JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENT

(AYODHYA VERDICT)

[M. Siddiq (D) Thr Lrs v. Mahant Suresh Das and Ors., (2019 SCC OnLine SC 1440)]

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M SIDDIQ (D) THR LRS V. MAHANT SURESH DAS AND OTHERS, (2019 SCC OnLine SC 1440)

Decided on : -09.11.2019

Bench :- 1. Hon'ble Mr. Chief JusticeRanjan Gogoi
2. Hon'ble Mr. JusticeS.A. Bobde
3. Hon'ble Mr. JusticeD.Y. Chandrachud
4. Hon'ble Mr. Justice Ashok Bhushan
5. Hon'ble Mr. Justice S. Abdul Nazeer

There is no evidence to the contrary by the Muslims to indicate that their possession of the disputed structure of the mosque was exclusive and that the offering of namaz was exclusionary of the Hindus

Background

These first appeals centre around a dispute between two religious communities both of whom claim ownership over a piece of land admeasuring 1500 square yards in the town of Ayodhya. The disputed property is of immense significance to Hindus and Muslims. The Hindu community claims it as the birthplace of Lord Ram, an incarnation of Lord Vishnu. The Muslim community claims it as the site of the historic Babri Masjid built by the first Mughal Emperor, Babur.

The disputed land forms part of the village of Kot Rama Chandra or, as it is otherwise called, Ramkot at Ayodhya, in Pargana Haveli Avadh, of Tehsil Sadar in the District of Faizabad. An old structure of a mosque existed at the site until 6 December 1992. The site has religious significance for the devotees of Lord Ram, who believe that Lord Ram was born at the disputed site. For this reason, the Hindus refer to the disputed site as Ram Janmabhumi or Ram Janmasthan (i.e. birth-place of Lord Ram). The Hindus assert that there existed at the disputed site an ancient temple dedicated to Lord Ram, which was demolished upon the conquest of the Indian sub-continent by Mughal Emperor Babur. On the other hand, the Muslims contended that the mosque was built by or at the behest of Babur on vacant land. Though the significance of the site for the Hindus is not denied, it is the case of the Muslims that there exists no proprietary claim of the Hindus over the disputed property.

A suit was instituted in 1950 before the Civil Judge at Faizabad by a Hindu worshipper, Gopal Singh Visharad seeking a declaration that according to his religion and custom, he is entitled to offer prayers at the main Janmabhumi temple near the idols.

The Nirmohi Akhara represents a religious sect amongst the Hindus, known as the Ramanandi Bairagis. The Nirmohis claim that they were, at all material times, in charge and management of the structure at the disputed site which according to them was a 'temple' until 29 December 1949, on which date an attachment was ordered under Section 145 of the Code of Criminal Procedure 1898. In effect, they claim as shebaits in service of the deity,

managing its affairs and receiving offerings from devotees. Theirs is a Suit of 1959 for the management and charge of 'the temple'.

The Uttar Pradesh Sunni Central Board of Waqf ("Sunni Central Waqf Board") and other Muslim residents of Ayodhya instituted a suit in 1961 for a declaration of their title to the disputed site. According to them, the old structure was a mosque which was built on the instructions of Emperor Babur by Mir Baqi who was the Commander of his forces, following the conquest of the subcontinent by the Mughal Emperor in the third decade of the sixteenth century. The Muslims deny that the mosque was constructed on the site of a destroyed temple. According to them, prayers were uninterruptedly offered in the mosque until 23 December 1949 when a group of Hindus desecrated it by placing idols within the precincts of its three-domed structure with the intent to destroy, damage and defile the Islamic religious structure. The Sunni Central Waqf Board claims a declaration of title and, if found necessary, a decree for possession.

A suit was instituted in 1989 by a next friend on behalf of the deity ("Bhagwan Shri Ram Virajman") and the birth-place of Lord Ram ("Asthan Shri Ram Janmabhumi"). The suit is founded on the claim that the law recognises both the idol and the birth-place as juridical entities. The claim is that the place of birth is sanctified as an object of worship, personifying the divine spirit of Lord Ram. Hence, like the idol (which the law recognises as a juridical entity), the place of birth of the deity is claimed to be a legal person, or as it is described in legal parlance, to possess a juridical status. A declaration of title to the disputed site coupled with injunctive relief has been sought.

These suits, together with a separate suit by Hindu worshippers were transferred by the Allahabad High Court to itself for trial from the civil court at Faizabad. The High Court rendered a judgment in original proceedings arising out of the four suits and these appeals arise out of the decision of a Full Bench dated 30 September 2010. The High Court held that the suits filed by the Sunni Central Waqf Board and by Nirmohi Akhara were barred by limitation. Despite having held that those two suits were barred by time, the High Court held in a split 2:1 verdict that the Hindu and Muslim parties were joint holders of the disputed premises. Each of them was held entitled to one third of the disputed property. The Nirmohi Akhara was granted the remaining one third. A preliminary decree to that effect was passed in the suit brought by the idol and the birth-place of Lord Ram through the next friend.

In January 1885, Mahant Raghubar Das, claiming to be the Mahant of Ram Janmasthan instituted a suit ("Suit of 1885") before the Sub-Judge, Faizabad. The relief which he sought was permission to build a temple on the Ramchabutra situated in the outer courtyard, measuring seventeen feet by twenty-one feet. A sketch map was filed with the plaint. On 24 December 1885, the trial judge dismissed the suit, `noting that there was a possibility of riots breaking out between the two communities due to the proposed construction of a temple. The trial judge, however, observed that there could be no question or doubt regarding the possession and ownership of the Hindus over the Chabutra. On 18 March 1886, the District

Judge dismissed the appeal against the judgment of the Trial Court but struck off the observations relating to the ownership of Hindus of the Chabutra contained in the judgment of the Trial Court. On 1 November 1886, the Judicial Commissioner of Oudh dismissed the second appeal,noting that the Mahant had failed to present evidence of title to establish ownership of the Chabutra. In 1934, there was yet another conflagration between the two communities. The domed structure of the mosque was damaged during the incident and was subsequently repaired at the cost of the colonial government.

The controversy entered a new phase on the night intervening 22 and 23 December 1949, when the mosque was desecrated by a group of about fifty or sixty people who broke open its locks and placed idols of Lord Ram under the central dome. A First Information Report ("FIR") was registered in relation to the incident. On 29 December 1949, the Additional City Magistrate, Faizabad-cum-Ayodhya issued a preliminary order under Section 145 of the Code of Criminal Procedure 1898 ("CrPC 1898"), treating the situation to be of an emergent nature. Simultaneously, an attachment order was issued and Priya Datt Ram, the Chairman of the Municipal Board of Faizabad was appointed as the receiver of the inner courtyard. On 5 January 1950, the receiver took charge of the inner courtyard and prepared an inventory of the attached properties. The Magistrate passed a preliminary order upon recording a satisfaction that the dispute between the two communities over their claims to worship and proprietorship over the structure would likely lead to a breach of peace. The stakeholders were allowed to file their written statements. Under the Magistrate's order, only two or three pujaris were permitted to go inside the place where the idols were kept, to perform religious ceremonies like bhog and puja. Members of the general public were restricted from entering and were only allowed darshan from beyond the grill-brick wall.

The Institution of the Suits

On 16 January 1950, a suit was instituted by a Hindu devotee, Gopal Singh Visharad[5], ("Suit 1") before the Civil Judge at Faizabad, alleging that he was being prevented by officials of the government from entering the inner courtyard of the disputed site to offer worship. A declaration was sought to allow the plaintiff to offer prayers in accordance with the rites and tenets of his religion ("Sanatan Dharm") at the "main Janmabhumi", near the idols, within the inner courtyard, without hindrance. On the same date, an ad-interim injunction was issued in the suit. On 19 January 1950, the injunction was modified to prevent the idols from being removed from the disputed site and from causing interference in the performance of puja. On 3 March 1951, the Trial Court confirmed the ad-interim order, as modified. On 26 May 1955, the appeal against the interim order was dismissed by the High Court of Allahabad.

On 5 December 1950, another suit was instituted by Paramhans Ramchandra Das ("Suit 2") before the Civil Judge, Faizabad seeking reliefs similar to those in Suit 1. Suit 2 was subsequently withdrawn on 18 September 1990.

On 17 December 1959, Nirmohi Akhara instituted a suit through its Mahant ("Suit 3") before the Civil Judge at Faizabad claiming that its "absolute right" of managing the affairs of the Janmasthan and the temple had been impacted by the Magistrate's order of attachment and by the appointment of a receiver under Section 145. A decree was sought to hand over the management and charge of the temple to the plaintiff in Suit 3.

On 18 December 1961, the Sunni Central Waqf Board and nine Muslim residents of Ayodhya filed a suit ("Suit 4") before the Civil Judge at Faizabad seeking a declaration that the entire disputed site of the Babri Masjid was a public mosque and for the delivery of possession upon removal of the idols.

On 6 January 1964, the trial of Suits 1, 3 and 4 was consolidated and Suit 4 was made the leading case.

On 25 January 1986, an application was filed by one Umesh Chandra before the Trial Court for breaking open the locks placed on the grill-brick wall and for allowing the public to perform darshan within the inner courtyard. On 1 February 1986, the District Judge issued directions to open the locks and to provide access to devotees for darshan inside the structure. In a Writ Petition filed before the High Court challenging the above order, an interim order was passed on 3 February 1986 directing that until further orders, the nature of the property as it existed shall not be altered.

On 1 July 1989, a Suit ("Suit 5") was brought before the Civil Judge, Faizabad by the deity ("Bhagwan Shri Ram Virajman") and the birth-place ("Asthan Shri Ram Janam Bhumi, Ayodhya"), through a next friend for a declaration of title to the disputed premises and to restrain the defendants from interfering with or raising any objection to the construction of a temple. Suit 5 was tried with the other suits.

On 10 July 1989, all suits were transferred to the High Court of Judicature at Allahabad. On 21 July 1989, a three judge Bench was constituted by the Chief Justice of the High Court for the trial of the suits. On an application by the State of Uttar Pradesh, the High Court passed an interim order on 14 August 1989, directing the parties to maintain status quo with respect to the property in dispute.

Decision and Observations

Juristic Personality

The question whether the first and second plaintiff in Suit 5 "Bhagwan Sri Ram Virajman" and "Asthan Sri Ram Janam Bhumi, Ayodhya", possess distinct legal personalities or, in other words, are "juristic persons", remained at the heart of the legal dispute. The Apex Court noted that the legal personality of the first plaintiff in Suit 5 ('Bhagwan Sri Ram Virajman') as represented by the physical idols of Lord Ram at the disputed site is not contested by any of the parties. However, whether the second plaintiff ('Asthan Sri Ram

Janam Bhumi') is a juristic person has been the subject of controversy. The Apex Court formulated the following questions:

First, what are the exact contours of the legal personality ascribed to a Hindu idol? In other words, to what extent is the artificial legal personality ascribed by courts to a Hindu idol akin to the legal personality of a natural person?

Second, can property of a corporeal nature (in this case land) be ascribed a distinct legal personality?

In order to answer these questions, the Apex Court found it necessary to understand both the true purpose underlying the legal innovation of recognising or conferring legal personality and why courts have conferred legal personality on Hindu idols. Regarding idols and juristic personality, the Apex Court stated:

> **108.** The Hindu practice of dedicating properties to temples and idols had to be adjudicated upon by courts for the first time in the late nineteenth century. The doctrine that Hindu idols possess a distinct legal personality was adopted by English judges in India faced with the task of applying Hindu law to religious endowments. Property disputes arose and fuelled questions about the ownership of the properties. Two clear interests were recognised as subjects of legal protection. First, there existed the real possibility of maladministration by the shebaits (i.e. managers) where land endowed for a particular pious purpose, ordinarily to the worship of an idol, was poorly administered or even alienated. Second, where the land was dedicated to public worship, there existed the threat that access or other religious benefits would be denied to the public, in particular to the devotees. Where the original founder of the endowment was not alive and the shebait was not the owner of the lands, how were the courts (and through them the State) to give effect to the original dedication? To provide courts with a conceptual framework within which they could analyse and practically adjudicate upon disputes involving competing claims over endowed properties, courts recognised the legal personality of the Hindu idol. It was a legal innovation necessitated by historical circumstances, the gap in the existing law and by considerations of convenience. It had the added advantage of conferring legal personality on an object that within Hinduism had long been subject to personification. The exact contours of the legal personality so conferred are of relevance to the present case to which this judgement now adverts.
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> **115.** A Hindu may make an endowment for a religious purpose. There is a public interest in protecting the properties endowed and ensuring that the original pious purpose of the dedicator is fulfilled. The law confers legal personality on this pious purpose. However, as Chief Justice B K Mukherjea notes, it is the idol, as the material manifestation of the juristic person which is "looked upon" as the centre in which the property vests. The idol as an embodiment of a pious or benevolent purpose is

recognised by the law as a juristic entity. The state will therefore protect property which stands vested in the idol even absent the establishment of a specific or express trust. The pious purpose, or 'benevolent idea' is elevated to the status of a juristic person and the idol forms the material expression of the pious purpose through which legal relations are affected. It is the pious purpose at the heart of the dedication which is the basis of conferring legal personality on the idol and which is the subject of rights and duties. The need to confer juristic personality arises out of the need for legal certainty as to who owns the dedicated property, as well as the need to protect the original intention of the dedicator and the future interests of the devotees. It was open for courts to even confer the personality on the community of devotees in certain situations, but the idol is chosen as a centre for legal relations as the physical manifestation of the pious purpose.

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116. [...] 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.

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119. Similar to the conceptual grounding of juristic personality in the case of a ship in admiralty law to personify actions in rem, the material object (i.e. idol), seen as an embodiment of the purpose behind the dedication, was chosen as the site of legal relations. The creation by judicial interpretation of an entity in law sub-served an important function. For it obviated a situation that would arise if, despite a dedication by a Hindu for a pious purpose, there existed no legally recognised entity which could receive the dedication. Such a situation was obviated by the judicially recognised principle that where an endowment is made for a religious or charitable institution and the object is pious, the institution will be treated as a juristic person even in the absence of a trust. Similarly, where the dedication is for an idol to be worshipped, the interests of present and future devotees would be at risk in the absence of a legal framework which ensured the regulation of the dedication made. The conferment of legal personality on the pious purpose ensured that there existed an entity in which the

> property would vest in an ideal sense, to receive the dedication and through whom the interests of the devotees could be protected. This was for the purpose of fulfilling the object of the dedication and through the performance of worship in accordance with religious texts, ensuring that the devotees realised peace through prayer.
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> **123.** The recognition of the Hindu idol as a legal or "juristic" person is therefore based on two premises employed by courts. The first is to recognise the pious purpose of the testator as a legal entity capable of holding property in an ideal sense absent the creation of a trust. The second is the merging of the pious purpose itself and the idol which embodies the pious purpose to ensure the fulfilment of the pious purpose. So conceived, the Hindu idol is a legal person. The property endowed to the pious purpose is owned by the idol as a legal person in an ideal sense. The reason why the court created such legal fictions was to provide a comprehensible legal framework to protect the properties dedicated to the pious purpose from external threats as well as internal maladministration. Where the pious purpose necessitated a public trust for the benefit of all devotees, conferring legal personality allowed courts to protect the pious purpose for the benefit of the devotees.

Although the juristic personality of the first plaintiff was recognised by the Apex Court, regarding the juristic personality of the second plaintiff it was argued that 'Asthan Shri Ram Janam Bhumi', as a place of religious worship must consequently be elevated to the status of a juristic person by virtue of the faith and belief of the worshippers. It was contended that the presence of an idol is dispensable in Hinduism, this contemplates a situation such as in this case, where the land is itself worshipped as a deity. Devotees pray to the land as the birth-place of Lord Ram, and consequently, the second plaintiff should, it was urged, be recognised as a juristic person.The Apex Court while deliberating upon juristic personality of the second plaintiff stated as follows:

> **174.** In the present case, the recognition of 'Asthan Sri Ram Janam Bhumi' as a juristic person would result in the extinguishment of all competing proprietary claims to the land in question. This conferral of 'absolute title' (resulting from the conferral of legal personality on land) would in truth render the very concept of title meaningless. Moreover, the extinguishing of competing claims would arise not by virtue of settled legal principles, but purely on the basis of the faith and belief of the devotees. This cannot be countenanced in law. [...]

An argument was also made in terms of ***Swayambhu*** deity which raised three questions for determination:

First, whether a *Swayambhu* deity may be recognised absent a physical manifestation; second, whether land can constitute a manifestation of the deity; and third, whether legal personality can be conferred on immovable property *per se*. Held, "to confer legal personality on immoveable property leads to consequences that fundamentally have no nexus to the limited purpose for which juristic personality is conferred"

Rejecting the argument of Swayambhu deity with respect to the Asthan Sri Ram Janam Bhumi, the second plaintiff in Suit 5 , the Apex court stated:

> **191.** A Swayambhu deity is the revelation of God in a material form which is subsequently worshipped by devotees. The recognition of a Swayambhu deity is based on the notion that God is omnipotent and may manifest in some physical form. This manifestation is worshipped as the embodiment of divinity. In all these cases, the very attribution of divinity is premised on the manifestation of the deity in a material form. Undoubtedly, a deity may exist without a physical manifestation, example of this being the worship offered to the Sun and the Wind. But a Swayambhu is premised on the physical manifestation of the Divine to which faith and belief attaches.
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> **192.** The difficulty that arises in the present case is that the Swayambhu deity seeking recognition before this Court is not in the form ordinarily associated with the pantheon of anthropomorphised Hindu Gods. The plaintiffs in Suit 5 have sought to locate the disputed land as a focal point by contending that the very land itself is the manifestation of the deity and that the devotees' worship not only the idols of Lord Ram, but the very land itself. The land does not contain any material manifestation of the resident deity Lord Ram. Absent the faith and belief of the devotees, the land holds no distinguishing features that could be recognised by this court as evidence of a manifestation of God at the disputed site. It is true that in matters of faith and belief, the absence of evidence may not be evidence of absence. However, absent a manifestation, recognising the land as a self-manifested deity would open the floodgates for parties to contend that ordinary land which was witness to some event of religious significance associated with the human incarnation of a deity (e.g. the site of marriage, or the ascent to a heavenly abode) is in fact a Swayambhu deity manifested in the form of land. If the argument urged by Mr Parasaran that there is no requirement of a physical manifestation is accepted, it may well be claimed that any area of religious significance is a Swayambhu deity which deserves to be recognised as a juristic personality. This problem is compounded by the fact that worship to a particular deity at a religious site and to the land underlying a religious site are for all intents and purposes, indistinguishable. Hence, in order to provide a sound jurisprudential basis for the recognition of a Swayambhu deity, manifestation is crucial. Absent that manifestation which distinguishes the land from other property, juristic personality cannot be conferred on the land.

Also, emphasising on the distinction between property vested in a deity and the property as a deity, the Apex court stated

> **194.** There is a significant distinction between property vested in a foundation (as in Roman law) or a deity as a juristic person (as in Hindu Law) and property per se being a juristic person. Where the property vests in a foundation constituted for a pious purpose, it retains its characteristics as immoveable property. This remains true even in cases where the property vests in the deity in an ideal sense. The purpose of conferring juristic personality is to ensure both a centre of legal relations as well as the protection of the beneficial interest of the devotees. It does not however, alter the character of the property which vests in the juristic person. It remains subject to the framework of the law which defines all relationships governing rights or interests claimed in respect of property and the liabilities which attach to jural transactions arising out of property.

On this point the Apex Court referred to***The Mosque, Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar,***[1] and stated that :

> **197.** [...] Underlying the line of reasoning adopted by the Privy Council is that the conferral of legal personality on immovable property could lead to the property losing its character as immoveable property. Immoveable property, by its very nature, admits competing proprietary claims over it. Immoveable property may be divided. However, the recognition of the land itself as a juristic person may potentially lead to the loss of these essential characteristics. Where juristic personality was recognised in corporeal property itself such as the idol, it served the larger purpose for which juristic personality was conferred - to ensure the execution and protection of the pious purpose set out by a donor and the ultimate protection of the beneficial interest of the worshippers. ***However, to confer legal personality on immoveable property leads to consequences that fundamentally have no nexus to the limited purpose for which juristic personality is conferred.*** It sets apart immoveable property on which a juristic character is conferred from all other species of immoveable property. This will lead to the claim that the legal regime which applies to the latter ('ordinary immoveable property') will not apply to that class of immoveable property which is recognised as a juristic person in and of itself. The principles of adverse possession and limitation would, if the argument were to be accepted, not apply to the land as a legal person which is incapable of being "possessed". The conferral of legal personality in the context of endowments was to ensure the legal protection of the endowed property, not to confer upon the property legal impregnability by placing it outside the reach of the law. The elevation of land to the status of a juristic person fundamentally alters its characteristics as immoveable property, a severe consequence against which a court must guard. Nor is it a valid safeguard to postulate that the court will decide on a case to case basis where a particular immoveable property should have a juristic status. Absent any objective standard of application the process of drawing lines will be rendered inherently subjective, denuding the efficacy of the judicial process.

[1] AIR 1940 PC 116

198. The land in question has been treated as immoveable property by all the parties to the present dispute, including those from the Hindu community until 1989. The litigation over the disputed property dated back to 1885, and at no point, until Suit 5 in 1989 was a plea taken that the land in question was anything possessed of a juristic personality. Apart from the reasons which have been outlined above, it would not be open for the court to treat the property differently now, solely on the basis of the novel plea urged by the plaintiffs in Suit 5 in 1989.

(emphasis supplied)

The Apex court was of the opinion that the adjudication of civil claims over private property must remain within the domain of the secular if the commitment to constitutional values is to be upheld. It was held that the second plaintiff in suit 5 is not a juristic person.

Suit 3

a. *Limitation in Suit 3*

224. Suit 3 was instituted on 17 December 1959. The Limitation Act of 1908 was in force on the date of the institution of the Suit. Section 3 of the Limitation Act provides that subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed by the first schedule shall be dismissed, although limitation has not been set up as a defence. Section 31(b) of the Limitation Act 1963 saves suits, appeals and applications which were pending on the date of its commencement from the application of the legislation. As a result, the issue of limitation for the purpose of Suit 3 is governed by the Limitation Act 1908.

By a split 2:1 verdict, the High Court held that Suit 3 was barred by limitation, the dissenting judge on this issue being Justice S.U. Khan.

225. Three articles of the schedule to the Limitation Act 1908 have been pressed in aid and the issue is which of those articles would stand attracted. The relevant articles are Articles 47, 120 and 142.....

Relevant Dates

226. Before we enter upon the issue of limitation, it is necessary to recapitulate the relevant dates bearing on the issue. They are as follows:

(i) On 29 December 1949, a preliminary order was passed under Section 145 of the CrPC 1898 by the Additional City Magistrate and while ordering attachment, a receiver was appointed;

(ii) On 5 January 1950, the receiver took charge and made an inventory of the attached properties;

(iii) On 16 January 1950, Suit 1 was instituted by Gopal Singh Visharad seeking a declaration that he was entitled to worship and offer prayers at the main Janmabhumi near the idols. On the same date, an ad interim injunction was granted in the Suit;

(iv) On 19 January 1950, the ad interim injunction in Suit 1 was modified in the following terms:

"The opposite parties are hereby restrained by means of temporary injunction to refrain from removing the idols in question from the site in dispute and from interfering with puja etc. as at present carried on. The order dated 16.01.1950 stands modified accordingly."

(v) On 3 March 1951, the order of temporary injunction dated 16 January 1950 as modified on 19 January 1950 was confirmed;

(vi) On 30 July 1953, the Additional City Magistrate passed the following order in the proceedings under Section 145:

"The finding of the Civil Court will be binding on the Criminal Court. It is no use starting proceedings in this case under Section 145 Cr.P.C. and recording evidence specially when a temporary injunction stands, as it cannot be said that what may be the finding of this Court after recording the evidence of parties. From the administrative point of view the property is already under attachment and no breach of peace can occur.

I, therefore, order that the file under Section 145 Cr.P.C. be consigned to records as it is and will be taken out for proceedings further when the temporary injunction is vacated."

(vii) On 31 July 1954, the Additional City Magistrate issued the following directions:

"This file cannot be weeded as it is not a disposed of file.

How do you report that it will be weeded of?"

(viii) On 26 April 1955, an appeal against the order dated 3 March 1951 under Order XLIII, Rule 1(r) of the Code of Civil Procedure 1908 was dismissed by the High Court; and

(ix) On 17 December 1959, Suit 3 was instituted by Nirmohi Akhara for a decree against the receiver for handing over charge and management of the temple

Nature and Scope of Section 145 CrPC

The proceedings under Section 145 could not have resulted in any adjudication upon title or possession of the rightful owner as that is within the exclusive domain of civil courts. Nirmohi Akhara cannot take the defence that no final order had been passed in Section 145 proceedings and as a result limitation did not commence

231. The Magistrate attached the property by an order dated 29 December 1949 made under Section 145 of the CrPC 1898. The plaintiffs in Suit 3 state that the cause of action arose on 5 January 1950 when the receiver took charge of the property and they were denied charge and management of the temple.

The Hon'ble Court referred to the judgments of the Court in several cases[2] and held :-

[2] *Bhinka* v. *Charan Singh*, (1959) Supp 2 SCR 798, *R.H. Bhutani* v. *Miss Mani J Desai*, (1969) 1 SCR 80, *Shanti Kumar Panda* v. *Shakuntala Devi*, (2004) 1 SCC 438, *Surinder Pal Kaur* v. *Satpal*, (2015) 13 SCC 25.

.....Section 145 is recognised to be a branch of the preventive jurisdiction of the Magistrate. Section 145(1) can be invoked on the satisfaction of the Magistrate that "a dispute likely to cause a breach of the peace exists...". The provision relates to disputes regarding possession of land or water or its boundaries which may result in breach of the peace. The function of the Magistrate is not to go into questions of title, but to meet the urgency of the situation by maintaining the party in possession. The Magistrate is empowered to call upon the parties to put in written statements in support of their claim to "actual possession". Such an order is to be served as a summons upon the parties. The Magistrate is to peruse the statements, hear the parties and weigh the evidence, in order to ascertain who was in possession at the date of the order. The Magistrate may make that determination "if possible" to do so. Moreover, the determination is about the factum of possession on the date of the order "without reference to the merits of the claim of any of such parties to a right to possess the subject of the dispute". These words indicate that the Magistrate does not decide or adjudicate upon the contesting rights to possess or the merits of conflicting claims. The Magistrate is concerned with determining only who was in possession on the date of the order. If possession has been wrongfully taken within two months of the order, the person so dispossessed is to be taken as the person in possession. In cases of emergency, the Magistrate can attach the subject of the dispute, pending decision. The action ultimately contemplated under Section 145 is not punitive, but preventive, and for that purpose is provisional only till a final or formal adjudication of rights is done by a competent court in the due course of law. Thus, nothing affecting the past, present and future rights of parties is contemplated under the provision.

233. The object of the provision is merely to maintain law and order and to prevent a breach of the peace by maintaining one or other of the parties in possession, which the Magistrate finds they had immediately before the dispute, until the actual right of one of the parties has been determined by a civil court. The object is to take the subject of dispute out of the hands of the disputants, allowing the custodian to protect the right, until one of the parties has established her right (if any) to possession in a civil court. This is evident from the provisions of sub-section (6) of Section 146. The Magistrate declares the party which is entitled to possession "until evicted therefrom in due course of law". While proceeding under the first proviso, the Magistrate may restore possession to a party which has been wrongfully and forcibly dispossessed. No party can be allowed to use the provisions of Section 145 for ulterior purposes or as a substitute for civil remedies. The jurisdiction and power of the civil court cannot in any manner be hampered.

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235. Section 145 proceedings do not purport to decide a party's title or right to possession of the land. The property held in attachment in proceedings under Section 145 is 'custodia legis'. Hence, it is not necessary to secure possession from a party who is not in possession and is hence, not in a position to deliver possession.....[3]

236. Where a suit is instituted for possession or for declaration of title before a competent civil court, the proceedings under Section 145 should not continue.....[4]

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[3] *Deokuer* v. *Sheoprasad Singh*,(1965) 3 SCR 655, *Jhummamal alias Devandas* v. *State of Madhya Pradesh*, (1988) 4 SCC 452.

[4] *Amresh Tiwari* v. *Lalta Prasad Dubey*,(2000) 4 SCC 440.

239. In view of the settled position in law, as it emerges from the decisions of this Court, after the Magistrate's order dated 29 December 1949 for attachment of property, nothing prevented Nirmohi Akhara from filing a declaratory suit for possession and title. The Magistrate's order did not decide or adjudicate upon the contesting rights to possess or the merits of conflicting claims of any of the parties***. Substantive rights with respect to title and possession of the property could have been dealt with only in civil proceedings before a civil court. The Magistrate did not have jurisdiction to determine questions of ownership and title. The proceedings under Section 145 could not have resulted in any adjudication upon title or possession of the rightful owner as that is within the exclusive domain of civil courts. Nirmohi Akhara cannot take the defence that no final order had been passed in Section 145 proceedings and as a result limitation did not commence.*** The Magistrate simply complied with the directions given by a civil court with respect to maintaining status quo in Suit 1 and accordingly, deferred the proceedings under Section 145.

(emphasis supplied)

Article 142 of the Limitation Act: the concepts of dispossession and discontinuance of possession

240. Article 142 governs a suit for possession of immoveable property when the plaintiff while in possession has been dispossessed or "has discontinued the possession". The period of limitation under Article 142 is 12 years. Time begins to run from the date of the dispossession or discontinuance. Nirmohi Akhara claims that the cause of action arose on 5 January 1950 and the suit which was instituted on 17 December 1959 is within the limitation of twelve years.

241. Besides the absence of specific relief in Nirmohi's Suit with respect to seeking possession of the Janmasthan temple, there is another aspect to be explored with respect to the applicability of the concepts of dispossession and discontinuance of possession in the facts of the present case. Article 142 of the Limitation Act 1908 encompasses a suit for possession of immovable property. It covers those suits for possession of immoveable property which fall within either of two descriptions. The first is when the plaintiff while in possession of the property has been dispossessed. The second covers a situation where the plaintiff while in possession has discontinued the possession. In other words, Article 142 which deals with suits for possession of immoveable property qualifies this with the requirement that the plaintiff should have been in possession of the property when either of the two events have taken place namely, the event of being dispossessed or, as the case may be, the event of having discontinued the possession. Article 142 has not confined the description of the suit to simply a suit for possession of immoveable property. The provision incorporates a requirement of prior possession of the plaintiff and either the dispossession or the discontinuance of possession while the plaintiff was in possession. The period of limitation is 12 years and time begins to run from the date of dispossession or discontinuance.

242. Article 144 is a residuary provision dealing with suits for possession of immoveable property or any interest in immoveable property not specifically provided for elsewhere. As a residuary provision, Article 144 applies to suits for possession of immoveable property which do not fall within a description which is specially enumerated

in the articles of the schedule. In the case of Article 144, the period of limitation is 12 years and time begins to run when the possession of the defendant has become adverse to the plaintiff.

243. ***Article 142, as seen above, incorporates two distinct concepts. The first is of dispossession and the second is of discontinuance of possession. Dispossession connotes an ouster; it involves a situation where a person is deprived of her/his possession with the coming of another person into possession. Dispossession implies deprivation of a right to possess which is not voluntary and involves an act of ouster which displaces the person who was in possession of the property*****.....** (emphasis supplied)

****

245. In order to bring the suit within the purview of Article 142, the following requirements must be fulfilled:

(i) The suit must be for possession of immoveable property;

(ii) The plaintiff must establish having been in possession of the property; and

(iii) The plaintiff should have been dispossessed or must have discontinued possession while in possession of the property.

For Article 142 to apply, these requirements must cumulatively be established.

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251. In the present case, it is evident that the use of the expression 'belongs' by the Nirmohi Akhara in the plaint has been deployed only in the context of management and charge. The entire case of Nirmohi Akhara is of the deprivation of its shebaiti rights by the Magistrate's order under Section 145. The claim of Nirmohi Akhara is against the state so as to enable the plaintiff to utilise the usufruct to render services to the deity. Nirmohi Akhara, in other words, claims ancillary rights with reference to management and charge. Indeed, the most significant aspect which emerges from the relief which has been claimed in Suit 3 is a decree for the removal of the first defendant "from the management and charge of the said temple of Janmabhumi and for delivering the same to the plaintiff". Suit 3 filed by Nirmohi Akhara is therefore not a suit for possession which falls within the meaning and ambit of Article 142.

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253..... The claim of Nirmohi Akhara for management and charge therefore rests on its assertion of being a shebait. In the case of a shebait as the above decisions authoritatively explained, the elements of office and of a proprietary interest are blended together. The Suit by Nirmohi Akhara was a suit for restoration of management and charge so as to enable the Akhara to have the benefit of the usufruct in the discharge of its obligations towards the deity. The suit was therefore not a suit for possession within the meaning of Article 142. Despite the ingenuity of counsel in seeking to expand the nature and ambit of the suit, we are categorically of the view that written submissions filed in the appeal cannot be a valid basis to reconfigure the nature of the suit. The suit has to be read on the basis of the original plaint in the trial court. Despite the amendment to the plaint

in Suit 3, the relief as it stands does not bring it within the ambit of Article 142. It may also be noted at this stage that during the course of the submissions, Mr S K Jain, clarified that Nirmohi Akhara by using the expression "belongs to" is not claiming title or ownership to the property. The Suit by Nirmohi Akhara is not a suit for possession. Hence, neither Article 142 nor Article 144 has any application.

Continuing Wrong

If there is no right, there can be no corresponding wrong which can furnish the foundation of a continuing wrong. There was no right inhering in Nirmohi Akhara which was disturbed by the order of the Magistrate

266. A continuing wrong, as this Court held in Balakrishna Savalram is an act which creates a continuing source of injury. This makes the doer of the act liable for the continuance of the injury. However, where a wrongful act amounts to an ouster, as in the present case, the resulting injury is complete on the date of the ouster itself. A wrong or default as a result of which the injury is complete is not a continuing wrong or default even though its effect continues to be felt despite its completion.

267. The submission of Nirmohi Akhara is based on the principle of continuing wrong as a defence to a plea of limitation. .....

268. In the present case, there are several difficulties in accepting the submission of Nirmohi Akhara that there was a continuing wrong. First and foremost, the purpose and object of the order of the Magistrate under Section 145 is to prevent a breach of peace by securing possession, as the Magistrate finds, on the date of the order. The Magistrate does not adjudicate upon rights nor does the proceeding culminate into a decision on a question of title. The order of the Magistrate is subordinate to the decree or order of a civil court. Hence, to postulate that the order of the Magistrate would give rise to a wrong and consequently to a continuing wrong is inherently fallacious. Secondly, would the surreptitious installation of the idols on the night between 22 and 23 December 1949 create a right in favour of Nirmohi Akhara? Nirmohi Akhara denies the incident completely. The right which Nirmohi Akhara has to assert cannot be founded on such basis and if there is no right, there can be no corresponding wrong which can furnish the foundation of a continuing wrong. There was no right inhering in Nirmohi Akhara which was disturbed by the order of the Magistrate. The claim of Nirmohi Akhara was in the capacity of a shebait to secure management and charge of the inner courtyard. Nirmohi Akhara has itself pleaded that the cause of action for the suit arose on 5 January 1950. Proceeding on the basis of this assertion, it is evident that the ouster which the Akhara asserts from its role as a shebait had taken place and hence, there was no question of the principle of continuing wrong being attracted.

b. *Nirmohi Akhara's claim to possession of the inner courtyard*

The claim of Nirmohi Akhara in Suit 3 was in respect of the inner courtyard, including the three domed structure of the mosque. Nirmohi Akhara denied the incident of 22/23 December 1949 during the course of which the idols were surreptitiously installed into the disputed structure. According to Nirmohi Akhara, the structure is a temple and not a

mosque. Refuting their argument, the Apex Court made the following observations on the basis of oral and documentary evidence:

> **306.** In view of the above analysis of the oral evidence and documentary material, the following conclusions can be drawn:
>
> (i) There are serious infirmities in the oral accounts of Nirmohi witnesses that the disputed structure was not a mosque but the Janmabhumi temple;
>
> (ii) The documentary evidence relied on by Nirmohi Akhara does not establish its possession of the inner courtyard and the structure of the mosque within it, being the subject of Suit 3;
>
> (iii) Contrary to the claims of Nirmohi Akhara, documentary evidence establishes the existence of the structure of the mosque between 1934 and 1949; and
>
> (iv) As regards namaz within the mosque, the Muslims were being obstructed in offering prayers as a result of which by December 1949, Friday prayers alone were being offered.

Suit 5:

Suit 5 was instituted on behalf of the first and second plaintiffs through a next friend who was impleaded as the third plaintiff. The first and second plaintiffs are: "Bhagwan Sri Ram Lala Virajman" and "Asthan Sri Ram Janma Bhumi, Ayodhya". The third plaintiff was Sri Deoki Nandan Agarwala, a former Judge of the Allahabad High Court. The third plaintiff was subsequently substituted by an order of the High Court as a result of his death. Nirmohi Akhara has instituted Suit 3 on the ground that it is the shebait of the deities of Lord Ram at the disputed site, the determination of which has a material bearing on the determination of rights *inter se* between the parties in Suits 3 and 5. The challenge to the maintainability of Suit 5 is premised on the contention that only a shebait can sue on behalf of the idol. The question of who can sue on behalf of the idol arises due to the unique nature of the idol. The idol is a juristic person and the owner of the debutter property, but only in an ideal sense. In law, the idol is capable of suing and being sued in its own name. However, for all practical purposes any suit by the idol must necessarily be brought by a human actor.

a. Shebaits: Role and Position

Explaining the role and position of the Shebaits, the Apex Court stated that a Hindu idol is recognised by the Courts as the material embodiment of a testator's pious purpose. Juristic personality can also be conferred on a *Swayambhu* deity which is a self-manifestation in nature. An idol is a juristic person in which title to the endowed property vests. The idol does not enjoy possession of the property in the same manner as do natural persons. The property vests in the idol only in an ideal sense. The idol must act through some human agency which will manage its properties, arrange for the performance of ceremonies associated with worship and take steps to protect the endowment, *inter alia* by bringing proceedings on behalf of the idol. The shebait is the human person who discharges this role.The position of a shebait is a substantive position in law that confers upon the person the

exclusive right to manage the properties of the idol to the exclusion of all others. In addition to the exclusive right to manage an idol's properties, the shebait has a right to institute proceedings on behalf of the idol.

Whether the right to sue on behalf of the idol can be exercised only by the shebait (in a situation where there is a shebait) or can also be exercised by the idol through a 'next friend'

The Apex Court stated :

> **337.** Ordinarily, the right to sue on behalf of the idol vests in the shebait. This does not however mean that the idol is deprived of its inherent and independent right to sue in its own name in certain situations. The property vests in the idol. A right to sue for the recovery of property is an inherent component of the rights that flow from the ownership of property. The shebait is merely the human actor through which the right to sue is exercised. As the immediate protector of the idols and the exclusive manager of its properties, a suit on behalf of the idol must be brought by the shebait alone. Where there exists a lawfully appointed shebait who is able and willing to take all actions necessary to protect the deity's interests and to ensure its continued protection and providence, the right of the deity to sue cannot be separated from the right of the shebait to sue on behalf of the deity. In such situations, the idol's right to sue stands merged with the right of the shebait to sue on behalf of the idol.

However, with regard to a suit by a worshipper or person interested, the Apex Court stated:

> **339.** There may arise a situation where a shebait has been derelict in the performance of duties, either by not taking any action or by being complicit in the wrongful alienation of the endowed property. In such a situation, where a suit is instituted for the recovery of the deity's property, the action is against **both** the shebait and the person possessing or claiming the property in a manner hostile to the deity. The remedy for an action against mismanagement simpliciter by a shebait can be found in Section 92 of the Civil Procedure Code 1908. However, where an action against a stranger to the trust is contemplated, the remedy is not a suit under Section 92 of the Civil Procedure Code 1908 but a suit in general law.
>
> **341.** A necessary adjunct of managing of the temple properties is the right to sue for recovery of the said properties. Ordinarily a shebait alone will be entitled to bring a suit on behalf of the idol. In addition to being convenient and providing immediate recourse for the idol, it also provides a valuable check against strangers instituting suits, the outcomes of which may adversely impact the idol without the knowledge of the idol or the shebait. But there may be cases where the conduct of a shebait is in question. In certain cases, where the shebait itself is negligent or sets up a claim hostile to the idol, it is open for a worshipper or a next friend interested in protecting the properties of the idol to file a suit to remedy the situation.

348. Where a shebait acts prejudicially to the deity's interests, there thus exist two views on the remedies available to the interested worshipper. The position taken by this Court in **Bishwanath** is that a worshipper can sue as a next friend on behalf of the deity. As next friend, the worshipper directly exercises the deity's right to sue. The alternative view taken by Justice Pal in **Tarit Bhushan Rai** and as observed by this Court in **Vemareddi Reddy** is that a worshipper can file a suit in a personal capacity to protect the deity's interests but cannot sue directly on behalf of the deity although the suit may be for the benefit of the deity. In this view, the deity is not bound by the suit of the worshippers unless the remedy provided is *in rem* in nature. ***The matter raises two questions: First, is a suit filed by a worshipper in a personal capacity a sufficient and expedient method to protect the interests of the deity? Second, does allowing a next friend to sue on behalf of the deity without establishing the bona fide intentions and qualifications of the next friend put the deity's interest at risk?***

(emphasis supplied)

Answering the first question, the Apex Court said:

349. A suit by a worshipper in their personal capacity may be an appropriate remedy in certain cases. For example, where a shebait denies worshippers access to the idol, a suit by the worshipper in a personal capacity to grant access to the idol may constitute a suitable remedy against the shebait. A further benefit of confining the suits of worshippers to suits filed in a personal capacity is that in cases concerning the recovery of property, a suit by a worshipper in a personal capacity does not raise the question as to whom the possession of the land would be given. However, where a suit is filed by a next friend on behalf of the deity itself, a problem arises: in a suit for the recovery of property on behalf of the idol, the court cannot deliver possession of the property to the next friend. The next friend is merely a temporary representative of the idol for the limited purposes of the individual litigation. Where a worshipper can only sue in their personal capacity, the question of the delivery of possession does not arise.

350. A suit by a worshipper in their personal capacity cannot however canvas the range of threats the idol may face at the hands of a negligent shebait and it may be necessary for the court to permit the next friend to sue on behalf of the idol itself to adequately protect the interests of the idol. For example, where a shebait fails to file a suit for possession on behalf of a deity, a suit by a worshipper in their personal capacity is inadequate. Rather, what is required is a suit by a next friend on behalf of the idol for the recovery of possession of the property. It is true that possession will not be delivered to the next friend. However, the court can craft any number of reliefs, including the framing of a scheme upon an application by the Advocate General or two persons under Section 92 of the Civil Procedure Code 1908[225], to ensure that the property is returned to the idol. Where the inaction or *mala fide* action of the shebait

has already been established, such a scheme may be the appropriate remedy, however this will necessarily depend on the facts and circumstances of every case.

351. In view of these observations, it is apparent that where the interests of the idol need to be protected, merely permitting interested worshippers to sue in their personal capacity does not afford the deity sufficient protections in law. In certain situations, a next friend must be permitted to sue on behalf of the idol - directly exercising the deity's right to sue. The question of relief is fundamentally contextual and must be framed by the court in light of the parties before it and the circumstances of each case.

In order to answer the second question, the Apex Court went on to elaborate:

352. This, however, brings us to the second question whether allowing a next friend to sue on behalf of the idol puts the idol at risk. The idol and its properties must be protected against the threat of a wayward 'next friend'. Where the shebait acts in a mala fide manner, any person claiming to be a 'next friend' may sue. Such a person may in truth have intentions hostile to the deity and sue under false provenance. Even a well-intentioned worshipper may sue as a next friend and purely due to financial constraints or negligence lose the suit and adversely bind the deity.

353. It is true that unless the fitness of the next friend is tested in some manner, an individual whose bona fides has not been determined may represent and bind the idol to its detriment. However, it would be unnecessarily burdensome to require every next friend to first be appointed by a court or for a court to find a disinterested person to represent the deity. The deity's interests would be sufficiently protected if, in cases where the bona fides of the next friend are contested by another party, the court substantively examines whether the next friend is fit to represent the idol. In an appropriate case, the court can do so of its own accord where it considers it necessary to protect the interest of the deity. In the absence of any objection, and where a court sees no deficiencies in the actions of the next friend, there is no reason why a worshipper should not have the right to sue on behalf of the deity where a shebait abandons his sacred and legal duties. Very often, worshippers are best placed to witness and take action against any maladministration by a shebait. Therefore, where a shebait acts adverse to the interests of the deity, a worshipper can, as next friend of the deity, sue on behalf of the deity itself, provided that if the next friend's *bona fides* are contested, the court must scrutinise the intentions and capabilities of the next friend to adequately represent the deity. The court may do so of its own accord, *ex debito justitae*.

While ascertaining the competence of the third plaintiff, the Apex Court stated that Where the fitness of the next friend is in dispute the court should scrutinise the bona fides of the next friend. However, in the present case, this enquiry was not necessary as the third plaintiff in Suit 5 had been appointed as next friend of the first and the second plaintiffs under the orders of the court. With the appointment of Triloki Nath Pande, the Court has

applied its mind to the question and permitted Triloki Nath Pande to act as next friend of the first and the second plaintiffs.

b. Nirmohi Akhara and Shebaiti Rights

The position in law with respect to who can sue on behalf of an idol where there exists an express deed of dedication identifying the shebait, is as follows:

(i) The right to sue vests exclusively in the lawfully appointed shebait; however,

(ii) Where the shebait acts in a manner negligent or hostile to the interests of the idol through express action or inaction, any person who is interested in the endowment may institute a suit on behalf of the idol; and

(iii) The exact nature of the interest possessed by the next friend, and whether the next friend is bona fide are matters of substantive law. If contested, it must be adjudicated upon by the court.

However, in the present case there was no express deed of dedication identifying a shebait. Therefore, the questions that arose were,

Whether the Nirmohi Akahara are the de facto shebaits of the idols of Lord Ram. If answered in affirmative, then whether Nirmohi Akhara have acted in a manner prejudicial to the interest of the idol.

The maintainability of Suit 5 hinged on the question whether Nirmohi Akhara were shebaits, and whether they have acted in a manner prejudicial to the interests of the idol. If the Nirmohi Akhara are found to be the *de facto* shebaits and have not acted prejudicially, Suit 5 is not maintainable as it is the shebait that enjoys the exclusive right to sue on behalf of the deity. Alternatively, if the Nirmohi Akhara are found not to be *de facto* shebaits of the idols, or are found to have acted prejudicially with respect to the idols, the suit by the next friend is maintainable.

Explaining the position regarding the Rights of a de facto shebait to sue, the Apex court said:

> **365.** Where a person claims to be a shebait despite the lack of a legal title, the relevant enquiry before the Court is whether the person was in actual possession of the debutter property and was exercising all the rights of a shebait. The paramount interest in the protection of the debutter property underlines the recognition of a *de facto* shebait. Where there is no de jure shebait, the court will not countenance a situation where a *bona fide* litigant who has exercised all the managerial rights over the debutter property cannot be recognised in law as the protector of the property. It is only for the paramount interest of the institution that the right to sue is conceded to persons acting as managers though lacking a legal title of a manager.

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369. [...]consistent with the jurisprudence on the rights of a shebait with respect to the properties of an endowment, a *de facto* shebait is entrusted with the power and the duty to carry out the purpose of the debutter in respect of the idol and its properties. Though the shebait may have an interest in the usufruct of the debutter property, the *de facto* shebait is not vested with an independent right of title over the debutter property. Thus, where a *de facto* shebait raises an independent claim to the debutter property to the idol, it assumes the position of a trespasser and no action at its behest is maintainable. A claim raised by a shebait adverse to the idol defeats the very purpose for which shebaits are vested with the right to manage the idol and its properties.

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371. All the above observations are of crucial importance. For, in **Sankarnarayanan Iyer** and in the consistent jurisprudence of our courts thereafter,[5] it has been held that a stray act or intermittent acts of management do not vest a person with the rights of a *de facto* shebait. Absent a deed of dedication, the contention urged by Nirmohi Akhara that they have been in management and charge of the disputed property is a claim in law, for the rights of management as *de facto* shebaits. Both Justices Viswanatha Sastri and Raghava Rao in **Sankarnarayanan Iyer** unequivocally held that isolated acts do not vest a person with the rights of a *de facto* shebait. The conduct in question, must be of a continuous nature to show that the person has exercised all the rights of a shebait consistently over a long period of time. The duration of time that would satisfy this requirement would, by necessity, be based on the facts and circumstances of each case. Justice Raghava Rao endorsed the view of Justice Viswanatha Sastri but went a step further to outline the practical difficulties in laying down a standard against which the acts of a person claiming to be a *de facto* shebait must be tested. The caution against adopting a low legal threshold to confer on a person who merely has possession of the debutter property and exercises intermittent managerial rights the position of a *de facto* trustee is well founded.

372. A *de facto* shebait is vested with the right to manage the debutter property and bring actions on behalf of the idol. A bona fide action for the benefit of the idol binds it and its properties. As compared to a de *jure* shebait whose rights can legally be traced to a deed of endowment, a *de facto* shebait is vested with the right by mere possession and exercise of management rights. The protection of the idol's properties is at the heart of this extraordinary conferral of rights. If courts were to adopt a standard that is easily satisfied, large tracts of debutter property may be left at the mercy of persons claiming to be in possession of and managing such properties. It is

[5] *Palaniappa Goundan* v. *Nallappa Goundan* AIR 1951 Mad 817; *Mohideen Khan* v. *Ganikhan* AIR 1956 AP 19; *Vankamamidi Balakrishnamurthi* v. *Gogineni Sambayya* AIR 1959 AP 186; *The Commissioner for Hindu Religious and Charitable Endowments, Madras* v. *PR Jagnnatha Rao* (1974) 87 LW 675; *D Ganesamuthuriar* v. *The Idol Of Sri Sappanikaruppuswami* AIR 1975 Mad 23; *Lalji Dharamsey* v. *Bhagwandas Ranchghoddas* 1981 Mah LJ 573; *Shri Parshvanath Jain Temple* v. *L.R.s of Prem Dass* (2009) 1 RLW (Rev) 523

the duty of the court in every case to assess whether there has been not just exclusive possession but a continuous and uninterrupted exercise of all management rights which are recognised by the beneficiaries of the trust property before conferring on a person a right to which they have no legal title.

Explaining the similarities and differences in the position of a defacto and a dejure Shebait, the Apex court said:

373. The duties that bind the exercise of powers of a *de jure* shebait apply equally to a *de facto* shebait. Thus, no action can be brought by the *de facto* shebait which is not in the beneficial interest of the idol or its properties. However, the position of a *de facto* shebait and a de jure shebait is not the same in all respects. In **Sankaranarayanan Iyer**, Justice Viswanatha Sastri held:

"It should be observed that the rights of a *de facto* trustee are not in all respects identical with those of a *de jure* trustee. A *de jure* trustee of a public religious endowment can be removed only for misconduct and that only in a suit instituted with the sanction prescribed by Section 92, Civil Procedure Code or section 73 of Madras Act II of 1927. Where, however, there is only a *de facto* shebait functioning as such, it is open to persons interested in the trust to bring a suit under the above provisions alleging a vacancy in the office and requiring that it should be filled up by the appointment of a trustee by the court. This would entail the removal of the *de facto* trustee without any misconduct on his part...The *de facto* trustee so long as he is functioning as such, has, from the necessities of the situation, the right to bring suits on behalf of and in the interests of the trust for evicting trespassers claiming adversely to the trust. In this respect and for this purpose, his rights and powers are the same as that of a *de jure* trustee..."

A *de jure* shebait can be removed from office only on the grounds of mismanagement or claiming an interest adverse to the idol. However, no such averment is required to remove a *de facto* shebait. A *de jure* shebait may, unless the right of the *de facto* shebait has been perfected by adverse possession, displace a *de facto* shebait from office and assume management of the idol at any point. Further, where there is a *de facto* shebait, a suit may be instituted under Section 92 of the Civil Procedure Code 1908 requiring the court to fill up the vacancy by the settling of a scheme. It is for the limited purpose of bringing an action for the protection of the idol that the rights and powers of the *de facto* shebait are the same as that of the *de jure* shebait.

374. The position of law that a person in continuous and exclusive possession of the debutter property who exercises management rights in the interests of the idol can bring actions on its behalf has found recognition by this Court in ***Vikrama Das Mahant v. Daulat Ram Asthana***[6].

[6] AIR 1956 SC 382

376. The protection of the trust property is of paramount importance. It is for this reason that the right to institute proceedings is conceded to persons acting as managers though lacking a legal title of a manager. A person claiming to be a de facto shebait can never set up a claim adverse to that of the idol and claim a proprietary interest in the debutter property. Where a person claims to be the de facto shebait, the right is premised on the absence of a person with a better title i.e. a de jure manager. It must be shown that the de facto manager is in exclusive possession of the trust property and exercises complete control over the right of management of the properties without any hindrance from any quarters. The person is, for all practical purposes, recognised as the person in charge of the trust properties. Recognition in public records as the manager would furnish evidence of being recognised as a manager.

377. Significantly, a single or stray act of management does not vest a person with the rights of a *de facto* shebait. The person must demonstrate long, uninterrupted and exclusive possession and management of the property. What period constitutes a sufficient amount is determined on a case to case basis. The performance of religious worship as a pujari is not the same as the exercise of the rights of management. A manager may appoint one or several pujaris to conduct the necessary ceremonies. In the ultimate analysis, the right of a person other than a *de jure* trustee to maintain a suit for possession of trust properties cannot be decided in the abstract and depends upon the facts of each case. The acts which form the basis of the rights claimed as a shebait must be the same as exercised by a *de jure* shebait. A *de facto* shebait is vested with the right to institute suits on behalf of the deity and bind its estate provided this right is exercised in a bona fide manner. For this reason, the court must carefully assess whether the acts of management are exclusive, uninterrupted and continuous over a sufficient period of time.

The Apex court on this point concluded:

399. The documentary evidence which has been produced by Nirmohi Akhara does not show that it was managing the property in question. Apart from the documentary evidence analysed above which does not further the case of Nirmohi Akhara, no evidence has been produced to show the exercise of management rights by Nirmohi Akhara. Stray acts do not constitute sufficient evidence to establish continuous, exclusive and uninterrupted exercise by Nirmohi Akhara of the rights and duties of a *de facto* shebait. No document that evidences repairs, construction, appointment of pujaris, or other activities has been produced before this Court. Significantly, apart from a stray reference in the account of the travellers, no document of Nirmohi Akhara has been put on record to show the exercise of management rights. The customs of Nirmohi Akhara were reduced to writing by a registered deed only on 19 March 1949.

401. A claim of rights as a *de facto* shebait must be substantiated with proof that person is in exclusive possession of the trust property and exercises complete control

over the right of management of the properties without any let or hindrance from any quarters whatsoever. For all practical purposes, this person is recognised as the person in charge of the trust properties. Though it cannot and has not been denied in the present proceedings that Nirmohi Akhara existed at the disputed site, the claim of Nirmohi Akhara, taken at the highest is that of an intermittent exercise of certain management rights. Their rights were peripheral, usually involving the assistance of pilgrims, and were constantly contested. As held above, a stray or intermittent exercise of management rights does not confer upon a claimant the position in law of a *de facto* shebait. It cannot be said that the acts of Nirmohi Akhara satisfy the legal standard of management and charge that is exclusive, uninterrupted and continuous over a sufficient period of time. Despite their undisputed presence at the disputed site, for the reasons outlined above, Nirmohi Akhara is not a shebait.

402. In light of the holding that Nirmohi Akhara is not the shebait for the idols of Lord Ram at the disputed site, it was open for an interested worshipper to sue on behalf of the deity. There existed no recognised shebait in law. In such a situation the idol's independent right to sue was exercised through its next friend, a worshipper interested in the protection of the idol and its interests. Suit 5 is maintainable as a suit instituted by a next friend on behalf of the first and second plaintiffs in the absence of a lawfully recognised shebait.

c. *Limitation in Suit 5*

Legal fiction of a deity as a minor has been evolved to obviate the inability of the deity to institute legal proceedings on its own. A human agent must institute legal proceedings on behalf of the deity to overcome the disability. However, the fiction has not been extended to exempt the deity from the applicability of the law of limitation.

In paragraph 406 of the judgment the Apex Court noted that Suit 5 was instituted for "a declaration that the entire premises of Sri Ram Janmabhumi at Ayodhya, as described and delineated in Annexures I, II and III belong to the plaintiff deities. and for a consequential perpetual injunction" Annexures I, II and III were described in paragraph 2 of the plaint as "two site plans of the building premises and of the adjacent area known as Sri Rama Janma Bhumi, prepared by Shiv Shankar Lal Pleader … along with his Report dated 25.05.1950". After the decision of the Constitution Bench of the Apex Court in *Dr M Ismail Faruqui* **v.** *Union of India*[238], the dispute has been circumscribed to the area comprised in the inner and outer courtyards.Suit 5 was instituted on 1 July 1989, on which date, the Limitation Act 1963 was in force.

.The Apex Court in paragraph 421 has stated that the legal fiction of a deity as a minor has been evolved to obviate the inability of the deity to institute legal proceedings on its own. A human agent must institute legal proceedings on behalf of the deity to overcome the disability. However, the fiction has not been extended to exempt the deity from the applicability of the law of limitation. Each of the three judges of the Allahabad High Court

furnished reasons of their own in holding that Suit 5 was within limitation. The Apex court in paragraph 428, accepted the reasons which weighed with Justice Sudhir Agarwal in holding suit 5 to be within limitation. Justice Sudhir Agarwal had held that the worship of the deities had continued and there was no action or inaction in respect of which the plaintiffs could claim a right to sue governed by a particular period of limitation.The learned judge held that in the preceding few hundred years, the only action which may have arisen to adversely affect the interest of the plaintiffs was the raising of the disputed structure. In spite of this, the place in dispute continued to be used by the Hindus for the purposes of worship. On the other hand, there is no mention of any Muslim having offered namaz from the date of the construction until 1856-57. In view of the above facts, there was no action for the Hindus to be aggrieved on a particular date, giving rise to a right to sue for the purposes of limitation. Consequently, the judge held that Suit 5 could not be held to be barred by limitation which has been accepted by the Apex Court.

The Suit of 1885 and Res Judicata –Held, There is absolutely no merit in the contention that the principles of constructive res judicata will bar the subsequent suits. The parties were distinct. The claim in the earlier suit was distinct. The basis of the claim was indeed not that which forms the subject matter of the subsequent suits

The plea of res judicata hinged on the content and outcome of a suit which was instituted in 1885 by Mahant Raghubar Das seeking a decree for the construction of a temple at Ramchabutra. The Apex Court said:

> **439.** The applicability of Section 11 is premised 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 a former suit;
>
> (ii) The former suit should be either between the same parties as in the latter suit or between parties under whom they or any of them claim litigating under the same title;
>
> (iii) The court which decided the former suit should have been competent to try the subsequent suit or the suit in which the issue has been subsequently raised; and
>
> (iv) The issue should have been heard and finally decided by the court in the former suit.
>
> Explanation VI to Section 11 is in the nature of a deeming provision which extends the ambit of the expression "between parties under whom they or any of them claim, litigating under the same title". Under Explanation VI, where persons litigate bona fide in respect of a public right or a private right which they claim in common for themselves and others, all persons interested in such a right, shall be deemed to claim under the persons so litigating. In other words, to attract Explanation VI, it is necessary that there must be a bona fide litigation in which there is a claim in respect of a public right or a private right claimed in common together with others. It is only

then that all persons who are interested in such a right would be deemed, for the purpose of the Section, to claim under the persons so litigating.

Order 1 Rule 8 contains provisions under which one person may sue or defend a suit on behalf or for the benefit of all persons interested.

440. The Suit of 1885 was instituted when the CPC 1882 was in force. Section 13 contained a provision in regard to res *judicata*. Section 13 corresponds to Section 11 of the CPC 1908, with certain material differences. Explanation V to Section 13 contained a deeming provision stating when persons would be deemed to claim, litigating under the same title. However, Explanation V to Section 13 covered only persons litigating in respect of a private right claimed in common for themselves and others. In contrast, Explanation VI to Section 11 of the CPC 1908 covers persons litigating in respect of a public right or a **private** right in common for themselves and others. This distinction between Explanation V of Section 13 in the CPC 1882 and Explanation VI to Section 11 of the CPC 1908 is brought out in the following table containing the two provisions:

Section 13 CPC 1882	Section 11 CPC 1908
Explanation V Where persons litigate bonafide in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.	**Explanation VI** Where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

It may be noted at this stage that Section 92 of the CPC 1908 contains a provision corresponding to Section 539 of the CPC 1882. However, the CPC 1908 introduced Section 91 to deal with public nuisances and other wrongful acts affecting the public. The words "of public right" were introduced in Explanation VI of Section 11 of the CPC 1908 in order to give due effect to suits relating to public nuisances incorporated in Section 91. Thus, the deeming provision contained in Explanation V to Section 13 of the CPC 1882 was expanded in the corresponding provision contained in Explanation VI to Section 11 of the CPC 1908 to cover a case where persons litigate bona fide in respect of a private right or a public right claimed in common with others. When the earlier Suit of 1885 was instituted, Explanation V had no application to a situation where persons were litigating in respect of a public right as distinct from a private right.

The Apex Court held in paragraph 441:

> [...]in any view of the matter, it is evident that the Suit of 1885 would not operate as res *judicata* either on the application of the provisions of Section 13 of the Code of 1882 or on the application of Section 11 of the Code of 1908. The pleadings and the findings in the earlier Suit of 1885 show that Mahant Raghubar Das was only asserting

a right that was personal to him. The earlier suit was not instituted in a representative capacity; the issues framed, and reliefs sought were distinct and so were the suit properties.

Further, the Apex Court said:

446. ***There is absolutely no merit in the contention that the principles of constructive res judicata will bar the subsequent suits. The parties were distinct. The claim in the earlier suit was distinct***. The basis of the claim was indeed not that which forms the subject matter of the subsequent suits. Similarly, there is no merit in the submission based on the doctrine of issue estoppel or estoppel by record which has been faintly urged. Consequently, and for the above reasons, there is no merit in the submissions which have been urged by Mr Naphade, learned Senior Counsel objecting to the maintainability of Suit 5 on the ground of *res judicata*.

(emphasis supplied)

Evidentiary Value of The Reliance On Travelogues, Gazetteers And Books. Held, While gazetteereers have been noticed in several decisions of this Court, it is equally important to note that the reliance placed on them is more in the nature of corroborative material.

556. The fact that a belief and faith is held is however a matter which is distinct from the actual place where worship was offered. In deciding the latter, there has to be a careful evaluation of the evidentiary record. The evidentiary material in the present case consists among other things of

(i) Travelogues;

(ii) Gazetteers;

(iii) The documentary record pertaining to the genesis of and the course which the disputes over the site in question followed; and

(iv) Documentary material pertaining to the use of the three domed structure.

588. Section 81 of the Evidence Act 1872 requires the court to "presume the genuineness of every document purporting to be" any Official Gazetteere or the Government Gazette "of any colony, dependency or possession of the British Crown". Section 81 raises a presumption of the genuineness of the documentand not of its contents. When the court has to form an opinion on the existence of a fact of a public nature, Section 37 of the Evidence Act314 indicates that any statement of it in a government gazette is a relevant fact. ***While gazetteereers have been noticed in several decisions of this Court, it is equally important to note that the reliance placed on them is more in the nature of corroborative material.***

(emphasis supplied)

592. The historical material which has been relied upon in the course of the proceedings before the High Court must be weighed in the context of the salutary

principles which emerge from the above decisions. The court may have due regard to appropriate books and reference material on matters, of public history. Yet, when it does so, the court must be conscious of the fact that the statements contained in travelogues as indeed in the accounts of gazetteers reflect opinions on matters which are not amenable to be tested by cross-examination at this distant point of time. Consequently, where there is a dispute pertaining to possession and title amidst a conflict of parties, historical accounts cannot be regarded as conclusive. The court must then decide the issue in dispute on the basis of credible evidentiary material.

594.[..] While we have made a reference to the accounts of travellers and gazetteers, we read them with caution. The contents of these accounts cannot be regarded as being conclusive on the issue of title which has necessitated an adjudication in the present proceedings. While the gazetteers may provide to the court a glimpse on matters of public history, history itself is a matter of divisive contestation.

While the court is not precluded from relying on the contents as relevant material, they must be read together with the evidence on the record in order to enable the court to enter its findings of fact in the course of the present adjudication. Above all, the court must sift matters which may be of a hearsay origin in its effort to deduce the kernel of truth which lies hidden in the maze of conflicting claims.

Travellogues and gazetteers contain loose fragments of forgotten history***. The evidentiary value to be ascribed to their contents necessarily depends upon the context and is subject to a careful evaluation of their contents.*** Our analysis has included in the balance, the need for circumspection, as we read in the accounts of travellers and gazetteers a colonial perspective on the contest at the disputed site.

(emphasis supplied)

Suit 4: Sunni Central Waqf Board

Suit 4 was instituted on 18 December 1961 by the Sunni Central Waqf Board.Regarding the maintainability of suit 4, the Apex court stated that Section 19(2) of the UP Muslim Waqf Act 1960 specifically empowers the board to adopt measures for the recovery of property and to institute and defend suits relating to waqfs. Under Section 3(2), the Board is defined to mean the Sunni Central Waqf Board, or the Shia Central Waqf Board constituted under the Act. Clearly, therefore in terms of the statutory power, the Sunni Central Waqf Board has authority to institute legal proceedings.

a. Limitation in Suit 4

In para 625 of the judgment, it can be found that the submission that Suit 4 is barred by limitation is founded on the following hypotheses:

(i) The entire property which is the subject matter of the suit was custodia legis consequent upon the proceedings under Section 145;

(ii) Once the property is custodia legis, a suit for declaration would suffice and there is no need to seek the relief of possession;

(iii) Prayer (b) seeking a decree for the delivery of possession, "if it is considered necessary is redundant; and

(iv) Consequently, in the absence of a prayer for possession, the suit is only one for declaring the character of the mosque and is hence governed by Article 120 of the Limitation Act 1908.

The basic foundation on which the above submission is based is that the entirety of the property comprised in the inner and outer courtyards was custodia legis and was under the protective attachment of the receiver. However, the Apex Court noted that as a matter of fact on 18 December 1961 when the suit was instituted only the inner courtyard had been attached in pursuance of the orders passed under Section 145. The outer courtyard was placed under receivership only in 1982. In Suit 4, the property which was the subject matter of the dispute was:

(a) The inner courtyard which had been attached under Section 145;

(b) The outer courtyard which had not been attached; and

(c) The adjoining graveyard which had not been attached.

626. Suit 4 related to both areas which were attached under Section 145 and areas which were clearly not the subject matter of attachment. Consequently, the declaration which was sought in the suit was not merely in respect of the land which fell within the purview of the order of attachment. Relief was sought in terms of:

(a) A declaration of the property described by the letter A B C D as a public mosque (covering both the inner and outer courtyards) and the graveyard marked by the letter E F G H; and

(b) Possession of the area of the mosque depicted as A B C D.

In addition, it must be noted that prayer (bb) was brought in by way of an amendment as a consequence of the destruction of the entire mosque and the relief which was claimed was as against the statutory receiver who was appointed as a consequence of the decision in Ismail Faruqui. In view of the above position, it becomes evident that the relief of possession which was sought in terms of prayer (b) was not only in respect of the area of the property which covered what was attached, but also that which was not the subject matter of the attachment. This being the position, the entire basis of the submission invoking the bar of limitation suffers from a fallacy and cannot be accepted.

627. Reading the plaint, the grievance of the plaintiffs was that they were in possession and had offered prayers till 23 December 1949. On 23 December 1949, it is alleged that the Hindus surreptitiously installed idols inside the mosque as a result of

which the mosque was desecrated. By pleading specifically that the plaintiffs were in possession and had offered prayers until a particular date, the sequitur is that after that date, the plaintiffs ceased to be in possession. This being the position, it becomes evident that even before the property became cutodia legis following the attachment under Section 145, the plaintiffs had been ousted from possession. It was in this background, that in prayer (a), the plaintiffs sought a declaration in regard to the character of the mosque as a public mosque and in prayer (b) sought possession, in case it is necessary

[.....] ***The suit in the circumstances is a suit for possession of immoveable property falling in the description provided by the first column of Article 142. The suit has been instituted within a period of twelve years of the date of alleged dispossession on 23 December 1949 and is hence within limitation***. In the view which has been taken above, the issue about whether a case of a continuing wrong has been established has no relevance. On the basis that the cause of action was completed on 23 December 1949, it is evident that the suit was instituted within a period of twelve years from the date of dispossession. Whether there was a continuing injury as opposed to a continuing wrong hence does not arise in the above view of the matter.

(emphasis supplied)

631. This being the position, the High Court was in error in applying the provisions of Article 120. The suit in essence and substance was governed by Article 142. Though, the last namaz was held on 16 December 1949, the ouster of possession did not take place on that day. The next Friday namaz would have been held on 23 December 1949 and the act of ouster took place on that date and when the mosque was desecrated. The suit which was filed on 18 December 1961 was within a period of 12 years from 23 December 1949 and hence within limitation. The view, which has been taken by the majority of the High Court holding that Suit 4 is barred by limitation, is hence incorrect. Suit 4 was filed within limitation.

Alternatively, even if it is held that the plaintiffs were not in exclusive or settled possession of the inner courtyard, the suit would fall within the residuary Article144 in which event also, the suit would be within limitation.

b. Waqf by user

In paragraph 729 of the judgment it is noted that an attempt was made at an advanced stage of the hearing to contend that the disputed site marked out by the letters A B C D is waqf property, not by virtue of a specific dedication, but because of the long usage of the property as a site of religious worship by the Muslim community. Hence, it was urged that even in the absence of an express dedication, the long use of the disputed site for public worship as a mosque elevates the property in question to a 'waqf by user'.

The above contention raised two points for determination:

First, whether the notion of a waqf by user is accepted as a principle of law by the courts; and second, as a matter of fact, whether its application was attracted in the present case.

Explaining the concept of waqf by user, the Apex court said:

> **739.** Our jurisprudence recognises the principle of waqf by user even absent an express deed of dedication or declaration. Whether or not properties are waqf property by long use is a matter of evidence. The test is whether the property has been used for public religious worship by those professing the Islamic faith. The evidentiary threshold is high, in most cases requiring evidence of public worship at the property in question since time immemorial. In **Faqir Mohamad Shah**, it was admitted that the old mosque was waqf property. The court subsequently examined the evidence on record to determine whether the structures forming the 'new mosque' built on property adjoining the 'old mosque' had also been used for public religious worship. It is on this basis that this Court held portions of the 'new mosque', in conjunction with the 'old mosque', to be a composite waqf property.

Regarding the application of waqf by user to the present case, the Apex court said:

> **741.** Dr Dhavan, learned Senior Counsel appearing on behalf of the plaintiffs in Suit 4, admitted that there is no evidence of possession, use or offering of worship in the mosque prior to 1856-7. No evidence has been produced to establish worship at the mosque or possessory control over the disputed property marked by the letters A B C D over the period of 325 years between the alleged date of construction in 1528 until the erection of railing by the colonial government in 1857. Hence in the absence of evidence on record, no conclusion can be drawn that prior to 1857, the disputed site was used for worship by the resident Muslim community. Following the events in 1856-57, the colonial government erected the railing to bifurcate the areas of worship into the inner courtyard and the outer courtyard. Shortly thereafter, the Ramchabutra was constructed in the outer courtyard. Worship at the Ramchabutra and at the preexisting Sita Rasoi led to the worship of the Hindus being institutionalised within the property marked by the letters A B C D.
>
> **742.** The construction of the railing was not an attempt to settle proprietary rights. It was an expedient measure to ensure law and order. Disputes between 1858 and 1883 indicated that the attempt to exclude the Hindus from the inner courtyard by raising a railing was a matter of continuing dispute. Significantly, the activities of the Hindu devotees in the outer courtyard continued. An important indicator in this regard was the decision of the colonial administration to allow the opening of an additional door to the outer courtyard in 1877 to facilitate the entry of Hindu devotees against which objections were raised and rejected. The need for an additional point of entry for Hindu devotees is an indicator of the extensive nature of their use to offer worship. On

gaining entry, the Hindu devotees offered worship at several structures such as the Ramchabutra and Sita Rasoi. The Bhandar was also under their control in the outer courtyard. This indicated that insofar as the outer courtyard was concerned, the Hindu devotees were in settled possession and actively practicing their faith. This possession of the Hindu devotees over the outer courtyard was open and to the knowledge of the Muslims. Several incidents between 1857 and 1949 have been adverted to in another part of the judgment which indicate that the possession of the inner courtyard was a matter of serious contest. The Muslims did not have possession over the outer courtyard. There is a lack of adequate evidence to establish that there was exclusive or unimpeded use of the inner courtyard after 1858.

743. The contention of the plaintiffs in Suit 4 is that the entire property of the mosque, including both the inner and outer courtyards is waqf property. Once a property is recognised as waqf, the property is permanently and irrevocably vested in the Almighty, Allah from the date the waqf is deemed to be in existence. The land is rendered inalienable and falls within the regulatory framework of waqf legislation and Islamic law. The doctrine of waqf by user is well established in our law. However, as noted by the precedents detailed above, it is a doctrine of necessity to deal with cases where a property has been the site of long and consistent religious use by members of the Islamic faith but the original dedication is lost to the sands of time. Given the radical alterations to the characteristics of ownership of the property consequent upon a recognition of a waqf by user, the evidentiary burden to prove a waqf by user is high. The pleadings in the plaint in Suit 4 are deficient. No particulars of the extent or nature of the use have been set out. A stray sentence in paragraph 2 of the plaint cannot sustain a case of waqf by user. Moreover, the contention that the entire property was a single composite waqf cannot be assessed in a vacuum. The Court cannot ignore the evidence of established religious worship by Hindu devotees within the premises of the disputed site. If the contention urged by the plaintiffs in Suit 4 that the entire disputed property is a waqf by user is accepted, it would amount to extinguishing all rights claimed by the Hindus in the disputed property as a site of religious worship.

745. The evidence adduced does not demonstrate that the entire disputed property was utilised by the resident Muslim community for public religious worship. It is evident that the outer courtyard was in fact used by and was in the possession of the devotees of Lord Ram. These portions of the property were admittedly not used for religious purposes by the members of the resident Muslim community and cannot be waqf property by long use. Further, the consequences that stem from recognising the entire disputed property marked by the letters A B C D in the present case as waqf by user is a mirror image to the claim of the plaintiffs in Suit 5 of recognising the land itself as a juristic person. The consequence would be the destruction of the rights of another community to offer worship by virtue of the internal tenets of a specific religion which have been recognised for a specific purpose. The law recognises that where, since time immemorial, worship has been offered at a land with a mosque, the

land is presumed to have been dedicated for a religious purpose and even absent a dedication, is waqf by user. However, this may not be extended to the extinguishment of competing and established religious rights of another community in the same property particular in the face of the evidence noted above. Accepting the contention urged on behalf of the plaintiffs in Suit 4 would have this effect and cannot be countenanced by law.

c. *Possession and Adverse Possession*

Held, The evidence in the records indicate that Hindus, post the setting up of the railing have, in any event, been in possession of the outer courtyard. On this basis alone, the plea of adverse possession set up by the plaintiffs in respect of the entirety of the area represented by the letters A B C D must fail.

746. The plaintiffs in Suit 4 plead adverse possession in the alternative The basis for claiming adverse possession has been set up in paragraph 11(a) of the plaint (as amended) which reads as follows:

"11(a). That assuming, though not admitting, that at one time there existed a Hindu temple as alleged by the defendants representatives of the Hindus on the site of which emperor Babar built the mosque, some 433 years ago, the Muslims, by virtue of their long exclusive and continuous possession beginning from the time the mosque was built and continuing right upto the time some mosque, some mischievous persons entered the mosque and desecrated the mosque as alleged in the preceding paragraphs of the plaint, the Muslims perfected their title by adverse possessions and the right, title or interest of the temple and of the Hindu public if any extinguished."

The pleadings in paragraph 11(a) are based on assumption: that in the event that there existed a Hindu temple, as alleged by the defendants on the site of which the mosque was constructed; the Muslims claim to have perfected their title by adverse possession by long, exclusive and continuous possession and that the right, title and interest of the temple and of the Hindu public, if any, stands extinguished. The plea of adverse possession is subsidiary to the main plea of the mosque being dedicated upon its construction by Babur for public worship by Muslims.

747. A plea of adverse possession is founded on the acceptance that ownership of the property vests in another against whom the claimant asserts a possession adverse to the title of the other. Possession is adverse in the sense that it is contrary to the acknowledged title in the other person against whom it is claimed. Evidently, therefore, the plaintiffs in Suit 4 ought to be cognisant of the fact that any claim of adverse possession against the Hindus or the temple would amount to an acceptance of a title in the latter. Dr Dhavan has submitted that this plea is a subsidiary or alternate plea upon which it is not necessary for the plaintiffs to stand in the event that their main plea on title is held to be established on evidence. It becomes then necessary to assess as to whether the claim of adverse possession has been established.

748. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous - possession which meets the requirement of being 'nec vi nec claim and nec precario'. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence. Evidence, it is well settled, can only be adduced with reference to matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case. Reading paragraph 11(a), it becomes evident that beyond stating that the Muslims have been in long exclusive and continuous possession beginning from the time when the Mosque was built and until it was desecrated, no factual basis has been furnished. This is not merely a matter of details or evidence. A plea of adverse possession seeks to defeat the rights of the true owner and the law is not readily accepting of such a case unless a clear and cogent basis has been made out in the pleadings and established in the evidence.

755. The plaintiffs have failed to adopt a clear stand evidently because they are conscious of the fact that in pleading adverse possession, they must necessarily carry the burden of acknowledging the title of the person or the entity against whom the plea of adverse possession has not been adequately set up in the pleadings and as noted above, has not been put-forth with any certitude in the course of the submissions. Above all, it is impossible for the plaintiffs to set up a case of being in peaceful, open and continuous possession of the entire property. Dr Dhavan repeatedly asserted that the Muslims were obstructed in their offering worship at the mosque as a result of the illegalities of the Hindus. For this purposes, Dr Dhavan refers to the incidents which took place in 1856-7, 1934 and 1949 . the last of them leading up to the preliminary order under Section 145. The events which are associated with each of the above incidents constitute indicators in the ultimate finding that in spite of the existence of the structure of the mosque, possession as asserted by the Muslims cannot be regarded as meeting the threshold required for discharging the burden of a case of adverse possession. ***The evidence in the records indicate that Hindus, post the setting up of the railing have, in any event, been in possession of the outer courtyard. On this basis alone, the plea of adverse possession set up by the plaintiffs in respect of the entirety of the area represented by the letters A B C D must fail.***

For the reasons indicated above, the plaintiffs in Suit 4 have failed to meet the requirements of adverse possession.

(emphasis supplied)

d. Doctrine of the lost grant

The alternate plea of adverse possession is destructive of a valid legal basis to apply the doctrine of lost grant as a rule of evidence

Regarding the doctrine of lost grant, the Apex Court stated the following in paragraph 767 of the judgment:

(i) The doctrine of lost grant supplies a rule of evidence. The doctrine is applicable in the absence of evidence, due to a lapse of time, to prove the existence of a valid grant issued in antiquity. However, the court is not bound to raise the presumption where there is sufficient and convincing evidence to prove possession or a claim to a land in which case the doctrine of lost grant will have no applicability;

(ii) Where it is impossible for the court to determine the circumstances under which the grant was made, an assumption is made about the existence of a valid and positive grant by the servient owner to the possessor or user. The grant maybe express or presumed. Once the assumption is made, the court shall, as far as possible, secure the possession of those who have been in quiet possession;

(iii) For a lawful presumption there must be no legal impediments. For the applicability of the doctrine it is necessary to establish that at the inception when the grant was made not only was there a valid grant but also capable grantees in whose favour the grant could have been made. In the absence of defined grantees, there will be no presumption of lost grant;

(iv) For the applicability of the doctrine of lost grant, there must be long, uninterrupted and peaceful enjoyment of an incorporeal right. Uninterrupted enjoyment includes continuous use or possession. The requisite period of use and possession is variable and to be determined from case to case; and

(v) A distinction has to be made between an assertion of rights due to a prolonged custom and usage and that by doctrine of lost grant.

Further, the Apex Court said:

> **768.** In the present case, the plaintiffs in Suit 4 have set up a claim of declaration on the basis of a dedication of the mosque constructed by Babur in 1528 for the worship of the Muslim community and, in the alternate, on adverse possession, if it is established that the mosque was constructed on the site of a Hindu temple. There is no pleading by the plaintiffs to support the application of the doctrine of lost grant. The specific case of the plaintiffs is that of a dedication of the mosque for public worship by Muslims. This must be evaluated on the basis of the evidence which has been adduced. In fact, ***the alternate plea of adverse possession is destructive of a valid legal basis to apply the doctrine of lost grant as a rule of evidence.*** Adverse possession postulates the vesting of title in one person and the existence of a long

continued and uninterrupted possession of another, to the knowledge of and in a manner hostile to, the true title holder. The plea of adverse possession would lead to an inference against the application of the doctrine of lost grant as a plea of adverse possession is premised in title vesting in someone other than the alleged grantee. The decisions of this Court and those of the Privy Council recognising the doctrine as a rule of evidence show that the principle must be applied with caution. The doctrine does not constitute an independent, substantive head for the recognition of titles but is a rule of evidence. Section 110 of the Evidence Act 1872 speaks of the burden of proof as to ownership : when a question arises as to whether a person in possession of anything is the owner of such thing, the burden of proving that he is not the owner is cast on the person who avers that he is not the owner. In the process of applying the doctrine of lost grant as a rule of evidence, the court must be circumspect about not travelling beyond the limits set for it by the legislature.

In the present case, absent any pleadings and of evidence on the basis of which a presumption could be raised of the application of the doctrine, it must necessarily follow that the doctrine of lost grant has no application.

(emphasis supplied)

e. *Analysis of Evidence in Suit 4*

In paragraph 781 of the judgment, while analyzing the documentary evidence the Court said:

(i) Prior to 1856-7 there was no exclusion of the Hindus from worshipping within the precincts of the inner courtyard;

(ii) The conflagration of 1856-7 led to the setting up of the railing to provide a bifurcation of the places of worship between the two communities;

(iii) The immediate consequence of the setting up of the railing was the continued assertion of the right to worship by the Hindus who set up the Chabutra in the immediate proximity of the railing;

(iv) Despite the existence of the railing, the exclusion of the Hindus from the inner courtyard was a matter of contestation and at the very least was not absolute;

(v) As regards the outer courtyard it became the focal point of Hindu worship both on the Ramchabutra as well as other religious structures within the outer courtyard including Sita Rasoi. Though, the Hindus continued to worship at the Ramchabutra which was in the outer courtyard, by the consistent pattern of their worship including the making of offerings to the 'Garbh Grih' while standing at the railing, there can be no manner of doubt that this was in furtherance of their belief that the birth-place of Lord Ram was within the precincts of and under the central dome of the mosque; and

(vi) The riots of 1934 and the events which led up to 22/23 December 1949 indicate that possession over the inner courtyard was a matter of serious contestation often leading to violence by both parties and the Muslims did not have exclusive possession over the inner courtyard. From the above documentary evidence, it cannot be said that the Muslims have been able to establish their possessory title to the disputed site as a composite whole.

f. Analysis on the Muslim Claim of Possession

786. The case of the plaintiffs in Suit 4 has to be evaluated on the basis of the entirety of the evidence on the record to deduce whether possession has been established on a preponderance of probabilities. The evidence reveals several significant features which must be noted:

(i) Though, the case of the plaintiffs in Suit 4 is that the mosque was constructed in 1528 by or at the behest of Babur, there is no account by them of possession, use or offer of namaz in the mosque between the date of construction and 1856-7. For a period of over 325 years which elapsed since the date of the construction of the mosque until the setting up of a grill-brick wall by the British, the Muslims have not adduced evidence to establish the exercise of possessory control over the disputed site. Nor is there any account in the evidence of the offering of namaz in the mosque, over this period;

(ii) On the contrary, the travelogues (chiefly **Tieffenthaler** and **Montgomery Martin**) provide a detailed account both of the faith and belief of the Hindus based on the sanctity which they ascribed to the place of birth of Lord Ram and of the actual worship by the Hindus at the Janmasthan;

(iii) **William Finch** (1608-11) and **Tieffenthaler** who visited India between 1743-1785 provided an account of Ayodhya. Conspicuous in both the accounts are references to worship by the Hindus to Lord Ram. The positive account of Hindu worship to Lord Ram is of probative value. **Tieffenthaler** specifically refers to Hindu places of worship including Sita Rasoi, Swargdwar and the Bedi or cradle symbolising the birth of Lord Ram. The account refers to religious festivals where during the course of which Hindu devotees would throng for worship. Tieffenthaler's account in the eighteenth century is prior to the construction of the grill.brick wall in front of the mosque. **Tieffenthaler** refers to "a square box raised 5 inches above the ground with borders made of lime with the length of more than 5 ells and the maximum width of 4 ells", which the Hindus called the Bedi or cradle. This, as he notes, was the site of the house where Lord Vishnu was born in the form of the Lord Ram. This, as he notes, is where it was believed that either Aurangzeb or (according to others) Babur got the place razed. **Tieffenthaler**, however, noted that in the place where the "native house" of Lord Ram existed the Hindus circumambulate three times and prostrate on the floor. This account of Tieffenthaler refers to a focal point of worship namely the birth-place of Lord Ram around which worship took place and the Hindus circumambulated and prostrated;

(iv) The communal riots that took place in 1856-7 resulted in the colonial administration setting up a grill-brick wall to bring about a measure of peace between the conflicting claims of the two communities. The immediate aftermath of the railing led to the dispute over the Ramchabutra, which was erected right outside the railing and from

where the Hindus sought to offer worship to Lord Ram. The time of the setting up of the Chabutra, the place of its location and the offer of worship to Lord Ram on Chabutra are pointers in the direction of the Hindus continuing to offer worship immediately outside the railing when faced with a possible exclusion from the inner courtyard;

(v) The construction of the grill-brick wall during the colonial administration did not constitute any determination of title as between the Hindus and the Muslims but was a measure intended to maintain public peace and safety having regard to the incidents which had taken place in 1856-7 resulting in a loss of life;

(vi) That the setting up of a buffer in the form of the grill-brick wall did not amount to an absolute exclusion appears from sporadic incidents such as the incident involving the setting up of a flag and the performance of hawan and puja by the Nihang Singh within the precincts of the mosque. Nihang Singh was evicted following the intervention of the authorities of the state;

(vii) Until 1877, there was only one entry through which access could be gained to the inner courtyard which was the door on the eastern side called Hanumat Dwar. On gaining entry, the Hindus had several places of worship such as the Ramchabutra and Sita Rasoi as well as the Bhandar which indicated that insofar as the outer courtyard is concerned, the Hindus were in settled possession;

(viii) The opening of an additional door on the northern side which came to be known as Singh Dwar was warranted as a measure to ensure the safe passage of a large number of pilgrims who entered the premises to offer worship. Objections to the opening of Singh Dwar were dealt with and resulted in their rejection as a consequence of which the opening of an additional door providing access became an established fact;

(ix) Disputes between the Hindus and the Muslims continued to persist, indicating the litigious nature of the respective claims, in respect of the inner courtyard;

(x) In 1934, there was yet another communal riot during the course of which the domed structure of the mosque was damaged. This led to the imposition of a fine on the Hindu residents of Ayodhya and the work of restoration being carried out at the expense of the colonial administration through a Muslim contractor. This indicates that while the Hindus had continued to offer worship continuously in the outer courtyard, there was no abandonment of the claim by the Muslims of the status of the structure inside the inner courtyard as a mosque. After 1934, there is documentary material to indicate that arrangements were made for the appointment of a Pesh Imam and Mutawalli for the mosque which would belie the notion that there was an abandonment of the mosque;

(xi) After 1934, evidence indicates that Muslim worship in the form of namaz had reduced as a result of the obstructions in their access to the inner courtyard. By 16 December 1949 (the last Friday namaz) the mosque was being used for the purposes of Friday namaz. The circumstances bearing upon the restoration of the damage which was done to the mosque in 1934, availing of the services of the Pesh Imam and the offering of namaz albeit to a reduced extent are circumstances which point to a reasonable inference that there was no total ouster of the Muslims from the inner structure prior to 22/23 December 1949 though their access was intermittent and interrupted; and

(xii) On 22/23 December 1949, idols were installed below the central dome of the inner structure which, according to the Muslims, led to the desecration of the mosque. Prior

to this, the last namaz was offered on Friday, 16 December 1949. The Friday namaz due on 23 December 1949 could not be offered due to the intervening desecration of the mosque.

The Sunni Central Waqf Board's case of possession to attract the applicability of Section 110 of the Evidence Act must therefore be assessed from two perspectives: First, insofar as the outer courtyard is concerned, it is impossible to accept on the basis of a preponderance of probabilities that the Muslims were in possession. On the contrary, the establishment of Hindu places of worship in the outer courtyard clearly belies such a claim. Second, insofar as the inner courtyard is concerned, the claim of the Muslims must necessarily be assessed with reference to various time periods namely (i) prior to 1856; (ii) between 1856 and 1934; and (iii) after 1934.

While assessing the claims of Muslims during the various time periods the Apex court said:

787. The Muslim account of worship prior to 1856 is conspicuously silent as opposed to the accounts of worship being offered by the Hindus. Post the setting up of the wall and railing, it is evident that there were obstructions which arose in the continued worship of the Muslims in the inner courtyard which is evidenced by numerous proceedings as well as by the riots of 1934. Yet, the manner in which the restoration of the mosque took place after the riots and the arrangements in particular for the services of the Pesh Imam indicate that the obstruction notwithstanding, some form of namaz continued to be offered in the mosque until 16 December 1949. While, as the Waqf Inspector indicated, the process of namaz was being obstructed and the worshippers were harassed, there is no evidence to show the abandonment of the claims by the Muslims. In fact, the documentary and oral evidence indicates that Friday namaz was intermittently being offered until 16 December 1949. Though, the claim of the Muslims over the inner courtyard was not abandoned, yet as the evidence indicates, this was a matter of contestation and dispute.

Analysis on Title

In order to determine the relief to be granted, the Apex Court marshaled together the evidence on the claim of title in suit 4 and suit 5 in paragraph 788. The Apex Court stated as follows:

I The report of the ASI indicates the following position:

(i) Archaeological finds in the area of excavation reveal significant traces of successive civilisations, commencing with the age of the North Black Polished Ware traceable to the second century B.C.;

(ii) The excavation by the ASI has revealed the existence of a preexisting underlying structure dating back to the twelfth century. The structure has large dimensions, evident from the fact that there were 85 pillar bases comprised in 17 rows each of five pillar bases;

(iii) On a preponderance of probabilities, the archaeological findings on the nature of the underlying structure indicate it to be of Hindu religious origin, dating to twelfth century A.D.;

(iv) The mosque in dispute was constructed upon the foundation of the pre-existing structure. The construction of the mosque has taken place in such a manner as to obviate an independent foundation by utilising the walls of the pre-existing structure; and

(v) The layered excavation at the site of excavation has also revealed the existence of a circular shrine together with a makara pranala indicative of Hindu worship dating back to the eighth to tenth century.

A reasonable inference can be drawn on the basis of the standard of proof which governs civil trials that:

(i) The foundation of the mosque is based on the walls of a large pre-existing structure;

(ii) The pre-existing structure dates back to the twelfth century; and

(iii) The underlying structure which provided the foundations of the mosque together with its architectural features and recoveries are suggestive of a Hindu religious origin comparable to temple excavations in the region and pertaining to the era.

II The conclusion in the ASI report about the remains of an underlying structure of a Hindu religious origin symbolic of temple architecture of the twelfth century A.D. must however be read contextually with the following caveats:

(i) While the ASI report has found the existence of ruins of a preexisting structure, the report does not provide:

(a) The reason for the destruction of the pre-existing structure; and

(b) Whether the earlier structure was demolished for the purpose of the construction of the mosque.

(ii) Since the ASI report dates the underlying structure to the twelfth century, there is a **time gap** of about four centuries between the date of the underlying structure and the construction of the mosque.

No evidence is available to explain what transpired in the course of the intervening period of nearly four centuries;

(iii) The ASI report does not conclude that the remnants of the preexisting structure were used for the purpose of constructing the mosque (apart, that is, from the construction of the mosque on the foundation of the erstwhile structure); and

(iv) The pillars that were used in the construction of the mosque were black Kasauti stone pillars. ASI has found no evidence to show that these Kasauti pillars are

relatable to the underlying pillar bases found during the course of excavation in the structure below the mosque.

III A finding of title cannot be based in law on the archaeological findings which have been arrived at by ASI. Between the twelfth century to which the underlying structure is dated and the construction of the mosque in the sixteenth century, there is an intervening period of four centuries. No evidence has been placed on the record in relation to the course of human history between the twelfth and sixteen centuries. No evidence is available in a case of this antiquity on (i) the cause of destruction of the underlying structure; and (ii) whether the pre-existing structure was demolished for the construction of the mosque. Title to the land must be decided on settled legal principles and applying evidentiary standards which govern a civil trial.

IV Historical records of travellers (chiefly **Tieffenthaler** and the account of **Montgomery Martin** in the eighteenth century) indicate:

(i) The existence of the faith and belief of the Hindus that the disputed site was the birth-place of Lord Ram;

(ii) Identifiable places of offering worship by the Hindus including Sita Rasoi, Swargdwar and the Bedi (cradle) symbolising the birth of Lord Ram in and around the disputed site;

(iii) Prevalence of the practice of worship by pilgrims at the disputed site including by *parikrama* (circumambulation) and the presence of large congregations of devotees on the occasion of religious festivals; and

(iv) The historical presence of worshippers and the existence of worship at the disputed site even prior to the annexation of Oudh by the British and the construction of a brick-grill wall in 1857.

Beyond the above observations, the accounts of the travellers must be read with circumspection. Their personal observations must carefully be sifted from hearsay . matters of legend and lore. Consulting their accounts on matters of public history is distinct from evidence on a matter of title. An adjudication of title has to be deduced on the basis of evidence sustainable in a court of law, which has withstood the searching scrutiny of cross-examination. Similarly, the contents of gazetteers can at best provide corroborative material to evidence which emerges from the record. The court must be circumspect in drawing negative inferences from what a traveller may not have seen or observed. Title cannot be established on the basis of faith and belief above. Faith and belief are indicators towards patterns of worship at the site on the basis of which claims of possession are asserted. The court has evaluated the rival claims to possessory title in a situation in which the state has expressly stated in its written statement that it claims no interest in the land.

V The evidence indicates that despite the existence of a mosque at the site, Hindu worship at the place believed to be the birth-place of Lord Ram was not restricted. The existence of an Islamic structure at a place considered sacrosanct by the Hindus did not stop them from continuing their worship at the disputed site and within the precincts of the structure prior to the incidents of 1856-7. The physical structure of an Islamic mosque did not shake the faith and belief of Hindus that Lord Ram was born at the disputed site. On the other hand, learned counsel fairly stated that the evidence relied on by the Sunni Central Waqf Board to establish the offering of namaz by the Muslim residents commences from around 1856-7;

VI The setting up of a railing in 1857 by the British around the disputed structure of the mosque took place in the backdrop of a contestation and disputes over the claim of the Hindus to worship inside the precincts of the mosque. This furnished the context for the riots which took place between Hindus and Muslims in 1856-7. The construction of a grick-brick wall by the colonial administration was intended to ensure peace between the two communities with respect to a contested place of worship. The grill-brick wall did not constitute either a subdivision of the disputed site which was one composite property, nor did it amount to a determination of title by the colonial administration;

VII Proximate in time after the setting up of the railing, the Ramchabutra was set up in or about 1857. Ramchabutra was set up in close physical proximity to the railing. Essentially, the setting up of Ramchabutra within a hundred feet or thereabouts of the inner dome must be seen in the historical context as an expression or assertion of the Hindu right to worship at the birth-place of Lord Ram. Even after the construction of the dividing wall by the British, the Hindus continued to assert their right to pray below the central dome. This emerges from the evidentiary record indicating acts of individuals in trying to set up idols and perform puja both within and outside the precincts of the inner courtyard. Even after the setting up of the Ramchabutra, pilgrims used to pay obeisance and make offerings to what they believed to be the 'Garbh Grih' located inside the three domed structure while standing at the iron railing which divided the inner and outer courtyards. ***There is no evidence to the contrary by the Muslims to indicate that their possession of the disputed structure of the mosque was exclusive and that the offering of namaz was exclusionary of the Hindus;***

(emphasis supplied)

VIII Hindu worship at Ramchabutra, Sita Rasoi and at other religious places including the setting up of a Bhandar clearly indicated their open, exclusive and unimpeded possession of the outer courtyard. The Muslims have not been in possession of the outer courtyard. Despite the construction of the wall in 1858 by the British and the

setting up of the Ramchabutra in close-proximity of the inner dome, Hindus continued to assert their right to pray inside the three-domed structure;

IX In or about 1877, at the behest of the Hindus, another door to the outer courtyard was allowed to be opened by the administration on the northern side (Sing Dwar), in addition to the existing door on the east (Hanumat Dwar). The Deputy Commissioner declined to entertain a complaint against the opening made in the wall. The Commissioner while dismissing the appeal held that the opening up of the door was in public interest. The opening of an additional door with the permission of the British administration indicates recognition of the presence of a large congregation of Hindu devotees necessitating additional access to the site in the interest of public peace and safety;

X Testimonies of both Hindu and Muslim witnesses indicate that on religious occasions and festivals such as Ram Navami, Sawan Jhoola, Kartik Poornima, Parikrama Mela and Ram Vivah, large congregations of Hindu devotees visited the disputed premises for darshan. The oral testimony of the Hindu devotees establishes the pattern of worship and prayer at Sita Rasoi, Ramchabutra and towards the 'Garb Grih', while standing at the railing of the structure of the brick wall;

XI Hindu witnesses have indicated that Hindus used to offer prayer to the Kasauti stone pillars placed inside the mosque. Muslim witnesses have acknowledged the presence of symbols of Hindu religious significance both inside and outside the mosque. Among them, is the depiction of Varah, Jai-Vijay and Garud outside the three domed structure. They are suggestive not merely of the existence of the faith and belief but of actual worship down the centuries;

XII There can no denying the existence of the structure of the mosque since its construction in the sixteenth century with the inscription of 'Allah' on the structure. The genesis of the communal incident of 1856-7 lies in the contestation between the two communities over worship. The setting up of the railing in 1856-7 was an attempt by the administration to provide a measure of bifurcation to observe religious worship . namaz by the Muslims inside the railing within the domed structure of the mosque and worship by the Hindus outside the railing. Attempts by the Sikhs or faqirs to enter into the mosque and set up religious symbols for puja were resisted by the Muslims, resulting in the administration evicting the occupier;

XIII After the construction of the grill-brick wall in 1857, there is evidence on record to show the exclusive and unimpeded possession of the Hindus and the offering of worship in the outer courtyard. Entry into the three domed structure was possible only by seeking access through either of the two doors on the eastern and northern sides of the outer courtyard which were under the control of the Hindu devotees;

XIV On a preponderance of probabilities, there is no evidence to establish that the Muslims abandoned the mosque or ceased to perform namaz in spite of the contestation over their possession of the inner courtyard after 1858. Oral evidence indicates the continuation of namaz;

XV The contestation over the possession of the inner courtyard became the centre of the communal conflict of 1934 during the course of which the domes of the mosque sustained damage as did the structure. The repair and renovation of the mosque following the riots of 1934 at the expense of the British administration through the agency of a Muslim contractor is indicative of the fact the despite the disputes between the two communities, the structure of the mosque continued to exist as did the assertion of the Muslims of their right to pray. Namaz appears to have been offered within the mosque after 1934 though, by the time of incident of 22/23 December 1949, only Friday namaz was being offered. The reports of the Waqf Inspector of December 1949 indicate that the Sadhus and Bairagis who worshipped and resided in the outer courtyard obstructed Muslims from passing through the courtyard, which was under their control, for namaz within the mosque. Hence the Waqf Inspector noted that worship within the mosque was possible on Fridays with the assistance of the police;

XVI The events preceding 22/23 December 1949 indicate the build-up of a large presence of Bairagis in the outer courtyard and the expression of his apprehension by the Superintendent of Police that the Hindus would seek forcible entry into the precincts of the mosque to install idols. In spite of written intimations to him, the Deputy Commissioner and District Magistrate (K K Nayyar) paid no heed and rejected the apprehension of the Superintendent of Police to the safety of the mosque as baseless. The apprehension was borne out by the incident which took place on the night between 22/23 December 1949, when a group of fifty to sixty persons installed idols on the pulpit of the mosque below the central dome. This led to the desecration of the mosque and the ouster of the Muslims otherwise than by the due process of law. The inner courtyard was thereafter attached in proceedings under Section 145 CrPC 1898 on 29 December 1949 and the receiver took possession;

XVII On 6 December 1992, the structure of the mosque was brought down and the mosque was destroyed. The destruction of the mosque took place in breach of the order of *status quo* and an assurance given to this Court. The destruction of the mosque and the obliteration of the Islamic structure was an egregious violation of the rule of law;

XVIII The net result, as it emerges from the evidentiary record is thus:

(i) The disputed site is one composite whole. The railing set up in 1856-7 did not either bring about a sub-division of the land or any determination of title;

(ii) The Sunni Central Waqf Board has not established its case of a dedication by user;

(iii) The alternate plea of adverse possession has not been established by the Sunni Central Waqf Board as it failed to meet the requirements of adverse possession;

(iv) The Hindus have been in exclusive and unimpeded possession of the outer courtyard where they have continued worship;

(v) The inner courtyard has been a contested site with conflicting claims of the Hindus and Muslims;

(vi) The existence of the structure of the mosque until 6 December 1992 does not admit any contestation. The submission that the mosque did not accord with Islamic tenets stands rejected. The evidence indicates that there was no abandonment of the mosque by Muslims. Namaz was observed on Fridays towards December 1949, the last namaz being on 16 December 1949;

(vii) The damage to the mosque in 1934, its desecration in 1949 leading to the ouster of the Muslims and the eventual destruction on 6 December 1992 constituted a serious violation of the rule of law; and

(viii) Consistent with the principles of justice, equity and good conscience, both Suits 4 and 5 will have to be decreed and the relief moulded in a manner which preserves the constitutional values of justice, fraternity, human dignity and the equality of religious belief.

XVIII The Hindus have established a clear case of a possessory title to the outside courtyard by virtue of long, continued and unimpeded worship at the Ramchabutra and other objects of religious signficance. The Hindus and the Muslims have contested claims to the offering worship within the three domed structure in the inner courtyard. The assertion by the Hindus of their entitlement to offer worship inside has been contested by the Muslims.

Finally, while granting the relief and directions, the Apex Court stated as follows:

805. We accordingly order and direct as follows:

1. (i) Suit 3 instituted by Nirmohi Akhara is held to be barred by limitation and shall accordingly stand dismissed;

(ii) Suit 4 instituted by the Sunni Central Waqf Board and other plaintiffs is held to be within limitation. The judgment of the High Court holding Suit 4 to be barred by limitation is reversed; and

(iii) Suit 5 is held to be within limitation.

2. Suit 5 is held to be maintainable at the behest of the first plaintiff who is represented by the third plaintiff. There shall be a decree in terms of prayer clauses (A) and (B) of the suit, subject to the following directions:

(i) The Central Government shall, within a period of three months from the date of this judgment, formulate a scheme pursuant to the powers vested in it under Sections 6 and 7 of the Acquisition of Certain Area at Ayodhya Act 1993. The scheme shall envisage the setting up of a trust with a Board of Trustees or any other appropriate body under Section 6. The scheme to be framed by the Central Government shall make necessary provisions in regard to the functioning of the trust or body including on matters relating to the management of the trust, the powers of the trustees including the construction of a temple and all necessary, incidental and supplemental matters;

(ii) Possession of the inner and outer courtyards shall be handed over to the Board of Trustees of the Trust or to the body so constituted. The Central Government will be at liberty to make suitable provisions in respect of the rest of the acquired land by handing it over to the Trust or body for management and development in terms of the scheme framed in accordance with the above directions; and

(iii) Possession of the disputed property shall continue to vest in the statutory receiver under the Central Government, untill in exercise of its jurisdiction under Section 6 of the Ayodhya Act of 1993, a notification is issued vesting the property in the trust or other body.

3. (i) Simultaneously, with the handing over of the disputed property to the Trust or body under clause 2 above, a suitable plot of land admeasuring 5 acres shall be handed over to the Sunni Central Waqf Board, the plaintiff in Suit 4.

(ii) The land shall be allotted either by:

(a) The Central Government out of the land acquired under the Ayodhya Act 1993; or

(b) The State Government at a suitable prominent place in Ayodhya;

The Central Government and the State Government shall act in consultation with each other to effectuate the above allotment in the period stipulated.

(iii) The Sunni Central Waqf Board would be at liberty, on the allotment of the land to take all necessary steps for the construction of a mosque on the land so allotted together with other associated facilities;

(iv) Suit 4 shall stand decreed to this extent in terms of the above directions; and

(v) The directions for the allotment of land to the Sunni Central Waqf Board in Suit 4 are issued in pursuance of the powers vested in this Court under Article 142 of the Constitution.

4. In exercise of the powers vested in this Court under Article 142 of the Constitution, we direct that in the scheme to be framed by the Central Government, appropriate representation may be given in the Trust or body, to the Nirmohi Akhara in such manner as the Central Government deems fit.

5. The right of the plaintiff in Suit 1 to worship at the disputed property is affirmed subject to any restrictions imposed by the relevant authorities with respect to the maintenance of peace and order and the performance of orderly worship.