 pillars inside and outside the mosque. This Court directed prior to the demolition of the disputed structure to give report and also prepare photographs of those pillars. In all 30 photographs, leave no room for doubt that there are certain images of Hindu God and Goddesses and other religious marks on the pillars. It further denotes that people were offering prayers and worshipping the images. Photographs on pillar no. 1, photograph-48, photograph No. 50 and photograph on pillar No. 52 etc. go to show that in all the 14 pillars there were religious images of Hindu God and Goddesses and other religious

structures and images of Hindu belief. These structures having images of idols and designed one cannot be a mosque under law of Shar. As such the disputed structure cannot be presumed as a mosque.

STRUCTURE HAVING IMAGES/IDOLS AND DESIGNED ONE CANNOT BE A MASJID UNDER LAW OF *SHAR* AS SUCH THE DISPUTED STRUCTURE AS IT WAS CAN NOT BE TERMED AS A MOSQUE:

1. The Holy prophet has said that angels do not enter in a house which has images, portraits, pictures, idols etc. and even the designed garments detract attention from prayer and, for that reason prohibited to decorate a mosque with pictures. As the disputed structure on its columns and other parts had engraved/chiseled images/idols of Load-bearing *Yakshas*, *Devis*, Divine - couples, *Kalash,* Lotus, Leaves, *Varah, Swastiks, Srivatsa, Kapot-pallis, etc.* it does not comes within the definition of Masjid according to Muslim Religious Law and belief but it comes within the definition of a Hindu Temple according to Hindu Personal Religious Law and belief.
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corate it with such pictures. They would be the worst of creatures on the Day of Judgment in the sight of Allah(1).

From the aforesaid Hadith it is crystal clear that there is forbiddance in Islam to decorate the Mosque with pictures. As such a building decorated with pictures can't be declared as a Masjid.

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>
> **Comments:**
> The taking or drawing of a picture is not allowed, keeping it is also not permissible, and whoever does so is deprived of the blessed and merciful supplications of the angels; while a person is in need of mercy and blessing at every moment. Likewise, a dog is an impure animal and some are of a satanic nature and the angels despise the devil."
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> (Jami' At-Tirmidhi (Vol.-V) Hadith 2804)

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On behalf of plaintiffs, it is submitted that the pillars do not contain images of Hindu God and Goddesses and they were taken from the ruins of any palace.

In view of the above referred tenets of Islam, it transpires that

the pillars which contain images of Hindu God and Goddesses which were found inside the mosque go to show that they remained part of Hindu Temple. Thus, the disputed structure lacks the character of Mosque under the tenets of Islam. Issue No.19(f) is decided against the plaintiffs and in favour of the defendants.

ISSUE NO. 20(a):

Whether the Waqf in question cannot be a Sunni Waqf as the building was not allegedly constructed by a Sunni Mohammedan but was allegedly constructed by Meer Baqi who was allegedly a Shia Muslim and the alleged Mutwalis were allegedly Shia Mohammedans? If so, its effect?

FINDINGS:

It has been urged on behalf of the defendants that the property does not belong to Sunni Waqf as the building was constructed by Mir Baqi who was a Shia Muslim and alleged Mutwalli was also Shia. In this context, the judgment dated 30.03.1946 in Original Suit No. 29 of 1945. Shia Central Waqf Board, U.P. (Lucknow) vs. Sunni Central Waqf Board, U.P. (Lucknow) is relevant. There was a dispute about the mosque. It was contented that since Mir Baqi was a Shia and Cash Nankar was awarded to the Zamindars of Bahorampur and Sholapur, who were Mutwallies and belong to Shia sect and claimed themselves to be descendants of Mir Baqi family. Accordingly, the mosque should be treated as Shia Mosque. On the contrary, it was alleged that the mosque was constructed by Emperor Babar, who was Sunni. Accordingly, the mosque belongs to Sunnies. The trial court framed

issues no. 1, 2, 3, 4 & 5 and thereafter dismissed the suit without declaration filed by Shia Waqf Board holding that mosque was built by Sunnies. These facts are strongly suggestive of the facts that the founder of the mosque was Sunni.

Thus, in view of the findings in original Suit No. 19 of 1945, it transpires that this finding would operate as estoppel against Shia Central Board of Waqf and in view of the aforesaid finding the Shia Waqf Board is stopped to raise any objection against Sunni Central Waqf Board that the mosque belong to them. But this finding remained restricted between Shia and Sunni Board only. The trial court has not given any declaration in favour of Shia Waqf Board. Consequently, in view of the aforesaid finding the building was not constructed by Mir Baqi, who was a Shia Muslim. However, it has also been pointed out that since no valid notification has been issued under Section 5(1) of the Muslim Waqf Act, 1936 in respect of the property in suit. Sunni Central Board of Waqf has not right to maintain the present suit. The point of notification was not considered in the aforesaid suits. Consequently, the finding of issue no. 17 recorded by learned Civil Judge on 21.4.1966 has become final. Accordingly, its effect is that without any notification under Muslim Waqf Act even Sunni Waqf Board cannot maintain a suit. Issue No. 20(a) is decided accordingly against the plaintiffs.

ISSUE NO. 20(b):

Whether there was a Mutwalli of the alleged Waqf and whether the alleged Mutwalli not having joined in the suit,

the suit is not maintainable so far as it relates to relief for possession?

FINDINGS:

It has been urged on behalf of the defendants that no Mutwalli of the alleged Waqf has filed the suit, accordingly the suit is not maintainable. In view of the finding recorded by the learned civil judge on 21.4.1966 on issue no. 17 which has become final, it transpires that without any valid notification under Waqf Act the suit itself is not maintainable. Accordingly, it is irrelevant to consider this aspect for the reason that in the year 1960 Muslim Waqf Act came into operation. Under Section 19 (q) the Board was authorized to institute and defend the suit and proceeding in the court of law and it was not necessary that Mutwallies should have filed the suit. Thus, it was not necessary in the suit that Mutwalli should also be arrayed as plaintiffs in the suit. However, in the U.P. Waqf Act, 1960, the Board has a power to institute the suit. In this regard this Court is of the view that in view of the finding recorded by the learned Civil Judge on 21.4.1966 on issue no. 17 without any valid notification, the Board was also not competent to institute the suit. Accordingly, the suit as framed is not maintainable in accordance with law. Issue No. 20(b) is decided accordingly.

ISSUE NO. 21:

Whether the suit is bad for non-joinder of alleged deities?

FINDINGS:

It has been urged on behalf of the defendants that the instant suit is barred for non-joinder of alleged deities. The plaintiffs have come out with a case in the plaint on 23.12.1949, a crowd of Hindus destroyed, damaged and desecrated the mosque by placing idol inside the mosque.

The plaintiffs in para 24-B sought the relief for removal of the idol and other article which the Hindus have placed in the mosque as object of their worship. On behalf of the defendants, it is suggested that the suit is barred for non-joinder of alleged deities. Learned counsel for the plaintiff has urged that since the Pran Pratishtha of the idol make them deities and there was no Pran Pratishtha of the idol. Accordingly, the idol cannot be termed as deities. Accordingly, it is not necessary to array them as a party. The sum and substance of the argument of the learned counsel for the plaintiffs is that the installed idols are not deity and they are not juristic person. Accordingly, they have not to be arrayed to the parties.

On behalf of the defendants Sri P.N. Misra, Advocate, has argued that Svyambhu symbols of deities do not need Pratistha while Pratistha of manmade symbols of deities can be done by single mantra of the divine Yajurved. His submissions are as under:-

1. According to Shastric (Scriptural) injunctions *Sri Ramajanmasthan Sthandil*, a *Svayambhu Linga (Symbol)* brought into existence and established by the Lord of Universe *Sri Vishnu Himself* as such in-spite of being decayed, or damaged,

or destroyed It shall forever remain sacred place of Worship as it does not need purification or consecration or change. *Pratistha* is required only in respect of man-made Images/Idols/Symbols of Deities that can be done by chanting single *Mantra* XXXI.1 or II.13 of the Holy Divine *Sri Yajurved* (*Vagasaneyee Samhita* also known as *Sri Shukla Yajurved*) .A deity needs to be worshipped by providing all things which are required for leading a healthy and excellent life.

2. *Svayambhu* i.e. Self-built or Self existent or Self-revealed *Lingas* (symbols) of *Devatas* (Gods) or the Lingas (Symbols) established by Gods, or by those versed in the highest religious truths, or by *Asuras,* or by sages, or by remote ancestors, or by those versed in the *tantras* need not to be removed though decayed or even broken. Only decayed or broken *Pratisthita* Images/Idols require to be replaced with new one. In respect of renewal of the images Treatise on Hindu Law celebrated Jurist Golapchandra Sarkar, Sastri reproduces the *Shastric* injunction (Scriptural law) as follows:

> "Raghunanda's Deva-Pratistha-Tantram, last paragraph reads as follows:
>
> "8. Now (it is stated) the prescribed mode of Renewal of Decayed Images. *Bhagwan* says – 'I shall tell you briefly the holy ordinance for renewing Decayed Images * * *'
> "Whatever is the material and whatever size of the image of *Hari* (or the God, the protector) that is to be renewed; of the same material and of the same size, and image is to be caused to be made; of the same size of the same form (and of the same material), should be (the new image) placed there; either on the second or on the third day (the image of) *Hari* should be established; if, (it be)

established after that, even in the prescribed mode, there would be blame or censure or sin; in this very mode the *linga* or phallic symbol and the like (image) should be thrown away; (and) another should be established, of the same size (&c.) as already described, - *Haya-Sirsha".*
"9. God said, -
'I shall speak of the renewal in the prescribed mode of *lingas* or phallic symbols decayed and the like &c * * *. (A *linga*) established by *Asuras,* or by sages or by remote ancestors or by those versed in the *tantras* should not be removed even in the prescribed form, though decayed or even broken.'

(*Agnipuranam* Chapter 103 Poona Edition of 1900 AD. p.143)
[There is a different reading of a part of this *sloke* noted in the foot-note of the Poona Edition of this *Puran* as one of the *Anandashram* series of sacred books: according to which instead of – " or by remote ancestors or by those versed in the *tantras*" –
the following should be substituted, namely].

"Or by Gods or by those versed in the highest religious truths."

"10. Now Renewal of Decayed (images is considered); that is to be performed when a *linga* and the like are burnt or broken or removed (from its proper place). But this is not to be performed with respect but a *linga* or the like which is established by a *Sinddha* or one who has become successful in the highest religious practice, or which is *anadi* i.e. of which the commencement is not known, or which has no commencement. But their *Mahabhisheka* or the ceremony of great *anointment* should be performed: - this is said by Tri-Vikrama" – Nirnaya – Sindhu – Kamalakar Bhatta, Bombay Edition of 1900 p.264.
The author of the *Dharma-Sindhu* says as above in almost the same words – see Bombay Edition of 1988 p.234 of that work. "

[Treatise on Hindu Law by Golapchandra Sarkar, Sastri (6th Edition, published by Easter Law House in 1927 at p.745-748]

3. Alberuni who compiled his book India in or about 1030 A.D. on page 121 of his book has written that the Hindus honour their

Idols on account of those who erected them, not on account of the material of which they are, best example whereof is Linga of sand erected by Rama. In his book on pages 117, 209, 306-07 and 380 he has also narrated about the Lord of Universe Sri Rama. Relevant extract from page 121 of his book Alberuni's India Translated by Dr. Edward C. Sachau. Reprint 2007 of the 1st Edn. 1910 published Low Price Publications, Delhi reads as follows:

> "The Hindus honour their idols on account of those who erected them, not on account of the material of which they are made. We have already mentioned that the idol of Multan was of wood. E.g. the linga which Rama erected when he had finished the war with the demons was of sand. Which he had heaped up with his own hand. But then it became petrified all at once, since the astrologically correct moment for the erecting of the monument fell before the moment when the workmen had finished the cutting of the stone monument which Rama originally had ordered."
>
> (*ibid* page 121)

4. According to the Hindus' Divine Holy & Sacred Scriptures there are two types of images one *Svayambhu* (self-existent or self-revealed or self-built) and other *Pratisthita* (established or consecrated). Where the Self-possessed Lord of Universe Sri *Vishnu* has placed himself on earth for the benefit of mankind, that is styled *Svayambhu* and it does not require *Pratistha*. As at *Ramajanamasthan* the Lord of Universe Sri Vishnu appeared and placed Himself on said sacred place said sacred place itself became *Svayambhu* for the reason that invisible power of the

Almighty remained there which confers merit and salvation to the devotees. Consecrated artificial man-made *Lepya* images i.e. moulded figures of metal or clay; and *Lekhyas* i.e. all kinds of pictorial images including chiselled figures of wood or stone not made by moulds are called *Pratisthita*. . B. K. Mukherjee in his book on Hindu Law referring authorities describes *Svayambhu* and *Pratisthita* artificial Images as follows:

> "4.5 Images – their descriptions –
> images, according to Hindu authorities are two kinds; first is known as *Svayambhu* or self-existent, while the other is *Pratisthita* or established. The *Padmapuran* says : The image of *Hari* (God) prepared of stone, earth, wood, metal, or the like and established according to the rights laid down in *Vedas, Smritis* and *tantras* are called the established; …
> where the self possessed *Vishnu* has placed himself on earth in stone, or wood for the benefit of mankind, that is styled the self re-built." *Svayambhu* or self-built image is a product of nature, it is *anadi* or without any beginning and the worshipper's simply discover its existence. Such image does not require consecration or *Pratistha.* All artificial or man made images require consecration. An image according to *Matsyapuran* may properly be made of gold, silver, copper, iron, bronze or bell metal or any kind of gem, stone, or wood, conch shell, crystal or eve earth. Some persons worship images painted on wall or canvas says the says the *Britha Puran* and some worship the spheroidical stones known as *Salgran.* Generally speaking, the puranic writers classified artificial images under two heads; viz. (1) *Lepya* and (2) *Lekhya. Lepya* images are moulded figures of metal or clay, while *Lekhyas* denote all kinds of pectoral images including chiselled figures of wood or stone not made by moulds.
>
> [*Hindu Law of Religious and Charitable Trusts* of *B. K. Mukherjea* 5th Edition, Published by Eastern Law House at page 154.]

5. According to the Holy Scripture *Sri Narsingh Puranam (62.7-14*

½) *Pratistha* of the Lord of Universe Sri Vishnu should be done by chanting 1st *Richa* of the *Purush Sukta* of *Shukla Yajurved* [i.e. *Vagasaneyee Samhita* Chapter XXXI] and be worshipped dedicating prescribed offerings by chanting 2nd to 15th *Richas* of the *Purush Sukta*. And if worshipper so wish after completion of worship he may by chanting 16th *Richas* of the *Purush Sukta* pray to Sri Vishnu for going to his His own abode. Above-mentioned verses of *Sri Narsingh Puranam* and Hindi translation thereof reads as follows:

तस्य सर्वमयत्वाच्च स्थण्डिले प्रतिमासु च।
आनुष्टुभस्य सूक्तस्य विष्णुस्तस्य च देवता॥ ७

पुरुषो यो जगद्बीजं ऋषिर्नारायणः स्मृतः।
दद्यात्पुरुषसूक्तेन यः पुष्पाण्यप एव च॥ ८

अर्चितं स्याज्जगत्सर्वं तेन वै सचराचरम्।
आद्ययाऽऽवाहयेद्देवमृचा तु पुरुषोत्तमम्॥ ९

द्वितीययाऽऽसनं दद्यात्पाद्यं दद्यात्तृतीयया।
चतुर्थ्यार्घ्यः प्रदातव्यः पञ्चम्याऽऽचमनीयकम्॥ १०

षष्ठ्या स्नानं प्रकुर्वीत सप्तम्या वस्त्रमेव च।
यज्ञोपवीतमष्टम्या नवम्या गन्धमेव च॥ ११

दशम्या पुष्पदानं स्यादेकादश्या च धूपकम्।
द्वादश्या च तथा दीपं त्रयोदश्यार्चनं तथा॥ १२

चतुर्दश्या स्तुतिं कृत्वा पञ्चदश्या प्रदक्षिणम्।
षोडश्योद्वासनं कुर्याच्छेषकर्माणि पूर्ववत्॥ १३

स्नानं वस्त्रं च नैवेद्यं दद्यादाचमनीयकम्।
षण्मासात्सिद्धिमाप्नोति देवदेवं समर्चयन्॥ १४

संवत्सरेण तेनैव सायुज्यमधिगच्छति।

अब पूजनका मन्त्र बताते हैं। शुक्ल यजुर्वेदीय रुद्राष्टाध्यायीमें जो पुरुषसूक्त है, उसका उच्चारण करते हुए भगवान्‌का पूजन करना चाहिये। पुरुषसूक्तका अनुष्टुप् छन्द है, जगत्‌के कारणभूत परम पुरुष भगवान् विष्णु देवता हैं, नारायण ऋषि हैं और भगवत्पूजनमें उसका विनियोग है। जो पुरुषसूक्तसे भगवान्‌को फूल और जल अर्पण करता है, उसके द्वारा सम्पूर्ण चराचर जगत् पूजित हो जाता है। पुरुषसूक्तकी पहली ऋचासे भगवान् पुरुषोत्तमका आवाहन करना चाहिये। दूसरी ऋचासे आसन और तीसरीसे पाद्य अर्पण करे। चौथी ऋचासे अर्घ्य और पाँचवींसे आचमनीय निवेदित करे। छठी ऋचासे स्नान कराये और सातवींसे वस्त्र अर्पण करे। आठवींसे यज्ञोपवीत और नवमी ऋचासे गन्ध निवेदन करे। दसवींसे फूल चढ़ाये और ग्यारहवीं ऋचासे धूप दे। बारहवींसे दीप और तेरहवीं ऋचासे नैवेद्य, फल, दक्षिणा आदि अन्य पूजन–सामग्री निवेदित करे। चौदहवीं ऋचासे स्तुति करके पंद्रहवींसे प्रदक्षिणा करे। अन्तमें सोलहवीं ऋचासे विसर्जन करे। पूजनके बाद शेष कर्म पहले बताये अनुसार ही पूर्ण करे। भगवान्‌के लिये स्नान, वस्त्र, नैवेद्य और आचमनीय आदि निवेदन करे। इस प्रकार देवदेव परमात्माका पूजन करनेवाला पुरुष छः महीनेमें सिद्धि प्राप्त कर लेता है। इसी क्रमसे यदि एक वर्षतक पूजन करे तो वह भक्त सायुज्य मोक्षका अधिकारी हो जाता है॥ ७–१४½॥

(Sri Narsingh Puranam 62.7-14 ½)

Be it mentioned herein that in the above *Sri Narsingh Puranam 62.13 Sloke* enumerates *Pradakshina i.e. Parikrama* (circumbulation) as 14th means of reverential treatment of the Deity and thereby makes it integral part of the religious customs and rituals of service and worship of a Deity.

6. 1st Holy Spells of *Purush Sukta* of the Holy Devine *Shukla Yajurved* [i.e. *Vagasaneyee Samhita* Chapter XXXI] prescribed by the Holy *Sri Narsingh Puranam* for *Pratistha* of the Lord of Universe Sri Vishnu reads as follows:

सहस्रशीर्षा पुरुषः सहस्राक्षः सहस्रपात् ।
स भूमिं॑ सर्वतः स्पृत्वाऽत्यतिष्ठद्दशाङ्गुलम् ॥ १ ॥

मन्त्रार्थ—सभी लोकों में व्याप्त महानारायण सर्वात्मक होने से अनन्त शिर वाले, अनन्त नेत्र वाले और अनन्त चरण (पैर) वाले हैं। ये पाँच तत्त्वों से बने इस गोलकरूप समस्त व्यष्टि और समष्टि ब्रह्माण्ड को तिरछा, ऊपर, नीचे सब तरफ से व्याप्त कर नाभि से दस अंगुल परिमित देश, हृदय का अतिक्रमण कर अन्तर्यामी रूप में स्थित हुए थे ॥ १ ॥

(*ibid as translated by Swami Karpatriji and published by Sri Radhakrishna Dhanuka Prakasan Samsthanam, Edn. Vikram samvat 2048)*

Simple English translation whereof reads as follows:

> 'The Almighty God who hath infinite heads, infinite eyes; infinite feet pervading the Earth on every side and transgressing the universe installed Him in sanctum as knower of inner region of hearts'.

Be it mentioned herein in the Mimamsa Darshan as commented in Sanskrit by Sri sabar Swami and in Hindi by Sri Yudhisthir Mimamsak and Mahabhasya meaning of *"Sahasra"* has also been given "infinite" as also "one" apart from "thousand" and according to context one or other meaning is adopted.

7. *Nitya Karma Puja Prakash* has prescribed a *Mantra* of *Yajurved* [i.e. *Vagasaneyee Samhita* Chapter II.13] for *Pratistha* of Lord G*anesh*. Relevant portion of the said book reads as follows:

> [Nitya Karma Puja Prakash published by Gita Press Gorakhpur 32nd Edn. 2060 Vikram Samvat at page 244]

8. The Holy *Sri Satpath-Brahman* interpreting said *Mantra* II.13 of the Holy Sri *Shukla Yajurved* [i.e. *Vagasaneyee Samhita*] says that *Pratistha* of all Gods should be done by said *Mantra.* Be it mentioned herein that the Holy *Sri Satpath-Brahman* being *Brahmn* Part of Divine Sri *Shukla Yajurved,* interpreting

Mantras of said *Vagasaneyee Samhita* tells about application of those *Mantras* in *Yajnas* (Holy Sacrifices). Said *Mantra* II.13 of the Divine *Sri Shukla Yajurved* (*Vagasaneyee Samhita*) as well as *Sri Satpath-Brahman* (I.7.4.22) with original texts and translations thereof read as follows:

मनो जूतिर्जुषतामाज्यस्य बृहस्पतिर्यज्ञमिमं तनोत्वरिष्टं यज्ञꣳ समिमं दधातु ।
विश्वे देवासऽइह मादयन्तामो३म्प्रतिष्ठ ॥ १३ ॥

[५४] (जूतिः मनः आज्यस्य जुषतां) तेरा चैतन्यात् मन घृतका सेवन करे, (बृहस्पतिः इमं यज्ञं तनोतु) यज्ञका स्वामी इस यज्ञको फैलावे, (इमं यज्ञं अरिष्टं सं दधातु) इस यज्ञको हिंसारहित करके सम्यक् धारण करे। (विश्वे देवासः इह मादयन्तां) सब देव यहां आनन्दित हों, (ओं प्रतिष्ठ) ऐसा ही होवे, प्रतिष्ठित होवे ॥ १३ ॥

(ibid Hindi Translation of Padmbhushan Sripad Damodar Satvalekar,1989 Edn. Published by Swayadhyay Mandal pardi)

English Translation of the above noted Hindi Translation reads as follows:

> "May your mind Delight in the gushing (of the) butter. May Brihaspati spread (carry through) this sacrifice ! May he restore the sacrifice uninjured. May all the Gods rejoice here. Be established/seated here."

Sanskrit text of *Sri Satpath-Brahman* (I.7.4.22) as printed in '*Sri Shukla Yajurvediya Satpath Brahman'* Vol. I on its page 150, Edn. 1988 Published by Govindram Hasanand, Delhi 110006 is reproduced as follows:

वाऽइदꣳ सर्वमाप्तं तन्मनसैवैतत्सर्वमाप्नोति बृहस्पतिर्यज्ञमिमं तनोत्वरिष्टं यज्ञꣳ समिमं दधात्विति यद्विवृहं तत्संदधाति विश्वे देवास इह मादयन्तामिति सर्वं वै विश्वे देवाः सर्वेणैवैतत्संदधाति स यदि कामयेत ब्रूयात्प्रतिष्ठेति यदु कामयेतापि नाद्रियेत ॥२२॥ ब्राह्मणम् ॥ २.[७.४.] ॥ अध्यायः ॥७॥ ॥

English translation of *Sri Satpath-Brahman* (I.7.4.22) as printed in Volume 12 of the series "The Sacred Books Of The east" under title '*The Satpath - Brahmana'* Part I on its page 215, Edn. reprint 2001 Published by Motilal Banarasidass, Delhi 110007 is reproduced as follows:

22. [He continues, Vâg. S. II, 13]: 'May his mind delight in the gushing (of the) butter[1]!' By the mind, assuredly, all this (universe) is obtained (or pervaded, âptam): hence he thereby obtains this All by the mind.—'May Brzhaspati spread (carry through) this sacrifice! May he restore the sacrifice uninjured!'—he thereby restores what was torn asunder.—'May all the gods rejoice here!'—'all the gods,' doubtless, means the All: hence he thereby restores (the sacrifice) by means of the All. He may add, 'Step forward!' if he choose; or, if he choose, he may omit it.

(Sri Satpath-Brahman I.7.4.22)

9. 19th Holy Spells of *Nasadiya Sukta* of the Holy Devine *Shukla Yajurved* [i.e. *Vagasaneyee Samhita* Chapter XXIII] is also widely applied by the Knower of the Scriptures to invoke and establish a deity. Said Mantra reads as follows:

गणानां त्वा गणपतिꣳ हवामहे प्रियाणां त्वा प्रियपतिꣳ हवामहे निधीनां त्वा निधिपतिꣳ हवामहे वसो मम ।
आहमजानि गर्भधमा त्वमजासि गर्भधम् ॥

English Translation of this *Mantra* based on Hindi Translation of Padmbhushan Sripad Damodar Satvalekar,1989 Edn.

Published by Swayadhyay Mandal pardi reads as follows:

> "O, Lord of all beings we invoke Thee. O, Lord of beloved one we invoke Thee. O, Lord of Wealth we invoke Thee. O abode of all beings Thou are mine. O, Sustainer of Nature let me know Thee well because Thee the sustainer of Universe as embryo are Creator of All."
>
> [*Shukla Yajurved* Chapter XXIII *Mantra* 19]

10. The vivified image is regained with necessaries and luxuries of life in due succession changing of clothes, offering of water, sweets as well as cooked and uncooked food, making to sleep, sweeping of the temple, process of smearing, removal of the previous day's offerings of flowers, presentation of fresh flowers and other practices are integral part of Idol-worship. These worships in public temple in olden days were being performed by Brahmins learned in Vedas & Agamas. B. K. Mukherjea in his book on Hindu Law writes as follows:

> "4.7 Worship of the idol – after a deity is installed it should be worshipped daily according to Hindu *Shastras.* The person founding a deity becomes morally responsible for the worship of the deity even if no property is dedicated to it. This responsibility is always carried out by a pious Hindu either by personal performance of the religious right or in the case of *Sudras* by the employment of a Bramhin priest. The daily worship of a sacred image including the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the reciprocal obligation of rice with sweets and water and other practices." The deity in shout is conceived of as leaving being and is treated in the same way as the master of the house would be treated by him humble servant. The daily routine of live is gone through, with minute accuracy, the vivified image is regained with necessaries and luxuries of life in due succession even to the changing of clothes, the offering of cooked and uncooked food and the retirement to rest.

> [*Hindu Law of Religious and Charitable Trusts* of *B. K. Mukherjea* 5th Edition, Published by Eastern Law House at page 156.]

On behalf of the other Hindu defendants, it is suggested that the deity's Pooja and Archana were going on, they are juristic person and no decree can be passed to remove from the disputed structure unless the juristic person i.e. deities are arrayed as a party.

The Hindu Law of Religious and Charitable Trust by B.K. Mukharjee, in this connection the attention of this Court was invited from the side of Hindus on one of the most important book.“ **The Hindu Law of Religious and Charitable Trust by B.K. Mukharjee”**. The concept of deity in Hindu faith has been considered in this outstanding book. The concept of deity is a distinguishing feature of the Hindu faith. The deity is the image of Supreme Being. The temple is the home of the deity. It is enough that Supreme Super Human Being Power i.e. an idol or image of the Supreme Being installed in the temple. The worship of such an image of the Supreme Being is acceptable in Hindu law. Hindus have also the belief that idol represent deity. In this context, para 1.33 pages 26 and 27 of the Hindu Law of Religious and Charitable Trust by B.K. Mukharjee, 1952 Edition is reproduced as under:-

> *4.* The traditional and classical legal literature relating to Hindus has also duly sanctified such belief and faith which has been exalted to a juristic status requiring legal recognition. In this connection, “**the Hindu Law of**

Religious and Charitable Trusts" by B.K. Mukherjea lays down some of the relevant concepts relating to deity and the temple along with concerned page number which are consistently being recognized as judicial authorities, not only in India but also abroad. The concept mentioned therein along with concerned page numbers are being quoted below:

Page 26-27 – Para "1.33: Idols representing same divinity – One thing you should bear in mind in connection with image worship viz. That the different images do not represent separate divinities; they are really symbols of the one Supreme Being, and in whichever name and form the deity might be invoked, he is to the devotee the Supreme God to whom all the functions of creation, preservation and destruction are attributed. In worshipping the image therefore the Hindu purports to worship the Supreme Deity and none else. **The rationale of image worship is thus given in a verse which is quoted by Raghunandan:**

"*Chinmayasyaadwitiiyasya Naskalashariirina Saadhakaanaam Hinaathayi Brahmanii Roopakalpanaa."*

"**It is for the benefit of the worshippers that there is conception of images of Supreme Being which is bodiless, has no attribute, which consists of pure spirit and has got no second."**

Temples and mutts are the two principal religious institutions of the Hindus. There are numerous texts extolling the merits

of founding such institutions. In *Sri Hari Bhaktibilash a* passage is quoted from Narsingha Purana which says that "whoever conceives the idea of erecting a divine temple, that very day his carnal sins are annihilated; what then shall be said of finishing the structure according to rule ….....
He who dies after making the first brick obtains the religious merits of a competed Jagna."

"1.34. **Other kinds of religious and charitable benefactions.- "**A person consecrating a temple", says Agastya, "also one establishing an asylum for ascetics also, one consecrating an alms house for distributing food at all times ascend to the highest heaven."

Besides temples and mutts the other forms of religious and charitable endowments which are popular among the Hindus are excavation and consecration of tanks, wells and other reservoirs of water, planting of shady trees for the benefit of travellers, establishment of *Choultries, satras or alms* houses and Dharamsala for the neefit of mendicants and wayfarers, Arogyasalas or hospitals, and the last though not the least, Pathshalas or schools for giving free education. Excavation of tanks and planting of trees are Purtta works well known from the earliest times. I have already mentioned that there is a mention of **rest houses for travellers even in the hymns of the *Rigveda***. The Propatha of the Vedas is the same thing as Choultrie or sarai and the name given to it by subsequent

writers is *Pratishraygrih*. They were very popular during the Buddhist tie. In *Dana Kamalakara*, a passage is quoted from Markandeya Puran which says that one should make a house of shelter for the benefit of travellers; and inexhaustible is his religious merit which secures for him heaven and liberation. There are more passages than one in the Puranas recommending the establishment of hospitals. "One must establish a hospital furnished with valuable medicines and necessary utensils placed under an experienced physician and having servants and rooms for the shelter of patients. This text says further that a man, by the gift of the means of freeing others from disease, becomes the giver of everything. The founding of educational institutions has been praised in the highest language by Hindu writers. Hemadri in his *Dankhanda* has quoted a passage from Upanishad according to which gifts of cows, land and learning are said to constitute *Atihaan* or gifts of surpassing merit. In another text cited by the same author, it is said that those excluded from education do not know the lawful and the unlawful; therefore no effort should be spared to cause dissemination of education by gift of property to meet its expenses".

Page 38-Para "1.50. The idol as a symbol and embodiment of the spiritual purpose is the juristic person in whom the dedicated property vests:- As you shall see later on the decision of the Courts of India as well as of the

Privy Council have held uniformly that the Hindu idol is a juristic person in whom the dedicated property vests. "A Hindu idol", the Judicial Committee observed in one of its recent pronouncements, "is according to long established authority founded upon the religious customs of the Hindus and the recognition thereof by Courts of Law, a juristic entity. It has a juridical status with the power of suing and being sued." You should remember, however, that the juridical person in the idol is not the material image, and it is an exploded theory that the image itself develops into a legal person as soon as it is consecrated by the *Pran Pratistha* ceremony. It is not also correct that the Supreme Being of which the idol is a symbol or image is the recipient and owner of the dedicated property. The idol as representing and embodying the spiritual purpose of the donor is the juristic person recognized by law and in this juristic person the dedicated property vests."

Page 38-39-Para "1.51. Deity owner in a secondary sense.- The discussions of several Hindu sages and commentators point to the conclusion that in case of dedicated property the deity is to be regarded as owner not in the primary but in the secondary sense. All the relevant texts on this point have been referred to by Sir Asutosh Mookerjee in his judgment in Bhupati v Ramlal and I will reproduce such portions of them as are necessary for my present purpose."

Sulapani, a reputed Brahminical Jurist, in his discourse on Sraddha thus expresses his views regarding the proper significance of gift to God:- “in 'Donation' having for its dative case, the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being extension to it of the inseparable accompaniment of that (gift in its primary sense), viz., the offer of the sacrifical fee etc. it has already been remarked in the chapter on the Bratis that such usage as Devagram, Hastigram, etc., are secondary”. Sree Krishna in commenting on this passage thus explains the meaning of the expression Devgram: “Moreover, the expression cannot be used here in its primary sense. The relation of one's ownership being excluded, the possessive case affix (in Devas in the term Devagram) figuratively means abandonment for them (the Gods)”. Therefore, the expression is used in the sense of “a village which is the object of abandonment intended for the Gods”. This is the purport. According to Savar Swami, the well-known commentator on Purba Mimansa, Devagram and Devakhetra are figurative expressions. What one is able to employ according to one's desire is one's property. The Gods however do not employ a village or land according to their use.”

Page 39-Para “1.52. These discussions are not free from obscurity but the following conclusions I think can be safely

drawn from them:-(1) According to these sages the deity or idol is the owner of the dedicated property but in a secondary sense. The ownership in its primary sense connotes the capacity to enjoy and deal with the property at one's pleasure. A deity cannot hold or enjoy property like a man, hence the deity is not the owner in its primary sense. (2) Ownership is however attributed to the deity in a secondary or ideal sense. This is a fiction (Upchaar) but not a mere figure of speech, it is a legal fact; otherwise the deity could not be described as owner even in the secondary sense. (3) The fictitious ownership which is imputed to the deity is determined by the expressed intentions of the founder; the debutter property cannot be applied or used for any purpose other than that indicated by the founder. The deity as owner therefore represents nothing else but the intentions of the founder. Although the discussions of the Hindu Jurists are somewhat cryptic in their nature, it is clear that they did appreciate the distinction between the spiritual and legal aspects of an idol. From the spiritual standpoint the idol might be to the devotee the very embodiment of Supreme God but that is a matter beyond the reach of law altogether. Neither God nor any supernatural being could be a person in law. So far as the deity stands as the representative and symbol of the particular purpose which is indicated by the donor, it can figure as a legal person and the correct view is that in the

capacity alone the dedicated property vests in it."

Thus, the Hindu concept of deity is worship of the images. It is an admitted case that deities were installed and are being worshiped in the structure. The time of installation has been seen in another issue but the factum is the same that the deities were available inside the structure and the plaintiffs have sought the relief of the removal without arraying them as a party. It is not a matter of dispute that deity is a juristic person. The plaintiffs are not in a position to say whether Pran Pratishtha was performed or not? The Hindu concept is that deities had to be worshipped. Thus the idol is a juristic person but they did not recognize a temple to be so. It is also a settled proposition of law that no decree can be passed against the juristic person without arraying them as a party. Thus, in view of the decision of the Hon'ble Apex Court in 2**000 (4) SSC 146, Shiromani Gurudwara Prabandhak Committee Vs. Somnath Das**. The deities installed and admitted by the plaintiff are the juristic persons. In view of **AIR 1957 SC Page 133, Deoki Nandan Aggarwal vs. Murlidhar** endowment property in favour of an idol as they are juristic persons. On the contrary, that the defendants Hindus' claim that deities have been Pran Pratishthit and they are idol or deities and according to their faith they are being properly worshipped and Muslims cannot claim that the religious performance of Hindus were defective and accordingly they are not juristic persons. In view of **AIR 1966 Patna 235, Ram Ratan Lal vs. Kashi Nath Tewari and others** that the actual Sankalp and Samarpan is not necessary. It is always possible that by worship also,

the deities acquire divinity. it is admitted between the parties that the prayers were offered to the deities at least from December, 1949 and the suit was filed after a long time even then the plaintiffs cannot, at this stage, suggest that there was no Pran Pratishtha in the temple of the deities. It is also a matter of common knowledge that deities are installed with Pran Pratishta. There is no difference between idol and deities. According to Hindu faith the worship is going on for the last 61 years. Accordingly at no stretch of imagination, at this stage, it can be said that without any Pran Pratishtha or Pooja the deities were installed.

Thus, in view of **AIR 1925 Privy Council 139 Pramatha Nath Mullick Vs. Pradyumna Kumar Mullick** even idol is a juristic person and it can sue and be sued. It is not a property which can be shifted to other place. Thus in this case once the parties accept that idols were placed and the worship was going on in that event there is no difference between deities and idols. The worship/prayers were offered. They were properly being worshipped for the last many decades. Accordingly, at this stage there is no justification to hold that the idol should not be treated as juristic persons. There is no material available on record that deities or idols or images cannot be supposed to be juristic persons. Thus, on hyper technical grounds and for want of any evidence from the side of the plaintiffs that Pran Pratishtha of the idols were not done, accordingly they are not a juristic person, cannot be accepted.

Thus, I hold that the deities are juristic persons. In the decision

of Hon'ble the Apex Court in the case of Udit Narayan AIR 1963 Supreme Court page 786, Re. Udit Narayan case, the Constitutional Bench of the Apex Court held that behind the back of a necessary party no decree should be passed. Further in the case of **Kasturi Vs. Iyya**m **Peumal and othe**rs reported in 2005 (6) SCC 733 the Hon'ble Court held that deity is a necessary party and without arraying deity as a necessary party, the suit filed by the plaintiff is not maintainable. In this context, it may be relevant to mention that Ram Lala Virajman is a juristic person and without arraying Him as a necessary party, no effective decree can be passed. Thus, deities are necessary parties in the suit. The contention of the plaintiffs that without any Pranprathistha of the deities, they are not juristic person is not accepted for the reasons ,referred to above. Moreover, the Hindus have claimed that there was Pran Prathistha and this fact could not be repelled by Muslim. Thus, I hold that idols are necessary parties. It is also settled proposition of law that deities become necessary party as declared against the interest of deities will not bind the deity vide AIR 1960 Supreme Court page 100, **Narayan Bhagwant Rao Vs. Gopal Vinay**ak . Further this Court in AIR 1957 Allahabad page 77 **Mukundji Mahraj Vs Persottam** held that if deities are not arrayed as a party, the decree shall be a nullity. Again in AIR 1957 Allahabad 743 **B. Jangi Lal V**s. **B. Panna Lal and anothe**r the Court held that if the interest of idols are not directly affected or its own existence is seriously imperilled, the appearance of the idols before the court is necessary.

There is nothing on record to discredit the statement of Hindus that their idols are having Pranprathistha and are being worshipped, accordingly they are necessary parties and decree, if passed against the deity, shall be a nullity.

Thus, to my mind no effective relief can be granted without arraying the deities as parties in this suit and no effective decree can be passed against the deities, who are installed and worshipped prior to the filing of the suit. Suit is bad for non-joinder of the necessary parties. Issue no. 21 is decided accordingly in favour of the defendant and against the plaintiff.

ISSUES NO. 23 & 24

23. If the wakf Board is an instrumentality of state? If so, whether the said Board can file a suit against the State itself?

24. If the wakf Board is State under under Article 12 of the constitution? If so, the said Board being the State can file any suit in representative capacity sponsoring the case of particular community and against the interest of another community"?

FINDINGS:

These issues are inter related. The United Provinces Muslim Waqf Act, 1936 has already been repealed and the suit was filed by Board constituted under U.P. Muslim Waqf Act, 1960. The Constitution of India came into force on 26.1.1950 in view of Article 12 of the Constitution of India, Board is an instrumentality of the

State. However, in view of Section 19(q) of Muslim Waqf Act, 1960, the Board can institute and defend suits and proceedings in court of law relating to Waqfs. Thus, issues no. 23 & 24 are decided accordingly that the Waqf Board is under the law is competent to institute the suit. However, it may be clarified that for want of valid notification under Section 5(1) of the Muslim Waqf Act, 1960 and the United Provinces Muslim Waqfs Act, 1936, the property cannot be deemed to be a Waqf Property. Accordingly the suit on this count is not maintainable. Issues No. 23 & 24 are decided against the plaintiffs.

ISSUES NO. 25 & 26

25. "Whether demolition of the disputed structure as claimed by the plaintiff, it can still be called a mosque and if not whether the claim of the plaintiffs is liable to be dismissed as no longer maintainable?"

26. "Whether Muslims can use the open site as mosque to offer prayer when structure which stood thereon has been demolished?"

FINDINGS:

These issues are inter related and can conveniently be disposed of at one place. Muslims claim that they can offer prayers in the open site as a Mosque even after the demolition of the disputed structure which goes to show that once a Mosque always a Mosque with or without any structure is the sum and substance of the arguments of the plaintiffs. On the contrary defendants claim that the suit is liable to be dismissed as the property is no more and the structure has

already been demolished.

Defendants further claim that the property in suit was not in exclusive possession of Muslims right from 1858. It is further submitted that in view of the possession of Hindus from 1858 and onwards which is evident from Ext. 15, 16, 18, 19, 20, 27 and 31, the outer courtyard was exclusively in possession of Hindus and the inner courtyard was not exclusively in possession of Muslims but also in joint possession of Hindus and Muslims till 1934. Muslims were dispossessed from the inner courtyard also in 1934 and plaintiffs admit that Muslims were dispossessed on 22/23December 1949 from the inner courtyard. Thus, on the basis of Islamic tenets the Muslims claim that the property shall be construed as a Mosque. In this reference the controversy has already been set at rest by the Privy Council in the decision of **Masjid Shahid Ganj Vs. Shiromani Gurudwara Prabandhak Committee, Amritsar, AIR 1940 Privy Council 116.**

The aforesaid view has been approved in **Dr. M. Ismail Faruqui Vs. Union Of India, 1994 (6) SCC 360,** Para 70 of the ruling is relevant which reads as under:-

In Mosque known as Masjid Shahid Ganj and Ors. v. Shiromani Gurdwara Prabandhak Committee, Amritsar AIR 1938 Lahore 369, it was held that where a mosque has been adversely possessed by non-Muslims, it lost its sacred character as mosque. Hence, the view that once a mosque is consecrated, it remains always a place of worship as a mosque was not the Mohammedan Law of India as approved by

Indian Courts. It was further held by the majority that a mosque in India was an immovable property and the right of worship at a particular place is lost when the right to property on which it stands is lost by adverse possession. The conclusion reached in the minority judgment of Din Mohd., J. is not the Mohammedan Law of British India. The majority view expressed by the learned Chief Justice of Lahore High Court was approved by the Privy Council in AIR 1940 PC 116, in the appeal against the said decision of the Lahore High Court. The Privy Council held:

> "...It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with the religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as "mosque" or unless the building is razed to the ground or loses the appearance which reveals its original purpose."

In view of the aforesaid decision, it transpires that the case of the defendants that they adversely possessed the property in suit leave no room for doubt that the property in suit lost its sacred character as a Mosque. Moreover, the disputed structure has already been

demolished. Accordingly, this place cannot be called as a Mosque and Muslims can not use the open place as a Mosque to offer prayers. Issues No. 25 & 26 are decided against the plaintiff and in favour of the defendants.

ISSUE NO. 27:-

"Whether the outer court yard contained Ram Chabutra, Bhandar and Sita Rasoi? If so whether they were also demolished on 6.12.1992 along with the main temple?"

FINDINGS:

It is not disputed that on 6.12.1992 the disputed structure and other adjoining places were demolished. Ext 18, application dated 2.11.1883 moved by Syed Mohammad Asgar against Raghubar Das reveals the existence of Chabutra, Ram Janam Sthan, Rasoi Bhandar and Charan Padhuka. Site plan prepared on 6.12.1885 by Commissioner Gopal Sahai in Suit No. 61/280 of 1885 confirms that foot prints, Chabutra and Bhandar were in existence. Thus, besides, the site plan Ext.25, the judgment dated 18.3.1886 further confirms the existence of Ram Chabutra,Charan Paduka and Rasoi Bhandaar. Lastly, in Original Suit No. 2 of 1950 Gopal Singh Visharad Vs. Jahoor Ahmad, the Commissioner made a local inspection and prepared site-plan, proved the existence of Sita rasoi, Ram Chabutra and Rasoi Bhandar. There is nothing on record to discredit the report of the Commissioner appointed by the Court.

In view of the aforesaid facts , I hold that the outer courtyard contained Ram Chabutra, Rasoi Bhandar and Sita Rasoi in the

disputed premises which were demolished on 6.12.1992 along with disputed structure.

Issue no. 27 is decided accordingly.

Tripathi/Tanveer/-