Neutral Citation No. - 2023:AHC:123171

RESERVED

A.F.R.

Court No. - 64

Case :- CIVIL REVISION No. - 101 of 2022

Revisionist :- Committee of Management, Anjuman Intezamia Masajid, Varanasi
Opposite Party :- Smt. Rakhi Singh and others
Counsel for Revisionist :- Syed Ahmed Faizan,Sr. Advocate, Zaheer Asghar
Counsel for Opposite Party :- Prabhash Pandey, Arya Suman Pandey, Saurabh Tiwari, Vishnu Shankar Jain, Vineet Sankalp

Hon'ble J.J. Munir,J.

This is a defendant's Civil Revision under Section 115 of the Code of Civil Procedure, 1908, arising out of an order of Dr. Ajaya Krishna Vishvesha, the District Judge of Varanasi, rejecting an application by the defendant-revisionist under Order VII Rule 11 CPC in Original Suit No.18 of 2022.

The reliefs claimed in the Suit

2. The five plaintiff-respondents to this revision have instituted Original Suit No.18 of 2022 against the State of Uttar Pradesh, represented by the Chief Secretary, the District Magistrate, Varanasi, the Commissioner of Police, Varanasi, the Committee of Management, Anjuman Intezamia Masajid, Varanasi through its Secretary, representing the Gyanvapi Mosque and the Board of Trustees, Sri Kashi Vishwanath Temple through the Chief Executive Officer/Secretary of the Board, seeking reliefs of declaration, permanent prohibitory injunction and mandatory injunction, which can best be understood by a reproduction of these *verbatim*:

"a) Decree the suit for declaration declaring that Plaintiffs are entitled to have Darshan, Pooja and perform all the rituals of Maa Srinigar Gauri, Lord Ganesha, Lord Hanuman and other visible and invisible deities within old temple complex situated at settlement Plot No.9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;

b) Decree the suit for permanent injunction restraining the Defendants from imposing any restriction, creating any obstacle, hindrance or interference in performance of daily Darshan, Pooja, Aarti, Bhog and observance of rituals by devotees of Goddess Maa Sringar Gauri at Asthan of Lord Adi Visheshwar along with Lord Ganesha, Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at settlement Plot No 9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;

c) Decree the suit for permanent injunction restraining the Defendants from demolishing, damaging, destroying or causing any damage to the images of deities Goddess Maa Sringar Gauri at Asthan of Lord Adi Visheshwar along with Lord Ganesha, Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at settlement Plot No.9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;

d) Decree the suit for mandatory injunction, directing the Government of Uttar Pradesh and District Administration to make every security arrangement and facilitate daily Darshan, Pooja, Aarti, Bhog by devotees of Maa Sringar Gauri along with Lord Ganesha, Lord Hanuman, Nandji and other images and deities within the precincts of temple complex known as 'Ancient temple' existing at settlement Plot No.9130 (Nine Thousand One Hundred Thirty) within the area of Ward and P.S. Dashwamedh the heart of the city of Varanasi;"

e) Grant such other relief for which the Plaintiffs may be found entitled to or which may be deem fit and necessary in the interest of justice; and

f) Decree the suit with costs in favour of Plaintiffs and against the Defendants;”

The Application under Order VII Rule 11 CPC

3. An application has been made in this suit on behalf of the revisionist-defendant No.4[1], to wit, the Committee of Management,

1 for short, 'the revisionist'

Anjuman Intezamia Masajid, Varanasi, saying that the plaint ought to be rejected without a trial of the suit, because the suit is barred by The Places of Worship (Special Provisions) Act, 1991[2]. The basis to say this, according to the revisionist, is that the plaintiffs have claimed a relief to the effect that their right to do *pooja* of the Deities on Settlement Plot No.9130 be declared and further that the defendants be restrained from interfering in the exercise of their right by the plaintiffs to do *pooja*, *aarti*, *bhog* of the Deities, nor demolish or destroy any part of images of those Deities. The objection pleading the bar claimed under the Act of 1991 proceeds on the basis that in Plot No.9130, there is in existence the Gyanvapi Mosque for the past 600 years and is still in existence, where Muslims from the city of Varanasi and its neighbourhood offer *namaz* five times a day as also on the two Eid and Fridays etc., without any let or hindrance.

4. It is the revisionist's case that under the Act of 1991, the religious character of a place of worship, as existing on 15th August, 1947, shall continue as it was, with no change to it. The statutory bar, therefore, pleaded is that by the relief claimed in the suit, the plaintiffs want to alter the character of the Gyanvapi Mosque. This objection is further supported on the foot of the contents of Paragraph No.5 of the said application, where it is said that the contents of Paragraph No.12, sub-Paragraphs Nos. (i) to (xiv) of the plaint make it manifest that whatever facts have been pleaded there, relate to the Gyanvapi Mosque, that is in existence for the past 600 years and that the plaintiffs seek relief of doing *pooja*, *archana* in the said Mosque. This would violate the Act of 1991, attracting the bar. This objection is also supplemented by asserting that in Paragraph No.29 of the plaint, it is said that the building complex is in the control of the Committee of Management, Anjuman Intezamia Masajid, Varanasi which shows

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2 for short, 'the Act of 1991'

that the relief claimed in the suit is with regard to the Gyanvapi Mosque and that all of it is clever drafting.

5. The other objection is that the suit is barred by The Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983[3]. The objection based on the Act of 1983 is to be found in Paragraph No.4 of the application, which asserts that the Government of U.P. enacted the Act of 1983, by which, the control of the entire Kashi Vishwanath premises and its upkeep was entrusted to the Board of Trustees. It is the Board of Trustees of Sri Kashi Vishwanath Temple that has to take care of all the Gods and Goddesses and management of their affairs.

6. The next statute, under which the suit is said to be barred, is The Waqf Act, 1995[4]. The basis of the last mentioned objection is to be found in Paragraph Nos.6 and 7 of the application, where it is said that the Gyanvapi Mosque, which has been described in Paragraph No.12, sub-Paragraph Nos.(i) to (xiv) of the plaint, is waqf property, which is recorded as Waqf No.100, Banaras with the U.P. Sunni Central Board of Waqf, Lucknow. The objection is that since the plaintiffs claim a right in property that is waqf, the Civil Court's jurisdiction to try the suit is barred under Section 85 of the Act of 1995. It is on the basis of all these three statutes that the revisionist has urged that the suit is barred under Order VII Rule 11(d) of the Code of Civil Procedure, 1908[5].

7. In their reply filed to the application under Order VII Rule 11 of the Code, the plaintiffs say that the application is not based on the averments made in the plaint and the plea regarding bar to the suit under the Act of 1991 has been raised to prolong litigation and avoid a hearing on merits. It has been asserted that there is no mosque

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3 for short, ‘the Act of 1983’
4 for short, ‘the Act of 1995’
5 for short, ‘the Code’

within Settlement Plot No.9130, situate in the area of ward and Police Station Dashashwamedh, Varanasi, which has been described as the suit property in the plaint, and also, in the reply to the application under Order VII Rule 11.

8. The crux of the reply to the application under Order VII Rule 11 of the Code carried in Paragraph Nos.4 to 8, including sub-Paragraphs of Paragraph No.8, is that there have been Deities in the suit property from time immemorial. The forcible offering of *namaz* within the property in question, at a particular point of time or a particular place, would not alter its character into a mosque. The principle of first existence has also been invoked. The scope of the suit has been spelt out as one to restrain the defendants from interfering in the performance of *darshan*, *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, *mandaps* and shrines, existing within the old temple complex i.e. the suit property. It has been emphasized that these Deities are continuously in existence within the property in question since before 15th of August, 1947 and the worshippers have a right to *darshan* and *pooja* of the Deities. They have every right to file a suit to protect and preserve the right to practice their religion flowing from Article 25 of the Constitution. The main events relating to the establishment of the Temple, its destruction across a number of events and restoration have been set out in historical detail. There is also a reference to an earlier suit on the issue, being Civil Suit No.62 of 1936, where the testimony of witnesses recorded during trial establishes that the Deities were in existence within the suit property before 15th August, 1947.

9. It is further on mentioned, in the reply to the application under Order VII Rule 11 of the Code that the report of the Advocate Commissioner, who was appointed to carry out the inspection, would throw light on the averments in the plaint and the plaintiffs would point

out, based on evidence, the specified places within the suit property, where the Deities exist for worship by the plaintiffs. It has been emphasized that the scope of the Court's jurisdiction under Order VII Rule 11 is confined to averments in the plaint and the revisionist's case cannot be considered at this stage. The averments in the plaint and the material on record make it clear that the Deities are existing within the suit property since before 15th August, 1947, and, therefore, the provisions of the Act of 1991 would not bar the suit at all. It is emphasized that under the Hindu Law, a property once vested in the Deity, shall continue to be the Deity's property and destruction (of the temple or the property), if any, cannot change the nature of the property.

10. There is also an averment in the reply to the application under Order VII Rule 11 of the Code based on the principle that the destruction of the idol does not lead to the termination of its pious purpose, and consequently, by an act of destruction of the idol, neither the endowment, its purpose nor existence can be effaced. The dedication of the property to the idol once vested in it would also continue, as would the idol's legal personality. The crux of the reply is that the Deities of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other visible and invisible Deities within the old temple complex i.e. the suit property, having once been established, intermittent acts of destruction would not efface their existence or the suit property, once vested in the Deities.

11. The thrust of this part of the plaintiffs' reply to the application under Order VII Rule 11 of the Code is that given the existence of the idols since time immemorial in the precincts of the suit property, the provisions of the Act of 1991 would not bar the suit. Dwelling further upon the reply to the application under Order VII Rule 11 based on the provisions of Section 4(1) of the Act of 1991, it is said that under the statute, the religious character of a place of worship existing on

the 15th of August, 1947, has to be preserved. It is, therefore, imperative for the parties to the suit to prove before the Court by evidence led at the trial as to what was the religious character of the property prevalent on the 15th August, 1947. Therefore, the plaint cannot be summarily rejected, invoking Rule 11 of Order VII of the Code.

12. It has further on been said in the reply that the plaintiffs have laid foundation by facts pleaded in the plaint that the religious character of the suit property was that of a Hindu Temple and the Deities were being worshipped there within the suit property. It is also said in the reply that under Section 2(c) of the Act of 1991, the term 'Mosque' means a religious Islamic construction raised according to Islamic tenets. It is not permissible under the Hindu law or the Muslim law to raise any construction over the religious property of the other religious community, which is precisely the case here. It is also emphasized in the reply that in Paragraph No.4 of the plaint, it has been clearly averred that Raja Todarmal had reconstructed a magnificent Temple of Lord Shiva at the same place, where the original Temple existed i.e. in Plot No.9130 on a grand scale, consisting a central Sanctum (*Garbhgrih*) surrounded by eight *mandaps*. In Paragraph No.6 of the plaint, it has been pleaded that Muslims, without creating any waqf or acquiring ownership of land lawfully, have forcibly raised constructions, which has been termed as the Gyanvapi Mosque. In other paragraphs of the plaint, it has been pleaded that the worshippers have been worshipping the old and existing idols in the suit property. There is evidence to that effect reflected in the testimony of witnesses in Civil Suit No.62 of 1936. In their reply, the plaintiffs, therefore, say that all issues arising between parties in the suit ought to be tried and not summarily determined under Order VII Rule 11 of the Code. It is then pointed out in the reply that in Paragraph Nos.22, 23, 24 and 25 of the plaint, the suit

property is included within the scope of the term 'Temple' as defined in Section 4(9) of the Act of 1983. The religious character of the property in dispute has already been declared by the U.P. State Legislature and, therefore, there is no question of applicability of the provisions of the Act of 1991. It is also emphasized that the competent Legislature has also recognized the existence of the Jyotirlinga within the definition of 'Temple', which is in existence beneath the structure claimed by the revisionist as the Gyanvapi Mosque.

The Order of the District Judge

13. The District Judge of Varanasi, who has heard and decided the application under Order VII Rule 11 of the Code moved by the revisionist, has rejected it by the order impugned and directed the suit to be tried. A perusal of the impugned order passed by the learned District Judge shows that, like this Court, he too was oppressed by parties pleading facts, law and evidence, running into tomes, well beyond the settled parameters of judging a plea under Order VII Rule 11 of the Code. The parties seem to have endeavoured almost to cajole the learned District Judge into holding a trial ahead of schedule in the garb of the application under Order VII Rule 11 of the Code.

14. This Court is gratified to note that the learned District Judge, though took note of all that was argued beyond the brief by parties, stuck course and decided within the permissible parameters of the motion under Order VII Rule 11 of the Code. The learned District Judge has fundamentally considered the bar to the suit pleaded by the revisionist under the Act of 1991, the Act of 1983 and the Act of 1995. From a perusal of the application under Order VII Rule 11 of the Code, no other plea, apart from the bar to the suit under the three statutes aforementioned, has apparently been raised. The learned District Judge, before embarking upon an examination of the parties'

case, set for himself the parameters, after review of authority on the point, by which he ought to judge the plea under Order VII Rule 11 of the Code. He then enumerated the specific pleas that were raised to say that the suit is barred. How the learned District Judge went about his task, can be best expressed in his words, carried in the impugned order, which read:

> "Therefore, in view of the law laid down in the above mentioned rulings, it is clear that while deciding an application under Order 7 Rule 11 of CPC, only the averments of the plaint must be seen and the defence made in the suit must not be considered. However, if the suit does not disclose a right to sue, the plaint can be rejected under Order 7 Rule 11 C.P.C.
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> From the perusal of the application paper no.35C, the main contentions of defendant no.4 are as follows:-
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> (a) The suit of the plaintiffs is barred by Section 4 of the Places of Worship (Special Provisions) Act, 1991 (Act no.42 of 1991);
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> (b) The suit of the plaintiffs is barred by Section 85 of the Waqf Act, 1995 (Act no.43 of 1995);
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> (c) The suit of the plaintiffs is barred by the Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983 (Act no.29 of 1983)"

15. The learned District Judge repelled the contention regarding the bar to the suit under the Act of 1991, holding that the plaintiffs are not seeking a declaration about their ownership of the suit property or a declaration that the suit property is a temple. They are seeking a right to worship Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other visible and invisible Deities, that they had, according to the plaint case, worshipped throughout the year, until 1993, located on a part of the suit property, that is to say, the backside of the Gyanvapi Mosque, on the north-east corner. It was also held that according to the plaint case, the right has been restricted under an administrative instruction of the Government of Uttar Pradesh to once a year after the year 1993 and is still being exercised within that limitation.

16. The learned District Judge opined that at the disputed place, even after 15th August, 1947, to wit, the relevant date under the Act of 1991, the Hindus have worshipped Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities, visible and invisible, restricted or unristricted till date. The learned Judge held that the right to worship is not only a fundamental right, but also a civil right, that can be enforced by suit. The plaintiffs do not, in substance, seek to alter the character of the suit property, which the defendants say is prohibited by the Act of 1991. They only seek to enforce their right to worship, which they have done all along. The learned District Judge, while turning down the plea of a bar to the suit under the Act of 1991, held in his concluding remarks:

> "Therefore, in the light of the law laid down by Hon'ble Supreme Court of India and Hon'ble Allahabad High Court, it is clear that right to worship is a civil right and any interference in it will raise a dispute of civil nature and under Section 9 of C.P.C., Civil Court has jurisdiction to decide such case involving such a dispute. In the present case, the plaintiffs are demanding right to worship Maa Sringar Gauri, Lord Ganesha, Lord Hanuman at the disputed property, therefore, Civil Court has jurisdiction to decide this case.
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> Further, according to the pleadings of the plaintiffs, they were worshipping Maa Sringar Gauri, Lord Hanuman, Lord Ganesh at the disputed place incessantly since a long time till 1993. After 1993, they were allowed to worship the above mentioned Gods only once in a year under the regulatory of State of Uttar Pradesh. Thus, according to plaintiffs, they worshipped Maa Sringar Gauri, Lord Hanuman at the disputed place regularly even after 15th August, 1947. Therefore, The Places of Worship (Special Provisions) Act, 1991 does not operate as bar on the suit of the plaintiffs and the suit of plaintiffs is not barred by Section 9 of the Act."

17. The next statute, on the basis of which bar of the suit was claimed by the revisionist, is Section 85 of the Act of 1995. This plea is based on the exclusion of the Civil Court's jurisdiction relating to matters of a waqf property. The learned Judge has taken note of the

provisions of Section 85, which bar the jurisdiction of a civil court, revenue court of other authority to determine any question, dispute or other matter relating to any waqf, waqf property or other matter, which is required by or under the Act of 1995 to be determined by a Tribunal constituted under the said Act.

18. The learned Judge has looked into the provisions of the said Act to discern what a waqf means, as defined there, including a waqf by user. He has also considered what is meant by a person interested in a waqf as defined under Section 3(k) of the Act of 1995. A wealth of authority has been surveyed on the issue about what suits would be barred under the Act of 1995 and what kind of actions can still be tried by Civil Court, the jurisdiction of Civil Court being plenary. The learned District Judge opined that it is only those matters that are required by or under the Act of 1995 to be determined by the Tribunal, where the Civil Court's jurisdiction would be ousted.

19. In substance, the learned Judge held that the relief seeking the right to worship the Deities of Maa Sringar Gauri, Gods and other Goddesses, located in the disputed property is not a relief covered by Sections 33, 35, 47, 48, 51, 54, 61, 64, 67, 72 and 73 of the Act of 1995. These are not matters required by or under the Act of 1995 to be decided by the Tribunal. Therefore, the jurisdiction of the Civil Court to try the suit was held unfettered by the bar under Section 85 of the Act of 1995.

20. The last of the statutes, by dint of which the suit was urged to be barred by law, on behalf of the revisionist, is the Act of 1983. Sections 4(5), 4(9), 5 and 6 of the Act of 1983 were taken into consideration by the learned Judge to hold that the suit in no way can be said to be barred by the Act of 1983. It was, therefore, held by the learned District Judge that none of the three statutes bar the trial of

the suit, rendering the plaint liable to be rejected under Order VII Rule 11 of the Code.

A remark by the Court and a mention of learned Counsel who appeared at the hearing

21. It must be mentioned as a prelude to the disposition of the contentions of parties before this Court that a reading of the order passed by the learned District Judge shows that no other plea apart from the bar under the three statutes, above mentioned, was urged in aid of the application under Order VII Rule 11 of the Code seeking to reject the plaint.

22. Heard Mr. S.F.A. Naqvi, learned Senior Advocate assisted by Mr. Syed Ahmad Faizan, Ms. Fatma Anjum, Mr. Zaheer Asghar and Mr. Mahmood Alam, learned Counsel appearing for the revisionist, Mr. Hari Shankar Jain, Mr. Vishnu Shankar Jain, Ms. Mani Munjal, Mr. Parth Yadav (via video conferencing) along with Mr. Prabhash Pandey and Mr. Pradeep Sharma, learned Counsel appearing on behalf of the plaintiff-respondents nos. 2 to 5, Mr. Saurabh Tiwari along with Mr. Arya Suman Pandey, learned Counsel appearing for plaintiff-respondent No.1, Mr. M.C. Chaturvedi, learned Additional Advocate General assisted by Mr. Bipin Bihari Pandey, learned Chief Standing Counsel-V along with Mr. Rananjay Singh, Additional Chief Standing Counsel, Mr. Shrawan Kumar Dubey, Mr. Girijesh Kumar Tripathi and Mr. Hare Ram Tripathi, learned Standing Counsel appearing on behalf of defendant-respondents Nos. 6, 7 and 8 and Mr. Vineet Sankalp, learned Counsel appearing on behalf of respondent No.9, the Board of Trustees.

Submissions on behalf of the revisionist

23. It is submitted by Mr. S.F.A. Naqvi, learned Senior Advocate that the suit is barred by Section 9 of the Code, as the provisions of

the Act of 1991 carry an express bar to the maintainability of a suit, that can effect altering the character of religious places of worship as existing on 15th August, 1947. He submits that the present suit precisely attempts to do that. It seems to seek altering the character of an existing mosque on the date of the suit into a Hindu temple. It is urged that the learned Trial Judge was duty bound to examine if the suit was maintainable, in view of the provisions of Sections 3, 4 and 7 of the Act of 1991. It is submitted by Mr. Naqvi that under Section 9 of the Code, the jurisdiction of Civil Court with regard to a particular kind of suit can be excluded, if there is an express provision barring the Court's jurisdiction or the bar is inferable by necessary implication. It is urged that all suits of civil nature are triable by the Civil Court, except those of which cognizance is barred expressly or impliedly. Here, the suit is expressly barred by the Act of 1991, according to Mr. Naqvi. He has referred to the provision of Rule 11(d) of Order VII of the Code to say that the provision affords the defendant a remedy to assail the maintainability of the suit at the threshold. It is emphasized that the law does not ostensibly contemplate any kind of a stage at which the bar may be pleaded. It can be raised at any stage. Rule 11 of Order VII casts a duty upon the Court to examine if the suit is worth trial and to reject the plaint, if it finds that the suit is barred under any of the clauses of Rule 11 of Order VII of the Code. In aid of his submissions on this point, Mr. Naqvi has placed reliance upon the decision of the Supreme Court in **Sopan Sukhdeo Sable and others v. Assistant Charity Commissioner and others**[6]**.** It is argued that the Mosque and portions underneath were always there and never disturbed. It has been in existence since time immemorial. It is pointed out that on 15th August, 1947, the Gyanvapi Mosque and all that was underneath it along with appurtenant land was in existence. Hence, the suit is barred by Sections 3, 4 and 7 of the Act of 1991. It is next submitted that if a suit is barred under any provision of the law,

6 (2004) 3 SCC 137

Order VII Rule 11(d) of the Code makes it imperative for the Courts to exercise jurisdiction and reject the plaint. This the Trial Court has failed to do, according to Mr. Naqvi. He has drawn the Court's attention to the objects and reasons of the Act of 1991 and submitted that the statute was enacted with the purpose of thwarting all attempts at converting the character of religious places as existing on August the 15th, 1947.

24. Learned Senior Advocate appearing for the revisionist particularly emphasizes that, in judging an application under Order VII Rule 11 of the Code, evidence, howsoever overwhelming on either side, cannot be looked into. The issues that may arise if the suit were to proceed to trial would be beyond the scope of proceedings at this stage. He submits that the provision under Order VII Rule 11 is a power available to the Court and a remedy to the defendant, where the Court can summarily terminate action at the threshold, without holding a trial, if satisfied that the action should be terminated on any of the grounds carried in Rule 11 of Order VII. It is argued that Order VII Rule 11(d) forbids the trial of a suit that is barred by law. The law includes statutory and customary law, including Judge-made law. A reference in this connection has been made to the decision of the Supreme Court in **Mohd. Aslam *alias* Bhure v. Union of India and others**[7], where the writ petition was disposed of, bearing in mind the assurance extended on 24 points, both by the Central and the State Government, to take all necessary steps for the safeguarding all religious places, including the Gyanvapi Mosque in Varanasi. Referring to the provisions of the Act of 1983, its subject and the definition of Temple there on one hand and the meaning of a Waqf enumerated in Section 3(r) of the Act of 1995 on the other, Mr. Naqvi submits that Waqf property of the Gyanvapi Mosque is separate from the property of Sri Kashi Vishwanath Temple Trust. He emphasized

7 (1994) 2 SCC 48

that this fact is clearly established by the deed of exchange, Paper No. 224C, that was executed between the U.P. Sunni Central Board of Waqf and the State of U.P. represented by the Collector. The Board of Trustees of Sri Kashi Vishwanath Temple and the State of U.P. desired that a Police Control Room should be established for the security of the “disputed property” as Mr. Naqvi describes. The Board of Trustees of the Temple and the Government of U.P. discussed the matter with the U.P. Sunni Central Board of Waqf and requested them to give some land on lease or a license for the purpose in the year 1993-94. The U.P. Sunni Central Board of Waqf gave some land to the Government of U.P. on license for the purpose of establishment of a Police Control Room. Later on, the State of U.P. represented by the Chief Executive Officer of the Board of Trustees of Sri Kashi Vishwanath Temple and the Committee of Management, Anjuman Intezamia Masajid, Varanasi (the revisionist) in the year 2021, amicably exchanged land, earlier licenced. These facts are evident from Paper Nos. 227C and 230C. It is pointed out that the aforesaid dealing in the land and its disposition by the Government of U.P. as well as the Board of Trustees of Sri Kashi Vishwanath Temple show that both of them consider the suit property as waqf property. It is for the said reason that in the first instance, the land was taken on a license by the Government from the Waqf Board in the year 1993-94, and, later on, dealt with through a deed of exchange in the year 2021.

25. It has also been urged by the learned Senior Advocate appearing for the revisionist that the present suit and its ancillary proceedings are pending in three different Courts, to wit, the learned District Judge, who has *seisin* of the suit, this Court, that has, before it, Matters under Article 227 Nos. 3341 of 2017, 1521 of 2020, 3562 of 2021 and 3844 of 2021, including this revision, and the Supreme Court. The matter which is engaging the attention of the Supreme Court is Petition for Special Leave to Appeal (C) No. 9388 of 2022

arising out of an earlier order passed in the suit and approved by this Court in a Matter under Article 227 of the Constitution. Learned Senior Advocate submits that doing all this is nothing but wastage of precious judicial time at different levels, which ought not to be permitted. Mr. Naqvi, during the course of his submissions, has reverted to the point, time and again, that the suit cannot proceed, bearing in mind the provisions of the Act of 1991, its objects and whatever it prohibits. He submits that office of the suit is ultimately to alter the religious character of Gyanvapi Mosque into a temple, which is within the prohibitive clause carried in the Act of 1991. He has also, during the course his submissions, said that the suit does not disclose a cause of action and it is a product of "clever drafting", an expression that has resounded during the long hearing of this revision. The learned Senior Advocate says that in the garb of asserting their right to worship, the dominant purpose of the suit is to convert the character of the existing Gyanvapi Mosque into a temple, which the Act of 1991 forbids. The dispute in the form raised through the device of clever drafting is to create the illusion of a cause of action, which is forbidden by law and does not exist.

26. Learned Senior Advocate for the revisionist has, for the proposition that a suit that is barred by law should be nipped in the bud, relied upon a decision of the Supreme Court in **Abdul Gafur and another v. State of Uttarakhand and others**[8]. He has also emphasized that the expression "law" in Clause (d) of Rule 11 of Order VII of the Code includes not only statutes, but also judicial precedents. For the said proposition, the learned Senior Advocate has placed reliance on a decision of the Supreme Court in **Bhargavi Constructions and another v. Kothakapu Muthyam Reddy and others**[9]. The learned Senior Advocate has further placed reliance upon the decision of the Supreme Court in **Sree Surya Developers**

8 (2008) 10 SCC 97
9 (2018) 13 SCC 480

and Promoters v. N. Sailesh Prasad and others[10]. To buttress his contention that the present suit is a product of clever drafting, whereby a non-existent cause of action has been portrayed as a real one, an illusion for which this Court must not fall and terminate the action, the revisionist has further referred to **T. Arivandandam v. T.V. Satyapal & another**[11] and **Madanuri Sri Rama Chandra Murthy v. Syed Jalal**[12].

Submissions on behalf of plaintiff-respondents Nos. 2 to 5

27. Mr. Hari Shankar Jain, Mr. Vishnu Shankar Jain, Ms. Mani Munjal and Mr. Parth Yadav along with Mr. Prabhash Pandey and Mr. Pradeep Sharma, learned Counsel appearing on behalf of plaintiffs nos. 2 to 5 to the suit and respondents to this revision have submitted that the suit is not at all barred by the provisions of the Act of 1991. It is submitted that the basis to plead the bar under the Act of 1991 is the fact that the so-called mosque in Plot No. 9130 is in existence since the last 600 years, where the Muslims offer *namaz*. It is urged that there is no mosque in the Settlement Plot No.9130 Dashashwamedh, Varanasi, which has been described as the 'property in question' in the suit. This Court has referred to it as the suit property and it shall be called that, as earlier also in this judgment, while noticing the revisionist's submissions. According to Mr. Vishnu Shankar Jain, the suit property vests in the Deity from time immemorial. If any person or persons forcibly and without authority of law offer *namaz* within that property or at a particular place, the same cannot be called a mosque. Nobody has the right to encroach upon land/ property already vested in the Deity. Mr. Jain has invoked the principle of 'first in existence' or 'prior in existence' as the paramount consideration in determining the right of worship at a place, where the Muslims and the Hindus both claim that right.

10 (2022) 5 SCC 736
11 (1977) 4 SCC 467
12 (2017) 13 SCC 174

Learned Counsel for plaintiff-respondents Nos. 2 to 5 emphasizes that the suit has been filed for restraining the defendants from interfering with the plaintiffs' right to *darshan* and *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, *mandaps and* shrines existing within the old temple complex, that is to say, the suit property. It is the plaintiffs' case that the Deities above mentioned are continuously in existence within the suit property, since before 15th August, 1947. The worshippers have the right to *darshan* and *pooja* of the Deities within the suit property and they have every right to institute this suit to protect and preserve their right to religion flowing from Article 25 of the Constitution.

28. The way Mr. Jain has made his submissions on behalf of plaintiff-respondents Nos. 2 to 5, may be summarised under different heads as follows:

I. <u>The plaintiffs' right to practice their religion</u> -

29. The present suit has been instituted by the plaintiffs to secure their right to *darshan* and *pooja* of Deities *Virajman* within the premises of the old temple of Lord Adi Vishweshwar. Learned Counsel has invited the Court's attention to the following facts and the pleadings in the plaint in this regard :

> **(i)** The plaintiffs are devotees of Lord Shiva. They have the right to worship Goddess Maa Sringar Gauri at the *asthan* of Lord Adi Vishwesehwar along with Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible Deities within the old temple complex, situate in Settlement Plot No. 9130 in the city of Varanasi.
>
> **(ii)** In Paragraph No. 1 of the plaint, it has been averred "that Plaintiffs are filing this suit to protect their right to religion guaranteed by Article 25 (Twenty Five) of the Constitution of

India…..". The suit, therefore, has evidently been instituted by the plaintiffs in a personal capacity, seeking to protect their right to worship.

(iii) In Paragraph No. 2 of the plaint, it has been averred that the Plaintiffs are idol worshippers. They are devotees of Lord of Universe, Lord Shiva and they visit the place of Lord Adi Vishweshwar Jyotirlinga at Kashi ….

(iv) In Paragraph No. 35 of the plaint, it has been stated "that the Plaintiffs are filing the present suit as State Government cannot reduce the daily pooja to one day in a year by passing an oral order and there is no reason for making such restriction..."

(v) In Paragraph No. 36 of the plaint, it has been averred that the plaintiffs, along with a number of devotees, performed *pooja* of Maa Goddess Sringar Gauri on 16.04.2021, but thereafter, the devotees are not being allowed to perform the daily *pooja*.

(vi) In Paragraph No. 42 of the plaint, it has been averred that the plaintiffs occasionally worship Lord Shiva, Maa Sringar Gauri, Lord Hanuman Virajman within the old temple. They perform *pooja*, worship and *darshan* from outside, undertaking the rituals there all through the year. They also worship within the old temple, whenever they are allowed to enter inside.

(vii) In Paragraph No. 46 of the plaint, it is stated "that the Plaintiffs and devotees of Lord Shiva have fundamental right to uninterrupted daily Darshan, Pooja, Aarti, Bhog…."

(viii) In Paragraph No. 50 of the plaint, it has been further asserted that "The cause of action for filing the suit lastly arose on 17.04.2021 (Seventeenth April Two Thousand Twenty-One)

as the District Administration is not allowing the Plaintiffs and other devotees to perform pooja…."

(ix) It is submitted that the right to worship, apart from being a fundamental right, is a civil right within the meaning of Section 9 of the Code. A violation of that right guaranteed under Article 25 entitles the person aggrieved to maintain a suit before the Civil Court for its enforcement. In support of the aforesaid contention, reliance has been placed by Mr. Jain upon the decision of the Supreme Court in **Most Rev. P.M.A. Metropolitan and others v. Moran Mar Marthoma and another**[13]. The attention of the Court has been drawn particularly to Paragraphs Nos. 28, 29, 36, 37 and 89 of the report. In **Most Rev. P.M.A. Metropolitan** *(supra)*, it has been held :

"**36.** In *Ugamsingh* v. *Kesrimal* [(1970) 3 SCC 831 : (1971) 2 SCR 836] it was held that right to worship is a civil right which can be subject-matter of a civil suit. The Court observed:

> "It is clear therefore that a right to worship is a civil right, interference with which raises a dispute of a civil nature…."

89. The conclusions thus reached are:

> (*a*) The civil courts have jurisdiction to entertain the suits for violation of fundamental rights guaranteed under Articles 25 and 26 of the Constitution of India and suits.
>
> (*b*) The expression 'civil nature' used in Section 9 of the Civil Procedure Code is wider than even civil proceedings, and thus extends to such religious matters which have civil consequence.
>
> (*c*) Section 9 is very wide. In absence of any ecclesiastical courts any religious dispute is cognizable, except in very rare cases where the declaration sought may be what constitutes religious rite."

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13 1995 Supp (4) SCC 286

II. <u>Violation of Article 25 of the Constitution</u>

30. Mr. Jain has pointed out that it has been pleaded in the plaint that the plaintiffs' right to worship enshrined under Article 25 of the Constitution is being infringed, and therefore, the present suit has been instituted. In this regard, he has drawn the Court's attention to the averments in Paragraphs Nos. 1, 45, 46 and 47 of the plaint.

III. <u>Deities under the Hindu Law - Swayambhu Deity, images, *asthan* and invisible Deity</u>

31. Mr. Jain submits that the Hindu law relating to *asthan* and invisible Deities has been extensively dealt with by Justice B.K. Mukherjea in **'The Hindu Law of Religious and Charitable Trusts',** Dr. Pandurang Vaman Kane in **'History of Dharmaśāstra'** and by Sri Gopalchandra Sarkar Sastri in his treatise **'A Treatise on Hindu Law'**. In **'The Hindu Law of Religious and Charitable Trusts'**, which is a compilation of Tagore Law Lectures delivered by Justice B.K. Mukherjea, ex Chief Justice of India, in Paragraph 4.8 at Pages Nos. 156-157, relating to 'Reconstruction or purification of idols in case of defilement or destruction' it has been stated :

> "... The destruction of an image, as you will see presently, does not cause an extinction of the religious trust that is created in its favour: The rules of construction or replacement of an idol as set out above are most liberally construed …"

32. Learned Counsel further cites Dr. Pandurang Vaman Kane in **'History of Dharmaśāstra'**, Volume II, Part II, Chapter XIX at Page 707, where it is stated :

> "...it is clear that the ancient sages hardly ever thought of the worship of idols, but of deities in the abstract to whom they ascribed different functions and poetically represented them as being endowed like human beings with hands and feet and other limbs…"

33. Further, in Chapter XXVI at Page No. 896 of the above mentioned treatise, Dr. Pandurang Vaman Kane says:

> "But even image worshippers are quite conscious that god is pure consciousness (*cit*), is one without a second, is without parts and without a physical body, and that the various images in which he is thought as in-dwelling are so imagined for the benefit of worshippers."

34. Learned Counsel for the plaintiff-respondents Nos. 2 to 5 has then drawn the Court's attention to Chapter XIV, Page No. 492-493 of the book called '**A Treatise on Hindu Law**' by Gopalchandra Sarkar Sastri, wherein the importance of worship of images under the Hindu law has been explained in the following words:

> "**Images. —** The images worshipped by the Hindus are visible symbols representing some form of the attribute of God contemplated as having one only of His threefold attributes, upon which is based the Hindu idea of Trinity, namely, God the Creator, God the Preserver, and God the Destroyer, the same perhaps, as God the Father, God the Son, and God the Holy Ghost.
>
> The images may be made of any of the substances mentioned in the Texts Nos. 4-6.
>
> The object of worship is not the image, but the God believed to be manifest in the image for the benefit of the worshippers who cannot conceive, or think of, the Deity, without the aid of a perceptible form on which he may fix his mind and concentrate attention, for the purpose of meditation. The lump of metal, stone, wood or clay forming the image is not the God, but the invisible *personified* Deity manifesting itself to the devotees by means of the image, is the God to a Hindu."

35. Mr. Jain has gone on to refer to the decision of the Supreme Court in **Ram Jankijee Deities and others v. State of Bihar and others**[14]**.** He has particularly referred to Paragraphs Nos. 11, 12, 13, 15, 18 and 19 of the report in **Ram Jankijee Deities** *(supra)* which, in his submission, lay down the law on this subject. He submits that the decision in **Ram Jankijee Deities** has been relied upon by the Constitution Bench in **M. Siddiq (dead) through Legal Representatives (Ram Janmabhumi Temple Case) v. Mahant Suresh Das and others**[15].

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14 (1999) 5 SCC 50
15 (2020) 1 SCC 1

IV. <u>The history of Lord Adi Vishweshwar and the Temple</u>

36. It is submitted by Mr. Jain that Sri Adi Vishweshwar Temple is in existence from ancient times. The facts relating to the said Temple have been pleaded in the following paragraphs of the plaint:

(i) In Paragraph No. 3 of the plaint, it has been stated that there existed a glorious lofty temple at Adi Vishweshwar Jyotirlinga, near Dashashwamedh Ghat.

(ii) In Paragraph No. 4 of the plaint, it has been stated that in the year 1585, Raja Todar Mal, the then Governor of Jaunpur, at the instance of his *Guru* Narayan Bhatt, reconstructed a magnificent temple of Lord Shiva at the very place where the temple originally existed i.e. Settlement Plot No. 9130 on a large scale, consisting of a Central Sanctum *(Garbagrih)* surrounded by eight *mandaps*.

(iii) In Paragraph No. 5 of the plaint, it has been stated that Aurangzeb had issued a *farman* (order) to demolish existing temples at Kashi and Mathura, which were carried out by his army and the fact of demolition of temple was communicated to him.

(iv) In Paragraph No. 6 of the plaint, it has been mentioned that Settlement Plot No. 9130 along with 5 *krosh* land had already stood vested in the Deity Adi Vishweshwar lacs of years ago.

V. <u>Frame of the Suit</u>

37. Learned Counsel for plaintiff-respondents Nos. 2 to 5 has submitted about the frame of the suit that the necessary averments have been made in the plaint in regard to the matters in issue, as required by Order VI Rule 2 and Order VII Rule 3 of the Code. He has taken the Court through the provisions of Order VI Rule 2 and Order VII Rule 3 and submitted that the learned Senior Advocate for the revisionist has argued that the plaint is liable to be rejected as the boundaries of the suit property have not been given, and also that the property in dispute does come within Police Station and Ward Chowk.

Mr. Jain has submitted that the aforesaid contention is not tenable, inasmuch as *Gata* No. 1 of Sri Kashi Vishwanath Temple falls within the local limits of Police Station Dashashwamedh Ghat, and further, that the survey number of the suit property is 9130, as given in the plaint. He submits that this is sufficient to identify the suit property as required by the provisions of the Code.

38. In support of his submissions, learned Counsel for plaintiff-respondents Nos. 2 to 5 has placed reliance upon the decisions of the Full Bench of this Court in **Ganesh v. Sri Ram Lalaji Maharaj Birajman Mandir and others**[16] and further, on a decision of the Bombay High Court in **Nari Shringar Big Bazar, Nagpur and another v. Pantaloon Retailing (India) Ltd., Mumbai and another**[17]. It is urged that in the above mentioned authorities, it has been held that all that the law requires is that the description of the suit property should be sufficient to identify it. Any other misdescription in the boundaries cannot affect either the suit or the decree passed in the suit. It has also been urged that within the scope of Order VII Rule 11 of the Code, the question of boundaries of the suit property cannot be gone into.

VI. <u>The worship of *asthan*, images, idols, Deities etc.</u>

39. Learned Counsel for the plaintiff-respondents Nos. 2 to 5 have drawn the attention of the Court to the pleadings regarding worshipping the *asthan*, images and Deities pleaded in the plaint. The following paragraphs of the plaint have been referred to :

> (i) In Paragraph No. 8, it has been mentioned that the devotees have been worshipping images of Maa Sringar Gauri, Lord Hanuman, Lord Ganesha etc. that are present in Settlement Plot No. 9130 since time immemorial despite the fact that Muslims, without any authority of law, raised some

16 1972 SCC OnLine All 244 : AIR 1973 All 116 (FB)
17 (2008) 3 Mah.L.J. 698

constructions over the temple, partly demolished by Aurangzeb.

(ii) In Paragraph No. 9, it has been averred that the Hindus continue to worship the Deities.

(iii) In Paragraph No. 10, it has been averred that the Hindus continued to be in possession of cellar *(tahkhana)* towards South and other parts of demolished temples. Lord Adi Vishweshwar is still in existence in His original shape.

(iv) Paragraph No. 11 refers to introduction of words “old temple” and “new temple”. Sometime in the years 1780-90, Rani Ahilyabai Holkar of Indore got constructed a Temple of Lord Shiva and established a Shiv Lingam adjacent to the old temple of Lord Shiva, which, for the sake of convenience, was termed as “new temple” and Sri Adi Vishweshwar Temple was termed as the “old temple”.

(v) In Paragraph No. 12, the book of Dr. A.S. Altekar has been relied upon.

(vi) In Paragraph No. 37, the description of Deities existing within the suit property has been given.

VII. <u>Civil Suit No. 62 of 1936</u>

40. This is a suit of the old, which has figured in the submissions of learned Counsel for both parties in one way or the other. The suit was numbered as Civil Suit No. 62 of 1936 on the file of the subordinate Judge of Benaras (Varanasi). It is submitted by Mr. Vishnu Shankar Jain that in the above suit, the Hindus were not made parties and their application for impleadment was rejected. Any order or decree passed in the suit is not binding on any member of the Hindu community and the decree passed in the suit cannot be used against any Hindu, including the plaintiffs. The right of Hindu devotees to worship within the temple complex in the suit property cannot be defeated on the strength of the judgment, decree or findings rendered in the said suit. The plaintiffs here have pleaded about the old suit under reference in Paragraphs Nos. 18, 19, 20 and 21 of the plaint.

41. It is submitted that it is a well-settled proposition of law that a decree or order passed in any suit or proceedings cannot bind parties who were not arrayed, either directly or through persons, through or under whom they claim. In support of the contention of his, Mr. Jain has placed reliance upon the decision of the Supreme Court in **State of Bihar v. Radha Krishna Singh and others**[18]. He has drawn the Court's attention to Paragraphs No. 124 and 125 of the report in **Radha Krishna Singh** *(supra)*. It is submitted by Mr. Jain that though the decree passed in the old suit would not bind the plaintiffs, as they were not parties, oral testimony in the said suit can be relied upon under Section 13 of the Indian Evidence Act, 1872, as held in the case of **Sital Das v. Sant Ram and others**[19]. It is next submitted that whatever decree has been passed in Suit No. 62 of 1936 does not derogate from the submission that it does not bind the plaintiffs, who were not parties, directly or through the predecessors-in-title by virtue of Section 2 of the Act of 1983.

42. So far as judgment in Civil Suit No. 62 of 1936, brought on record as Paper No. 229C is concerned, it is submitted that no Hindu or body of Hindus were arrayed as parties to the suit. Therefore, the findings, whatever recorded in the judgment, are not binding and cannot affect the plaintiffs. It is pointed out by Mr. Jain that in the judgment of the learned Civil Judge, nevertheless, it is mentioned that the Mosque in question was erected after demolishing the existing temple illegally. Mr. Jain has drawn the Court's attention to the following remarks and the judgment of the learned Civil Judge, who decided Civil Suit No. 62 of 1936:

> "The next question then is as to whether the construction of the mosque was lawful. Certainly according to strict Muslim law it was not lawful. The demolition of temples according to law might have been lawful in order to abolish idolatry, but the law no where provides so far as it has been referred to me that the lands occupied by

18 (1983) 3 SCC 118
19 AIR 1954 SC 606

> such temples should also be appropriated. On the other hand the law provides that it is not lawful to offer prayers on the land of another without his consent, and it is not the plaintiffs' case that over the consent of the Hindus was taken, so strictly speaking, I think, on the materials laid before me, that it was not lawful to construct his mosque and to offer prayers in it, but as already observed the King is above the law and so everything done by him was lawful."

43. It is submitted by the learned Counsel for the plaintiff-respondents Nos. 2 to 5 that the learned Civil Judge, in his judgment, has not used the word "Waqf" in its true sense, and the said word has been employed in reference to possession over the property either by a Hindu or a Muslim for the purpose of temple or mosque. In this regard, attention of the Court has been invited to the following remarks in the judgment of the learned Civil Judge deciding the old suit:

> "His second contention is that the court treated the whole thing as 'waqf', and therefore it is Muslim 'waqf'. The defendant's reply is that the 'word waqf' was used for both, that is Muslim and Hindu dedications. I agree with this contention. The court said Masjid Gyanbafi and well Bishnath and whatever appertain to it or them is all "waqf"."

VIII. U.P. Sri Kashi Vishwanath Temple Act, 1983

44. It is argued by Mr. Jain that it is relevant to mention that the U.P. State Legislature passed the Act of 1983 recognizing right of the devotees to worship within Sri Adi Vishweshwar Temple and also in the new Temple constructed by Rani Ahilyabai Holkar. Section 5 of the Act of 1983 declares that the Temple and the endowment vests in the Deity of Sri Kashi Vishwanath.

45. It is submitted by the learned Counsel for plaintiff-respondents Nos. 2 to 5, in Paragraphs Nos. 22 to 25 of the plaint, that there are averments made in regard to the Act of 1983. The word "Temple" has been defined in Section 4(9) of the Act, last mentioned. Section 5 of the Act of 1983 discloses the ownership of the Temple and its

endowment shall vest in the Deity of Sri Kashi Vishwanath. The term “Endowment” has been defined under Section 4(5) of the Act of 1983. The Supreme Court has upheld the validity of the Act last mentioned, giving a complete history of the Temple in Paragraph No. 1 of the report in **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and others v. State of U.P. and others**[20]. Much reliance has been placed on this judgment by Mr. Vishnu Shankar Jain.

IX. Action of the State Government

46. It is argued that there is a specific pleading on behalf of the plaintiffs that the State Government, without any authority of law and without passing any written order, had directed the District Administration of Varanasi to restrict entry of the devotees of Lord Shiva within the old temple complex. In this regard, the averments made in Paragraphs Nos. 42, 43, 44, 45, 48 and 49 of the plaint have been referred to.

X. No waqf ever created

47. It is the plaintiffs' case that there has never been a dedication of the suit property by the lawful owner thereof to God so as to constitute it into a waqf. The suit property, once vested in the Deity Sri Adi Vishweshwar, since time immemorial, no waqf could ever be created by anyone out of it. It did not belong to any member of the Muslim community, including the reigning monarch of the day at any point of time, entitling its dedication to a waqf, where a mosque could be erected. It is pleaded that the Muslims have no right to use of the suit property for religious purposes in the absence of creation of a waqf. In this regard, averments in Paragraph No.7 of the plaint have referred to. It is pointed out by Mr. Vishnu Shankar Jain that the principle that property of which a waqf is made must belong to the settlor is carried in the famous Treatise '**Principles of Mahomedan**

20 (1997) 4 SCC 606

Law' by Sir D.F. Mulla. Section 176 has been referred to, which speaks about the competence of the person creating a waqf:

> "**176. Subject of Waqf must belong to waqif–**The Property dedicated by way of waqf must belong to the waqif (dedicator) at the time of dedication. A person who is in fact the owner of the property but is under the belief that he is only a mutawalli thereof is competent to make a valid waqf of the property. What is to be seen in such cases is whether or not that person had a power of disposition over the property."

48. In view of the above proposition of law, it is submitted that property was vesting in the Deity when, under the orders of Aurangzeb, it was partly demolished/ damaged, and, therefore, there could be no *waqif* competent to dedicate the property to 'Allah'.

XI. <u>Notification dated 25.02.1944 under U.P. Muslim Waqfs Act, 1936</u>

49. It is submitted by Mr. Jain that the existence of the waqf has never been traced to a waqf by user and its recognition is by virtue of a notification dated 25.02.1944 issued under the U.P. Muslim Waqfs Act, 1936. The notification dated 25.02.1944 (Paper Nos. 103-Ga and 104-Ga) relates to a certain Alamgiri Mosque, which was erected after demolition of Sri Bindu Madhav Temple in the year 1673, also during the regime of Aurangzeb. It is pertinent to say that in the notification, Settlement Plot No.9130 does not find mention, whereas in relation to other properties, the settlement numbers have been given. The submission is that aforesaid notification does not relate to the suit property, or so to speak, the Gyanvapi Mosque. It is submitted that the revisionist, during hearing before the learned District Judge, filed a copy of the notification dated 25.02.1944 issued under the U.P. Muslim Waqfs Act, 1936. He has emphasized that the notification does not relate to the suit property, called the Gyanvapi Mosque. The reference there to the Alamgiri Mosque is not to be confounded with the suit property, the Gyanvapi Mosque structure.

50. The revisionist before the learned District Judge, during the course of hearing, filed an extract of *Khasra* of 1291 *Fasli* (Calendar Year 1883-1884) relating to Plot No. 9130. It is numbered as Paper No. 221-C. It is argued that the correctness of the entries made in any revenue record can be proved by leading evidence. The revenue record is not proof of ownership or title.

51. It is next submitted that the notification issued under the U.P Muslim Waqfs Act, 1936 is not binding on non-Muslims. The expression 'person interested', occurring in Section 5(2) of the U.P Muslim Waqfs Act, 1936 was later employed in Section 6 (1) of Waqf Act, 1954. The expression fell for consideration before the Supreme Court about its import, where it was held that it does not apply to persons, who are non-Muslims. In support of the contention, reliance has been placed by Mr. Jain upon the following decisions of the Supreme Court:

(a). **Board of Muslim Wakfs, Rajasthan v. Radha Kishan and others**[21]; and,

(b). **Ramesh Gobindram (Dead) Through LRs v. Sugra Humayun Mirza Wakf**[22].

52. The submission is that in view of the law laid down in the context of what a 'person interested' under the statutes relating to waqf would mean, it is evident that it has no application to non-Muslims.

53. Towards the tail-end of his submissions under this limb of their case, it is pointed out by Mr. Vishnu Shankar Jain that on the official website[23] of Waqf Assets Management System of India, the particulars of a mosque have been published showing its location in Manduadih, bearing registration No.100. It carries a description of all

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21 (1979) 2 SCC 468
22 (2010) 8 SCC 726
23 www.wamsi.nic.in

the cases pending against Waqf No.100. Those cases are in relation to the suit property. A copy of the document is available on the official website. This document, after supplying a copy to the learned Counsel for the revisionist, was filed before the learned District Judge during the course of arguments. A copy of the document was also placed before this Court, downloaded from official website as aforesaid.

54. It is pointed out by the learned Counsel for plaintiff-respondents Nos.2 to 5 that the publication on the official website does not carry details of the Gazette Notification, date of creation of the waqf, *Khasra* Number and other relevant details. It is also submitted that the documents filed by the revisionist cannot be looked into in deciding this application under Order VII Rule 11 of the Code.

XII. <u>Regarding documents filed along with paper no. 219-C</u>

55. It is submitted by the learned Counsel for plaintiff Nos.2 to 5 that the revisionist has filed papers Nos. 221-C, 222-C, a copy of *Khasra* of 1291 *Fasli* (corresponding to the Calendar Year 1883-84) to demonstrate that a mosque was recorded there. Learned Counsel for the plaintiff-respondents Nos.2 to 5 says that they seriously dispute the correctness of the entries made in the *Khasra* by the officials of Revenue Department. It is emphasized that in **Din Mohammad and others v. Secretary of State**[24], relied upon by the revisionist, the aforesaid revenue record was discarded by this Court in appeal. It is further urged that the correctness of entries made in any revenue record can be proved by leading evidence. The revenue record is not proof of ownership or title.

56. It is submitted that for a proposition of the law, it is well settled that entries made in the revenue records do not create or extinguish title to land, nor do these have any presumptive value about title. Mr.

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24 AIR 1942 All 353

Jain, in this connection, has placed reliance upon the following authorities:

(a). **Union of India and others v. Vasavi Cooperative Housing Society Limited and others**[25]; and,

(b). **Prabhagiya Van Adhikari Awadh Van Prabhag v. Arun Kumar Bhardwaj (Dead) through LRs. and others**[26].

57. It is next submitted that the authenticity and contents of paper No. 223-C is seriously disputed by plaintiff-respondents Nos.2 to 5. This document, it is said, is not a public document. Its genuineness and correctness are subject to proof by evidence. The entries made in this document are totally incorrect. There is no material to support the facts stated therein. The document has been prepared designedly, bearing in mind the ongoing litigation, that commenced with the filing O.S. No. 610 of 1991. The right of devotees, who are Hindus and devotees of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji etc., cannot be defeated due to the licence granted in the year 1993 in favour of the State by the U.P. Sunni Central Board of Waqf, carried in paper No.224-C. The correctness of this document is seriously disputed on behalf of the plaintiffs.

58. The map, paper No. 224-C/04 is not admissible in evidence and the correctness thereof can be proved only by leading evidence. The plaintiffs say that they deny the correctness of this map. Again, paper No. 226-Ga is not admissible in evidence and cannot be utilized to defeat the plaintiffs' right, who are Hindus and devotees of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji etc., all of whom exist within the suit property. It is further submitted that the State Government cannot take away the plaintiffs' rights of worshipping the Deities within the suit property. The exchange deed

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25 (2014) 2 SCC 269
26 2021 SCC OnLine SC 868

executed between the revisionist and the State Government through the Chief Executive Officer, Board of Trustees, Sri Kashi Vishwanath Temple, Varanasi also cannot defeat or prejudice the plaintiffs' right to worship, which is the subject matter of the present suit.

XIII. <u>Non-applicability of the Act of 1991</u>

59. According to the learned Counsel for the plaintiff-respondents Nos.2 to 5 the suit property as well as the nature of the relief claimed in the suit, has been specified in the plaint. The suit has been filed *inter alia* for the purpose of restraining the defendants from interfering in the performance of *darshan*, *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, *mandaps* and shrines existing within the old temple complex, i.e. the suit property.

60. It is the plaintiff-respondents' case that the Deities are continuously in existence within the suit property since before 15th August, 1947. The worshippers have a right to *darshan* and *pooja* of the Deities in the suit property. They have every right to file the present suit to protect and preserve their right to practice their religion, flowing from Article 25 of the Constitution.

61. Mr. Jain has referred to various paragraphs of the plaint, including Paragraph Nos.3, 4, 5, 6 and 7, referring to the history of destruction of the old temple and what the plaintiff-respondents say is an encroachment of the old temple by the Muslims, terming it as the Gyanvapi Mosque. But, he is quick to add that what is important is the existence of Sri Adi Vishweshwar Jyotirlingam along with the images of Maa Sringar Gauri, Lord Hanuman, Lord Ganesh and other visible and invisible Deities within the temple complex at Settlement Plot No.9130, properly known as the Sri Adi Vishweshwar Temple. These Deities are being worshipped by devotees of Lord Shiva from time immemorial, despite destruction of a portion of the temple during

the time of Aurangzeb, when without any of authority of law, some constructions over the land of the Deities were raised. The Deity, nevertheless, continues to be the *de jure* owner of the suit property.

62. The image of Maa Sringar Gauri exists within the suit property at the backside of Gyanvapi in the *Ishan Kon* (north-east corner). The Hindu devotees continuously perform *pooja* of Maa Sringar Gauri, Lord Hanuman, Lord Ganesh and other visible and invisible Deities with rituals and are doing circumambulation (*parikrama*) of the temple of Lord Sri Adi Vishweshwar. In this connection, he has drawn the Court's attention to Paragraph No.9 of the plaint.

63. Mr. Jain has also emphasized that the Temple is in possession of a cellar (*Tehkhana*) towards the south and other parts of the demolished temple with its ruins. Lord Adi Vishweshwar is still in existence in the original shape in the western part of the old temple. Learned Counsel for plaintiff-respondents has drawn the Court's attention to Paragraph No.10 of the plaint.

64. It is next submitted that in Suit No.62 of 1936, the witnesses testified to the existence of images of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and visible and invisible Deities, besides the performance of daily *pooja* at that place. Paragraph No.18 of the plaint, where those pleadings are there, has been brought to this Court's notice.

65. In Paragraph No.19 of the plaint, a reference is made to the gist of the testimony of witnesses, who deposed in Suit No.62 of 1936, it is pleaded that the Deities were in existence within the suit property much before the 15th August, 1947 and those Deities are still there.

66. Mr. Jain has emphasized that the averments in the plaint make it clear that it is the plaintiffs' case that the Deities mentioned in the suit are in existence within the suit property since much before the

15th August, 1947, and, therefore, the Act of 1991 would not bar the plaintiff-respondents' right to relief. If the Deities are there, as alleged by the plaintiffs, is a matter to be tried and proved by evidence. It cannot be summarily determined.

67. Mr. Jain submits that the plaintiff-respondents have instituted the present suit to enforce their right to *darshan* and *pooja* of the existing Deities. He has referred to the provisions of Section 4(1) of the Act of 1991 and says that what the Act prohibits is change of the religious character of the place of worship, as existing on 15th August, 1947. The submission is that there is no change to the character of the suit property as existing on 15th August, 1947. The religious character of the suit property, as prevalent on 15th August, 1947, pleaded by parties differently, is a subject matter of evidence to be led on both sides. Therefore, the Act of 1991 does not bar the suit in any manner.

68. Mr. Vishnu Shankar Jain has referred to Paragraph Nos.22, 23, 24 and 25 of the plaint to submit that the word 'Temple' defined in Section 4(9) of the Act of 1983, includes the suit property within the definition. The religious character of the suit property has already been declared by U.P. State Legislature while enacting the Act of 1983. There is no question of the suit being barred by the provisions of the Act of 1983. It is emphasized that under the Act of 1983, the 'Jyotirlinga' is included within the definition of 'Temple', and that it is in existence beneath the structure called 'Gyanvapi Mosque' has been recognized. What is important is that Section 4(2) of the Act of 1983 protects the right of the worshippers to worship the Deities existing within the old temple complex, part of the suit property.

69. The right to worship is an indefeasible right. The suit has been brought to enforce the right of the plaintiff-respondents to worship within the suit property as they were doing before and after 15th

August, 1947. What was the precise nature and character of the building complex, part of the suit property where *darshan* and *pooja* were done before 15th August, 1947 and thereafter by Hindus, like the plaintiffs, is necessary to be determined in order to decide the question of the bar that the revisionist pleads under the Act of 1991. That is a matter of evidence, which would require the suit to be tried.

70. It is next submitted that documents filed on behalf of the revisionist along with their application dated 22.08.2022, that are photocopies of some documents, cannot be looked into. The scope of proceedings under Order VII Rule 11 of the Code does not permit the examination of any kind of documents. It is emphasized more in reiteration by Mr. Vishnu Shankar Jain that the Hindus have been worshipping at different points of the disputed structure, part of the suit property, images of God and Goddesses. The office of the suit is limited to enforcing the plaintiffs' right to worship and *pooja* of the Deities *virajman* in visible and invisible form, who were being worshipped continuously prior to 1990 or 1993 by the Hindus in general, and, thereafter, with certain restrictions till date. The suit really is one brought to remove the restrictions imposed by the State Government upon the right to worship those Deities for the plaintiff-respondents. It is urged that the suit raises triable issues and is not barred by the Act of 1991, the Act of 1995 or the Act of 1983, so as to call for a rejection of the plaint under Order VII Rule 11 of the Code.

71. Mr. Saurabh Tiwari, learned Counsel has addressed the Court at length on behalf of plaintiff-respondent No.1, supporting the order impugned. He has pointed out material pleadings carrying facts, that show an ancient as well as a continuing right, entitling the plaintiffs to do *pooja-archana* of Maa Sringar Gauri and other Deities on the western wall of the old Sri Adi Vishweshwar Temple.

72. Mr. Vineet Sankalp, learned Counsel appearing for defendant No.5 and respondent No.9 here, the Board of Trustees of Kashi Vishwanath Temple, has taken a stand that the Board have no objection to a trial of the suit.

The Court's determination

73. This Court must say at the outset that one would not expect the record of submissions so elaborate in a revision arising out of an order deciding a motion under Order VII Rule 11 of the Code. However, this Court has no option but to record a summary of what learned Counsel for the parties appearing on both sides said in the unexpectedly long schedule of hearing, that spread across a total period of 17 days, albeit not full day hearings.

74. Mr. S.F.A. Naqvi, learned Senior Advocate for the revisionist has, in substance, urged that the order of the learned District Judge ought to be reversed and the application under Order VII Rule 11 of the Code allowed, rejecting the plaint because the suit is barred under Section 9 of the Code read with the three different statutes, to wit, Act of 1991, the Act of 1983 and the Act of 1995. What the revisionist, therefore, says is that the plaint ought to be rejected under Order VII Rule 11(d) of the Code. The submission of Mr. Naqvi that the Civil Court has jurisdiction to try all suits of civil nature by virtue of Section 9, except those where the jurisdiction of the Civil Court is expressly, or by necessary implication, barred, is a proposition too well settled to brook doubt. The more pertinent question here is, if at all, one or the other statute relied upon by Mr. Naqvi to say that the suit is expressly or by necessary implication, barred, does really bar the suit?

75. Urging that the suit is barred the Act of 1991, Mr. Naqvi has drawn the attention of the Court to Sections 3, 4 and 7 of that Act and also its Statement of Objects and Reasons. It would be apposite to

notice the statement of objects and reasons, the enacting clause, besides Sections 3, 4 and 7 of the Act of 1991. These read:

"**STATEMENT OF OBJECTS AND REASONS**

In view of the controversies arising from time to time with regard to conversions of places of worship, it is felt that such conversions should be prohibited.

2. In order to foreclose any controversy in respect of any place of worship that existed on 15th day of August, 1947 it is considered necessary to provide for the maintenance of the religious character of such place of worship as it existed on the 15th day of August, 1947. As a consequence thereof, all the suits or other proceedings pending as on 11th day of July, 1991 with respect to any of such places of worship, may abate and also further suits or other proceedings may be barred.

3. However, since the case relating to the place commonly called Ram Janma Bhumi-Babri Masjid forms a class by itself, it has become necessary to exempt it entirely from the operation of this Act.

4. Moreover, in order to maintain communal harmony and peace, matters decided by courts, tribunals or other authorities, or those settled by parties amongst themselves or through acquiescence, between 15th day of August, 1947 and the 11th day of July, 1991 are also exempted from the operation of this Act.

5. The 11th day of July, 1991 is proposed as the commencement date of the Act as on that day the President addressed the Parliament making such a declaration.

6. The Bill seeks to achieve the above objectives.

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

BE it enacted by Parliament in the Forty-second Year of the Republic of India as follows:—

3. Bar of conversion of places of worship.—No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof.

4. Declaration as to the religious character of certain places of worship and bar of jurisdiction of courts, etc.—(1) It is hereby declared that the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day.

(2) If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority:

Provided that if any suit, appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act, such suit, appeal or other proceeding shall not so abate and every such suit, appeal or other proceeding shall be disposed of in accordance with the provisions of sub-section (1).

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to,—

(*a*) any place of worship referred to in the sub-sections which is an ancient and historical monument or an archaeological site or remains covered by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) or any other law for the time being in force;

(*b*) any suit, appeal or other proceeding, with respect to any matter referred to in sub-section (2), finally decided, settled or disposed of by a court, tribunal or other authority before the commencement of this Act;

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

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

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

7. Act to override other enactments.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than this Act."

76. A perusal of the Statement of Objects and Reasons and Sections 3, 4 and 7 of the Act of 1991, to which elaborate reference has been made by Mr. Naqvi, shows that the statute seeks to preserve the identity of places of worship of any religious denomination or any section thereof, forbidding its conversion into a

place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof. A cutoff date has been introduced, with reference to which, the existence of religious character of the place of worship is to be preserved. That date is 15th of August, 1947. The fact in issue, therefore, that would attract the bar under the Act of 1991 is the act of conversion of an existing place of worship belonging to any religious denomination, to that of another religious denomination or any other section of the same religious denomination; and, the character that has to be preserved for any place of worship is with reference to 15th August, 1947. The first and perhaps the terminal question to be answered, while judging the plea of a statutory bar to the present suit under the Act of 1991, is to find out if the office of the suit, or so to speak, the reliefs that the plaintiffs claim, are ones directed to convert what the revisionist claims to be the Gyanvapi Mosque into a Hindu temple.

77. A perusal of the plaint, particularly the relief clause and the material averments, does not show that the existing character of the place of worship as the Gyanvapi Mosque, asserted by the revisionist, is sought to be altered. There are averments in the plaint based on historical origin of the entire structure and the subsisting remnants of all that has happened in history to show that the image of Maa Sringar Gauri exists within the suit property at the backside of the Gyanvapi Mosque in the *Ishan Kon* (north-east corner). This averment finds place in Paragraph No.9 of the plaint. There is then an averment that Lord Adi Vishweshwar is still in existence in His original shape in the western part of the old temple within the suit property. This averment finds place in Paragraph No.10 of the plaint.

78. There is an averment in Paragraph No.12(ii) of the plaint that a portion of the *mandap* of the old temple exists in the courtyard of the Gyanvapi Mosque, still in possession of the Hindus. There is a further

averment in Paragraph No.12(iv) that at the back of the western wall of Gyanvapi Mosque, there is the image of Goddess Maa Sringar Gauri, existing since time immemorial and worshipped continuously. In Paragraph No.12(v) of the plaint, it is pleaded that Hindus have continued to worship, on the western side of the Mosque, 'the *Gupt*', i.e. the invisible Deity. The Hindus continue to worship the shape in the dilapidated wall of the ruins to the west of the Mosque as the abode of Maa Sringar Gauri and her son, Lord Ganesha. They also pay homage to the *Panch Mandaps*.

79. In Paragraph No.25 of the plaint, it has been averred that it is undisputed that *pooja* and worship of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, *mandaps* and shrines, is being performed by the devotees. There is an averment there that the Act of 1983 recognizes the right of devotees to worship the Deities within the old temple complex.

80. In Paragraph No.26 of the plaint, it is asserted that the worshippers of Lord Shiva and other subsidiary Deities have the right to perform *pooja* and *darshan* of the shrines, sub-shrines, *asthan*, images of Deities, *mandaps*, including the image/ shrine of Goddess Sringar Gauri.

81. In Paragraph No.36 of the plaint, there is a clear averment that on the 4th day of *Chaitra Navratra*, *Samvat* 2078 of the Hindu calendar year or the Gregorian calendar date 16th April, 2021, the devotees were allowed *darshan* and *pooja* of Maa Sringar Gauri. The plaintiffs along with other devotees performed *pooja* on 16.04.2021, but thereafter the plaintiffs are not being allowed to perform the daily *pooja*.

82. It is pleaded rather insequentially in Paragraph Nos.42 and 43 of the plaint that the devotees of Lord Shiva were performing daily *pooja* and worship of Maa Sringar Gauri and the other Deities within

the old temple continuously till 1990, when during Ayodhya movement, the Government of Uttar Pradesh placed restrictions on the daily *pooja*, and since 1993, the State Administration, working under the oral orders of the State Government, are allowing the devotees to perform *pooja* only on the 4th day of the *Vasantik Navratra* in *Chaitra*. The plaintiffs perform *pooja* (worship), do *darshan* from outside and perform rituals there. They also worship within the old temple, whenever they are allowed to enter there.

83. In Paragraph Nos.27 and 44 of the plaint, it is averred that the State Government have no right, power or jurisdiction to restrict the right of devotees to worship by passing a restraint order without any authority of law and without giving reasons to impose such restrictions. Doing so completely negates the plaintiffs' right to practice of their religion guaranteed under Article 25 of the Constitution.

84. In Paragraph No.45 of the plaint, it is averred that the State Government have no right to infringe fundamental rights of citizens guaranteed under Article 25, by restricting the *pooja* and *darshan* to a single day. The officers of the Government, in putting those restrictions, are infringing the rights of citizens, which is arbitrary and void.

85. In Paragraph No.46, it is averred that the plaintiffs and devotees of Lord Shiva have the fundamental right to uninterrupted daily *darshan*, *pooja*, *aarti*, *bhog* and the performance of rituals of Goddess Maa Sringar Gauri at the *asthan* of Lord Adi Sri Vishweshwar along with Lord Ganesha, Nandiji and other Deities within the old temple complex, existing at Settlement Plot No.9130, Ward and P.S. Dashashwamedh. All these averments have apparently been made in aid of the reliefs claimed in Clauses (a) and (b) of the relief clause.

86. The averments above referred have been made to support the plaintiffs' right to worship Maa Sringar Gauri at the *asthan* of Lord Adi Vishweshwar and the other Deities, visible and invisible.

87. In Paragraph No.47 of the plaint, there are averments to support the relief sought in Clause (c) of the plaint directed to ensure that the defendants do not demolish, damage, destroy or cause any damage to the images of Deities of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities, visible and invisible.

88. In Paragraph No.47 of the plaint, it is averred that the plaintiffs, on 10.08.2021, have learnt that some members of the Muslim community, with the active support of the revisionist, are intending to damage/ destroy the images of Deities Maa Sringar Gauri, Lord Ganesha, Lord Hanuman *Virajman*, within the old temple with the intention to deprive the members of the Hindu community from *darshan* and *pooja* etc.

89. In Paragraph No.48 of the plaint, it is pleaded that under the undue influence exerted by the State Government and the District Administration, the Board of Trustees of Sri Kashi Vishwanath Temple had to give 1000 square feet of land belonging to the Trust by entering into a deed of exchange with the Uttar Pradesh Sunni Central Board of Waqf.

90. Dovetailed with this averment in the plaint, it is said in Paragraph No.49 that the plaintiffs have reasons to believe that the State Government and the District Administration of Varanasi would be silent spectators and will not take any action if the revisionist, their members and followers cause damage to the images of the Deities within the precincts of the old temple.

91. It appears that on 16th of April, 2021, the plaintiffs had *darshan* and did *pooja* of Maa Sringar Gauri, but on the following day i.e. the

17th April, 2021, they were prevented from doing so by defendant-respondents Nos.6, 7 and 8 to the suit, as pleaded to in the plaint, and particularly, Paragraph No.50 thereof.

The Nature and Scope of the plaintiffs' right, the nature of the suit and the restrictions placed on the plaintiffs' right by the State, impugned in the Suit

92. Upon a reading of the plaint, it is evident that the plaintiffs have not brought the suit as a class action, seeking to represent as relators, the right of Hindus in general, or a particular class, who are the devotees of Lord Shiva, Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, to do *pooja* or *darshan* of the Deities in the suit property. The plaintiffs have asserted that there has been such a right since time immemorial, amongst the devotees of Lord Shiva, Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, which has been exercised in one form or the other. What the plaintiffs seek to exercise is their individual right to worship Lord Shiva, Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, tracing their right to their religious beliefs and supporting it by averments regarding the tradition amongst Hindus to worship these Deities. The plaintiffs have elaborately averred about the basis of their religious belief founded on Hindu scriptures, but that is to show that their belief is well-grounded in religious text. Beyond that, the right pleaded by the plaintiffs is their personal right to worship the named Deities *in situ*, i.e. the suit property. There is no pleading, apart from narration of historical events concerning the suit property, which may show *in presenti* any cause of action or relief to convert the existing Gyanvapi Mosque into a temple or any other place of worship of the Hindus, within the mischief of Sections 3, 4 and 7 of the Act of 1991.

93. A reading of the plaint shows that according to the plaintiffs, there is a right with them as Hindus to perform *pooja* of Goddess Maa

Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible Deities, though on account of events that have taken place over time, the exercise of that right now has come to be restricted. In the present time, one right that the plaintiffs are free to exercise on a daily basis is the performance of *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, with rituals and doing circumambulation (*parikrama*) of Lord Adi Vishweshwar. This right is exercised in relation to the image of the Deities that exists at the backside of the Gyanvapi Mosque in the *Ishan Kon* (north-east corner). This right the plaintiffs say they can exercise any time and is being continuously exercised by other devotees without restriction. Apparently, this right to do *pooja* through rituals and circumambulation (*parikrama*) is from outside the suit property and not by entering it. The other right, that is averred to be exercised *in presenti* by the plaintiffs, is to do *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, and other visible and invisible Deities by entering the suit property, which is now restricted to the 4th day of *Vasantik Navratra* in *Chaitra*, that fell in the year 2021 on the 16th of April. This right, prior to 1993, was being exercised on a daily basis by other Hindus, besides the plaintiffs. It came to be restricted on a temporal basis to a single day, instead of a everyday right, to wit, the 4th day of the *Vasantik Navratra* in *Chaitra* in the year 1993 for the devotees in general under oral instructions of the State Government, by the District Administration, represented by defendant-respondents Nos.6, 7 and 8.

94. The plaintiffs question the right of the State Government to restrict this right to a single day, as it violates their rights guaranteed under Article 25 of the Constitution. These averments are eloquent in Paragraph Nos.42, 43, 44, 45 and 46. It appears from the averments in the plaint, particularly those in Paragraph No.43, that the right to worship these Deities by the devotees was exercised on a daily basis

by entering the suit property up to the year 1990 and came to be restricted by the Government under some kind of an administrative instruction since the year 1993. There was much ado during the hearing made on behalf of the revisionist about the mention of the two years when this right is said to have been restricted, i.e. 1990 and 1993.

95. Mr. Naqvi emphasized that the pleadings are not clear when the right was actually restricted from a daily exercise to a single day. A wholesome and meaningful reading of the paragraph, together with other averments in the plaint, shows that the restriction placed on the right of devotees to do *pooja* of the Deities was an administrative or a law and order measure, taken in the aftermath of the Ayodhya movement. Apparently, such decisions do not come about in the form of a legislative edict or a judicial order enforced from a particular day. These come about as measures, more of arrangement, to order about a particular situation and to preserve law and order. These come with their own hiccups. *Prima facie*, therefore, there is nothing to condemn the plaintiffs' pleadings as vague on this account. If they say that the right was exercised continuously till 1990 and then restricted to a single day in the year 1993, in between, there would be exploration of measures by the Government and the Administration to preserve law and order.

96. The plaintiffs, therefore, assert the existence of a right on a daily basis to do *pooja* and *darshan* of the Deities, that was exercised by Hindus in general, without hitch until the year 1990. It came to be restricted for the sake of administrative exigency to a single day in the year 1993. The right the plaintiffs plead has never been effaced as devotees of the Deities of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman. The plaintiffs say that they are entitled not to be restricted in their right to do *pooja* and *darshan* of the Deities at any time during the year. It is apparent from the case of parties that the right of the

plaintiffs to do *pooja* and *darshan* of the Deities after entering the suit property and proceeding to the *situs* of the Deities was never questioned by the revisionist. That is not the plaintiffs' case either. The right was restricted to a single day in the year 1993 from a daily event by the State Government and the District Administration, bearing in mind the exigencies of law and order prevalent at the time. When the restriction came, the plaintiffs say it was over a stretch of time between 1990 and 1993 during the Ayodhya movement. The substance of the right that the plaintiffs assert is that their right to worship is intact and not impugned by the revisionist at any point of time. Now, the plaintiffs, who are also devotees of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, are entitled to prove their right to worship, unfettered by the temporal restriction to a single day, because the exigencies that brought about the restriction have since long disappeared.

97. The State Government and defendant-respondents Nos.6, 7 and 8, who represent the District Administration of Varanasi, took no stand in the matter before this Court. But, that hardly matters. After all, this revision is about the suit being triable or not on the basis of averments in the plaint and nothing more. All that the defendants can show is that the suit is not triable according to the averments in the plaint. The law in this regard is well settled, as held by the Supreme Court in **P.V. Guru Raj Reddy represented by GPA Laxmi Narayan Reddy and another v. P. Neeradha Reddy and others**[27]. In **P.V. Guru Raj Reddy** (*supra*), it has been observed:

> "**5.** Rejection of the plaint under Order 7 Rule 11 of CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under

27 (2015) 8 SCC 331

> Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial."

98. A similar view has been expressed by their Lordships in **H.S. Deekshit and another v. M/s. Metropoli Overseas Limited and others**[28].

The Act of 1991

99. The question that the revisionist raised to say that the suit is barred and now under consideration, is founded on the Act of 1991. No doubt, that statute places an express bar on the right to convert a place of worship of one religious denomination to that of another, which is to be preserved for every place of worship as existing on the 15th day of August, 1947. Here, apparently, according to the averments in the plaint, there is no case or relief seeking to convert the Gyanvapi Mosque, which the revisionist represent, as already said, into a Hindu temple or other place of worship. The suit is confined in its office to enforcement of the plaintiffs' right to worship, according to the established tradition. How far that right can be established, is relevant for the purpose of present suit and that must await trial.

100. It has to be clearly borne in mind that the right to worship the Deities of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, that the plaintiffs seek to enforce, upon the allegations in the plaint and the material placed before the Court by parties, short of evidence or defence, is neither a new right that the plaintiffs seek to establish nor is it a right that was never exercised after 15th August, 1947 by devotees like the plaintiffs. It is nobody's case that the devotees of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and

28 2022(4) ICC 944

the other Deities in the suit property exercised this right at some point of time, which became extinct on or before 15th August, 1947. The right continued to be exercised by the devotees, as claimed, all through the year up to the year 1990 without hitch. It is this right that the plaintiffs seek to enforce.

101. As earlier remarked, the exercise of that right appears to have run a troubled course between the years 1990 and 1993, till it was restricted to a single day, that is to say, 4th day of the *Vasantik Navratra* in *Chaitra*. Further, as already said, this temporal restriction came in as a matter of administrative exigency then emergent for the Government and the District Administration. The right was not restricted to a single day upon an objection or resistance by the revisionist. The right of the devotees of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities in the suit property, according to the pleadings in the plaint, is an existing right, which the plaintiffs, as such devotees, seek to enforce throughout the year for themselves. It is quite another matter whether the plaintiffs establish this right at the trial or fail, which is beyond the scope of the present proceedings.

102. The fact that they have a right to do *darshan* and *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities in the suit property throughout the year is what devotees like the plaintiffs were doing, as already remarked, up to the year 1990 and are now doing on a single day of the year. This Court fails to see that if the plaintiffs or devotees like them can do *pooja* and *darshan* of the Deities on a single day in the year with no threat to the mosque's character, how the making of it a daily or a weekly affair, would lead to a conversion or change of the mosque's character. It may require some arrangements to be made by the local administration, and may be, also by the Government by way of some regulation, but that is not the concern of the law.

103. The other facet of the matter, of course, is, and one already noticed, that the right being exercised all through the year beyond 15th August, 1947 and as late as in the year 1993, the enforcement of the right that the plaintiffs seek throughout the year does not attract the mischief of Sections 3 and 4 of the Act of 1991. Likewise, the mere asking to enforce a right to worship Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities, located in the suit property at their specified place, is not an act that changes the character of the Gyanvapi Mosque into a temple. It is no more than the seeking of a full enforcement of a subsisting right that inheres in the plaintiffs and since long exercised by other devotees like them until a time much after 15th August, 1947. This, at least, is the plaint case which does not, in the least measure, attract the bar under Sections 3 and 4 of the Act of 1991.

104. The declaration that has been sought about the plaintiffs' right appears to be a relief sought *ex abundanti cautela*. As already noticed, the plaintiffs say that devotees like them have exercised the right much after 15th August, 1947 on a daily basis uninterruptedly, until the year 1990, then with some trouble between the years 1990 and 1993, and thereafter as an annual feature. This Court would think that the declaration may not at all be necessary. After all, the relief is only about the frequency of the exercise of the right, rather than the exercise of the right itself.

105. The other relief that the plaintiffs seek is to prevent an apprehended demolition of the Deities existing in the north-east corner of the Gyanvapi. After all, it is the images of the Deities of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, that are the object of the devotees' worship, including the plaintiffs. The relief that the plaintiffs seek is based on the apprehension of a serious injury. The injunction, that has been claimed in this part of the relief, is a *quia timet* injunction, which has to be proved according to its own

standards. The existence of the images of the Deities that the injunction under this part of the relief seeks to preserve and prevent desecration of, is to preserve a position about the existence of the Deities, on the plaint allegations that are there on and after 15th August, 1947 until date. It is not by altering the existing position of the Deities that the plaintiffs seek to enforce their right to worship. Therefore, this part of the relief would also not fall in the teeth of the bar envisaged under Sections 3 and 4 of the Act of 1991.

106. So far as Relief (d) is concerned, that is a relief ancillary to the other reliefs and relates to issue of directions to the Government and the Administration to make security arrangements to enable the plaintiffs to exercise their right to worship the Deities daily within the suit property. If the other reliefs, as already said, are not *ex facie* barred by the provisions of Sections 3 and 4 of the Act of 1991, the provision in clause (d) of Rule 11 of Order VII of the Code would hardly be attracted to make out a case of non-triability.

107. It must be noticed here that a very important limb of the submissions of Mr. Naqvi, that was canvassed before this Court very emphatically, is that the plaint is a piece of clever drafting. What Mr. Naqvi has urged is that couched in the garb of the enforcement of their right to worship the Deities, the plaintiffs, in substance, seek an alteration of the character of the Mosque into a temple. The idea, about pleadings being a piece of 'clever drafting' to escape an express or implied bar to the maintainability of an action before the Court, gained currency in this country with the employment of that expression by V.R. Krishna Iyer, J. in **T. Arivandandam v. T.V. Satyapal and another**[29], a *cause celebre* relating to discouraging trials of frivolous actions. In **T. Arivandandam** (*supra*), His Lordship observed:

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29 (1977) 4 SCC 467

> "**5.** We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:
>
> "It is dangerous to be too good.""

(emphasis by Court)

108. Not surprisingly, Mr. Naqvi relied on the said decision in aid of his submission that the plaint here was a piece of clever drafting. This Court is afraid that the plaint giving rise to the suit here is far from a piece of clever drafting. The point has been elucidated much in detail already and need not be repeated. For all that is said in this regard, it only need be mentioned that there is no clever drafting, because what the plaintiffs seek to enforce is a subsisting right of worship which they have been exercising after 15th August, 1947. It is not that that the plaintiffs, in any manner, wish to bring about any change to the suit property or alter its character, in whatever manner existing.

109. The learned District Judge has, more or less for the same reasons, held that the suit is not barred by the Act of 1991 and this Court, for all that has been said, does not find any ground to interfere with that conclusion.

Limitation: a plea by surprise

110. Although the point of the suit being *ex facie* barred by limitation, was not a plea that was urged before the District Judge or decided by him, it was sprung up by Mr. Naqvi in the rejoinder of his submissions before this Court. A plea of limitation does not find place in the application under Order VII Rule 11 of the Code, nor a ground to that effect is raised before this Court in the memorandum of revision. In the opening of his case also, Mr. Naqvi did not argue that point. But, at the fag end in the rejoinder, he said that the right of the plaintiffs is barred by limitation, because they are seeking a declaration, 28 years after the cause of action first accrued. He referred to the provisions of Article 58 occurring in Part III of the Schedule to the Limitation Act, 1963[30] to submit that the right ought to have been enforced within three years by the Hindus after the year 1990 or 1993. Now, it was a most exceptionable way to raise a plea of limitation in a motion under Order VII Rule 11 of the Code, where it was never raised earlier. Nevertheless, this Court heard Mr. Naqvi in support of the contention and Mr. Jain in answer.

111. Mr. Jain submits that the suit would not be barred by limitation, because the right to worship, which the plaintiffs assert, gives rise to a continuous or a recurring cause of action, to which Mr. Naqvi has responded by saying that Article 58 of the Schedule to the Act of 1963 mentions in the third column the time period from which the limitation would run as the point when the right to sue first accrues. He, therefore, submits that the right first accrued to the Hindus in the year 1990 or 1993. According to him, this position being evident on a bare reading of the plaint, the suit, which is one for declaration, must be held barred by limitation.

112. To the understanding of this Court, the objection raised on the ground of limitation cannot be accepted. The reasons are more than one. For a first, it is flawed premise to assume that what the plaintiffs

30 for, 'Act of 1963'

seek to enforce is a religious community right of the Hindus. It has been remarked earlier that the suit is no class action. What the plaintiffs seek to enforce is their individual right to worship the Deities. It is not the case of the revisionist that any class action for the same right was earlier brought under Order I Rule 8 of the Code on behalf of the Hindus and reached some kind of an unsuccessful terminus, so as to bind these plaintiffs in any way. The right to worship for a member of a particular religious community or denomination is his/ her individual right. It is both a civil right and a fundamental right. If not covered by an earlier class action on behalf of the community, there is no principle by which a class or community's inaction would cause the running of limitation under Section 9 of the Act of 1963 continuously against an individual member of that class or community, if he/ she possesses that right in his/ her individual capacity, albeit as a member of that class or community.

113. To the understanding of this Court, inaction on the part of one or more members of a class or community, all possessing the same but individual right to enforce it would not bar by limitation, an action brought by an individual member of that class on an emergent cause of action. Therefore, in the opinion of this Court, if in the year 1990 or 1993, other members of the Hindu community, who possess a like right to worship the Deities, have not brought an action to restore the right to worship all through the year and have been content with a day of worship in the entire year, that is to say, on the 4th day of the *Vasantik Navratra* in *Chaitra*, this Court fails to see how the plaintiffs, who seek to enforce a daily right to worship, because they were prevented on the day following the 4th day of the *Vasantik Navratra* in *Chaitra* of the calendar year 2021, would face the bar of limitation. No principle or authority has been brought to the notice of this Court on the point, which may dispel or affirm the view that this Court takes.

114. The principle, that the right to worship is an individual right possessed by the members of a class or group by virtue of being such members that can be enforced through individual action and without the necessity of bringing a class action, has long come to be settled. One of the earliest authorities on the point is a Full Bench decision of our Court in **Jawahra and others v. Akbar Husain, ILR**[31]. The point which fell for consideration before their Lordships of the Full Bench of this Court in **Jawahra** (*supra*) was whether a Muslim had an individual right to worship in a mosque as distinguished from one enjoyed in common with all or other members of the community and also an individual *locus standi* to maintain an action concerning the right to worship in the mosque for the purpose of obtaining appropriate relief to realize that right. The question, as aforesaid, had arisen in the context of the Code of Civil Procedure, 1877[32], that was in force at the time. In the Code of 1877, there was Section 30, which was about class action. It granted one party the right to sue or defend on behalf of a number of others, if all of them had the same interest to prosecute or defend. This provision is *pari materia* to Order I Rule 8 of the Code. Likewise, the question also arose in the legal foreshadow of Section 539 of the Code of 1877, that is *pari materia* to the contemporary provisions of Section 92 of the Code. Therefore, what fell for consideration before their Lordships was whether the right to worship, after all, was an individual right, individually enforceable or one that could be enforced through class action alone; and, a joint right. In **Jawahra**, Petheram, C.J. held:

> "Now, the Muhammadans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way. Everyone who has such a right is entitled to exercise it without hindrance, and has aright of action against any one who interferes with its exercise. It is not a *joint* right; it is a right which belongs to many people. S. 30 was meant, to apply to a case in which many persons are *jointly* interested in obtaining relief; and

31 (1885) 7 All 178 (FB)
32 for short, 'the Code of 1877'

> where, under the old law, it would have been necessary for all of such persons to be joined, s. 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more, with the permission of the Court, to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit, and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie."

(emphasis by Court)

115. In **Jawahra**, in his concurring opinion, Mahmood, J. held:

> "The right of a Muhammadan to use a mosque is, as the learned Chief Justice has said, like the right to use a private road; any one who has the right may maintain a suit in respect of it. This settles the question as to s. 30 of the Civil Procedure Code. That section applies only to cases where no *individual* right is interfered with; but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right, and it was violated."

(emphasis by Court)

116. The principle, that is laid down in **Jawahra**, would apply to an individual worshipper of any religion, where the right to worship and the enforcement of that right both have to be regarded as individual to the devotee or the worshipper. It is not like a joint right, which exists in common with others alone, survives jointly and can have no individual existence.

117. The consequences that would follow from a right being an individual right, though enjoyed in common with others as distinguished from a joint right, was acknowledged on the authority of **Jawahra** by a Division Bench of the Calcutta High Court in **Baiju Lal Parbatia and others v. Bulak Lal Pathuk**[33]. The authority is not about the right of worship as such being an individual right, but one that acknowledges the distinction between an individual right shared with others and a joint right not individually held. Later on, a Division

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33 ILR (1897) 24 Cal 385

Bench of this Court in **Ram Chandra and others v. Ali Muhammad and others**[34] followed **Jawahra** to hold:

> "But it seems to us that on the authorities we are bound to hold that the plaintiffs are entitled to maintain the suit. In the case of *Jawahra* v. *Akbar Husain*, it was held by a Full Bench of five Judges that every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise, irrespective of the provisions of sections 30 and 539 of the Code of Civil Procedure, 1882. In the present case the defendants interfered with the rights of the plaintiffs and attempted to turn them out of the mosque. We are bound to follow the decision of the Full Bench, which has been followed in other cases and we must, therefore, hold that the plaintiffs are entitled to maintain this suit."

118. Most of the decisions were rendered in regard to the right of Muslim worshippers to pray in mosques and for matters connected therewith as individual rights, in the context of the issue whether the said right was a joint right that could not be enforced on the individual's suit, but by a class action. It was consistently held to be not a joint right, but a right in common, individually held, enforceable through individual action. Now in contemporary times, where the right to worship is not only a civil right, but also a fundamental right, its character as an individual right can hardly be doubted; nor has it been doubted. It is for the said reason perhaps that there is not much modern authority to offer guidance on the point if the right to worship is an individual right. It certainly is. And, it is an individual right for the plaintiffs here as well, who are Hindus and devotees of the Deities pleaded to be there in the suit property.

119. If the right that the plaintiffs enjoy individually, say was denied to them on the day following the 4th day of the *Vasantik Navratra* in *Chaitra* of the calender year 2021, it is difficult to see how by imputing to their right the character of one enjoyed in common with other

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34 ILR (1913) 35 All 197

Hindu devotees, the plaintiffs' cause can be held barred by the inaction of others in the past. The cause of action for the plaintiffs indeed arose on the day following the 4th day of the *Vasantik Navratra* in *Chaitra* of the year 2021 i.e. 17.04.2021.

120. The other facet of the matter, which leads this Court to think that the bar of limitation would not at all apply, is that it is common ground between parties that prior to the year 1990 or the year 1993, the *pooja*, *darshan* of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities in the suit property was a daily affair. The restriction of that right to a single day, in the opinion of this Court, is a continuing wrong within the meaning of Section 22 of the Act of 1963. The right to worship the Deities is not comparable to a right to office or property, wherefrom a person, once ousted, suffers a completed wrong at that point of time, and later on, the continuing effects of the injury. The denial of the right to worship the object of it, that is the Deity, is a continuing wrong, that happens everyday and every minute it is denied. Here, what is important is that the State Government and the District Administration have restricted the right to worship to a single day in the year 1990 or 1993 for Hindu worshippers in general, owing to the administrative exigencies then prevalent, but have not denied the existence of the object of worship in the suit property. To emphasize, as already remarked, the revisionist also do not deny that earlier Hindu devotees worshipped on a daily basis and have now been restricted to a single day after the year 1993 under an administrative arrangement of some kind. There is, therefore, without doubt the basis to say for any devotee, including the plaintiffs that denial of the right to worship the Deities is a continuing wrong that accrues everyday. Any person from amongst the Hindu devotees, who is, therefore, denied the right on any day, would be within his right to commence action the day he/ she is prevented from worshipping the Deities.

121. The distinction between what would constitute a continuing wrong within the meaning of Section 22 of the Act of 1963 and what would be a concluded and completed wrong with a lingering effect of the injury, fell for consideration of the Constitution Bench in **M. Siddiq** (*supra*). In **M. Siddiq** what constitutes a continuing wrong and what does not, was elucidated thus:

> "**342.** A continuing wrong, as this Court held in *Balakrishna Savalram* [*Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan*, 1959 Supp (2) SCR 476 : AIR 1959 SC 798] 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.
>
> **343.** The submission of Nirmohi Akhara is based on the principle of continuing wrong as a defence to a plea of limitation. In assessing the submission, a distinction must be made between the source of a legal injury and the effect of the injury. The source of a legal injury is founded in a breach of an obligation. A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. 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. This indeed was the basis on which the three-Judge Bench in *Maya Rani Punj* [*Maya Rani Punj* v. *CIT*, (1986) 1 SCC 445 : 1986 SCC (Tax) 220] approved the statement in a decision [*G.D. Bhattar* v. *State*, 1957 SCC OnLine Cal 200 : AIR 1957 Cal 483 : (1956-57) 61 CWN 660 : 1957 Cri LJ 834] of the Calcutta High Court in the following terms : (*Maya Rani Punj case* [*Maya Rani Punj* v. *CIT*, (1986) 1 SCC 445 : 1986 SCC (Tax) 220] , SCC p. 458, para 20)

> "*20.* … In *G.D. Bhattar* v. *State* [*G.D. Bhattar* v. *State*, 1957 SCC OnLine Cal 200 : AIR 1957 Cal 483 : (1956-57) 61 CWN 660 : 1957 Cri LJ 834] it was pointed out that a continuing offence or a continuing wrong is after all a continuing breach of the duty which itself is continuing. If a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong."

Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may enure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation."

122. How the above principle would apply may be best understood by the holding of their Lordships in **M. Siddiq** while rejecting the Nirmohi Akhara's defence to the plea of limitation, invoking the principle of continuing wrong in the following words:

> "**344.** 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 CrPC 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 22-12-1949 and 23-12-1949 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 5-1-1950. 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."

123. It would be noticed that in **M. Siddiq**, the right that was claimed by the Nirmohi Akhara, was that of a *shebait*, which is a right to the management of a temple or a right to office. There was admittedly an ouster from that office for the Nirmohi Akhara, which was a concluded wrong when the ouster took place. The plea of continuing wrong was, therefore, discarded by their Lordships.

124. The decision in **Balakrishna Savalram Pujari Waghmare and others v. Shree Dhyaneshwar Maharaj Sansthan and others**[35] was approved by the Constitution Bench in **M. Siddiq**. In **Balakrishna Savalram Pujari Waghmare** (*supra*), the following observations, expositing the principle in **Hukum Chand v. Maharaj Bahadur Singh**[36], a Privy Council decision about what constitutes a continuing wrong in the context of the right to worship, are of particular relevance:

> "**33.** Similarly, in Hukum Chand v. Maharaj Bahadur Singh, 60 Ind App 313: (AIR 1933 PC 193), the Privy Council was dealing with a case where the defendants' act clearly amounted to a continuing wrong and helped the plaintiff in getting the benefit of S. 23. The relevant dispute in that case arose because alterations had been made by the Swetamvaris in the character of the charans in certain shrines and the Digambaris complained that the said alterations amounted to an interference with their rights. It had been found by the courts in India that the charans in the old shrines were the impressions of the footprints of the saints each bearing a lotus mark. "The Swetambaris who preferred to worship the feet themselves have evolved another form of charan not very easy to describe accurately in the absence of models or photographs which shows toe nails and must be taken to be a representation of part of the foot. This the Digambaris refused to worship as being a representation of a detached part of the human body". The courts had also held that the action of the Swetambaris in placing the charans of the said description in three of the shrines was a wrong which the Digambaris were entitled to complain. The question which the Privy Council, had to consider was whether the action of the Swetambaris in placing the said charans in three of the shrines was a continuing wrong or not; and in answering this question in favour of the plaintiffs the Privy Council referred to its earlier decision in the case of Maharani Rajroop Koer (supra) and held that the action in question was a

35 AIR 1959 SC 798
36 AIR 1933 PC 193

> continuing wrong. There is no doubt that the impugned action did not amount to ouster or complete dispossession of the plaintiffs. It was action which was of the character of a continuing wrong and as such it gave rise to a cause of action de die in diem. In our opinion, neither of these two decisions can be of any assistance to the appellants."

(emphasis by Court)

125. In view of the aforesaid position of the law propounded on very high authority about what constitutes a continuing wrong, and particularly, in the context of the right to worship, poses no difficulty in this case to infer that the Hindu worshippers of the Deities Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, which includes the plaintiffs, are sufferers of a continuing wrong in their individual right to worship the Deities. Therefore, there is no substance in the plea that the suit on the cause of action disclosed in the plaint is *ex facie* barred by limitation, by virtue of Article 58 of the Schedule to the Act of 1963.

The Act of 1983

126. So far as the case of the revisionist that Section 4(9) of the Act of 1983 bars the suit, this Court does not see how the said provision or the statute read as a whole would bar the present suit, that is one for the enforcement of the plaintiffs' right to worship. Section 4(9) of the Act of 1983 read:

> "4. **Definitions.**– In this Act, unless the context otherwise requires,–
>
> (9) "Temple" means the Temple of Adi Vishweshwar, popularly known as Sri Kashi Vishwanath Temple, situated in the City of Varanasi which is used as a place of public religious worship, and dedicated to or for the benefit of or used as of right by the Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temples, shrines, subshrines and the ashthan of all other images and deities, mandaps, wells, tanks and other necessary structures and land appurtenant thereto and addition which may be made thereto after the appointed date;"

127. It is urged on behalf of the revisionist that the purpose of enactment of the Act of 1983 is to provide for the proper and better administration of the Sri Kashi Vishwanath Temple, Varanasi and nothing beyond it. It is also contended that the statute aforesaid has not been enacted to misappropriate any property, which does not belong to Sri Kashi Vishwanath Temple. The contention that the Board of Trustees of Sri Kashi Vishwanath were privy to a decision, that led the U.P. Sunni Central Board of Waqf to exchange some land with the State for the establishment of a Police Control Room, would show that the Temple Trustees acknowledge the suit property as waqf property, is absolutely irrelevant here. Neither Section 4(9) of the Act of 1983 nor the transaction relating to exchange of land between the Waqf Board and the State of U.P. have any relevance to the present suit, which is about the plaintiffs' right to worship the Deities situate in the suit property. The plaintiffs neither claim title to the suit property nor possession of it. They are not the Board of Trustees of Sri Kashi Vishwanath Temple engaged in some kind of a boundary dispute with the revisionist or a title dispute with the Waqf Board. In fact, this Court utterly fails to see how the Act of 1983 would have any bearing on the plaintiffs' right to worship the Deities located in the suit property.

The Act of 1995

128. The substance of the revisionist's case to urge a bar to the trial of the suit resting on the Act of 1995 is one with reference to Section 85 of the said statute. Section 85 of the Act of 1995 envisages a bar to the jurisdiction of the Civil Court, that is cast in the following terms:

> "**85. Bar of jurisdiction of civil courts.**—No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal."

129. The crux of the matter is that whereas there can be little doubt to a bar of the Civil Court's jurisdiction, or for that matter, of the Revenue Court and any other authority in respect of any dispute, question or other matter relating to any waqf or waqf property, to borrow the phraseology of the statute, the clause that controls the entire section is the phrase, 'which is required by or under this Act to be determined by a Tribunal'. Whereas in the earlier part of the section, almost anything and everything related to a waqf property has been brought within the ambit of the rule of ouster, yet the determinative factor is that it should be a matter required by or under the Act of 1995 to be decided by a Tribunal. The sequitur is that for the bar under Section 85 of the Act of 1995 to operate and oust the Civil Court's jurisdiction, there should be one or the other provision in the Act of 1995 that requires the matter by its terms to be decided by the Tribunal. The reference to the Tribunal in Section 85 is, of course, to the Waqf Tribunal, as defined under Section 3(q) of the Act, which in turn would bear reference to Section 83(1).

130. The plaintiffs seek a right to worship the Deities that Hindu devotees like the plaintiffs have since long been doing and much after 15th August, 1947. The learned District Judge has examined the provisions of Sections 33, 35, 47, 48, 51, 54, 61, 64, 67, 72 and 73 of the Act of 1995 and opined that the reliefs claimed by the plaintiffs that they should be allowed to worship the Deities of Maa Sringar Gauri and Gods and Goddesses in the suit property, are not matters covered under any of those provisions of the Act of 1995. *A fortiori* the reliefs claimed by the plaintiffs are not matters which are required to be decided by or under the Act of 1995.

131. The other premise on which the learned District Judge has held the Act of 1995 to be inapplicable is that the Act does not operate in case of non-Muslims and strangers to the waqf in the matter of determination of their rights to property, that is included in the list

published under sub-Section (2) of Section 5 of the Act of 1995. This Court is of opinion that on the first limb of the reasoning alone, the matter would stand concluded, because there is no relief claimed by the plaintiffs, which is required by or under the Act of 1995 to be decided by a Tribunal within the meaning of Section 85. There is absolutely no relief claimed regarding title or possession with regard to the suit property, claimed to be waqf, so as to bring in the ouster of jurisdiction under Section 85. There is not the remotest of the kind of matter envisaged to be decided by or under the provisions of the Act of 1995 by a Tribunal, involved in the nature of the relief that the plaintiffs claim. On this score alone, this Court is in agreement with the conclusions reached by the District Judge on a far more elaborate reasoning.

132. It goes without saying that all that has been said here is limited to the purpose of a decision of the revisionist's application under Order VII Rule 11 of the Code and would not affect the case of either party on merits at the trial.

133. In view of what has been said hereinabove, this Court finds no merit in this revision.

134. This revision fails and is **dismissed**. Costs easy.

Order Date :- 31.5.2023
Anoop / I.Batabyal

(**J.J. Munir, J.**)