A.F.R.

Neutral Citation No. 2023:AHC:239874
Reserved on 08.12.2023
Delivered on 19.12.2023

Court No. - 9

Case :- MATTERS UNDER ARTICLE 227 No. - 3562 of 2021

Petitioner :- U.P Sunni Central Waqf Board
Respondent :- Ancient Idol Of Swayambhu Lord Vishweshwar And 5 Others
Counsel for Petitioner :- Punit Kumar Gupta
Counsel for Respondent :- Ajay Kumar Singh,Ajay Kumar Singh,Ashish Kumar Singh,Hare Ram,Manoj Kumar Singh,Tejas Singh,Vineet Pandey,Vineet Sankalp

with

Case :- MATTERS UNDER ARTICLE 227 No. - 3341 of 2017

Petitioner :- Anjuman Intazamia Masazid Varanasi
Respondent :- Ist A.D.J. Varanasi And Others
Counsel for Petitioner :- A.P.Sahi,A.K. Rai,D.K.Singh,G.K.Singh,M.A. Qadeer,S.I.Siddiqui,Syed Ahmed Faizan,Tahira Kazmi,V.K. Singh,Vishnu Kumar Singh
Counsel for Respondent :- C.S.C.,A.P.Srivastava,Ajay Kumar Singh,Ashish Kr.Singh,Bakhteyar Yusuf,Hare Ram,Manoj Kumar Singh,Prabhash Pandey,R.S.Maurya,Rakesh Kumar Singh,V.K.S.Chaudhary,Vineet Pandey,Vineet Sankalp

with

Case :- MATTERS UNDER ARTICLE 227 No. - 1521 of 2020

Petitioner :- Anjuman Intezamiya Masajid Varanasi
Respondent :- Ancient Idol Of Swayambhu Lord Vishweshwar And 5 Others
Counsel for Petitioner :- Syed Ahmed Faizan,Syed Farman Ahmad Naqvi(Senior Adv.),Zaheer Asghar
Counsel for Respondent :- Punit Kumar Gupta,Ajay Kumar Singh,Ashish Kumar Singh,Hare Ram,Vineet Pandey,Vineet Sankalp

with

Case :- MATTERS UNDER ARTICLE 227 No. - 234 of 2021

Petitioner :- U.P.Sunni Central Board Of Waqfs Lucknow
Respondent :- Ist A.D.J. Varanasi And Others
Counsel for Petitioner :- M.A.Haseen,Ateeq Ahmad Khan,Bakhteyar Yusuf
Counsel for Respondent :- C.S.C.,Ajay Kumar Singh,Ashish Kumar Singh,Hare Ram,Prabhash Pandey,Syed Ahmed Faizan,Vineet Pandey,Vineet Sankalp,Zaheer Asghar

with

Case :- MATTERS UNDER ARTICLE 227 No. - 3844 of 2021

Petitioner :- Anjuman Intezamia Masajid Varanasi
Respondent :- Ancient Idol Of Swayambhu Lord Visheshwar Full And 5 Others
Counsel for Petitioner :- Syed Ahmed Faizan,Sr. Advocate Shri S.F.A. Naqvi,Zaheer Asghar
Counsel for Respondent :- Punit Kumar Gupta,Ajay Kumar Singh,Ashish Kumar Singh,Hare Ram,Tejas Singh,Vineet Pandey,Vineet Sankalp

Hon'ble Rohit Ranjan Agarwal,J.

1. These connected five cases filed under Article 227 of Constitution of India have been nominated to this Court by orders of Hon'ble The Acting Chief Justice dated 29.11.2023.

2. Defendant no. 1, Anjuman Intezamia Masjid filed three cases under Article 227 No. 3341 of 2017 (Earlier Writ Petition No. 32565 of 1998) assailing the revisional order dated 23.09.1998 and order dated 18.10.1997 passed by trial court on application 96/C filed by plaintiffs, deciding Issue No. 2 in regard to applicability of Section 4 of Places of Worship (Special Provisions) Act, 1991 (hereinafter called as *'Act of 1991'*).

3. Case No. 3844 of 2021 filed under Article 227 challenges the order passed on 08.04.2021 by Civil Judge (Senior Division), F.T.C., Varanasi on application, being Paper No. 266-Ga directing for survey by Archaeological Survey of India (ASI) in Original Suit No. 610 of 1991.

4. Case No. 1521 of 2020 has been filed for setting aside the order dated 04.02.2020 passed by Civil Judge (Senior Division)/F.T.C., Varanasi rejecting the application 270-Ga of petitioner-defendant no. 1 and application 274-Ga of defendant no. 2, wherein a prayer was made for staying the proceedings of Original Suit No. 610 of 1991 on the basis of interim order granted by this Court on 13.10.1998 in Writ Petition No. 3341 of 2017.

5. Defendant No. 2, U.P. Sunni Central Board of Waqfs, Lucknow had filed two cases under Article 227 No. 234 of 2021 and 3562 of 2021. Case No. 234 of 2021 (Earlier Writ-C No. 18576 of 1999) raises challenge to the revisional order passed on 23.09.1998 and order dated 18.10.1997 passed by trial court on Issue No. 2 holding that Section 4 of the Act of 1991 was not attracted and the plaint could not be rejected under Order 7 Rule 11 C.P.C.

6. Case No. 3562 of 2021 assails the order passed by Civil Judge (Senior Division) F.T.C., Varanasi directing for the scientific survey by ASI on the application moved by plaintiffs being Paper No. 266-Ga.

FACTS

7. Plaintiffs-respondent nos. 3 to 6 of Petition No. 3341 of 2017 filed Original Suit No. 610 of 1991, Ancient Idol of Swayambhu Lord Vishweshwar and others vs. Anjuman Intezamia Masajid and another before the court of Civil Judge (Senior Division), Varanasi on 15.10.1991, claiming following reliefs:-

> *"(a) By a decree of this Hon'ble Court it be declared that the structure standing over and above the cellars (Tahkhana) and the adjoining part of the old temple of plaintiff no. l together with the Naubat Khana fully detailed and discribed in Schedule 'A' and shown with red hatched-lines in the plaint map towards North of the temple of lord Visheweshwar and a house lying to the east of the said Naubat Khana is the property of the plaintiff no.l and the devotees of lord Visheshwar i.e. the Hindus at large have every right to use it as place of worship and to renovate and reconstruct their temple adding it with the remaining portion of the temple structure still in existence in any manner they decide in which the defendants have no right, title or interest or any kind whatsoever and the entire Muslim community represented by the defendants have no right to occupy as their occupation is illegal.*
>
> *(b) By a decree of mandatory injunction the defendants be ordered to remove its effects from the portion shown with red hatched lines in the plaint map fully detailed and described in Schedule "A" of the plaint by handing over possession over the said structures to the plaintiffs.*
>
> *(c) By decree of prohibitory injunction the defendants their agents and servants be permanently restrained from interfering in peaceful possession of the plaintiffs over properties and the structures mentioned in Schedule "A" of the plaint in any way from performing religious, ceremonies, Sewa Puja and Rag Bhog etc. and re-modeling, repairing, reconstructing adding with the remaining portion of the temple of lord Visheshwar existing at spot."*

8. In the plaint, it has been alleged that part and partial of old temple of Lord Vishweshwar is lying in centre of Gyanvapi compound, over and above cellars (Tahkhana) existing in part of settlement Plot No. 9130, situated at Mauza Shahar Khas, Paragana- Dehat Amanat, Tehsil and District- Varanasi, alleged to be Mosque marked with red hatched line in

the map annexed with the plaint and Naubatkhana over the northern gate of Gyanvapi compound and the house towards east of Naubatkhana i.e. northern gate.

9. Entire property of Gyanvapi compound forming settlement Plot No. 9130, 9131 and 9132 measuring 1 Bigha, 9 Biswa and 6 Dhoor is surrounded by old boundary wall containing ancient temple of Lord Vishweshwar together with four Mandaps and its ruins Gyankoop, Mukti Mandap newly constructed, Vyas Gaddi, Idol of Sri Ganeshwar, Ganga Devi, Sri Hanuman Ji, Nandi, Sri Gauri Shanker, Sri Ganesh Ji, Sri Mahakaleshwar, Sri Maheshwar, Shringar Gauri and several other idols of Hindu God and Goddesses visible and non-visible, duly consecrated, three trees standing over idol Nandi, Naubatkhana over the northern gate and house of servants of the temple towards the east of northern gate and Naubatkhana with its boundaries have been described in Schedule “B” of the plaint.

10. Further, it has been stated that there exists prior to puranic period Swayambhu Jyotirlinga of Lord Shiva, popularly known as Lord Vishweshwar, which is in existence, much before the advent of Muslim Rule in India. Land pertinent to the temple is mainly used for parikrama and worship of idol.

11. The importance of pious place of Gyanvapi idol of Lord Vishweshwar and idols situated in the precincts have been elaborately described in Skanda Puran of Kashi Khand and other Purans. The temple was constructed by King Vikramaditya about 2050 years ago and duly consecrated the idol of Lord Vishweshwar therein. Due to religious antipathy it was pulled down several times during Muslim Rule in the country and ruins of temple exist at the place and since it was the period of Mughal Empire, hence, Hindus strictly preserved the main Linga of Lord Vishweshwar at the same place and continued worship.

12. During the regime of Emperor Akbar, the temple was rebuilt after consent was granted and the construction of temple was done by Narayan Bhatt with help of his disciple Raja Todarmal, Finance Minister of Emperor Akbar.

13. Besides the original temple of Lord Vishweshwar, there are four mandaps around the temple known as Mukti Mandap, Gyan Mandap, Aishwarya Mandap and Shringar Mandap.

14. Name of idol and temple of Lord Vishweshwar in Gyanvapi compound is synonymously known as Lord Vishwanath. It was on 18.04.1669 A.D., on a wrong information reaching Emperor Aurangzeb, he ordered for demolition of such schools and temples of infidels (kafirs). The aforesaid event of demolition has been mentioned in "Ma-Asir-i-Alamgiri" printed in Arabic in 1871 by Asiatic Society of Bengal.

15. The place in dispute is abode of deity Swayambhu Lord Vishweshwar and it cannot be the building of another faith i.e. non Hindus. It is further averred that property in dispute was never dedicated to alleged Mosque by Emperor Aurangzeb nor he was the owner of temple of Lord Vishweshwar, hence, he could not have created a Waqf in favour of Muslims nor to Allah nor he did so. Thus, the property in dispute could never have been a Waqf to non Hindus i.e. Muslims and the construction could not be appropriated as alleged Mosque according to true spirit of Muslim Law.

16. Defendant No. 2 had illegally and unauthorisedly alleged to have registered the property as alleged Mosque in its register which is illegal, unauthorised, void and not binding upon the plaintiffs and other Hindus. Moreover, Waqf Act is not applicable to Hindus. Hence, religious character of place of worship in dispute detailed and described in Schedule "A" of the plaint has never been converted into Mosque and property in dispute is from very ancient time i.e. Satyug uptil now and is

temple of Swayambhu Lord Vishweshwar.

17. Petitioner-defendant No. 1 filed an application 71-C on 23.03.1995 under Order 7 Rule 11(d) C.P.C. for rejecting the plaint in view of bar contained in Act of 1991. Defendant No. 2, U.P. Sunni Central Board of Waqf which was initially not impleaded as defendant in the suit but was later impleaded on 01.01.1992 as defendant no. 2. They also filed an application under Order 7 Rule 11(d) C.P.C. seeking rejection of the plaint in view of provisions of Act of 1991.

18. However, both defendant no. 1 and 2 filed their separate written statement on 15.11.1996 and 23.02.1995. As the applications were not pressed by respective defendants, the trial court after perusal of pleadings of the parties framed 10 issues on 17.07.1997, which are as under:-

> "(1) क्या वाद न्युन मूल्यांकित है। और प्रदत्त न्याय शुल्क अर्याप्त है।
>
> (2) क्या वाद धारा-4 उपासनास्थल (विशेष उपबंध) अधिनियम 1991 से वर्जित होने के कारण वाद पत्र आदेश-7 नियन नियम 11 सी०प्र०सं० के अंतर्गत नामन्जूर होने योग्य है?
>
> (3) क्या वादी संख्या 1 वाद पत्र की अनुसूची "क" में वर्णित तहखाना नौवतखाना तथा उन पर स्थित निर्माण और उनके पूरव स्थित मकान वादी संख्या -1 की सम्पत्ति है। तथा सामान्य हिन्दुओ को इस सम्पत्ति पर उपासना अधिकार है और प्रतिवादियों को उसमे बाधा डालने का कोई अधिकार स्वत्व व हित नहीं है जैसा कि दावा है ?
>
> (4) वादीगण की वाद पत्र की अनुसूची "क" लाल स्याही से अनुरेखित विवादित निर्माण को आज्ञाप का ब्यादेश के द्वारा हटवा पाने तथा उस पर कब्ज़ा और दख्ल पाने का हक़ है, जैसा कि दावा है ?
>
> (5) क्या वाद धारा 65 - उ o प्र o वक्फ अधिनियम 1960 के अंतर्गत नोटिस न दिये जान से दूषित है?
>
> (6) क्या वाद धारा 75 उ o प्र o वक्फ अधिनियम 1960 से बाधित है ?
>
> (7) क्या वाद काल बाधित है ?

(8) क्या वाद को उपमति और विविन्ध के सिद्धानत लागू होते है ?

(9) क्या व्यादेश का वाद पोषणीय नहीं है, जैसाकि प्रतिवाद पत्र 65 क /17 की धारा 45 में कहा गया ?

(10) वादीगण किस अनुतोष को यदि कोई हो, पाने का हकदार है। वाद बिंदु संख्या। व 2 प्रारम्भिक होगा। 21.8.97 को प्रारम्भिक वाद बिंदु संख्या 1 व 2 पर सुनवायी की जायेगी।"

19. The trial court on the same day directed that Issue No. 1 and 2 shall be the preliminary issues and fixed for 21.08.1997. An application, being Paper No. 96/C was filed by plaintiffs for recalling the order dated 17.07.1997 for treating Issue No. 2 as preliminary issue, as it required to be adjudicated on merit by taking evidence of both the parties and was not an issue of question of law to be determined as preliminary issue.

20. The trial court on 18.10.1997 held that relief No. (a) and (c) were not barred by provisions of Section 4 of the Act of 1991 but relief No. (b) was hit by provisions of Section 4 and directed plaintiff to delete relief (b) from the plaint by moving amendment application and held that application 96/C was not maintainable and for disposal of Issue No. 2 evidences were not necessary.

21. Against the order dated 18.10.1997, three revisions were filed. Civil Revision No. 281 of 1997 was filed by Defendant No. 2, U.P. Sunni Central Waqf Board, while Civil Revision No. 285 of 1997 was filed by defendant No. 1, Anjuman Intezamia Masjid and Civil Revision No. 286 of 1997 was filed by plaintiffs.

22. By a common judgment and order dated 23.09.1998, the order passed by trial court deciding Issue No. 2 was set aside and trial court was directed to decide Issue No. 2 along with other issues after taking evidence.

23. Against the order passed by revisional court dated 23.09.1998,

defendant no. 1 had filed Matter under Article 227 No. 3341 of 2017 (Earlier No. 32565 of 1998) wherein further proceedings of Suit No. 610 of 1991 was stayed. Matter under Article 227 No. 234 of 2021 (Old No. 18576 of 1999) was preferred by defendant no. 2 challenging the revisional court's order dated 23.09.1998 as well as the order of trial court.

24. It was during the pendency of these two petitions that plaintiff on 10.12.2019 moved an application before the trial court being Paper No. 266-Ga stating that interim order granted by this Court on 13.10.1998 came to an end after expiry of six months from passing of the interim order, in view of decision of Apex Court in case of **Asian Resurfacing of Road Agency vs. Central Bureau of Investigation (2018) 16 SCC 299** praying for the relief that survey of premises in dispute be conducted by Archaeological Survey of India. The application was allowed on 08.04.2021 by court below. The operative portion of the order is quoted below:-

> *"I. The Director General, Archaeological Survey of India, Darohar Bhawan, 24 Tilak Marg, New Delhi, functioning under the Ministry of Culture, Government of India, is hereby directed to get a comprehensive archaeological physical survey be done of the entire Settlement Plot No.9130 located at Mauja Shahar Khas, Pargana Dehat Amanat, Tehsil and District Varanasi including the Naubat Khana situated at the Northern Gate of Gyanvapi compound and the house towards the northern gate of the Naubatkhana, i.e., the Gate (Hereinbefore termed as disputed site and duly described in the plaint as Schedule-A.)*
>
> *II. For above said purpose, the Director General shall constitute a five member committee of eminent persons who are experts and well versed in the science of archaeology, two out of which should preferably belong to minority community.*
>
> *III. The Director General, shall also appoint an eminent and highly experienced person who can be regarded as expert in the science of archaeology to act as the observer for the committee so constituted. Such person should preferably be a scholarly personality and established academician of any Central University. The committee so constituted shall report the observer about the survey work done on a particular day.*

IV. The committee shall prepare a comprehensive documentation along with the drawing, plan, elevation, site map with precise breadth and width of the disputed site, marked with hatched lines in the plaint map.

V. The prime purpose of the archaeological survey shall be to find out as to whether the religious structure standing at present at the disputed site is a superimposition, alteration or addition or there is structural overlapping of any kind, with or over, any other religious structure. If so then what exactly is the age, size monumental and architectural design or style of the religious structure standing at present at the disputed site and what materials has been used for building the same. The committee shall also trace as to whether any temple belonging to the Hindu community ever existed before the mosque in question was built or superimposed or added upon it at the disputed site. If so, then what exactly is the age, size, monumental and architectural design or style of the same, and also, as to which of Hindu deity or deities the same was devoted to.

VI. For that purpose the committee shall be entitled to enter into every portion of the religious structure standing at present at the disputed site. The committee shall firstly resort to Ground Penetrating Radar (GPR) or Geo-Radiology system or both, to satisfy itself a to whether any excavation or extraction work is needed at any portion of the religious structure standing at present. Even if by use of GPR system the committee feels satisfied that further excavation or extraction work is needed to be carried out, the same shall firtly be done by trial trench method vertically and that too at a very small scale an not more than four square feet at a time. Horizontal excavation shall be done only when the committee is fully satisfied that there is indeed a certainty of belief that by such excavation they would be able to reach more concretized conclusion regarding ascertainment of the precise archaeological remain below the ground level.

VII. During the entire survey proceeding every artefacts supporting the plaint or defence version shall be properly preserved. If any artefacts is so deeply entrenched with the earth or super structure standing at the disputed site, removal of which can potentially disturb the existing super structure, or the committee otherwise feels that the same should not be removed due to being bulky in nature or for any other reasons to be recorded, then photography, videography and external measurement, sketching and drawing (comprehensive documentation of the architectural remains) of the same shall only be done and the same shall not be removed.

VIII. The committee shall also record its finding to the effect as to whether true architectural structure traced at the disputed site (Schedule-A) has any sort of connection with the temples and artefacts mentioned in the in the Schedule-B of the plaint.

IX. While carrying out the survey, the committee shall ensure that the people belonging to Muslim community is not prevented to offer Namaj at the disputed site. If due to ongoing survey work, it is not practicable to facilitate the offering of Namaj to the persons belonging to Muslim community at a particular place, then the committee shall provide such persons an alternative and suitable place to offer Namaj at any other place within the precincts of the mosque. The committee is expected be

throughout aware of the sensitivity of the matter, hence the committee shall always ensure that stakeholders of both Hindu and Muslim religions shall not be subjected to any partisan or preferential treatment and both shall be equally respected.

X. Before entering into survey work at any point of the time, the committee shall give advance notice to the parties or their counsels,. The parties to this suit shall be entitled to remain present in person or through their counsels. But no party appearing through a counsel shall be entitled to nominate more than one counsel at a time.

XI. Entire survey work shall be done in camouflaged manner, i.e., entire disputed site shall be camouflaged before the commencement of survey and till the same is finished. Non general public or media person shall be allowed to have access to witness the onging survey work. Neither the observer nor any of the members of the committee will ever brief the media about the status of ongoing survey work.

XII. No party shall dictate the committee to interpret this order or act in particular manner. The committee alone shall be entitled to do the same.

XIII. Photography (coloured as well as black and white and slides) and videography of the entire survey proceeding shall be ensured by the committee as a record of the proceeding. Comprehensive documentation and preparation of map stating placement of necessary artefacts and drawings shall be done. A report of survey work on routine basis shall be prepared stating the time of entering at the disputed site and exist therefrom.

XIV. To ensure that entire survey work is not tampered with at the behest of the either party, the committee shall be entitled to get necessary security personals be deputed at the disputed site during the survey work as well as after tentative closure thereof.

XV. It shall be the duty of the district administration to ensure that complete peace and tranquillity is maintained at the disputed site and in nearby areas during the entire survey proceeding, and the committee is given due assistance and co-operation by the district administration at all point of time till the survey proceeding is completed so that the committee could be enabled to discharge its functions without any fear or favour.

XVI. The survey work shall be carried out between 09:00 A.M. to 05:00 P.M.

XVII. The committee and parties participating in the survey proceeding shall give due adherence to the norms and guidelines issued time by time by the Central and State Government with regard to upsurge second wave of pandemic Covid-19.

XVIII. After completion of the survey work, the committee shall submit its report and the record of the entire survey proceeding in sealed cover without undue delay.

XIX. Keeping in mind the representative capacity in which the suit is being prosecuted by the plaintiffs and contested by the defendants, and the fact that public at large is interested in the controversy in hand, it would be unjust to burden the plaintiffs alone to bear the expenses and

> *cost of the survey work. It is therefore, the cost and expenses of the entire survey proceeding shall be borne by the Archaeological Survey of India."*

25. Aggrieved by order of trial court, both defendant nos. 1 and 2 filed civil revision before District Judge, Varanasi. The defendant nos. 1 and 2 simultaneously filed Matter under Article 227 No. 3844 of 2021 and 3562 of 2021 before this Court. On objection being raised by plaintiffs, the revisions filed before the District Judge were withdrawn by defendant no. 1 and 2 by making necessary application and an order was passed on 12.08.2021. In both the petitions filed by defendant no. 1 and 2, an amendment was sought which was allowed by this Court on 09.09.2021 and further proceedings of Original Suit No. 610 of 1991 was stayed.

26. In the meantime, defendant no. 1 filed application No. 270-Ga in Original Suit No. 610 of 1991 for staying further proceedings of Original Suit No. 610 of 1991 in pursuance of interim order dated 13.10.1998. The said application was dismissed on 04.02.2020 which was challenged by defendant no. 1 through Matter under Article 227 No. 1521 of 2020.

27. All these five cases filed under Article 227 of Constitution of India have been connected by earlier order of this Court and have been placed before this Court for adjudication after nomination of Hon'ble The Acting Chief Justice dated 29.11.2023.

SUBMISSIONS OF PETITIONER IN CASE NO. 3341 OF 2017 AND 234 OF 2021

28. Sri S.F.A. Naqvi, learned Senior Counsel appearing in Case No. 3341 of 2017 submitted that plaintiffs-respondent nos. 1 to 5 have got nothing to do with place of worship in question, they have every right to offer their prayer in temple in question and are neither debarred nor anybody has stopped them to perform religious rites inside the temple. Committee running the affairs of temple has no dispute with the petitioner and both are performing their religious rites and duties in congenial and

friendly atmosphere. These outsiders are creating all sorts of hurdle.

29. The Act of 1991 was promulgated with purpose to foreclose any controversy in respect of any places of worship. It was an Act made by Parliament under constitutional mechanism and operates within the four corners of Constitution of India.

30. According to him, the suit involves a legal question which has already been addressed by the statement of object and reason of the Act of 1991. It is an Act to prohibit conversion of any place of worship and to provide for maintenance of religious character of any place as existed on 15th day of 1947.

31. According to him, Section 2(b) defines "Conversion", which means its grammatical variations, includes alteration or change of whatever nature. Section 3 bars conversion of place of worship, while Section 4 provides declaration as to religious character of certain places of worship which existed on 15th day of August, 1947 and bars jurisdiction of Court. According to him, relief of declaration, mandatory injunction as well as prohibitory injunction claimed by plaintiffs in Suit No. 610 of 1991 cannot be granted in view of Section 4 of the Act of 1991.

32. According to him, once the Act was enforced on 11th day of July, 1991, any suit or other proceeding with respect to conversion of religious character of any place of worship existing on 15th August 1947 shall abate.

33. As the Mosque stands on Plot No. 9130 and is being used by Muslims to offer Namaz since 15th August 1947, religious character cannot change, and it cannot be converted into a temple which is against the provisions of Section 4 of the Act of 1991.

34. To establish that a Mosque exists at the place of dispute, reliance has been placed upon the decision rendered by Additional Civil Judge on 25.08.1937 in Original Suit No. 62 of 1936 between **Din Mohammad**

and 2 others vs. The Secretary of State for India in Council, through District Magistrate and Collector, Banaras which was affirmed in First Appeal No. 466 of 1937 by this Court, reported in **AIR (29) 1942 Allahabad 353**.

35. Emphasis has been laid to the fact that trial court on 25.08.1937 declared that only Mosque and Graveyard with land underneath are Hanafi Muslim Waqf and plaintiffs and other Hanafi Muslims have right of offering prayer and doing other religious but legitimate act only in the Mosque. Once it was settled in 1937 that it was a Mosque, the suit filed under Order 1 Rule 8 by plaintiffs is clearly barred by provisions of Section 4 of Act of 1991.

36. He then contended that an undertaking was given by State Government and Union Government before Apex Court in case of **Mohd. Aslam @ Bhure vs. Union of India and other, 1994 (2) SCC 48** for safeguarding the religious places i.e Gyanvapi Masjid and Vishwanath Temple at Varanasi and Krishna Temple and Eidgah at Mathura. He then contended that suit in question is barred by Section 9 C.P.C. as same is expressly barred by provisions of Act of 1991. It was the duty of court below to consider maintainability of suit barred by operation of law, which in the instant case is expressly barred.

37. It was next contended that Order 7 Rule 11(d) C.P.C. clearly provides for rejection of plaint where the suit appears from statement to be barred by any law. In the instant case, from perusal of the plaint specially para nos. 12, 13 and 14, the fact as to existence of Mosque has been alleged by plaintiffs. Once it has been accepted that a Mosque exist on the disputed site which has also been established by judgment rendered in **Din Mohammad (supra)**, Suit No. 610 of 1991 is barred by provisions of Act of 1991. He then contended that the court below should have decided the application filed under Order 7 Rule 11(d) C.P.C. but it

proceeded to decided Issue No. 2.

38. Learned counsel then invited attention of the Court to provisions of sub-Rule (2) of Rule 2 of Order 14. According to him, the court below was required to decide issue of law where a bar to the suit created by any law for the time being in force. According to him, Order 7 Rule 11 (d) and Order 14 Rule 2(2)(b) has to be read in harmony, while court below failed to take note of this fact.

39. Reliance has been placed upon various decisions of Apex Court as well as this Court rendered on Section 9 C.P.C. and Order 7 Rule 11(d) C.P.C., which are as under:-

1. **(1986) 4 SCC 364, Ram Singh and others vs. Gram Panchayat Mehal Kalan and others** 2. **AIR 1991 Punjab & Haryana 12, Aimer Kaur and others vs. Punjab State and others** 3. **(2008) 10 SCC 97, Abdul Gafur and others vs. State of Uttarakhand and others** 4. **(2017) 5 SCC 345, Kuldeep Singh Pathania vs. Bikram Singh Jaryal** 5. **(2018) 13 SCC 480, Bhargavi Constructions and another vs. Kothakapu Muthyam Reddy and others** 6. **AIR 2019 (SC) 1430, Raghwendra Sharan Singh vs. Ram Prasanna Singh** 7. **(2019) 13 SCC 372, Urvashiben and another vs. Krishnakant Manuprasad Trivedi** 8. **AIR 2004 SC 1801, Sopan Sukhdeo Sable and others vs. Assistant Charity Commissioner and others** 9. **AIR 2017 SC 2653, Madanuri Sri Rama Chandra Murthy vs. Syed Jalal** and 10. **(2016) 14 SCC 275, R.K. Roja vs. U.S. Rayudu and another**.

40. It was next contended that Original Suit No. 18 of 2022 (Smt. Rakhi Singh and others vs. State of U.P. and others) has been filed in respect of same Plot No. 9130 claiming relief of declaration and injunction. Defendant No. 1 is contesting the said suit and had also filed application under Order 7 Rule 11 C.P.C., stating that it was barred under Order 7 Rule 11(d). The application was dismissed on 12.09.2022 by trial

court, against which Civil Revision No. 101 of 2022 was preferred before this Court which was dismissed on 31.05.2023. Against which, Special Leave Petition has been filed before Hon'ble Apex Court and the same is pending consideration.

41. Sri Punit Kumar Gupta, learned counsel appearing for defendant no. 2 submitted that State of U.P. had promulgated Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983 (U.P. Act No. 29 of 1983) for providing proper and better administration of Sri Kashi Vishwanath temple. On the other hand, Waqf property of a Waqf is governed by Waqf Act, 1995. Waqf has been defined under Section 3(r) of Waqf Act. Both temple and mosque are separate entities and governed by their respective Act.

42. According to him, an exchange deed was executed between defendant no. 2 and State of U.P. for giving the land for establishment of Police Control Room for security of disputed property. The Waqf Board in year 1993-94 had given some land on license to U.P. Government through S.S.P., Varanasi, where Police Control Room was established. The land was exchanged in the year 2021.

43. He then contended that the Mosque in question is a Waqf as has already been held in the judgment of **Din Mohammad (supra)**. Section 4 of the Act of 1991 clearly bars the suit filed by plaintiffs under Order 1 Rule 8 C.P.C.

44. Reliance has been placed upon the decision rendered by Hon'ble Apex Court in case of **M. Siddiq vs. Mahant Suresh Das and others (2020) 1 SCC 1** also known as **Ram Janmabhumi Temple Case (Ayodhya Case)**. Relevant paras 92, 97.2, 99, 100, 101, 102, 103, 104 and 105 are extracted hereasunder:-

> *"**I. Places of Worship Act***
>
> ***92.** Parliament enacted the Places of Worship (Special Provisions) Act,*

1991 ["Places of Worship Act".] . Sections 3, 6 and 8 of the legislation came into force at once on the date of enactment (18-9-1991) while the other provisions are deemed to have come into force on 11-7-1991. The long title evinces the intent of Parliament in enacting the law, for it is:

"An Act to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15th day of August, 1947, and for matters connected therewith or incidental thereto."

The law has been enacted to fulfil two purposes. First, it prohibits the conversion of any place of worship. In doing so, it speaks to the future by mandating that the character of a place of public worship shall not be altered. Second, the law seeks to impose a positive obligation to maintain the religious character of every place of worship as it existed on 15-8-1947 when India achieved independence from Colonial Rule.

***97.2.** The law preserves the religious character of every place of worship as it existed on 15-8-1947. Towards achieving this purpose, it provides for the abatement of suits and legal proceedings with respect to the conversion of the religious character of any place of worship existing on 15-8-1947. Coupled with this, the Places of Worship Act imposes a bar on the institution of fresh suits or legal proceedings. The only exception is in the case of suits, appeals or proceedings pending at the commencement of the law on the ground that conversion of a place of worship had taken place after 15-8-1947. The proviso to sub-section (2) of Section 4 saves those suits, appeals and legal proceedings which are pending on the date of the commencement of the Act if they pertain to the conversion of the religious character of a place of worship after the cut-off date. Sub-section (3) of Section 4 however stipulates that the previous two sub-sections will not apply to:*

(a) Ancient and historical monuments or archaeological sites or remains governed by Act 24 of 1958 or any other law;

(b) A suit or legal proceeding which has been finally decided settled or disposed of;

(c) Any dispute which has been settled by the parties before the commencement of the Act;

(d) A conversion of a place of worship effected before the commencement of the Act by acquiescence; and

(e) Any conversion of a place of worship before the commencement of the Act in respect of which the cause of action would be barred by limitation.

The intention of Parliament

***99.** The purpose of enacting the law was explained by the Union Minister of Home Affairs on the floor of the Lok Sabha on 10-9-1991 [Lok Sabha Debates, Vol. V, Nos. 41-49, p. 448.] :*

"We see this Bill as a measure to provide and develop our glorious traditions of love, peace and harmony. These traditions are part of a cultural heritage of which every Indian is justifiably proud. Tolerance for all faiths has characterised our great civilisation since time immemorial.

These traditions of amity, harmony and mutual respect came under severe strain during the pre-Independence period when the colonial power sought to actively create and encourage communal divide in the country. After Independence we have set about healing the wounds of the past and endeavoured to restore our traditions of communal amity and goodwill to their past glory. By and large we have succeeded, although there have been, it must be admitted, some unfortunate setbacks. Rather than being discouraged by such setbacks, it is our duty and commitment to take lesson from them for the future."

(emphasis supplied)

100. *The Union Minister of Home Affairs indicated that the law which sought to prohibit the forcible conversion of places of worship was not "to create new disputes and to rake up old controversies which had long been forgotten by the people … but facilitate the object sought to be achieved" [Lok Sabha Debates, Vol. V, Nos. 41-49, p. 448.] . Speaking in support of the cut-off date of 15-8-1947, one of the Members (Shrimati Malini Bhattacharya) explained [Lok Sabha Debates, Vol. V, Nos. 41-49, pp. 443-444.] :*

"But I think this 15-8-1947 is crucial because on that date we are supposed to have emerged as a modern, democratic and sovereign State thrusting back such barbarity into the past once and for all. From that date, we also distinguished ourselves … as State which has no official religion and which gives equal rights to all the different religious denominations. So, whatever may have happened before that, we all expected that from that date there should be no such retrogression into the past."

(emphasis supplied)

101. *The Places of Worship Act which was enacted in 1991 by Parliament protects and secures the fundamental values of the Constitution. The Preamble underlines the need to protect the liberty of thought, expression, belief, faith and worship. It emphasises human dignity and fraternity. Tolerance, respect for and acceptance of the equality of all religious faiths is a fundamental precept of fraternity. This was specifically adverted to by the Union Minister of Home Affairs in the course of his address before the Rajya Sabha [Rajya Sabha Debates, Vol. CLX, Nos. 13-18, pp. 519-520 and 522.] on 12-9-1991 by stating:*

"I believe that India is known for its civilisation and the greatest contribution of India to the world civilisation is the kind of tolerance, understanding, the kind of assimilative spirit and the cosmopolitan outlook that it shows….

The Advaita philosophy … clearly says that there is no difference between God and ourselves. We have to realise that God is not in the mosque or in the temple only, but God is in the heart of a person….

Let everybody understand that he owes his allegiance to the Constitution, allegiance to the unity of the country : the rest of the things are immaterial."

102. *In providing a guarantee for the preservation of the religious character of places of public worship as they existed on 15-8-1947 and*

against the conversion of places of public worship, Parliament determined that independence from Colonial Rule furnishes a constitutional basis for healing the injustices of the past by providing the confidence to every religious community that their places of worship will be preserved and that their character will not be altered. The law addresses itself to the State as much as to every citizen of the nation. Its norms bind those who govern the affairs of the nation at every level. Those norms implement the Fundamental Duties under Article 51-A and are hence positive mandates to every citizen as well. The State, has by enacting the law, enforced a constitutional commitment and operationalised its constitutional obligations to uphold the equality of all religions and secularism which is a part of the basic features of the Constitution. The Places of Worship Act imposes a non-derogable obligation towards enforcing our commitment to secularism under the Indian Constitution. The law is hence a legislative instrument designed to protect the secular features of the Indian polity, which is one of the basic features of the Constitution. Non-retrogression is a foundational feature of the fundamental constitutional principles of which secularism is a core component. The Places of Worship Act is thus a legislative intervention which preserves non-retrogression as an essential feature of our secular values.

Secularism as a constitutional value

103. *In a nine-Judge Bench decision of this Court in S.R. Bommai v. Union of India [S.R. Bommai v. Union of India, (1994) 3 SCC 1] , B.P. Jeevan Reddy, J. held : (SCC p. 233, para 304)*

"304. … How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitution as affirmed in Kesavananda Bharati [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] and Indira Nehru Gandhi v. Raj Narain [Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1] . Any step inconsistent with this constitutional policy is, in plain words, unconstitutional."

(emphasis in original)

The Places of Worship Act is intrinsically related to the obligations of a secular State. It reflects the commitment of India to the equality of all religions. Above all, the Places of Worship Act is an affirmation of the solemn duty which was cast upon the State to preserve and protect the equality of all faiths as an essential constitutional value, a norm which has the status of being a basic feature of the Constitution. There is a purpose underlying the enactment of the Places of Worship Act. The law speaks to our history and to the future of the nation. Cognizant as we are of our history and of the need for the nation to confront it,

Independence was a watershed moment to heal the wounds of the past. Historical wrongs cannot be remedied by the people taking the law in their own hands. In preserving the character of places of public worship, Parliament has mandated in no uncertain terms that history and its wrongs shall not be used as instruments to oppress the present and the future.

104. *The observations made on the Places of Worship Act by D.V. Sharma, J. are contrary to the scheme of the law as they are to the framework of constitutional values. D.V. Sharma, J. observed as follows : (Gopal Singh Visharad case [Gopal Singh Visharad v. Zahoor Ahmad, 2010 SCC OnLine All 1919 : 2010 SCC OnLine All 1920 : 2010 SCC OnLine All 1921 : 2010 SCC OnLine All 1922 : 2010 SCC OnLine All 1923 : 2010 SCC OnLine All 1925 : 2010 SCC OnLine All 1926 : 2010 SCC OnLine All 1927 : 2010 SCC OnLine All 1928 : 2010 SCC OnLine All 1929 : 2010 SCC OnLine All 1930 : 2010 SCC OnLine All 1931 : 2010 SCC OnLine All 1932 : 2010 SCC OnLine All 1933 : 2010 SCC OnLine All 1934 : 2010 SCC OnLine All 1935] , SCC OnLine All para 89)*

"89. …1(c) Section 9 is very wide. In absence of any ecclesiastical courts any religious dispute is cognizable, except in very rare cases where the declaration sought may be what constitutes religious rite. Places of Worship (Special Provisions) Act, 1991 does not debar those cases where declaration is sought for a period prior to the Act came into force or for enforcement of right which was recognised before coming into force of the Act."

The above conclusion of D.V. Sharma, J. is directly contrary to the provisions of Section 4(2).

D.V. Sharma, J. postulates in the above observations that the Places of Worship Act will not debar cases of the following nature being entertained, namely:

(i) Where a declaration is sought for a period prior to the enforcement of the Places of Worship Act; or

(ii) Where enforcement is sought of a right which was recognised before the enforcement of the Places of Worship Act.

105. *Section 4(1) clearly stipulates that the religious character of a place of worship as it existed on 15-8-1947 shall be maintained as it existed on that day. Section 4(2) specifically contemplates that all suits, appeals and legal proceedings existing on the day of the commencement of the Places of Worship Act, with respect to the conversion of the religious character of a place of worship, existing on 15-8-1947, pending before any court, tribunal or authority shall abate, and no suit, appeal or proceeding with respect to such matter shall lie after the commencement of the Act. The only exception in the proviso to sub-section (2) is where a suit, appeal or proceeding is instituted on the ground that the conversion of the religious character of a place of worship had taken place after 15-8-1947 and such an action was pending at the commencement of the Places of Worship Act. Clearly, in the face of the statutory mandate, the exception which has been carved out by D.V. Sharma, J. runs contrary to the terms of the legislation and is therefore erroneous."*

45. Sri Gupta contended that Hon'ble Apex Court in Ayodhya Case had clearly held that where a declaration is sought for a period prior to enforcement of Places of Worship Act or where enforcement is sought of a right which was recognised before the enforcement of Places of Worship Act is directly contrary to provisions of Section 4(2) of the Act of 1991. Thus, once the provisions of Section 4 has been upheld by Hon'ble Apex Court in the aforesaid case, the suit at the behest of plaintiffs claiming the same relief in the instant suit is also hit by provisions of Section 4 of the Act of 1991.

46. Emphasis has been laid by counsel that finding returned in the Ayodhya Case would constitute *ratio decidendi* though Section 5 of the Act of 1991 barred the applicability of the Act to Ram Janmabhumi-Babri Masjid case. He then contended that 'Waqf' means permanent dedication by any person, of any movable or immovable property for any purpose recognised by Muslim law as pious, religious or charitable. Once it has been held that Mosque was a Waqf in 1937, the matter stood concluded and plaintiffs cannot reagitate the same in 1991 by filing Suit No. 610.

47. According to him, continuance of suit would amount to converting place of worship and changing its religious character. According to him, the allegation made in the plaint does not dispute as to existence of Mosque over Plot No. 9130, and once it is an accepted fact that Mosque exists on 15.08.1947, thus, the suit filed on 15.10.1991 after enforcement of the Act on 11.07.1991 was barred by provisions of Section 4.

48. According to him, revisional court was not correct in setting aside the finding recorded by trial court on Issue No. 2 and holding that same has to be decided along with other issues as issue of law and fact.

SUBMISSIONS OF PLAINTIFF-RESPONDENT NOS. 3 TO 6

49. Sri C.S. Vaidyanathan, learned Senior Counsel appearing for plaintiffs submitted that emphasis of Act of 1991 is on prohibition of conversion of any place of religious worship, while Section 4 declares that religious character of place of worship existing on 15th day of August, 1947 shall continue to be the same as it existed on that day. Thus, according to him, the vital question is as to what religious character on the relevant day. Parties have rival claims with regard to status and character of the premises in question and therefore such a disputed question of fact cannot be determined as a preliminary issue merely on the basis of pleadings and has to be decided only after considering the evidence.

50. The well settled principle of Hindu law 'once a temple always a temple' is a judicially recognized principle of law and therefore religious character of Swayambhu deity cannot be lost, not even by destruction.

51. Learned Senior Counsel relied upon the observation made by Hon'ble Supreme Court on certain paragraphs of Ayodhya Case, which are as under:-

> *"**144.** In holding that the non-existence of the idol at the time of the testator's death did not matter, the opinion of Jenkins, C.J. clearly demonstrates that the endowed property vests in the purpose itself. As he notes, "the pious purpose is still the legatee". It is on this purpose that juristic personality is conferred. In recognising the pious purpose as a juristic person, the State gives effect to, and protects the endowment. The idol is the material embodiment of the testator's gift. As the gift is one to ensure the continued worship of the deity, the idol is a physical manifestation of the testator's pious purpose. Where courts recognise the legal personality of the idol they are in effect recognising and protecting the testator's desire that the deity be worshipped.*
>
> ***148.** The idol constitutes the embodiment or expression of the pious purpose upon which legal personality is conferred. The destruction of the idol does not result in the termination of the pious purpose and consequently the endowment. Even where the idol is destroyed, or the presence of the idol itself is intermittent or entirely absent, the legal personality created by the endowment continues to subsist. In our country, idols are routinely submerged in water as a matter of religious practice. It cannot be said that the pious purpose is also extinguished due to such submersion. The establishment of the image of the idol is the manner in which the pious purpose is fulfilled. A conferral of legal personality on the idol is, in effect, a recognition of the pious purpose itself and not the method through which that pious purpose is usually*

> *personified. The pious purpose may also be fulfilled where the presence of the idol is intermittent or there exists a temple absent an idol depending on the deed of dedication. In all such cases the pious purpose on which legal personality is conferred continues to subsist.*
>
> ***153.*** *The recognition of juristic personality was hence devised by the courts to give legal effect to the Hindu practice of dedicating property for a religious or "pious" purpose. The founder or testator may choose to dedicate property for the use of a pious purpose. In many of the above cases, this pious purpose took the form of continued maintenance and worship of an idol. There was a clear State interest in giving effect to the will of the founder or testator who has so dedicated property, as well as for ensuring that the property is at all times used for the purpose of the dedication. A legal fiction was created by which legal personality was conferred on the religious or charitable purpose for which the endowment was made. In the case of a dedication for an idol, the juristic personality finds "compendious expression" in the idol itself. By conferring legal personality, the court gave legal effect to the dedication by creating an entity to receive the properties so dedicated. By stating that the artificial person created is in fact the owner of the dedicated properties, the court guarded against maladministration by the shebait. Even though the artificial legal person cannot sue without the assistance of a natural person, a legal framework was brought into existence by which claims for and against the dedicated property could be pursued.*
>
> ***154.*** *Though conceptually courts attributed legal personality to the intention of the founder, a convenient physical site of legal relations was found in the physical idol. This understanding is reiterated by this Court's observations in Deoki Nandan [Deoki Nandan v. Murlidhar, 1956 SCR 756 : AIR 1957 SC 133] that the idol is a "compendious expression" of the testator's pious purpose. The idol, as a representation or a "compendious expression" of the pious purpose (now the artificial legal person) is a site of legal relations. This is also in consonance with the understanding that even where an idol is destroyed, the endowment does not come to an end. Being the physical manifestation of the pious purpose, even where the idol is submerged, not in existence temporarily, or destroyed by forces of nature, the pious purpose recognised to be a legal person continues to exist."*

52. He then contended that the effect of deity being Swayambhu has to be considered in the suit for which evidence must be necessarily led as it positions the area of Swayambhu beyond property laws. The effect of Swayambhu is that land is inseparable from manifestation. Reliance upon para nos. 233 and 237 of Ayodhya Case has been made which are as under:-

> *"**233.** A Swayambhu deity is a manifestation of God that is "self-revealed" or "discovered as existing" as opposed to a traditional idol that is handcrafted and consecrated by the prana pratishta ceremony.*

> *The word "swayam" means "self" or "on its own", "bhu" means "to take birth". A Swayambhu deity is one which has manifested itself in nature without human craftsmanship. Common examples of these deities are where a tree grows in the shape of a Hindu God or Goddess or where a natural formation such as ice or rock takes the form of a recognised Hindu deity.*
>
> ***237.*** *It is conceivable that in certain instances the land itself would possess certain unique characteristics. For example, it may be claimed that certain patterns on a seashore or crop formations represent a manifestation of the divine. In these cases, the manifestation is inseparable from the land and is tied up to it. An independent question arises as to whether land can constitute the physical manifestation of the deity. Even if a court recognises land as a manifestation of a deity, because such land is also governed by the principles of immovable property, the court will need to investigate the consequences which arise. In doing so the court must analyse the compatibility of the legal regime of juristic personality with the legal regime on immovable property. It is necessary now to turn to this."*

53. It was next contended that in case of Swayambhu, the specific area or spot on which the temple or remnants of a temple or faith or belief of worshippers exist is considered holy and as one unit. Feelings of devotee is material. Relevant para no. 223 of Ayodhya judgment is relied upon, which is extracted hereasunder:-

> *"**223.** Mr Parasaran next relied on Sri Sabhanayagar Temple v. State of T.N. [Sri Sabhanayagar Temple v. State of T.N., 2009 SCC OnLine Mad 1516 : (2009) 4 CTC 801] to demonstrate the recorded existence of a temple without any resident idol. The decision records a brief history of the Chidambaram Temple in Tamil Nadu. T. Raja, J., speaking for a Division Bench of the Madras High Court notes : (SCC OnLine Mad para 4)*
>
> *"4. The Chidambaram Temple contains an altar which has no idol. In fact, no Lingam exists but a curtain is hung before a wall, when people go to worship, the curtain is withdrawn to see the "Lingam". But the ardent devotee will feel the divinely wonder that Lord Siva is formless i.e. space which is known as "Akasa Lingam". Offerings are made before the curtain. This form of worshipping space is called the "Chidambara rahasyam" i.e. the secret of Chidambaram."*
>
> *The decision supports Mr Parasaran's argument that there can exist a temple without an idol. An idol is one manifestation of the divine and it cannot be said that absent an idol, there exists no divinity to which prayer may be offered. However, the question before the Madras High Court was whether the appellant and his predecessors were the founders of the temple and whether it was a denominational temple for the purposes of State regulation of the temple's secular affairs. The High Court did not consider whether a temple could be a juristic person and the decision does not support Mr Parasaran's contention that the mere worship of empty land or "space", absent a physical*

> *manifestation could confer juristic personality. Moreover, the facts of the case are materially different from the present case as the Chidambaram Temple is a physical structure built around a specific spot that is considered holy. Despite the absence of an idol, the temple serves as the physical manifestation of the deity and demonstrates the institutional nature of the worship. This is in contrast to the present case. Worship is offered to the idol of Lord Ram. The disputed site is a site of religious significance, but that itself is not sufficient to confer juridical personality on the land."*

54. In the instant case, the manifestation is inseparable from the land and land is inseparable from manifestation as per the practice of faith, belief and worship and feeling of devotees.

55. Learned Senior Counsel then submitted that it is a well-known legal proposition that temples are sacrosanct and there cannot be alienation of a public temple under any circumstance being *res extra commercium.* It is not open to a private individual to acquire by prescription any private ownership in regard thereto. The character of a temple as a public temple cannot be taken away by any assertion of private right and there is no evidence that the public have ever been excluded therefrom. It was during Mughal invasion, some portion of the temple was destroyed and a disputed structure was raised thereon in a portion thereof, but notwithstanding the same, the divine character of the place was not affected and devotees and faithful continued to flock to the premises and offer worship. The place is impressed with divine and sacred character which has been worshipped as possessing divinity and as offering religious blessings by worship there at, without the need for worshipping any idol. Moreover, there is no exclusive possession by Muslims of the disputed area, by ouster of or to the exclusion of Hindus during any period.

56. According to learned Senior Counsel, religious character of premises has always been a Hindu place of public worship which is one composite and integral property considered as the most holy, pious and significant place of worship of Hindu devotees and a place of pilgrimage

since time immemorial.

57. According to him, continuance of worship by Hindu devotees even after construction of illegal and unauthorized structure establishes the true nature and religious character of the place as Hindu place of public worship. Therefore, the religious character of premises as Hindu Temple was never lost and cannot be lost.

58. Learned Senior Counsel then refuting the arguments from petitioner side submitted that certain passages in respect of the Act of 1991 in Ayodhya judgment is untenable and the observation made therein are completely inapplicable in the instant case.

59. According to him, the said judgment itself does not frame any issue, nor invited any argument on Places of Worship Act. The Hon'ble Supreme Court decided only those issues as joined by parties. The dispute was confined to Ram Janmabhoomi and no other temple. Hence, the Court had no occasion to go into the question of character of any other temple.

60. Reliance has been placed upon a decision of Apex Court in case of **Venkataramana Devaru and others vs. State of Mysore and others, 1958 SCR 895**. According to him, the Constitution Bench of Hon'ble Supreme Court held that it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding. Thus, according to him, the Court could not have gone into any issue touching upon the status/character of any temple in the Ayodhya case, other than Ram Janmabhoomi. The observations relied upon by petitioner cannot be ratio of the judgment and is clearly *obiter dicta* and are not authoritative.

61. Learned Senior Counsel has relied upon the decision of Apex Court in case of **Jayant Verma vs. Union of India, (2018) 4 SCC 743**, **Career Institute Educational Society vs. Om Shree Thakurji Educational Society 2023 SCC OnLine SC 586** and **State of Gujarat v. Utility Users' Welfare Assn., (2018) 6 SCC 21**.

62. He then submitted that any observation made by Hon'ble Supreme Court qua the scope, applicability or interpretation of Places of Worship Act is thus merely an opinion which may not be binding, since the said question never arose for the determination of the Court.

63. Sri Vijay Shankar Rastogi and Sri Ajay Kumar Singh, learned counsels appearing for the plaintiffs submitted that Section 2(b) provides "Conversion", with its grammatical variations, which includes alteration or change of whatever nature. Clause (c) defines "place of worship", which means, a temple, mosque, gurudwara, church, monastery or any other place of public religious worship of any religious denomination or any section thereof. While section 3 creates bar of conversion of place of worship.

64. "Religious Character" has not been defined in Act of 1991, as it cannot be confined in limits of verbal terminology. It could only be decided on facts and circumstances of each case. According to them, as per definition given in the Act of 1991, religious character of a place of worship cannot be converted, meaning thereby that Act itself creates a distinction between "place of worship" and its "religious character". There is a distinction between "structure" and its "uses". A structure can be used differently from its design, shape or style.

65. A structure of Mosque may be used by Shia and Sunni, simultaneously, a church may be used by Catholic or Protestant. A temple may also be used by Sanatani Hindu, Sai followers, Satsangis etc. What is important, that is, "uses" not "structure". As per the plaint, Hindus are

worshipping entire structure as temple of Lord Adi Vishweshwara while Muslims are claiming some part thereof used for offering Namaz.

66. Thus, what would be the religious character of the place, whether it would be religious character of Hindus or Muslims. To find out its religious character, it is necessary to adjudicate entire matter by taking evidence.

67. In the instant case, character of structure is also in dispute, while on the one hand, defendant claim it to be "Mosque" while plaintiffs claim it to be a "Temple", and the same can be decided only by taking evidence. While the Courts have to see only religious character of a place of worship leaving aside the design, shape or style of its structure.

68. It was next contended that Section 4(1) and 4(2) of the Act of 1991 applies only in case of undisputed structure and not in case of disputed structure. It is incumbent upon trial court to determine "religious character" of place in dispute which can only be done when parties lead evidence as per their pleadings. Further, bar created under Section 4(1) and 4(2) would not affect the trial of suit, as Section 4(3)(d) negatives/removes the said bar. Acquiescence or silence about the forcible act of Mughal Emperor in demolishing part of temple and illegal construction over it will not affect the maintainability of suit.

69. In Ayodhya case, Section 4(3)(d) of the Act of 1991 was not under consideration, as Section 5 of the Act specifically exempted Ramjanmabhumi- Babri Masjid case, and any observation to the contrary not concerned with the present dispute will not affect the suit in which declaratory relief has been sought for determining religious character of disputed place.

70. According to the counsels, the Court can adjudicate upon private property claims that were expressly or impliedly recognised by British

sovereign and subsequently not interfered with our Indian independence. With respect to disputed property, it is evident that British sovereign recognised and permitted the existence of both Hindu and Muslim community at the disputed property when riot happened in the city of Banaras in respect of place in dispute and Hindus completely ousted Muslims. A report was submitted by then District Magistrate, Mr. Watson on 30.12.1809 to the Vice-President in Council stating that in the disputed place Gyanvapi, there existed very pious temple of Lord Vishwanath of Hindus which was demolished due to religious antipathy by orders of Aurangzeb. But, thereafter, District Magistrate, Mr. Bird on 12.03.1810 stated that it should be opened for both communities, the rights of parties though recognised, but not decided. This continued basis of the legal rights of the parties in the present suit and it is these acts that Court must evaluate to decide in view of observations of Hon'ble Apex Court in para no. 997 of Ayodhya case. The change of legal regime between British sovereign and Republic of India, there exists a line of continuity, Article 372 of the Constitution embodies the legal continuity between the British sovereign and independent India in general as has been decided in para no. 996 and 996.3 of Ayodhya judgment, which are extracted hereasunder:-

> *"**996.** With respect to the change of legal regime between the British Sovereign and the Republic of India, there exists a line of continuity. Article 372 of the Constitution embodies the legal continuity between the British Sovereign and Independent India.*
>
> ***996.3.** These articles in the Constitution evidence a legal continuity between the British Sovereign and the Republic of India. Moreover, the conduct of the Republic of India subsequent to attaining Independence was to uphold private property claims that existed during the rule of the British Sovereign. It cannot be said that upon Independence, all pre-existing private claims between citizens inter se were extinguished. They were recognised unless modified or revoked by the express acts of the Indian Government. For the present purposes therefore, there is both express and implied recognition that the Independent Indian Sovereign recognised the private claims over property as they existed under the British Sovereign unless expressly evidenced otherwise. Therefore, the rights of the parties to the present dispute which occurred during the Colonial Regime can be enforced by this Court today."*

71. It was next contended that unless and until the religious character of a place is confirmed then only bar contained in the Act of 1991 would apply. It is a mixed question of fact and law and cannot be decided without evidence led by parties on specific Issue No. 2 in light of their contention made in their plaint and written statement.

72. Learned counsel addressing the Court on rejection of plaint and framing of issues submitted that under Order 7 Rule 11 C.P.C., a plaint can be rejected even before the filing of written statement. However, a plaint can also be rejected once an issue has been framed in regard to suit being barred by law, by taking plea in written statement. In the instant case, both defendants had moved application under Order 7 Rule 11 C.P.C. in the year 1995 but it was never addressed by them and thereafter both defendants filed their written statement and it was on the basis of pleadings of the parties that trial court proceeded to frame 10 issues.

73. According to counsel, Order XIV Rule 1 provides for framing of issues. Sub-Rule (1) of Rule 1 provides that issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Issues are of two kinds, issue of fact and issue of law. The object of framing issue is to focus upon the question on which evidence has to be led and to indicate the party on whom the burden of proof lies which is necessary in every contested suit. Reliance has been placed upon decision rendered in case of **Ramrameshwari Devi vs. Nirmala Devi, (2011) 8 SCC 249** and **Vimal Chand Ghevarchand Jain v. Ramakant Eknath Jadoo, (2009) 5 SCC 713**.

74. It was next contended that Order XIV Rule 2 C.P.C. stood amended w.e.f. 01.02.1977 and the amended provision came up for consideration before the Full Bench of this Court in case of **Sunni Central Waqf Board and others vs. Gopal Singh Visharad and others, AIR 1991 All 89**, and it was held that substitution of word “may” in place of “shall”, it

is now discretionary for Court to decide the issue of law as a preliminary issue or to decide it along with other issues. Further, even all issues of law cannot be decided as preliminary issues and only those issues of law falling within the ambit of Clause (a) and (b) of Sub-Rule (2) of Rule 2 could be decided.

75. In **Sathyanath and others vs. Sarojamani, (2022) 7 SCC 644**, it was held that only those issues of law can be decided without taking evidence where facts are admitted to both the parties and not otherwise. The object of substitution of Sub-Rule (2) is to avoid the possibility of remanding back the matter after decision on preliminary issues, as it is mandated for the trial court under Order XIV Rule 2 and Order XX Rule 5, and for the first appellate court in terms of Order XLI Rules 24 and 25 to record findings on all issues.

76. Learned counsels then contended that whether religious character of place in dispute existed on 15.08.1947 cannot be determined as a preliminary issue under Order 7 Rule 11 C.P.C. and effect of provisions of Order XIV Rule 1 and 2 prior to 1976 amendment and thereafter. According to them, the decision on Issue No. 2 needs evidence to be led by both the parties for determining the fact as to the religious character of place which existed on 15.08.1947. Reliance has been placed upon decision of Apex Court in case of **Sajjan Sikaria vs. Shakuntala Devi Mishra, (2005) 13 SCC 687; Abdul Gafur and others vs. State of Uttarakhand and others, (2008) 10 SCC 97; Popat and Kotecha Property vs. State Bank of India Staff Assn., (2005) 7 SCC 510; Sopan Sukhdeo Sable and others vs. Assistant Charity Commissioner and others, (2004) 3 SCC 137** and **Fiza Developers & Inter-Trade (P) Ltd. v. Amci (I) (P) Ltd., (2009) 17 SCC 796.**

77. It was then contended that object of framing issues is to focus upon question on which evidence has to be led and to indicate the party on

whom the burden of proof lies.

78. Addressing on the question as to whether the property in question is a Muslim Waqf and a Mosque, learned counsels submitted that earlier provisions of U.P. Muslim Waqf Act, 1960 were not applicable to the Hindus. Reliance has been placed upon decisions in case of **Board of Muslim Wakfs v. Radha Kishan, AIR 1979 SC 289; Ayodhya Prasad vs. Additional District Judge, Moradabad and others, 1995 ACJ 1159** and **U.P. Sunni Central Board of Wakfs vs. ADJ Court No. 3, Muzaffarnagar and another, 2016 (2) ALJ 209**.

79. Sri Rastogi submitted that definition as contained in Section 3(r) of Waqf Act, 1995 provides that "Waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by Muslim law as pious, religious or charitable and includes- a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser. According to him, upon enforcement of Act of 1995, by virtue of section 112(3) any law which corresponded to Act of 1995, and was in force in any State, stood repealed. Thus, after enactment of Act of 1995, U.P. Waqf Act, 1960 stood repealed.

80. He then contended that Hon'ble Supreme Court in **Punjab Wakf Board vs. Sham Singh Harike, 2019 (1) ARC 511 SC** had observed that before issuing notification under Section 5(2) of the Waqf Act, notice to the person affected was necessary to be issued, and if notice has not been issued, the Waqf Act is not binding on strangers. Petitioners have not placed on record any iota of proof by document that either under the Waqf Act, 1995; Waqf Act, 1936 or U.P. Muslim Waqf Act, 1960, the Board initiated its enquiry for identifying waqf property and the Board had submitted its report to State Government and after the satisfaction of the State notification was published. Thus, there has been no exercise done by

Waqf Board under the provisions of law. The alleged Waqf to have been created is not binding on Hindus i.e. plaintiffs, and disputed property is not a Waqf property nor it can be called as Waqf of Muslims.

81. He further emphasised that entire property in Gyanvapi compound was a very big temple of Swayambhu Lord Vishweshwar before advent of Muslim rule in country and it has pauranic and historical evidences. By demolishing a part of structure of temple and changing its physical structure can never change its religious character. He has relied upon the Farman issued by Emperor Aurangzeb on 18.04.1669 which has been published in "Ma-Asir-e-Alamgiri", which is extracted hereasunder:-

> "17 जिलकदा, हिजरी 1079 (18 अप्रैल 1669) के दिन दीन (धर्म) के रक्षक बादशाह सलामत के कानों में खबर पहुंची कि टटठा और मुल्तान के सूबों में और विशेषकर बनारस में बेवकूफ ब्राह्मण अपनी रद्दी किताबें अपनी पाठशालाओं में पढ़ाते और समझाते और उनमें दूर-दूर से हिन्दू और मुसलमान विद्यार्थी और जिज्ञासु उनके बदमाशीभरे ज्ञान-विज्ञानों को पढ़ने की दृष्टि से जाते हैं। धर्म -संचालक बादशाह ने यह सुनने के बाद सूबेदारों के नाम यह फरमान जारी किया कि वे अपनी इच्छा से काफिरों के तमाम मन्दिर और पाठशालाएं गिरा दें। उन्हें इस बात की भी सख्त ताकीद दी गयी कि वे सब प्रकार के मूर्ति - पूजा सम्बन्धी शास्त्रों का पठन पाठन और तिंपूजा भी बन्द कर दें। 15 रखी उल- आखिर (2 सितम्बर, 1669) को दीन प्रतिपालक बादशाह को खबर मिली कि उनकी आज्ञा उनके अमलों ने बनारस में विश्वनाथ का मन्दिर गिरा दिया।" मन्दिर केवल गिराया ही नहीं गया उस पर ज्ञानवापी की मस्जिद भी उठा दी गयी । मस्जिद बनाने वालों ने पुराने मन्दिर की पश्चिमी दीवार गिरा दी और छोटे मन्दिरों को जमींदोज़ कर दिया व पश्चिमी, उत्तरी और दक्षिणी द्वार भी बन्द कर दिये गये, द्वारों पर उठे शिखर गिरा दिये गये और उनकी जगह गुंबद खड़े कर दिये गये। गर्भगृह मस्जिद के मुख्य दालान में परिणत हो गया। चारों अंतगृह बचा लिये गये और उन्हें मंडपों से मिलाकर 24 फुट मुरब्बे में दालाने निकाल दी गयीं। मन्दिर का पूर्वी भाग तोड़कर एक बरामदे में परिणत कर दिया गया। इसमें अब भी पुराने खंभे लगे हैं। मन्दिर के पूर्वी मंडप में जो 125 फुट x 35 का था पत्थर के चौके बैठाकर उसे एक लम्बे चौक में परिणत कर दिया गया।"

82. Reliance has been placed upon decision of Apex Court rendered in case of **Gulam Abbas and others vs. State of U.P. and others, (1982) 1 SCC 71** which is in regard to certain Waqfs of District- Varanasi relied upon by the parties upon a notification dated 26.02.1944 which was doubted by Hon'ble Apex Court in its judgment.

83. It was then contended that the power of superintendence conferred

under Article 227 of Constitution of India, is to be exercised most sparingly and within the parameters which has been summarised in the case of **Shalini Shyam Shetty vs. Rajendra Shankar Patil, (2010) 8 SCC 329**, and also in case of **Radhey Shyam and another vs. Chhabi Nath and others, (2015) 5 SCC 423**.

84. According to him, counsel for petitioners have not been able to point out any material error or illegality in the order passed by court below warranting interference of this Court for exercising power under Article 227 of Constitution of India.

85. Replying the argument from petitioner side as to the applicability of the judgment rendered in case of **Din Mohammad (supra)**, learned counsel for the plaintiffs submitted that in the Original Suit No. 62 of 1936 filed by Din Mohammad, Mohammad Hussain and Mohammad Jakaria, Hindus were not party. Petitioner, Anjuman Intezamia Masjid was though a party but during the course of hearing it was exempted and name and address of petitioner in the said suit was cut out in original suit in red ink. The suit was not filed in representative capacity but the reliefs were claimed personally by three mohammedans. The Hindus had applied for being made party but their application was rejected and the High Court upheld the order of the trial court. In the said suit, 10 issues were framed and judgment rendered by trial court affirmed by appellate Court is not binding upon Hindus. Moreover, petitioner was also not a party to that suit and relief granted was for offering Namaz which was an individual right claimed by plaintiffs of that suit and would not affect the present suit, as the rights of Muslims in general has not been decided.

86. It is further contended that the judgment of **Din Mohammad (supra)** would not operate as *res judicata* within the meaning of Section 11 of C.P.C. as neither the matter directly or substantially in issue has been directly and substantially in issue in the former issue between the

same parties litigating under the same title.

SUBMISSION OF PETITIONER IN CASE NO. 3562 OF 2021 AND 3844 OF 2021

87. Sri Naqvi, Senior Counsel appearing in Case No.3844 of 2021 submitted that a suit for identical relief had already been filed by one Rakhi Singh and others being Suit No.18 of 2022 in respect of same plot No.9130, wherein an application for appointment of Advocate Commissioner to make local inspection of property was moved invoking provisions of Section 75 and Order XXVI, Rules 9 and 10 read with Section 151 CPC. The application was allowed. The order passed by Civil Judge was challenged before this Court by the petitioner, which was upheld vide order dated 21.4.2022. Thereafter the matter was carried to the Hon'ble Apex Court and on 04.08.2022 the Hon'ble Apex Court confirming the order for survey held that direction issued by trial Court under Order XXVI Rule 10A directing for scientific investigation by ASI needs no interference.

88. He, thus contended that the order dated 08.04.2021 passed by trial Court for conducting survey by ASI by scientific methods as well as excavation is of no consequence and be set aside once the ASI is already conducting survey of the same plot No.9130. According to him, report submitted by ASI can be easily read in the present suit and no further directions are required to be carried out as per the order dated 08.04.2021.

89. Sri Punit Kumar Gupta, counsel appearing in Case No.3562 of 2021 submitted that petitioner had objected to the prayer for survey by ASI on the ground that survey by commission can be issued only to supplement the evidence and in the present suit, none of the parties had led evidence therefore application is premature. According to him, trial Court while allowing the application for ASI survey had gone to the extent in holding that circumstances of the case are such that none of the

parties are in a position to lead evidence and to prove their assertions and counter assertions. According to him, petitioner being the defendant in the suit had no where stated that they are not capable of giving any evidence. He then contended that the direction as contained in Clauses 5 and 6 of the order demonstrate the bias of the Court below. He then contended that Court can order for scientific investigation under Order XXVI, Rule 10A, if it finds that place in dispute involves such a question which requires such investigation. The opinion, according to him, has been formed by the Court below on its own.

90. He lastly invited the attention of the Court to Rule 15 of Order XXVI, CPC which provides for expenses to be borne by the party for commission to be paid into the Court, but in the instant case the Court had directed that cost was to be borne by ASI.

SUBMISSION OF PLAINTIFF-RESPONDENT NOS. 3 TO 6

91. Sri Vaidyanathan, Senior Counsel and Vijay Shankar Rastogi, one of the plaintiffs to the suit, submitted that the case of plaintiffs in the plaint is that Mughal emperor Aurangzeb issued a Farman to the effect of demolishing temple of Swayambhu Lord Vishweshwar at Kashi and get a mosque constructed at the very same place. His commandants partly destroyed the temple of Lord Vishweshwar and erected the disputed structure with the ruins of the temple. According to plaintiffs, beneath the disputed structure, the remnants of ancient temple of Lord Vishweshwar still exist in form of cellars and towards the west thereof, debris of old temple exist. The western wall of the temple is also in existence and three doors of Swayambhu Lord Vishweshwar has been closed which can be seen with naked eyes. The Linga of about 100 fts. height is still in existence beneath the disputed structure and there is place and sight of Parikrama path of Swayambhu Lord Vishweshwar around the old temple and the plaintiffs and other Hindus are performing Darshan, Pooja etc.

and doing circumambulation (Parikrama).

92. There is a denial to this fact in the written statement, therefore, one of the core issue which goes to the root of dispute is whether the disputed structure was constructed after demolishing an existing temple and this question can only be decided by a competent Court, if expert evidence of archaeologist and historians is led and tested in cross examination.

93. It was after considering the pleadings of the parties that Court below decided for scientific investigation by an expert body. It was on account of the interim order, which was operating in the matters and the proceeding was stayed, that in a subsequent suit the trial Court had directed for conducting a survey of the property at settlement plot No.9130 which has been affirmed by the order of the Apex court, and the ASI is conducting a survey of the portion of suit property, and the report is awaited.

94. Both the counsels submitted that the suit filed by the plaintiffs in the year 1991 is in representative capacity, while the subsequent suit filed in the year 2022 has been filed in individual capacity and therefore the nature, prayer and even the extent of suit property is different in both the suits. The scope of survey, directed in the instant case, is much larger and has bearing on the suit compared to the other suit filed in the year 2022.

95. The counsels fairly submitted that there may be some overlapping in the direction for conducting survey but evidently the scope of survey in the instant case is much larger and in respect of larger extent of land. It was lastly contended that ASI may be directed to file its report in the present suit as well and also be directed to carry out further survey, if required in compliance of the order passed by trial Court on 08.04.2021, which has been left out in the survey already conducted by them in other suit [Original Suit No.18/2022 (693/2021)].

SUBMISSIONS OF PETITIONER AND RESPONDENTS IN CASE NO.1521 OF 2020

96. Senior counsel appearing for petitioner submitted that there arose no occasion for the Court below on 04.02.2020 for rejecting application No.270-Ga and 274-Ga filed by petitioner-defendant Nos.1 and 2 and allowing the application of the plaintiff 277-Ga and directing for proceedings in Suit No.610 of 1991 and posting the matter on 17.2.2020. Once the proceedings of suit No.610 of 1991 was stayed in Writ No.32565 of 1998, the Court below should have restrained itself in proceeding with the matter till the writ petition filed by defendant Nos.1 and 2 was decided finally and issue relating to applicability of Act of 1991 was decided.

97. Sri Ajay Singh, counsel for plaintiff submitted that in view of judgment of Apex Court rendered in case of **Asian Resurfacing of Road Agency Pvt. Ltd. (supra)**, the interim order had come to an end after expiry of six months and thus the Court below rightly proceeded with the matter. He then contended that as no interim order was operating in the matter, which is evident from the order sheet, and the judgment was reserved on 15.3.2021 in Case No.3341 of 2017 and 234 of 2021, the Court below on 08.4.2021 directed for survey by ASI.

98. According to him, in the instant case, the effect and operation of order dated 04.02.2020 was stayed on 26.02.2020 and matter was posted for 17.03.2020. On 17.03.2020 the interim order was extended till 15.4.2020 but on 15.4.2020 the interim order was never extended. This Court taking *suo motu* action in PIL No.564 of 2020 had extended all the interim orders at all levels. But the said PIL was disposed of on 05.01.2021. However, vide order dated 24.4.2021 the order dated 05.01.2021 was recalled and all the interim orders which were subsisting on 15.03.2021 stood extended till 31.5.2021. But in the instant case and the other connected cases, the interim orders were not subsisting on

15.03.2021 and as such they never stood extended in view of order passed by Division Bench in PIL No.564 of 2020 on 24.04.2021.

99. According to him, the Court below had rightly proceeded on 08.04.2021 with the matter. He has also relied upon the order passed on Misc. Application No.890 of 2021 in the matter of **Asian Resurfacing of Road Agency Pvt. Ltd. (supra)** by Hon'ble Apex court on 02.07.2021 whereby the Apex Court had held that whatever stay was granted by any Court including the High Court automatically expires upon the expiry of period of six months, and unless extension is granted for good reason as per the judgment of Apex Court, within the next six months, the trial Court is, on the expiry of first period of six months, to set a date for trial and go ahead with the same.

100. It was lastly contended that above petition has lost its significance in the light of the order passed by Division Bench in PIL No.564 of 2020 as well as orders passed by Apex Court on 02.07.2021 in the matter of **Asian Resurfacing of Road Agency Pvt. Ltd. (supra)**.

DISCUSSIONS

101. I have heard respective counsel for the parties and perused the material on record.

102. Parties to the lis before this Court have come up with different interpretation to the enactment and provisions of Places of Worship Act, 1991.

103. The emphasis of plaintiffs to the suit are that the enactment of Act of 1991 in no way bars or restrict the institution of Suit No. 610 of 1991 for claiming relief mentioned therein. According to them, none of the provisions of the Act are applicable to the dispute between the parties, and the same has to be tried without taking cognizance of the same.

104. On the other hand, defendants, who are petitioners before this Court

vehemently opposed the institution of the suit and its trial on the ground that the statement of object and reason for enactment of Act of 1991 was to prohibit such type of vexatious litigations and provisions of Section 2, 3 and 4 completely oust the jurisdiction of the trial court in entertaining the suit instituted by the plaintiffs.

105. Two of the cases under Article 227 No. 3341 of 2017 and 234 of 2021 having been filed by defendant no. 1 and 2, assail the order passed by trial court as well as revisional court on 18.10.1997 and 23.09.1998 on the premise, that Issue No. 2 framed by the trial court has to be decided on the basis of provisions of Section 4 of the Act of 1991 and the plaint deems to be rejected in view of Order 7 Rule 11 C.P.C.

106. While the other two cases under Article 227 No. 3844 of 2021 and 3562 of 2021 assail the order passed by trial court on 08.04.2021 directing for scientific survey by ASI under the provisions of Order XXVI Rule 10-A C.P.C.

107. Matter under Article 227 No. 1521 of 2020 challenges the order passed by trial court on 04.02.2020, whereby, the applications moved by defendants have been rejected and the trial of the suit has proceeded.

108. The three questions which require adjudication by this Court are:-

(1) Whether the provisions of "Places of Worship (Special Provisions) Act, 1991" apply to Suit No. 610 of 1991, and the plaint is liable to be rejected under Order 7 Rule 11 CPC ?

(2) Whether the order passed by trial court directing for scientific survey under Order XXVI Rule 10-A on 08.04.2021 warrants any interference by this Court exercising jurisdiction under Article 227 of Constitution of India?

(3) Whether the court below has proceeded with the Suit No. 610 of 1991 in defiance of the interim order of this Court?

QUESTION NO. 1

109. The first question which arises for consideration is as to whether Suit No. 610 of 1991 is barred by provisions of Act of 1991, and the plaint is liable to be rejected under Order 7 Rule 11 C.P.C.

110. The petitioners before this Court who are defendants in the suit had raised a preliminary objection by filing an application under Order 7 Rule 11 (d) C.P.C. in the year 1995 that plaint is hit by provisions of Act of 1991. However, defendant no. 1 on 15.11.1996 and defendant no. 2 on 23.02.1995 filed their respective written statement. It was on the basis of pleadings of the parties that 10 issues were framed by trial court on 17.07.1997.

111. Issue No. 2 was as to whether the suit in view of Section 4 of the Act of 1991 was barred and the plaint was liable to be rejected under Order 7 Rule 11 C.P.C. The trial court had fixed 21.08.1997 for hearing on the preliminary issue no. 1 and 2. The trial Court on 18.10.1997 held that relief No. (a) and (c) was not barred by provisions of Section 4 of the Act of 1991, but relief (b) was hit by aforesaid section and it was directed to delete relief (b) from the plaint. It was against the order of trial court that three revisions were filed, one by plaintiff and two by defendants. All the revisions were decided by a common order on 23.09.1998 which is subject-matter before this Court.

112. An effort has been made by defendants to demonstrate that statement and object of the Act clearly spells out that place of worship that existed on 15th day of 1947 shall exist and there is a complete prohibition on conversion of such place of worship. Section 3 bars conversion of place of worship, while Section 4(1) and 4(2) provides for maintaining the status as existed on 15.08.1947. Further, Section 5 specifically provides for exemption of the application of the Act in respect of dispute relating to Ramjanmabhumi- Babri Masjid.

113. On the contrary, an emphasis has been laid by plaintiffs' counsel to demonstrate that Act of 1991 is not applicable in the instant case as there is no conversion of place of worship neither there is change of religious character. To understand better, a glimpse of Section 2(b), (c), 3, 4 and Section 5 is necessary, which are extracted hereasunder:-

> *" **Section 2 (b)** "conversion", with its grammatical variations, includes alteration or change of whatever nature;*
>
> *(c) "place of worship" means a temple, mosque, gurudwara, church, monastery or any other place of public religious worship of any religious denomination or any section thereof, by whatever name called.*
>
> ***Section 3. Bar of conversion of places of worship.***
>
> *No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof.*
>
> ***Section 4. Declaration as to the religious character of certain places of worship and bar of jurisdiction of courts, etc.***
>
> *(1) It is hereby declared that the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day.*
>
> *(2) If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority:*
>
> *Provided that if any suit, appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act, such suit, appeal or other proceeding shall be disposed of in accordance with the provisions of sub-section (1).*
>
> *(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to,—*
>
> > *(a) any place of worship referred to in the said sub-sections which is an ancient and historical monument or an archaeological site or remains covered by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) or any other law for the time being in force;*
> >
> > *(b) any suit, appeal or other proceeding, with respect to any matter referred to in sub-section (2), finally decided, settled or disposed of by a court, tribunal or other authority before the*

commencement of this Act;

(c) any dispute with respect to any such matter settled by the parties amongst themselves before such commencement;

(d) any conversion of any such place effected before such commencement by acquiescence;

(e) any conversion of any such place effected before such commencement which is not liable to be challenged in any court, tribunal or other authority being barred by limitation under any law for the time being in force.

Section 5. Act not to apply to Ram Janma Bhumi-Babri Masjid.

Nothing contained in this Act shall apply to the place or place of worship commonly known as Ram Janma Bhumi-Babri Masjid situated in Ayodhya in the State of Uttar Pradesh and to any suit, appeal or other proceeding relating to the said place or place of worship.

114. Section 2(b) provides for definition of word "conversion" which includes alteration or change of whatever nature. While Sub-Section (c) defines "place of worship" which means a temple, mosque, gurudwara, church, monastery or any other place of public religious worship of any religious denomination or any section thereof.

115. Similarly, Section 3 places an embargo upon the conversion of place of worship and the same mentions that no person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination. While Section 4(1) maintains for a religious character of a place of worship existing on 15th day of 1947 to continue as it existed on that day. Section 4(2) specifically mentions that on the date of commencement of the Act of 1991 i.e. 18.09.1991, if any suit, appeal or any proceeding with respect to conversion of religious character of any place of worship, existing on the 15th day of 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority.

116. From the simple reading of Section 4(1) and 4(2), it is clear that

religious character of place of worship existing on the 15th day of 1947 is to continue and in case of any proceedings which were pending on the date of enactment was to abate and further a restriction has been imposed under Sub-Section (2) from further institution of any suit or appeal or other proceedings in respect of such religious character of place of worship after enforcement of the Act of 1991.

117. The Act clearly defines "conversion" and "place of worship" in Section 2(b) and 2(c) but the "religious character" of place of worship has not been defined under the Act.

118. The question which crops up for consideration is as to what is the religious character of the place in dispute.

119. One finds that religious character cannot be confined in limits of verbal terminology, as the Act has not defined the term "religious character", it could only be decided by facts and circumstances of each and every case.

120. From the reading of the definitions provided under the Act, it is clear that the Legislature had defined place of worship such as temple, mosque, gurudwara, church, monastery etc. but not the religious character, maintaining distance between the two. It is the Court who has to find out from the facts and circumstances of each case as to the religious character of place of worship.

121. In the instant case, plaintiffs have sought relief of declaration in respect of Plot No. 9130, 9131 and 9132 claiming it to be the entire area of temple of Swayambhu Lord Adi Vishweshwar since Satyug uptil now. Dispute is only to the part of entire area, i.e. Plot No. 9130, which is claimed to be the part of Gyanvapi compound and temple having stood there which was brought down by Farman of Emperor Aurangzeb in the year 1669.

122. An effort has been made by plaintiffs to establish that religious character of Temple has not changed only by erecting the alleged Mosque after demolition of temple by invaders. Emphasis has been laid that "once a temple always a temple" is a judicially recognised principle of law and therefore the religious character of Swayambhu deity cannot be lost not even by destruction.

123. The Apex Court in Ayodhya Case in para nos. 233 and 237 while considering a Swayambhu deity had held that "A Swayambhu Deity" is a manifestation of God i.e. "self revealed" or "discovered as existing" as opposed to a traditional idol that is handcrafted and consecrated by prana pratishtha ceremony. The Court further held that effect of Swayambhu is that land is inseparable from manifestation. The Court further proceeded to hold that manifestation is inseparable from the land and land is inseparable from manifestation as per the practice of faith, belief, worship and feelings of devotees.

124. While delivering Tagore Law Lectures, Dr. B.K. Mukherjee, ex-Chief Justice of India, which was published as "The Hindu Law of Religious and Charitable Trusts", His Lordship described that from very early times religious and charitable institutions in this country came under special protection of ruling authority and the duty of King was to protect endowments rested on the basis of immemorial customs which was sacred as written texts. He further went on to say that images, according to Hindu authorities, are of two kinds: the first is known as Swayambhu or self-existent or self-revealed, while the other is pratisthita or established. A Swayambhu or self-revealed image is a product of nature, which is Anadi or without any beginning and worshippers simply discover its existence. Such image does not require consecration of Pratistha. All artificial or man-made images require consecration and image according to Matsya Purana may properly be made of gold, silver, copper, iron, brass or bell metal or any kind of jem, stone or wood, conch shell, crystal or even earth

(Padma Purana Uttara Khanda).

125. Some persons worship images printed on wall and canvass, says Brihata Purana and some worship the spheroidical stones known as Salgram (Matsya Puran). Generally speaking, pauranic writers classify artificial images under two heads; viz (1) Lepya and (2) Lekhya.

126. It is no doubt true that there is a distinction between the structure and its uses. A structure can be used differently from its design, shape or style. According to the plaint, Hindus are worshipping the entire structure as temple of Lord Adi Vishweshwar while Muslims are claiming some part for offering Namaz.

127. Character of the structure is also under dispute, as one claim it to be a Temple while the other claim it to be a Mosque. Only religious character of place of worship has to be seen while deciding Issue No. 2.

128. To arrive at the finding as to the religious character of the place in dispute, an adjudication is required by a competent Court to deal with the matter, specially when there is a dispute as to the structure. Section 4(1) and 4(2) of the Act of 1991 apply to the undisputed structure. Merely by asserting that certain place is used as place of worship by certain section of persons would not declare the religious character of that place. The Act was promulgated with the object to set at rest the controversies arising from time to time for conversion of place of worship, and the Government felt that such conversion should be prohibited.

129. Conversion has been defined under the Act and includes alteration or change of whatever nature. However, in the instant case, the relief sought by plaintiffs is not of converting any place of worship, but a declaration has been sought as to the religious character for part of Gyanvapi compound which comprise of a large area of 1 Bigha, 9 Biswa and 6 Dhoor forming settlement Plot No. 9130, 9131 and 9132, existing

since Satyug till date.

130. According to the plaintiffs, the religious character has never changed and the Gyanvapi compound is the place of Adi Lord Vishweshwar, and by raising alleged Mosque in part of it will not change the character.

131. While the defendants on the strength of decision rendered in **Din Mohammad (supra)** case emphasised that religious character of disputed place already stands settled, and there is no need for declaration by competent Court.

132. It is on the basis of claim and counterclaim by the parties, and there being no clarity under the Act of 1991, Issue No. 2 cannot be decided solely on the basis of provisions of Section 4 of the Act of 1991. It requires adjudication by the court. Adjudication can only be done once the parties lead evidence.

133. Had there been no ambiguity in the Act by defining religious character of a place of worship on 15.08.1947, there would have been no difficulty in deciding Issue No. 2 on basis of Section 4.

134. Once the defendants do not claim the entire Gyanvapi compound and do not dispute the religious character, and place of worship of Swayambhu Adi Vishweshwar, the disputed structure standing on Plot No. 9130 cannot be said to have religious character of a “Mosque”, at this stage.

135. The decision of **Din Mohammad (supra)** does not lay down religious character of the disputed place, and it only permits plaintiffs therein to offer Namaz in the alleged Mosque.

136. The object of framing issues is to focus upon question on which evidence has to be led and to indicate the party on whom the burden of proof lies.

137. Framing of issues is a very important stage in civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by Presiding Judge while framing issues, this was held by Apex Court in case of **Ramrameshwari Devi (supra)**.

138. A plaint can be rejected under two circumstances, firstly, by moving an application under Order 7 Rule 11 C.P.C. or by getting an issue framed with regard to suit being barred by law, by taking plea in the written statement, and leading evidence both documentary as well as oral. In the instant case, application under Order 7 Rule 11(d) C.P.C. was never pressed and issues were framed. The trial court took Issue Nos. 1 and 2 as preliminary issue and decided Issue No. 2 and held that relief (b) was hit by provisions of Section 4. Order of trial court was reversed by the revisional court and it was directed to decide Issue No. 2 along with other issues.

139. It is well settled that while considering an application under Order 7 Rule 11 C.P.C., consideration of written statement is not a condition precedent and only averment in the plaint has to be looked into. But once an issue has been framed on the basis of pleadings of the parties, the court rightly proceeded to decide the issue. In **Sajjan Sikaria (supra),** the Apex Court held as under:-

> *"**3.** We find that the directions for considering the question relating to Order 7 Rule 11 CPC as preliminary issue is not correct as that would necessitate filing of a written statement. It is a settled position in law that while dealing with an application under Order 7 Rule 11 CPC, consideration of written statement is not a condition precedent and only averments in the plaint have to be considered. Therefore, that part of the order is set aside. It will be in the interest of the parties if the whole suit is taken up for disposal as early as practicable. Considering the fact that the suit was filed in 1996, learned counsel for the parties submit that they shall cooperate in disposal of the suit, and if a request is made to the trial court for disposal of the suit within six months, that would suffice."*

140. While dealing with nature and scope of Section 9 C.P.C. and Order 7 Rule 11 C.P.C., Hon'ble Supreme Court in **Abdul Gafur (supra)** held

that civil court has jurisdiction to try all suits of civil nature, excepting the suit cognizance of which is expressly or impliedly barred. Rule of pleading postulates that a plaint must contain material facts. The plaint has to be read in entirety and if it does not disclose cause of action it may be rejected in terms of Order 7 Rule 11 C.P.C. The bar to jurisdiction of civil court has to be considered having regard to contention raised in the plaint. Once the cause of action is disclosed, the suit stands maintainable. Relevant paras 16 and 19 are extracted hereasunder:-

> *"**16.** Section 9 of the Code provides that the civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other tribunal or authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute.*
>
> ***19.** It is trite that the rule of pleadings postulates that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7 Rule 11 of the Code. Similarly, a plea of bar to jurisdiction of a civil court has to be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the court would not be justified in determining the question, one way or the other, only having regard to the reliefs claimed dehors the factual averments made in the plaint. (See Church of North India v. Lavajibhai Ratanjibhai [(2005) 10 SCC 760] .)"*

141. While considering scope of clause (d) of Order 7 Rule 11 C.P.C. in case of **Popat and Kotecha Property (supra),** the Hon'ble Supreme Court held that it applies to those cases only where statement made by plaintiffs in the plaint, without any doubt or dispute shows that suit is barred by any law in force. The averments in the plaint are germane, the pleas taken by defendants in written statement would wholly be irrelevant at that stage. Relevant paras 10, 14, 15, 16, 17 and 18 are extracted hereasunder:-

> *"**10.** Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.*
>
> ***14.** In Saleem Bhai v. State of Maharashtra [(2003) 1 SCC 557] it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.*
>
> ***15.** In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal [(1998) 2 SCC 70] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.*
>
> ***16.** The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam v. T.V. Satyapal [(1977) 4 SCC 467] .)*
>
> ***17.** It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in Roop Lal Sathi v. Nachhattar Singh Gill [(1982) 3 SCC 487] only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.*
>
> ***18.** In Raptakos Brett & Co. Ltd. v. Ganesh Property [(1998) 7 SCC 184] it was observed that the averments in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 was applicable."*

142. Similar view was taken by Hon'ble Apex Court in case of **Sopan Sukhdeo Sable (supra)**. Reliance of which has been placed by both sides on relevant para nos. 10, 13, 14, 15 and 18. Thus, it is clear that defendants have no case for dismissal of the plaint under Order 7 Rule 11 C.P.C. as they could not make out from the plaint that suit is barred by

any provisions of law. Moreover, the issues were framed after considering the pleadings of both parties.

143. Order XIV Rule 2 C.P.C. was amended w.e.f. 01.02.1977 and the word "shall" used in Sub-Rule (2) of Rule 2 of Order XIV was substituted by the word "may", and the amended provision came up for consideration before the Full Bench of this Court in case of **Gopal Singh Visharad (supra)** and the Court held substitution of word "may" in place of word "shall", makes it discretionary for court to decide issue of law as preliminary issue. It was further held that even all the issues of law cannot be decided as preliminary issue and only those issues of law falling within the ambit of Clause (a)(b) of Sub-Rule (2) of Rule 2 could be decided.

144. Recently, the Apex Court in **Sathyanath (supra)** held that only those issues of law can be decided without taking evidence where facts are admitted to both the parties and not otherwise. The object of substitution of Sub-Rule (2) is to avoid the possibility of remanding back the matter after the decision on the preliminary issues, it is mandated for the trial court under Order XIV Rule 2 and Order XX Rule 5 and for the first appellate Court in terms of Order XLI Rule 24 and 25 to record findings on all issues. In the instant case, the facts are not admitted to both the parties and there is dispute to the structure standing over settlement Plot No. 9130. Once there is dispute to the admitted fact and religious character of place has to be determined, thus, the suit cannot be held to be barred by Section 4 of Places of Worship (Special Provisions) Act, 1991.

145. Post amendment of Order XIV Rule 2 makes it no more obligatory to the court to decide issues of law as a preliminary issue. Thus, the court postponing decision on an issue of law does not commit any jurisdictional error. For deciding Issue No. 2, and finding out religious character of place in dispute existing on 15.08.1947, evidence of both the parties are required. The same cannot be decided solely on the basis of possession of

one of the parties. Possession of a disputed place by a party cannot be an evidence defining religious character. The dispute is only to a part of a land of big Gyanvapi compound. The argument of defendants' counsel cannot be accepted that judgment rendered in **Din Mohammad (supra)** case would define the religious character of the disputed place as a Mosque, and the suit filed by plaintiffs can be rejected at the threshold.

146. Evidently, plaintiffs were never party in the suit filed by Din Mohammad and two others in which relief claimed was in individual capacity for offering Namaz in the structure. Moreover, defendant no. 1/petitioner was also dropped out of the proceedings by orders of trial court.

147. Section 11 C.P.C. operates on certain governing principles. These are: (i) The matter directly and substantially in issue in the suit should have been directly and substantially in issue in former suit (ii) The former suit should be either between the same parties as in the later suit or between the parties under whom they or any of them claim, litigating under the same title (iii) The court which decided the former suit should be competent to try subsequent suit or the suit in which issue has been subsequently raised (iv) The issue should have been heard and finally decided by the court in the former suit.

148. Both plaintiffs and defendants were not party in the suit of Din Mohammad. Moreover, the present suit has been filed under Order 1 Rule 8 C.P.C. while the suit of 1936 was filed in individual capacity.

149. Thus, it is clear that once the parties to the present lis were not a party in suit filed by Din Mohammad, the religious character of the disputed structure cannot be termed as "mosque" as the relief granted was *in persona* to the plaintiffs therein.

150. Another argument which has been raised by defendants that

property in dispute is a Muslim Waqf and a Mosque, emphasis has been made that judgment rendered in Din Mohammad case speaks about Mosque, and the plaintiffs therein were granted permission to offer Namaz at the Mosque.

151. The plaintiffs while opposing the argument submitted that Section 3(r) of the Waqf Act, 1995 defines "Waqf" which means permanent dedication by any person, of any movable or immovable property for any purpose recognised by Muslim law as pious, religious or charitable. According to them, there is no material on record to demonstrate that a Waqf was created by dedicating the same and further complying the provisions of Section 5(2) of the Act of 1995.

152. According to plaintiffs, it was on the Farman of Emperor Aurangzeb that temple of Lord Adi Vishweshwar was brought down, and from ruins of the Temple alleged Mosque was constructed, and there is no creation of Waqf by Emperor nor subsequently.

153. Recently, the Apex Court while considering the effect of Section 5(2) of the Waqf Act in case of **Sham Singh Harike (supra)** had held that before issuance of notification under Section 5(2) of the Act, notice to person affected was necessary to be issued by Board and if no notice is issued to the affected persons, notification issued is not binding upon them.

154. Section 36 of Waqf Act, 1995 mandates for registration of every Waqf, whether created before or after the commencement of the Act, and has to be registered at the office of the Board.

155. The fact whether the Waqf Act of 1936, U.P. Muslim Waqf Act, 1960 or Act of 1995 was complied with by defendant no. 2 is a matter of fact and can only be adjudicated by trial court when parties lead evidence and the same is considered by court below. Issue Nos. 5 and 6 have

already been framed by court below in regard to the Waqf Act which needs adjudication by the trial court. Moreover, there is no material on record to demonstrate the creation of Waqf and construction of Mosque.

156. An argument has been raised from defendants side that upon promulgation of Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983, the temple board is managing the temple under the Act, while mosque is being governed by Waqf Act. To deal with this argument, a glance of some of provisions of Sri Kashi Vishwanath Temple Act is necessary. Section 4(9) defines "temple", which is as under:-

> *"(9) "Temple" means the Temple of Adi Vishweshwar, popularly known as Sri Kashi Vishwanath Temple, situated in the City of Varanasi which is used as a place of public religious worship, and dedicated to or for the benefit of or used as of right by the Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temples, shrines, sub-shrines and the ashthan of all other images and deities, mandaps, wells, tanks and other necessary structures and land appurtenant thereto and addition which may be made thereto after the appointed date;"*

157. From the reading of above, it is clear that State legislature has recognised the deity "Adi Vishweshwar" Jyotirlinga also known as Kashi Vishwanath, along with other subsidiary deities existing within the temple complex including the structure and land appurtenant thereto. The Act was granted presidential assent on 12.10.1983. The contention raised from plaintiffs side is justified to a extent that enactment of Kashi Vishwanath Temple Act is a sovereign Act, and after fall of Mughal Empire, the property in question came under the control of British sovereign and thereafter under the constitutional regime of Republic of India. In 1950, it came within the jurisdiction of State of Uttar Pradesh in view of Article 294 of Constitution of India.

158. With the change of legal regime between British sovereign and Republic of India, there exists a line of continuity, and Article 372 of Constitution of India embodies the legal continuity between British sovereign and independent India. Articles 294, 296 and 372 are relevant in

the present case and are extracted hereasunder:-

> *"**294. Succession to property, assets, rights, liabilities and obligations in certain cases.**—As from the commencement of this Constitution—*
>
> *(a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and*
>
> *(b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,*
>
> *subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.*
>
> ***296. Property accruing by escheat or lapse or as bona vacantia.**—Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:*
>
> *Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.*
>
> ***372. Continuance in force of existing laws and their adaptation.**—*
>
> *(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.*
>
> *(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.*
>
> *(3) Nothing in clause (2) shall be deemed—*

(a) to empower the President to make any adaptation or modification of any law after the expiration of 1[three years] from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.—The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II.—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III.—Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV.—An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

159. These articles evidence a legal continuity between the British sovereign and Republic of India, moreover, the conduct of Republic of India and subsequent to attaining independence was to uphold private property claims that existed during rule of British sovereign.

160. After independence, all pre-existing private claims between citizens were not extinguished, they were recognised unless modified or revoked by express Act of Indian Government. The rights of the parties to the lis which accrued during colonial regime can be enforced by the court of the day, as held by Apex Court in para no. 996.3 of Ayodhya case. The British sovereign never recognised the legal existence of the alleged mosque, and in their written statement filed in case of **Din Mohammad (supra)**, the

said fact was denied.

161. Another point canvassed by plaintiffs' counsel to the non-applicability of Section 3, 4(1) and 4(2) is on the basis of *non obstante* clause contained in Sub-Section (3) of Section 4, that Section 4(1) and 4(2) will not apply to any conversion of place effected before such commencement by acquiescence. The bar contained in Section 3, 4(1) and 4(2) is negatived by Sub-Section (3)(d) of Section 4, as the forcible act of Mughal Emperor in demolishing part of temple, and thereafter raising illegal construction would not affect the maintainability of suit.

162. The Act of 1991 is not an absolute bar upon the parties approaching the courts after its enforcement seeking their right as to place of worship or defining religious character of any place of worship. Sub-Section (3) of Section 4 enumerates certain cases in which the parties can approach the court for redressal of their grievance. Sub-Section (3)(d) is one of those case, where conversion has taken place much before the commencement of the Act and a party had not approached the court, the acquiescence or silence would not bar the action of such party.

163. As "religious character" has not been defined under the Act, and the place cannot have dual religious character at the same time, one of a temple or of a mosque, which are adverse to each other. Either the place is a temple or a mosque.

164. The evidence of entire Gyanvapi compound detailed in Schedule-B of the plaint is necessary to be taken while determining religious character. The revisional court had rightly proceeded to hold that Section 4 of the Act of 1991 is not applicable in the instant case as the religious character of the place in dispute has to be determined.

165. Reliance placed by defendants upon certain paragraphs of Ayodhya case does not help their case as Section 5 of the Act of 1991 clearly bars

the application of the Act to Ramjanmabhumi- Babri Masjid case.

166. The Apex Court in case of **Career Institute Educational Society (supra)** had clearly upheld the "inversion test" to identify whether a decision is *ratio decidendi* or *obiter dicta*. Relevant paras 6, 7 and 8 are extracted hereasunder:-

> *"**6.** The distinction between obiter dicta and ratio decidendi in a judgment, as a proposition of law, has been examined by several judgments of this Court, but we would like to refer to two, namely, State of Gujarat v. Utility Users' Welfare Association (2018) 6 SCC 21 and Jayant Verma v. Union of India (2018) 4 SCC 743.*
>
> ***7.** The first judgment in State of Gujarat (supra) applies, what is called, "the inversion test" to identify what is ratio decidendi in a judgment. To test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case.*
>
> ***8.** In Jayant Verma (supra), this Court has referred to an earlier decision of this Court in Dalbir Singh v. State of Punjab5 to state that it is not the findings of material facts, direct and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is the vital element in the decision and operates as a precedent. Even the conclusion does not operate as a precedent, albeit operates as res judicata. Thus, it is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided and, for this reason, it is important to analyse a decision and isolate from it the obiter dicta.*

167. Thus, I find that religious character of the disputed place as it existed on 15.08.1947 is to be determined by documentary as well as oral evidence led by both the parties. Unless and until the court adjudicates, the disputed place of worship cannot be called as a temple or mosque.

168. This Court finds that judgment and order dated 23.09.1998 passed by revisional court needs no interference by this Court exercising power under Article 227 of Constitution of India, as the same has to be exercised most sparingly and within the parameters laid down by Apex Court in case of **Shalini Shyam Shetty (supra)** and **Radhey Shyam (supra)**.

QUESTION NO. 2

169. Now coming to the second question as to whether any interference is required by this Court against the direction issued for scientific survey under Order XXVI, Rule 10-A?

170. It had been contended on behalf of defendant no.1 that already another Suit No.18 of 2022 in respect of same plot No.9130 has been instituted by one Rakhi Singh and others wherein application for scientific survey was allowed by the trial Court and the order has been affirmed by Apex Court on 04.8.2022, thus, there is no requirement for any survey to be conducted again for the same disputed place. However, counsel for defendant No.2 had submitted that such direction was against the Rule, as evidence had not been led by any of the parties, question for scientific survey does not arise. Moreover, scientific survey under Order XXVI, Rule 10-A can only be ordered in case it is found that dispute involves such a question, which requires such investigation.

171. On the contrary, Sri Vaidyanathan, Senior counsel appearing for plaintiffs had fairly submitted that there may be some overlapping in the direction for conducting survey but evidently the scope of survey in the instant case is much larger. However, it was submitted that ASI may be directed to submit its report in the present suit also and if required, a direction may be issued for further survey complying the order dated 08.04.2021, which has been left out in the survey already conducted.

172. This Court finds that the plaintiffs had filed the suit in the year 1991, after the decision on the preliminary issue no.2, the two cases were filed by the defendants being matter under Article 227 in the year 1998 & 1999, in which proceedings of the suit No.610 of 1991 was stayed. It was on the directions of the Apex Court issued in case of **Asian Resurfacing of Road Agency Pvt. Ltd. (supra)** that proceedings started again before the Court below and application for scientific survey was allowed on

08.04.2021. In the meantime, Suit No.18 of 2022 (693 of 2021) was filed by Rakhi Singh and 4 others in the individual capacity claiming certain relief over the same settlement plot No.9130. An application was moved for scientific survey which was allowed and the order passed therein was confirmed by Hon'ble Apex Court.

173. It is not in dispute that scientific survey is being conducted by ASI on the disputed site plot No.9130 and the orders passed in Suit Nos.610 of 1991 and 18 of 2022 are to some extent overlapping for conducting survey.

174. From the reading of the directions issued on 08.04.2021 by Court below especially Clause-VI of the order, the scope of survey of Suit No.610 of 1991 is much wider and in respect of larger extent of land, than the survey which is conducted by ASI in suit filed by Rakhi Singh.

175. However, as the order passed by Court below in case of Rakhi Singh for conducting scientific survey has already been upheld by the decision of Hon'ble Apex Court in special leave petition filed by defendant No.1, this Court finds that direction for compliance of order dated 08.04.2021 for conducting again the scientific survey in respect of plot No.9130 would be a futile exercise.

176. The suggestion made by Sri Vaidyanathan appeals to the Court and ASI is directed to place its report of scientific survey being done in Original Suit No.18 of 2022 (693 of 2021), in Suit No.610 of 1991 also, which shall be taken into consideration by the court. It is further made clear that in case the Court below finds it necessary for adjudication of case that further survey is required to be conducted, which has been left out in the survey already conducted, then in view of the order dated 08.04.2021, it shall issue necessary direction to ASI for complying the order dated 08.4.2021. Thus, the order dated 08.04.2021 stands modified to such extent.

177. A last ditch effort was made by defendant no. 2 that compliance of Rule 15 of Order XXVI was not made by plaintiffs and expenses were not deposited in the court, on which Sri S.P. Singh, learned ASGI submitted that the cost was being borne by ASI and plaintiffs are not required to pay the same.

178. I find that once ASI is already conducting the scientific survey as per the orders of the court, the plea raised by defendant no. 2 is untenable and of no legal consequence and the same is turned down. Both the matters filed under Article 227 of the Constitution by defendant no. 1 and 2 challenging the very validity of order dated 08.04.2021 passed by court below needs no interference by this Court.

Question No. 3

179. Now moving to the third question, as to whether the Court below has proceeded with the suit in defiance of the interim order granted by this Court in the year 1998.

180. A feeble attempt has been made by counsel for defendant No.1 that trial Court was not correct in rejecting the application moved by defendants for staying the suit proceedings in the light of decision of Apex Court in case of **Asian Resurfacing of Road Agency Pvt. Ltd. (supra),** as the interim orders were operating in the two petitions No.3341 of 2017 and 234 of 2021. The plaintiffs' counsel had vehemently opposed the same and submitted that no interim order was operating and the Court below had rightly proceeded in the matter and rejected the application filed by defendants on 04.02.2020.

181. After careful scrutiny of the various orders passed by this Court in different cases under Article 227, I find that no interim order was operating and the Court below had rightly proceeded with the suit complying the mandate of the Apex Court in case of **Asian Resurfacing**

of Road Agency Pvt. Ltd. (supra), the interim order passed in PIL No.564 of 2020 during COVID pandemic also came to an end on 05.01.2021. It was subsequently that the PIL was restored vide order dated 24.04.2021 and order dated 05.01.2021 was recalled and those interim orders which were in existence on 15.03.2021 stood extended till 31.05.2021.

182. In the instant case, the interim order had already come to an end on 15.04.2020 and were never extended. Once the interim order was not extended, the Court below had rightly proceeded. Thus, I find that the Court below had not defied the interim order of this Court and matter under Article 227 No.1521 of 2020 warrants no interference of this Court.

CONCLUSION

183. In view of the discussions made above, I come to the conclusion that the present suit filed by plaintiffs being Suit No.610 of 1991 is not barred by provisions of Section 4 of Act of 1991, and the plaint cannot be rejected under Order 7 Rule 11 C.P.C..

184. The Act does not define “religious character”, and only “conversion” and “place of worship” have been defined under the Act. What will be the religious character of the disputed place can only be arrived by the competent Court after the evidences are led by the parties to the suit. It is a disputed question of fact, as only part and partial relief has been claimed of entire Gyanvapi compound which comprises of settlement plot Nos.9130, 9131 and 9132.

185. Either the Gyanvapi Compound has a Hindu religious character or a Muslim religious character. It can’t have dual character at the same time. The religious character has to be ascertained by the Court considering pleadings of the parties, and evidences led in support of pleadings. No conclusion can be reached on the basis of framing of preliminary issue of

law. The Act only bars conversion of place of worship, but it does not define or lays down any procedure for determining the religious character of place of worship that existed on 15.08.1947.

186. More than 32 years have elapsed since filing of Original Suit No. 610 of 1991, and only issues have been framed after filing of written statement by defendants. Proceedings of the suit had remained pending for almost 25 years on the strength of interim order granted by this Court on 13.10.1998.

187. The dispute raised in the suit is of vital national importance. It is not a suit between the two individual parties. It affects two major communities of the country. Due to the interim order operating since 1998, the suit could not proceed. In the national interest, it is required that the suit must proceed expeditiously and be decided with utmost urgency with the cooperation of both the contesting parties without resorting to any dilatory tactics.

188. In view of the fact that the suit is of the year 1991, and more than 32 years have elapsed, this Court directs the trial Court to proceed with the matter expeditiously and conclude the proceedings of Original Suit No.610 of 1991 preferably within a period of next six months from the date of production of a certified copy of this order. It is made clear that the Court below shall not grant unnecessary adjournment to either of the parties. In case adjournment is granted, it will be at heavy cost.

189. This Court finds that Case Nos.3341 of 2017 and 234 of 2021 filed by defendant Nos.1 and 2 are for the same relief, which this Court finds cannot be granted to them at this stage and both the matters fails and are hereby dismissed and interim orders stands vacated.

190. Further, identical controversy has been raised through Case No.3562 of 2021 and 3844 of 2021. As the scientific survey is already

being conducted by ASI in Original Suit No.18 of 2022, it is hereby directed that ASI shall submit the same report in Suit No.610 of 1991 and in case it is found that further survey is required, which have been left out in the survey conducted by ASI, the Court below shall issue necessary directions to carry out further survey in view of order dated 08.4.2021.

191. In view of the above, the order dated 08.04.2021 passed by Court below for conducting scientific survey is modified to the extent indicated above. Both the cases filed under Article 227 No.3562 of 2021 and 3844 of 2021 fail and are hereby dismissed. Thus, all the five matters under Article 227 No. 3562 of 2021, 3341 of 2017, 1521 of 2020, 234 of 2021 and 3844 of 2021 warrant no interference by this Court and stand dismissed. Interim order, if any, stands vacated.

Order Date :- 19.12.2023
Kushal/V.S. Singh