M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors. (decided on 09.11.2019)

SUMMARY

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BACKGROUND:

This Court is tasked with the resolution of a dispute whose origins are as old as the idea of India itself. The events associated with the dispute have spanned the Mughal empire, colonial rule and the present constitutional regime. The dispute in these appeals arises out of four regular suits which were instituted between 1950 and 1989. Before the Allahabad High Court, voluminous evidence, both oral and documentary was led, resulting in three judgements running the course of 4304 pages.

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 Sadarm in the District of Faizabad. An old structure of a mosque existed at the site until 6 December 1992. 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.

The Central Government acquired an area of about 68 acres, including the premises in dispute, by a legislation called the Acquisition of Certain Area at Ayodhya Act 1993 (Ayodhya Acquisition Act 1993). Sections 3 and 4 envisaged the abatement of all suits which were pending before the High Court. Simultaneously, the President of India made a reference to this Court under Article 143 of the Constitution. The reference was on *(w)hether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janam Bhoomi and Babari Masjid (including the premises of the inner and outer courtyards on such structure) in the area on which the structure stands.*

Writ petitions were filed before the High Court of Allahabad and this Court challenging the validity of the Act of 1993. All the petitions and the reference by the President were heard together and decided by a judgment dated 24 October 1994. The decision of a Constitution Bench of this Court, titled Dr M Ismail Faruqui v. Union of India[1] held Section 4(3), which

[1] (1994) 6 SCC 360

provided for the abatement of all pending suits as unconstitutional. The rest of the Act of 1993 was held to be valid.

During the course of the hearings, the High Court issued directions on 23 October 2002 to the Archaeological Survey of India (ASI) to carry out a scientific investigation and have the disputed site surveyed by Ground Penetrating Technology or Geo-Radiology (GPR). In order to facilitate a further analysis, the High Court directed the ASI on 5 March 2003 to undertake the excavation of the disputed site. A fourteen-member team was constituted, and a site plan was prepared indicating the number of trenches to be laid out and excavated.

On 30 September 2010, the Full Bench of the High Court comprising of Justice S U Khan, Justice Sudhir Agarwal and Justice D V Sharma delivered the judgment, which is in appeal here. The High Court had before it 533 exhibits and depositions of 87 witnesses traversing 13,990 pages. Besides this, counsel relied on over a thousand reference books in Sanskrit, Hindi, Urdu, Persian, Turkish, French and English, ranging from subjects as diverse as history, culture, archaeology and religion. Justices S U Khan and Sudhir Agarwal observed: *We have no benefit of testifying the correctness of the contents of the said documents. In the absence of any one available to prove the contents of the said documents, in our view, the same cannot be relied and therefore, nothing turns out from the aforesaid documents either in favour or against any of the parties.*

On 5 December 2017, a three judge Bench of this Court rejected the plea that the appeals against the impugned judgement be referred to a larger Bench in view of certain observations of the Constitution Bench in *Ismail Faruqui*. On 14 March 2018, a three judge Bench heard arguments on whether the judgment in *Ismail Faruqui* required reconsideration. On 27 September 2018, the three judge Bench of this Court by a majority of 2:1 declined to refer the judgment in *Ismail Faruqui* for reconsideration and listed the appeals against the impugned judgement for hearing. By an administrative order dated 8 January 2019 made pursuant to the provisions of Order VI Rule 1 of the Supreme Court Rules, 2013, the Chief Justice of India constituted a five judge Bench to hear the appeals.

On 26 February 2019, this Court referred the parties to a Court appointed and monitored mediation to explore the possibility of bringing about a permanent solution to the issues raised in the appeals. On 8 March 2019, a panel of mediators comprising of (i) Justice Fakkir Mohamed Ibrahim Kalifulla, a former Judge of this Court; (ii) Sri Sri Ravi Shankar; and (iii) Mr Sriram Panchu, Senior Advocate was constituted. Time granted to the mediators to complete the mediation proceedings was extended on 10 May 2019. Since no settlement had been reached, on 2 August 2019, the hearing of the appeals was directed to commence from 6 August 2019.

Final arguments were concluded in the batch of appeals on 16 October 2019. On the same day, the mediation panel submitted a report titled ‘Final Report of the Committee’ stating that a settlement had been arrived at by some of the parties to the present dispute. The settlement was

signed by Mr Zufar Ahmad Faruqi, Chairman of the Sunni Central Waqf Board. Though under the settlement, the Sunni Central Waqf Board agreed to relinquish all its rights, interests and claims over the disputed land, this was subject to the fulfillment of certain conditions stipulated. The settlement agreement received by this Court from the mediation panel has not been agreed to or signed by all the parties to the present dispute. Moreover, it is only conditional on certain stipulations being fulfilled. Hence, the settlement cannot be treated to be a binding or concluded agreement between the parties to the dispute.

It is necessary to note 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. Whether the second plaintiff (Asthan Sri Ram Janam Bhumi) is a juristic person has however been the subject of controversy in the oral proceedings before us.

A. SOME BASIC CLARIFICATIONS BY SUPREME COURT IN OPPOSITION TO HIGH COURT's VIEWS:

High Court	Supreme Court
1. It is accepted by the counsel appearing on behalf of the Sunni Central Waqf Board that the sole basis for determining the date of the construction of the mosque and correlating it to Babur consists of the inscriptions stated to have been installed on the mosque as referred to in the gazetteers and other documents. 2. As regards the inscriptions noted by Fuhrer, the third inscription refers to the foundation of the construction of the mosque being laid in Hijri 930 which corresponds to 1523 A.D. This is prior to the invasion by Babur and the battle at Panipat which resulted in the defeat of Ibrahim Lodhi. It shows that the construction of the mosque was not in 1528 A.D. Inscription XLI mentions the name of Mir Khan while inscription XLII refers to the construction of the mosque as Hijri 930. 3. As regards the work of Beveridge, it is evident that she had neither seen the original text nor had she translated the text of the inscriptions herself. Beveridge states that she made ―a few slight changes in the term of expression‖. According to her, the text of the two inscriptions was incomplete and was not legible. 4. Justice Sudhir Agarwal while adverting to the work of Ashraf Husain and Z A Desai took serious note of the ―fallacy and complete	1. <u>Contrary conclusion to the findings:</u> Justice S U Khan - Finding: *Muslims have not been able to prove that the land belonged to Babur under whose orders the mosque was constructed* Conclusion: *The disputed structure was constructed as mosque by or under orders of Babar*. Justice Sudhir Agarwal- *The defendants have failed to prove that the property in dispute was constructed by… Emperor Babar in 1528 AD..and also failed to prove that the same was built by Mir Baqi. Accordingly, the question as to whether Babar constructed the property in dispute as a 'mosque' does not arise and needs no answer.* Justice D V Sharma *It transpires that the temple was demolished and the mosque was constructed at the site of the old Hindu temple by Mir Baqi at the command of Babur.*

misrepresentation of the author in publishing a text under the authority of the ASI without regard for its accuracy, correctness and genuineness: *"...Both these inscriptions...are said to be non-available by observing —of these the last mentioned two epigraphs have disappeared‖. The time of disappearance according to Maulvi Ashraf Husain was 1934 A.D. when a communal riot took place at Ayodhya. However, he claimed to have got an inked rubbing on one of the two inscriptions from Syed Badrul Hasan of Faizabad. The whereabouts of Syed Badrul Hasan, who he was, what was his status, in what way and manner he could get that ink rubbing of the said inscription and what is the authenticity to believe it to be correct when original text of the inscription are not known. There is nothing to co-relate the text he got as the correct text of the inscription found in the disputed building claimed to have lost in 1934.*

5. —Tuzuk-i-Babri: The records for the period from 2 April 1528 till 17 September 1528 are missing. Out of this period, the period from 2 April 1528 to 15 September 1528 was of 934 Hijri while the period from 15 September 1528 to 17 September 1528 was of 935 Hijri.

Justice Sudhir Agarwal noted in the High Court that the crucial year was 935 Hijri and the missing record was only of three days.

Since Babur did not enter Ayodhya himself, there was no question of a demolition of a temple by him and a construction of a mosque. The absence in Babur-Nama of a reference to the construction of a mosque has been relied upon as a factor to discredit the inscriptions which have been analysed earlier.

6. Mr Mishra urged that there is no reference in the Ain-e-akbari to the construction of a mosque at Ayodhya. The text refers to certain cities as being dedicated to the divinities, among them being Kashi and Ayodhya. By its order dated 18 March 2010, the High Court permitted the above text to be relied on under the provisions of Section 57(13) of the Evidence Act 1872.

2. The basic issue, however, is <u>whether it was necessary for the High Court to enter into this thicket on the basis of the pleadings of the parties.</u> Hence, both in the pleading in Suit 4 and in Suit 5, there was essentially no dispute about the fact that the mosque was raised in 1528 A.D. by or at the behest of Babur. Nirmohi Akhara in Suit 3 did not accept that the structure is a mosque at all for. The case of the Nirmohis will be considered separately.

7. The judge observed that ―Whether the building in dispute is a mosque, treated to be a mosque, believed to be a mosque and practiced as a mosque have to be decided not in terms of the tenets of the Shariat but according to how people believed and conducted themselves over a length of time. The High Court held that whether Muslims had used the mosque for offering worship immediately after its construction had not been proved either way but there was evidence to indicate that Muslims had visited the mosque in order to offer namaz after the partition wall was set up in 1856-57 until the last namaz was offered in the inner courtyard on 16 December 1949,	3. It is inappropriate for this Court to enter upon an area of theology and to assume the role of an interpreter of the Hadees. The true test is whether those who believe and worship have faith in the religious efficacy of the place where they pray. The belief and faith of the worshipper in offering namaz at a place which is for the worshipper a mosque It would be preposterous for this Court to question it on the ground that a true Muslim would not offer prayer in a place which does not meet an extreme interpretation of doctrine selectively advanced by Mr Mishra. Above all, the practice of religion, Islam being no exception, varies according to the culture and social context. Our Court is founded on and owes its existence to a constitutional order. We must firmly reject any attempt to lead the court to interpret religious doctrine in an absolute and extreme form and question the faith of worshippers. Nothing would be as destructive of the values underlying Article 25 of the Constitution.
8. Justice D V Sharma observed as follows: *Section 9 of Places of Worship (Special Provisions) Act 1991 is very wide. In absence of any ecclesiastical Courts any religious dispute is cognizable, except in very rare cases where the declaration sought may be what constitutes religious rite. Places of Worship (Special Provisions) Act, 1991 does not debar those cases where declaration is sought or a period prior to the Act came into force or for enforcement of right which was recognized before coming into force of the Act*‖	4. In *S R Bommai v Union of India*[2], Justice B P Jeevan Reddy *Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions*. Hat is material is that it is a constitutional goal and a basic feature of the Constitution as affirmed in *Kesavananda Bharati* [*Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1] and *Indira N. Gandhi* v. *Raj Narain* [1975 Supp SCC 1 : (1976) 2 SCR 347] . Any step inconsistent with this constitutional policy is, in plain words, unconstitutional. 5. Section 4 *of Places of Worship (Special Provisions) Act 1991* preserves the religious character of a place of worship as it existed on 15 August 1947: *if any suit,*

[2] (1994) 3 SCC 1

	appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act, such suit, appeal or other proceeding shall not so abate 6. Clearly, in the face of the statutory mandate, the exception which has been carved out by Justice D V Sharma runs contrary to the terms of the legislation and is therefore erroneous.

B. ***WHETHER THE SECOND PLAINTIFF (ASTHAN SRI RAM JANAM BHUMI) IS A JURISTIC PERSON?***

Arguments on behalf of the plaintiffs in Suit 5	**Arguments on behalf of the Sunni Central Waqf Board**
1. 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. 2. *Parikrama* (circumambulation) around the disputed spot with the faith and belief that it is the birth-place of Lord Ram 3. There is a distinction between: (i)the land being a deity; (ii)the land being the abode of a deity; and (iii)the land being the property of a deity. 4. Land constituting the disputed site, is an object of worship and is itself the deity. 5. Any division of the property will amount to a destruction of the deity. 6. It was contended that land which is *res nullius* or *res extra commercium* cannot be acquired by adverse possession. 7. The land is a *Swayambhu* deity (i.e. self-manifested deity) worship at the disputed site was not offered only to Lord Ram but the very land on which Lord Ram is said to have been	1. While the faith and belief of a sect that religious significance attaches to the birth-place of Lord Ram cannot be questioned, the precise site which constitutes the place of birth is in dispute. 2. The subjective belief of a certain section of devotees cannot lead to the objective consequence of a proprietary claim in law. 3. The conferral of juristic personality on the second plaintiff would create two legal regimes – one applicable to idols and the other to land – both with distinct rights, power, duties and interests. 4. *Parikrama* is merely a form of worship and not a method of delineating the boundaries of a property. 5. *Swayambhu* deity would necessarily need to be based on: (i) some evidence of the manifestation of God in a material form followed by; (ii) faith and belief that a particular piece

born. 8. Ram Janmabhumi is a *Swayambhu*‘ deity, no dedication or consecration is required for the court to recognise its juristic personality. It was contended that the deity, by its very nature necessitated the performance of a *parikrama* around it, which also delineated the boundaries of the property upon which juristic personality must be conferred. 9. That no material manifestation is required for the conferral of juristic personality in the case of a *Swayambhu* deity. In this view, the performance of worship with the faith and belief that corporeal property represents the divine is adequate for the conferral of juristic personality. Second, in the alternative, assuming that a material manifestation is a pre-requisite for a *Swayambhu* deity, the land at the disputed site represents the material manifestation and given the performance of religious worship, no further evidence is required for the conferral of juristic personality.	of corporeal property represents the divine; and (iii) in the absence of traditional *prana parishta* ceremonies of consecration, some institutionalised worship constituting recognition by the religion itself that the manifestation was a deity.

SUPREME COURT:

1. There is a distinction between the ownership of the property by the temple, and the conferral of legal personality on land. Where land is owned by a person, it cannot be a juristic person, for no person can own a deity as a juristic person.
2. The method of worshipping an established deity as a real person is separate and distinct from the conferral of juristic personality in law.
3. The recognition of the Hindu idol as a legal or ―juristic‖ person is therefore based on two premises employed by courts.
    a. 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.
    b. 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.
    c. 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.
    d. the Hindu idol is a legal person. and the property endowed to the pious purpose is owned by the idol as a legal person in an ideal sense.

e. 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.

4. The cases referred by the plaintiff instead affirm that the practice of conferring legal personality on Hindu idols was evolved by courts to ensure that the law adequately protected the properties endowed to religious purposes. In the case of an endowment, courts have recognised the charitable or religious purpose situated in the institution as a basis for conferring juristic personality on the institution.
5. The first difficulty that arises: how such immovable property is to be delineated. The *parikrama* is not performed in order to mark the exact boundaries of the property to which juristic personality is conferred.
6. The conferral of legal personality on Hindu idols arose due to the fundamental question of who the property was dedicated to and in whom the dedicated land vested. The two clear interests that the law necessitated protection of were the interests of the devotees and the protection of the properties from mismanagement. In the present case, there exists no act of dedication and therefore the question of whom the property was dedicated to does not arise and consequently the need to recognise the pious purpose behind the dedication itself as a legal person also does not arise.
7. This Court in *Yogendra Nath Naskar v CIT, Calcutta*[3] drew a distinction between the perception of the devotee that the idol is a manifestation of the Supreme Being and the position in law that legal personality is conferred on the pious purpose of the testator that is entitled to legal protection. However, as a matter of law, every manifestation of the Supreme Being is not a legal person.
8. The land holds no distinguishing features that could be recognised by this court as evidence of a manifestation of God at the disputed site. -- would open the floodgates for parties.
9. 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
10. The Privy Council in *The Mosque, Masjid Shahid Ganj v Shiromani Gurdwara Parbandhak Committee, Amritsar*[4] 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. 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.

[3] (1969) 1 SCC 555
[4] AIR 1940 PC 11

11. The conferral of juristic personality is a legal innovation applied by courts in situations where the existing law of the day has certain shortcomings or such conferral increases the convenience of adjudication. Where the law is capable of adequately protecting the interests of the devotees and ensuring the accountable management of religious sites without the conferral of legal personality, it is not necessary to embark on the journey of creating legal fictions that may have unintended consequences in the future.
12. From Shahid Gunj to Ayodhya, in a country like ours where contesting claims over property by religious communities are inevitable, our courts cannot reduce questions of title, which fall firmly within the secular domain and outside the rubric of religion, to a question of which community‘s faith is stronger.
13. It is thus held that the second plaintiff in Suit 5 –Asthan Shri Ram Janam Bhumi is not a juristic person.

C. ARGUMENTS ON BEHALF OF NIRMOHI AKHARA IN SUITS 3 and 5:

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 Procedure1898. 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 Boardǁ) and other Muslim residents of Ayodhya instituted a suit in 1961 for a declaration of their title to the disputed site.

1. The claim of Nirmohi Akhara is in the capacity of a shebait and as a manager of the temple.
2. It is submitted that the denial or obstruction of Nirmohi Akhara‘s absolute‘ shebait rights of management and charge is a continuing wrong and by virtue of Section 23, a fresh cause of action arose every day.
3. Nirmohi Akhara opposes the maintainability of Suit 5 on the ground that as a shebait, it alone is entitled to represent the deity of Lord Ram.
4. It denies the locus of the next friend as the third plaintiff to represent the deities. The third plaintiff, it has been asserted is not a worshipper of the deity and is a Vaishnavite and has no locus to represent the deity or the ―so-called Asthan.
5. It specifically denies the status of the second plaintiff as a juridical person. According to the written statement, Asthan simply means a place and is not a juridical person.
6. Suit 3 was barred by limitation, a dismissal of that suit only extinguished the remedy of Nirmohi Akhara to file a suit for possession but did not extinguish the Nirmohi’s rights as shebaits. Therefore, Nirmohi Akahara continued to be shebaits and possess an exclusive right to sue on behalf of the idols of Lord Ram even in 1989.

7. It is the submission of Nirmohi Akhara that by virtue of their long-standing presence at the disputed site, and their exercise of certain actions with respect to the idol, they are shebaits *de facto*.
8. Although a deity is treated as a minor because of its inability to sue except through a human agency, a deity is not a minor for the purposes of limitation.
9. Nirmohi Akhara set up the plea that the trust which has been set up in 1985 was with an ―obvious design‖ to damage the title and interest of the Nirmohi Akhara.

SUPREME COURT:

C.1. WHO IS A SHEBAIT?

1. A four judge Bench of this Court in *Angurbala Mullick v Debabrata Mullick*[5] dealt with the nature and position of a shebait. Justice B K Mukherjea (as he then was) speaking for the Court held that the position of a shebait in regard to the debutter property does not exactly correspond to that of a trustee in English law.
   Privy Council's decision in *Vidya Varuthi Thirtha v Balusami Ayyar*[6], this Court observed: *The shebait has not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the Judicial Committee observed in the above case, in almost all such endowments the shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Thus, in the conception of shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property.*

C.2 WHETHER SUIT 3 IS BARRED BY LIMITATION?

2. Section 145 was included in Chapter XII of the Code of 1898, titled Disputes as to Immovable Property. The provision relates to disputes regarding possession of land or water or its boundaries which may result in breach of the peace. 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. The property held in attachment in proceedings under Section 145 is *custodia legis*.
3. On 29 December 1949, a preliminary order under sub-section (1) of Section 145 was issued by the Additional City Magistrate, Faizabad-cumAyodhya. Pursuant to the order

[5] 1951 SCR 1125
[6] AIR 1922 PC 123

of the Magistrate, only two or three pujaris were permitted to go inside the place. Nothing prevented Nirmohi Akhara from filing a declaratory suit for possession and title.

4. In order to bring the suit within the purview of Article 142, the following requirements must be fulfilled:
   a. The suit must be for possession of immoveable property;
   b. The plaintiff must establish having been in possession of the property; and
   c. The plaintiff should have been dispossessed or must have discontinued possession while in possession of the property.

C.3 CONTINUING WRONG

5. A two judge of this Court in Commissioner of Wealth Tax, Amritsar v Suresh Seth[7]: *The distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default.*
6. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, where positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature. There was no right inhering in Nirmohi Akhara which was disturbed by the order of the Magistrate and hence, there was no question of the principle of continuing wrong being attracted.
7. In view of the above analysis of the oral evidence and documentary material, the following conclusions can be drawn:
   a. There are serious infirmities in the oral accounts of Nirmohi witnesses that the disputed structure was not a mosque but the Janmabhumi temple;
   b. 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;
   c. Contrary to the claims of Nirmohi Akhara, documentary evidence establishes the existence of the structure of the mosque between 1934 and 1949.

<u>Suit 3 has been held to be barred by limitation</u>

[7] (1981) 2 SCC 790

C.4 WHETHER SHEBAITS HAVE AN EXCLUSIVE RIGHT TO SUE?

8. The recognition of a person or a group of persons as shebaits is a substantive conferment of the right to manage the affairs of the deity. A necessary adjunct of the status of a shebait, is the right to brings actions on the behalf of an idol and bind it and its properties to the outcomes. Where a person is in complete and continuous management of the deity's affairs coupled with long, exclusive and uninterrupted possession of the appurtenant property, such a person may be recognised as a shebait despite the absence of a legal title to the rights of a shebait. Unlike in the case of a trust, dedicated property does not legally vest in the shebait. There is thus a distinction between the proprietary right of a trustee in English law and a shebait in Hindu Law Chief Justice B K Mukherjea, in his seminal work Hindu Law of Religious Charitable *Trusts states: ―In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of the cestui que trust. In a Hindu religions endowment, the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person, and the Shebait or Mahant is a mere manager.*[8]
9. A pujari is a servant or appointee of a shebait and gains no independent right as a shebait despite having conducted the ceremonies for a long period of time. A shebait is vested with the authority to manage the properties of the deity and ensure the fulfilment of the purpose for which the property was dedicated. 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.
10. 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. This understanding is summarised by Justice B K Mukherjea in ―The Hindu Law of Religious and Charitable Trusts‖ in the following manner: ―This decision [in *Maharaja Jagadindra Nath Roy Bahadur v Rani Hemanta Kumari Debi*[9]], therefore, establishes three things: -

    (1) That the right of a suit in respect of the deity's property is in the Shebait;

[8] B.K. Mukherjea, The Hindu Law of Religious and Charitable Trust (5th Edn. Eastern Law House, 1983) at page 204
[9] (1903-04) 31 IA 203

(2) this right is a personal right of the Shebait which entitles him to claim the privilege afforded by the Limitation Act; and

(3) the Shebait can sue in his own name and the deity need not figure as a plaintiff in the suit, though the pleadings must show that the Shebait is suing as such.[10]

C.5 SUIT BY NEXT FRIEND

11. 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. In *Bishwanath v Sri Thakur Radha Ballabhji*[11]the court observed: *Should it be held that a worshipper can file only a suit for the removal of the Shebait and for the appointment of another in order to enable him to take steps to recover the property, such a procedure will be rather prolonged and a complicated one and the interest of the idol may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol. It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment.*
12. 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. A solution offered by Justice Pal in *Tarit Bhushan Rai v Sri Sri Iswar Sridhar Salagram Shila Thakur*[12] and urged by Dr Dhavan in the present proceedings, is that only court appointed next friends may sue on behalf of the idol. No doubt this would satisfy the court that the next friend is *bona fide* and can satisfactorily represent 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.
13. 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. the Madras High

[10] B.K. Mukherjea, The Hindu Law of Religious and Charitable Trust (5th Edn. Eastern Law House, 1983) at pages 257-258
[11] (1967) 2 SCR 618
[12] AIR 1942 Cal 99

Court in *Sankarnarayanan Iyer v Sri Poovananathaswami Temple*[13] *—De facto means, —by the title of possession‖, in antithesis to —de jure i.e., —by the title of right. So long as the action is for the benefit of the real owner, namely, the idol or the mutt, and the person bringing the action is the only person who is in management of the affairs of the idol or the mutt for the time being, there is no reason why such person should not be allowed to maintain the action on behalf of the idol or the mutt.*

C.6 APPLICATION OF ABOVE PRINCIPLES IN THE PRESENT CASE:

14. Suit 5 was instituted in 1989 by Deoki Nandan Agarwal, a Vaishnavite. The principal deity of Vaishnavas is Lord Vishnu. The Vaishnava sect worships Lord Ram as one of the many avatars of Lord Vishnu. Deoki Nandan Agarwal was appointed as next friend to the first and the second plaintiffs by an order of the Civil Judge dated 1 July 1989. There was no reason for this Court to examine the correctness of the order of the High Court dismissing the application to permit TP Verma to retire from acting as the next friend. The Allahabad High Court subsequently appointed Triloki Nath Pande a next friend by an order dated 18 March 2010.
15. Both Justices Viswanatha Sastri and Raghava Rao in *Sankarnarayanan Iyer v Sri Poovananathaswami Temple*[14] 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. 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.
16. Nirmohi Akhara has failed to prove that at the material time, the disputed structure was a temple which was in its possession and that no incident had taken place on 22/23 December 1949. Absent exclusive possession of the inner courtyard, the claim that Nirmohi Akhara was managing the inner courtyard as shebaits does not arise.
17. 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.
18. 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.

<u>The first plaintiff in Suit 5 is a juristic person</u>

[13] AIR 1949 Mad 721
[14] AIR 1949 Mad 721

C.7 WHETHER SUIT 5 CAN BE HELD TO BE WITHIN LIMITATION ON THE GROUND THAT A DEITY IS A PERPETUAL MINOR:

19. Section 10 applies to suits filed against: (i) A person in whom property has become vested in trust for a specific purpose; and (ii) Legal representatives and assigns of such a trustee.
20. In B K Mukherjea's ―The Hindu Law of Religious and Charitable Trust‖, the position of law has been thus summarised: *For purposes of Limitation Act the idol does not enjoy any privilege and regarding contractual rights also the position of the idol is the same as that of any other artificial person. The provisions of the Civil Procedure Code relating to suits by minors or persons of unsound mind do not in terms at least apply to an idol; and to build up a law of procedure upon the fiction that the idol is an infant would lead to manifestly undesirable and anomalous consequences.*[15]
21. In a decision of a Division Bench of the Calcutta High Court in *Tarit Bhushan Rai v Sri Sri Iswar Sridhar Salagram Shila Thakur*[16], Nasim Ali J noted the similarities and points of distinction between the position of a minor and an idol in Hindu Law: ―

The points of similarity between a minor and a Hindu idol are:

(1) Both have the capacity of owning property.

(2) Both are incapable of managing their properties and protecting their own interests.

(3) The properties of both are managed and protected by another human being. The manager of a minor is his legal guardian and the manager of an idol is its shebait.

(4) The powers of their managers are similar.

(5) Both have got the right to sue.

(6) The bar of S. 11 and Order 9, R. 9, Civil P.C., applies to both of them.

The points of difference between the two are:

(1) A Hindu idol is a juristic or artificial person but a minor is a natural person.

(2) A Hindu idol exists for its own interest as well as for the interests of its worshippers but a minor does not exist for the interests of anybody else.

(3) The Contract Act (Substantive law) has taken away the legal capacity of a minor to contract but the legal capacity of a Hindu idol to contract has not been affected by this Act or by any other statute.

(4) The Limitation Act (an adjective law) has exempted a minor from the operation of the bar of limitation but this protection has not been extended to a Hindu idol.

22. The Suit by Nirmohi Akhara (Suit 3) was for management and charge of what it described as the Ram Janmabhumi temple. Its claim of being a shebait had not, as of the date of the institution of Suit 3, been adjudicated. It was not a de-jure shebait (there being no deed of dedication) and its claim of being a de facto shebait had to be established on evidence. Suit 5 is founded on the plea that the needs and concerns of the deity of Lord

[15] B.K. Mukherjea, The Hindu Law of Religious and Charitable Trust, 5th Edn. Eastern Law House, (1983) at pages 256-25

[16] AIR 1942 Cal 99

Ram were not being protected and that the parties to the earlier suits were pursuing their own interests.

It must be held that Suit 5 is instituted within the period of limitation.

D. RULING ON SUIT 4: ISSUE OF LIMITATION

The case of the plaintiffs was that the act of entering upon the mosque on 23 December 1949 and placing idols inside it was intended to destroy, damage and defile the character of the mosque and that by doing so the mosque stood desecrated. Moreover, it is in that context that the pleading in paragraph 23 is that the cause of action arose on 23 December 1949 when the mosque was desecrated and interference in the worship by the Muslims was caused and loss of possession by the Muslims.

The evidence on the record indicates that after the idols were introduced into the mosque on 23 December 1949, worship of the idols was conducted by the priests within the precincts of the mosque. This was an ouster of possession.

SUPREME COURT:

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. 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.

E. PERUSAL OF EVIDENCES BY THE SUPREME COURT

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.

E.1 The Code of Civil Procedure: Section 75 and Order XXVI

While directing the ASI to carry out a scientific investigation, the High Court was exercising its powers under Section 75 and Rule 10A of Order XXVI. Rule 10(2) stipulates

that the report and the evidence taken by the commissioner ―shall be evidence in the suit‖. There is a mandate of the statute that the report and the evidence be treated as evidence in the suit and that it ―shall form part of the record‖. However, either the court on its own accord or any of the parties to the suit (with the permission of the court) may examine the Commissioner personally. This is an enabling provision under which the Commissioner can be examined either by the court on its own accord or at the behest of a party to the suit.

There is no dispute about the factual position that none of the parties sought to examine the Commissioner in terms of the provisions contained in Rule 10(2) of Order XXVI which, as seen above, are applicable by virtue of Rule 10A(2) to a Commission constituted for a scientific investigation.

The GPR survey report dated 17 February 2003 found a variety of anomalies ranging from 0.5 to 5.5 meters in depth that could be associated with ancient and contemporaneous structures such as pillars, foundations walls and slab flooring extending over a large portion of the site. The survey report however indicated that these anomalies were required to be confirmed by systematic ground trothing', such as by archaeological trenching. Out of 184 anomalies detected by the GPR survey, 39 were confirmed during excavation.

On 5 March 2003, when the High Court directed the ASI to excavate the site, it was in order to determine: ―*Whether there was any temple/structure which was demolished and a mosque was constructed on the disputed site.* The ASI presented its final report dated 22 August 2003 opining: *indicative of remains which are distinctive features found associated with the temples of north India.*

The report which has been submitted by the ASI is an opinion; an opinion nevertheless of an expert governmental agency in the area of archaeology. The report constitutes the opinion of an expert. Expert opinion has to be sieved and evaluated by the court and cannot be conclusive in and of itself.

While considering archaeological evidence within the framework of Section 45 of the Evidence Act and the court-ordered excavation in the context of the provisions of Rule 10A of Order XXVI of the CPC, it is nonetheless necessary for the court to appreciate both the strength and the limits of the discipline. Archaeology is no exception.

The excavation in the present case does in fact suggest a confluence of civilisations, cultures and traditions. Carefully analysing these depositions, the issue essentially is whether this will discredit the overall findings contained in the ASI report. In specialised subjects, experts may and do differ. The statement that some of the fragments belong to an Islamic structure has in fact been noticed in the ASI report. The report specifically speaks of those fragments denoted by plates 92-94 which ―can clearly be associated the Islamic architecture on stylistic ground‖. Hence, the ASI report delineated those architectural recoveries which belong to Islamic

architecture of the sixteenth century. Even taking the opinion of DW 20/5 and PW 32 that the recoveries may also be consistent with a palace or a Buddhist and Jain structures, the noteworthy point that emerges is that those fragments are of a non-Islamic origin (except for those specific artefacts which have been identified to be of an Islamic origin by ASI, as noted above).

However, the test which the court must apply is whether on a preponderance of probabilities, the conclusions which have been drawn by the ASI are justified.

It is sufficient to note that the evidence on the record consisting of the report of the Commissioner dated 3 August 1950 as well as the coloured and black and white albums of photographs indicate :

1. Firstly, the inscriptions of Allah on the disputed structure, secondly,
2. The presence of black Kasauti stone pillars containing some images of Hindu Gods and Goddesses and
3. Thirdly, a depiction of a *garuda* flanked by lions which would appear to be of a non-Islamic origin. Inscriptions of an Islamic religious origin and engravings of a Hindu religious character have co-existed on the disputed structure.
4. There is an absence of any depiction of Hindu Gods and Goddesses on the Kasauti stone pillars.
5. Report dated 3 February 2002 before the High Court of Dr K V Ramesh who is an epigraphist, pertaining to the Ayodhya Vishnu Hari temple inscription‖.He has furnished a translation of the original inscription and has indicated the basis on which he deduced that it relates to the twelfth century. He notes that the epigraphists mention Govindachandra who belonged to the Gahadavala dynasty and ruled between 1114 and 1155 A.D. Moreover, the chaste Sanskrit, orthographical features and palaeography confirmed (according to Dr Ramesh) that the inscription belongs to the twelfth century A.D. Dr Ramesh also spoke about verses 21 to 24 mentioning the construction of a lofty stone temple by Meghasuta dedicated to Lord Vishnu Hari. He was succeeded by Ayusyacandra who, while ruling Ayodhya endowed Saketa Mandala with the construction of reservoirs. Verse 27 which has been damaged in part has been interpreted by Dr Ramesh in the course of his Examination-in-Chief . Hence, he deduced that the Vishnu temple constructed by Meghasuta must have been in existence in the temple town of Ayodhya from twelfth century A.D.
6. The rock inscription would indicate the existence of a Vishnu Hari temple at Ayodhya, having been constructed in twelfth century A.D. But once the recovery of the inscription from the site in question is disbelieved, the inscription cannot be the basis to conclude that the Vishnu Hari temple which is referred to in the inscription was a temple which existed at the very site of the demolished structure.
7. Once the witnesses have deposed to the basis of the belief and there is nothing to doubt its genuineness, it is not open to the court to question the basis of the belief. Scriptural

interpretations are susceptible to a multitude of inferences. The court would do well not to step into the pulpit by adjudging which, if any, of competing interpretations should be accepted.

8. Punjab Chief Court in Farzand Ali v Zafar Ali[17] *We are inclined to think that the use of the historical works to establish title to the property cannot be justified on the strength of section 57 of the Indian Evidence Act. The question of title between the trustee of a mosque, though an old and historical institution, and a private person cannot, in our opinion, be deemed to be a ―matter of public history‖ within the meaning of the said section.* A clear distinction must be drawn between relying on a gazetteereer to source a claim of title (which is impermissible) and as reference material on a matter of public history (which the court may consult to an appropriate extent with due circumspection) In Vimla Bai v Hiralal Gupta[18] the two judge Bench of this Court dealt with the provisions of Section 37 and Section 57(13) of the Evidence Act 1872 in the context of migration and observed: 5. *The statement of fact contained in the official Gazette made in the course of the discharge of the official duties on private affairs or on historical facts in some cases is best evidence of facts stated therein and is entitled to due consideration but should not be treated as conclusive in respect of matters requiring judicial adjudication. In an appropriate case where there is some evidence on record to prove the fact in issue but it is not sufficient to record a finding thereon, the statement of facts concerning management of private temples or historical facts of status of private persons etc. found in the official Gazette may be relied upon without further proof thereof as corroborative evidence.*

E.2 WITNESSES:

Analysing the depositions of the above witnesses, the following facets can be gleaned:

(i) Hindus consider Ayodhya as the birth-place of Lord Ram., inside the inner sanctum or Garbh Grih‘ right below the central dome of the three domed structure; Muslim witnesses also stated that Hindus have faith and belief in the existence of the Janmasthan

(ii) What Muslims call the Babri mosque, the Hindus consider as the Ram Janmabhumi or the birth-place of Lord Ram;

(iii) Both Hindu and Sunni witness testimonies indicate that the disputed site was being used for offering worship by devotees of both faiths;

(iv) Both Hindu and Sunni witnesses have described the physical layout of the disputed structure in the following manner:

a. There were two entrances to the disputed premises – one from the East through the Hanumat Dwar and the other from the North through Singh

[17] (1918) 46 IC 119
[18] (1990) 2 SCC 22

Dwar. There were on both sides of Hanumat Dwar black touch stone (Kasauti stone) pillars with engravings of flowers, leaves and Hindu Gods and Goddesses. Hindus used to pray and offer worship to the engravings on the pillars.

b. Outside the main gate was a fixed stone with the words _Janam Bhumi Nitya Yatra' written on it. On entering through this gate, the Ramchabutra was on the left upon which the idols of Lord Ram had been placed. Kirtan was carried out near the Ramchabutra by devotees and saints;

c. In one corner of the outer courtyard idols of Ganesha, Nandi, Shivlinga, Parvati and others were placed below a fig and a neem tree;

d. There existed a structure with a thatched roof, which had provisions for storing food and preparing meals;

e. Outside the disputed premises, in the south-eastern corner, Sita Koop was located at a distance of 200-250 paces;

f. The Northern entrance gate to the disputed site was Singh Dwar above which a pictorial representation of *garuda* was engraved in the centre with two lions on either side. On entering through Singh Dwar, Sita Rasoi was accessed, which included a *Chauka-BelanChoolha, Charan Chinha* and other signs of religious significance; and

g. To the West of Ramchabutra, there was a wall with iron bars. Inside the railing was the three domed structure which Hindus believed to be the birth-place of Lord Ram. The Hindus believed this as the Garbh Grih which was considered a holy and revered place. There existed black Kasauti stone pillars in the three domed structure. The witnesses stated that the pillars had engravings of flowers, leaves, Gods and Goddesses on them.

(v) A pattern of worship and prayer emerges from the testimonies of the witnesses. Upon entering Hanumat Dwar, the Hindus used to offer prayers and worship the idols of Lord Ram placed upon the Chabutra in the outer courtyard followed by the idols placed below the fig and neem tree. Prayers were offered at the Sita Rasoi and then pilgrims used to pay obeisance to the Garbh Grih located inside the three domed structure, while making their offerings standing at the iron railing that divided the inner and outer courtyard. The Hindus performed a *parikrama* or performed circumambulation of the Ram Janmabhumi.

(vi) Both Hindu and Muslim witnesses stated that on religious occasions and festivals such as Ram Navami, Sawan Jhoola, Kartik Poornima, Parikrama Mela and Ram Vivah, many Hindu pilgrims from across the country visited the disputed premises for darshan. Worshippers used to take a dip in the Saryu river and have darshan at Ram Janmabhumi, Kanak Bhawan and Hanumangarhi. Pilgrims would perform a customary circumambulation around the disputed premises; and

(vii) Both Hindu and Muslim witnesses have referred to *Panchkoshi* and *Chaudahkosi Parikramas* that were performed once a year during the month of Kartik, which attracted lakhs of pilgrims to the city of Ayodhya.

E.3 THE AREAS OF DISPUTE

From the testimony of the Hindu and Sunni Muslims witnesses, there appear three significant areas of dispute:

(i) The first is about the presence of idols under the central dome of the three domed structure, which was a part of the Babri mosque to the Muslims and the Garbh Grih to the Hindus. The oral accounts contain isolated references to the presence of a calendar bearing a photograph of the idol and of worship being offered to this pictorial representation. The Hindu witnesses have however accepted that the idol of Lord Ram was shifted into the inner courtyard, below the central dome on the night between 22- 23 December 1949. The possibility of any idol under the central dome prior to 22-23 December 1949 stands excluded on a preponderance of probabilities;

(ii) Second, there are variations in regard to the statements of the Hindu witnesses on whether and, if so the nature of the prayers, that were offered inside the inner sanctum prior to 22-23 December 1949.

(iii) Third, there is a variation between the statements of the Hindu and Muslim witnesses on whether namaz was offered inside the three domed structure of the mosque between 1934 and 1949.

F. PERUSAL OF ARGUMENTS RAISED IN THE CASE:

ARGUMENTS ON BEHALF OF THE SUNNI CENTRAL WAQF BOARD

1. No deities were installed within the premises of Babri Masjid until the idol was surreptitiously brought in on the night between 22-23 December 1949. The written statement denies the presence of a presiding deity or of ―any Asthan.
2. Regular prayers were offered in the mosque up to 22 December 1949 and Friday prayers until 16 December 1949.
3. The colonial government continued grants for the upkeep and maintenance of the mosque originally given during the time of Babur.
4. 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. It contended that since the construction of the mosque by Emperor Babur in 1528 till its desecration on 22/23 December 1949, namaz has been offered in the mosque. Hence, the disputed property has been the site of religious worship.

5. The plaintiffs in Suit 4 plead adverse possession in the alternative. The basis for claiming 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.
6. Loss of grant doctrine.
7. Disputed site is based on the Janmasthan temple of the Hindus being outside the courtyard and the offering of namaz by the Muslim in the mosque.

ARGUMENTS ON BEHALF OF THE PLAINTIFFS

1. It was urged that during Babur's invasion of India, several temples were destroyed, including the temple constructed by Vikramaditya at Ayodhya. He contended that during the Mughal period, the territory now known as India was under foreign occupation – Hindus were not permitted to exercise their religious rights and, upon the adoption of the Constitution of India, the wrongs of the Mughals are liable to be rectified.
2. It was further urged that as the land of a deity is inalienable, the title of the plaintiff deities from the twelfth century continues to be legally enforceable today.
3. The 1928 edition of the Faizabad Gazetteer, in support of the plea that the ancient temple, called the Ram Janmabhumi temple, was destroyed by Babur in 1528 and on its site, a mosque was built largely with the materials of the destroyed temple, including the Kasauti pillars. Yet, according to the plaint, the worshippers continued to worship Lord Ram through symbols such as the Charan and Sita Rasoi and the idol of Lord Ram on the Ramchabutra within the enclosure.
4. No valid waqf was ever created or could have been created. Despite occasional trespass by the Muslim residents, it has been stated that title and possession vested in the plaintiff deities. It is alleged that no prayers were offered at the mosque.
5. Proceedings under Section 145 to which the plaintiff deities were not parties.
6. Deities have been in possession and any claim of title adverse to the deities stands extinguished by adverse possession.
7. Suit 5 was necessitated as a result of the deity not being a party to the earlier suits and based on the apprehension that in the existing suits, the personal interests of the leading parties were being pursued without protecting the independent needs and concerns of the deity of Lord Ram, is well and truly borne out by the proceedings as they unfolded in the proceedings before this Court.

G. RULINGS OF THE SUPREME COURT

G.1 ACTS OF STATE AND CHANGES IN SOVEREIGNTY

1. Privy Council in its decision in *Thomas and James Cook v Sir James Sprigg*[19], observed that *where there is a change of sovereignty from a former sovereign to a new sovereign, the municipal courts of the new sovereign will not enforce the legal rights of parties existing under the former sovereign absent an express recognition by the new sovereign of such legal rights.*
2. In *Promod Chandra Deb v State of Orissa*[20], the court observed that t*he Municipal Courts recognised by the new sovereign have the power and jurisdiction to investigate and ascertain only such rights as the new sovereign has chosen to recognise or acknowledge by legislation, agreement or otherwise. Such an agreement or recognition may be either express or may be implied from circumstances and evidence appearing from the mode of dealing with those rights by the new sovereign. Hence, the Municipal Courts have the jurisdiction to find out whether the new sovereign has or has not recognised or acknowledged the rights in question, either expressly or by implication, as aforesaid. In any controversy as to the existence of the rights claimed against the new sovereign, the burden of proof lies on the claimant to establish the new sovereign has recognised or acknowledged the right in question.*
3. It would need to be demonstrated that every subsequent sovereign to the territory within which the disputed land falls either expressly or impliedly recognised the title of the plaintiff deities in Suit 5.
4. The burden to establish this would rest firmly on the plaintiffs in Suit 5.
5. No evidence has been led with respect to the continued existence of the legal regime or any change in legal regime. It is admitted by all parties that at some point during the reign of the Mughal empire, a mosque was constructed at the disputed site.
6. On 13 February 1856 with the annexation of Oudh by the East India Company, no actions were taken by the sovereign to exclude either the Hindu devotees of Lord Ram from worship nor the resident Muslims offering namaz at the disputed property.
7. The construction of the railing in 1858 to separate and maintain law and order between the two communities is premised on the worship of both religious communities at the disputed property.
8. With respect to the change of legal regime between the British sovereign and the Republic of India, there exists a line of continuity. Article 372 of the Constitution embodies the legal continuity between the British sovereign and independent India. Article 372(1) states: ―(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent

[19] (1899) AC 57
[20] 1962 Supp (1) SCR 405

authority. Therefore, the rights of the parties to the present dispute which occurred during the colonial regime can be enforced by this Court today.

G.2 *GRANTS AND RECOGNITION*

1. No documentary evidence has been brought on the record indicating the conferment of title in a form of the grant of the land underlying the mosque. The documentary evidence on which reliance has been placed essentially consists of grants which were made by the British Government for the upkeep and maintenance of the mosque. These grants are stated to be in continuation of those which have been made previously prior to the annexation of Oudh by the colonial government. The register Mafiat which bears government orders dated 13 March 1860 and 29 June 1860 has been noticed in the judgment of Justice Sudhir Agarwal as a document which is torn and the contents of which were not legible. The grant for the upkeep and maintenance of the mosque was ―so long the masjid is kept up and the Mohammedans conduct themselves properly.‖ This document even if it is accepted as authentic indicates a grant for specific purposes and does not confer the title to the disputed land. Soon after the incident of November 1858 in which the Nihang Singh is alleged to have organised a hawan puja and to have erected a symbol of ―Sri Bhagwan‖ within the premises of the mosque is the commencement of a series of episodes indicating that the exclusion of the Hindus from the inner courtyard was neither accepted nor enforced as a matter of ground reality.
2. The sequence of events emanating from the installation of an idol in 1873, the specific permission to the Hindus to open an additional access on the northern side and the observations in the appeal that the objections to the opening were baseless are significant. The presence and worship of the Hindus at the site was recognised and the appellate order rejected the attempt to cede control over the entry door to the Muslims as this would make the Hindu community dependent on them. The administration in other words recognised and accepted the independent right of the Hindu worshippers over the area as a part of their worship of the idols
3. Section 110 is based on the principle that title follows possession. That is why the provision postulates that where a person is shown to be in possession, and a question arises as to whether that person is the owner, the law casts the burden of disproving ownership on the individual who affirms that the person in possession is not the owner.
4. The plaintiffs in Suit 4 were unable to establish a specific grant of the land as a foundation of legal title prior to the annexation of Oudh or upon the transfer of power to the colonial administration after 1857.

G.3 WAQF

1. Waqf is a permanent and irrevocable dedication of property and once the waqf is created, the dedication cannot be rescinded at a later date. Muslim law does not require an express declaration of a Waqf in every case. The dedication resulting in a waqf may also be reasonably inferred from the facts and circumstances of a case or from the conduct of the wakif. Wwhere property has been the subject of public religious use since time immemorial. statutory recognition in Section 3(r) of the Waqf Act,360 1995. Given the irrevocable, permanent and inalienable nature of a waqf, the evidentiary threshold for establishing a waqf by user is high, as it results in a radical change in the characteristics of ownership over the property. 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.

G.4 ADVERSE POSSESSION

1. In *Karnataka Board of Wakf v Government of India*[21], Justice S Rajendra Babu, speaking for a two judge Bench held that: *Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed.*
2. No records are available with respect to possession for the period between 1528 and 1860. 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 respectof the entirety of the area represented by the letters A B C D must fail

[21] (2004) 10 SCC 779

G.5 DOCTRINE OF LOST GRANT:

1. From the analysis of the precedent on the subject, the following principles can be culled out:

   1. 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;

   2. For a lawful presumption there must be no legal impediments. For the applicability of the doctrine a) there must be long, uninterrupted and peaceful enjoyment of an incorporeal right. b) 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;

   3. The doctrine of lost grant supplies a rule of evidence. 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;
2. 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.

G.6 DISTINCTION BETWEEN INNER AND OUTER COURTYARD AND TITLE

1. The offering of worship at Ramchabutra which was situated in close proximity to the railing coincided with the attempt by the colonial administration, post the communal incident of 1856-7, to conceive of the railing as a measure to maintain peace and order.
2. The extensive nature of worship by the Hindus is indicated by the existence of specific places of worship and the permission by the administration for the opening of an additional point of entry in 1877 due to a large rush of devotees.
3. On a preponderance of probabilities, the archaeological findings on the nature of the underlying structure indicate:
   a. it to be of Hindu religious origin, dating to twelfth century A.D.;
   b. the mosque in dispute was constructed upon the foundation of the pre-existing structure.
   c. the ASI report does not conclude that the remnants of the preexisting structure were used for the purpose of constructing the mosque.
   d. 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 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.

4. In the face of a consistent pattern of worship by the Hindus in the outer courtyard after 1856-7, the documentary material does not indicate either settled possession or use of the outer courtyard by the Muslims (except for the purpose of gaining access to the mosque). The presence of the Hindus in the outer courtyard and their occupation was not merely in the nature of a prescriptive right to enter for the purpose of worship. On the contrary, the occupation and possession of the Hindus is evident from:
   (i) the exclusive presence of Hindu places of worship in the disputed property which lay beyond the railing;
   (ii) evidence of worship by the Hindus at these places of worship;
   (iii) recognition by the administration of the need to open an additional entry gate on the northern side occasioned by the large presence of devotees;
   (iv) absence of any evidence to indicate that the Muslims had asserted any right of possession or occupation over the area of the disputed property beyond the railing;
   (v) occurrence of incidents during which the use of the mosque inside the railing became contentious;
   (vi) report of the Waqf Inspector complaining of Muslims being obstructed in proceeding to the mosque for namaz;
   (vii) access to the outer area of the disputed property beyond the railing being exclusively with the Hindus; and
   (viii) the landlocked nature of the area inside the railing.
5. Despite the setting up of the grill-brick wall in 1857, the Hindus never accepted the division of the inner and the outer courtyard. For the Hindus, the entire complex as a whole was of religious significance. A demarcation by the British for the purposes of maintaining law and order did not obliterate their belief in the relevance of the Garbh-Grih being the birth-place of Lord Ram. This is evident from the witness testimonies which indicate that pilgrims offered prayer standing at the railing by looking towards the sanctum sanctorum. Proximate in time after the setting up of the railing, the Ramchabutra was set up in or about 1857. 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. 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; 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 Waqf Inspector noted that worship within the mosque was possible on Fridays with the assistance of the police;

6. Another relevant piece of evidence is the admission of the Moazzin of the Babri Mosque in his complaint dated 30 November 1858 against Nihang Singh. The Moazzin admitted that previously the symbol of Janamsthan had been there for hundreds of years and Hindus did puja inside the three domed structure.
7. a. Historical records of travellers (chiefly Tieffenthaler and the account of Montgomery Martin in the eighteenth century) indicate the existence of the faith and belief of the Hindus that the disputed site was the birth-place of Lord Ram;
   b. the contents of gazetteers can at best provide corroborative material to evidence which emerges from the record.
   c. 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.
8. 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. 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.
9. From the documentary evidence, it emerges that:

   (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.

10. All the evidence indicates that a reasonable inference based on a preponderance of probabilities can be made that there was continuum of faith and belief of the Hindus that the Garbh-Grih was the place of birth of Lord Ram both prior to and after the construction of the wall.
11. 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.

H. THE VERDICT:

1. On 22/23 December 1949, when a group of fifty to sixty persons installed idols on the pulpit of the mosque below the central dome. 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;
2. The High Court has adopted a path which was not open to it in terms of the principles formulated above. It granted reliefs which were not the subject matter of the prayers in the suits. In the process of doing so, it proceeded to assume the jurisdiction of a civil court in a suit for partition, which the suits before it were not.
3. The allotment of land to the Muslims is necessary because though on a balance of probabilities, the evidence in respect of the possessory claim of the Hindus to the composite whole of the disputed property stands on a better footing than the evidence adduced by the Muslims, the Muslims were dispossessed upon the desecration of the mosque on 22/23 December 1949 which was ultimately destroyed on 6 December 1992. There was no abandonment of the mosque by the Muslims. This Court in the exercise of its powers under Article 142 of the Constitution must ensure that a wrong committed must

be remedied. Justice would not prevail if the Court were to overlook the entitlement of the Muslims who have been deprived of the structure of the mosque through means which should not have been employed in a secular nation committed to the rule of law. The Constitution postulates the equality of all faiths. Tolerance and mutual co-existnce nourish the secular commitment of our nation and its people. While determining the area of land to be allotted, it is necessary to provide restitution to the Muslim community for the unlawful destruction of their place of worship. Having weighed the nature of the relief which should be granted to the Muslims, we direct that land admeasuring 5 acres be allotted to the Sunni Central Waqf Board either by the Central Government out of the acquired land or by the Government of Uttar Pradesh within the city of Ayodhya.

4. 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;
5. Suit 3 filed by Nirmohi Akhara has been held to be barred by limitation. Nirmoh Akhara's claim to be a shebait stands rejected. However, having regard to the historical presence of Nirmohi Akhara at the disputed site and their role, it is necessary for this Court to take recourse to its powers under Article 142 to do complete justice. Hence, we direct that in framing the scheme, an appropriate role in the management would be assigned to the Nirmohi Akhara.