IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4768-71 OF 2011

IN THE MATTER OF:

BHAGWAN SRI RAMA VIRAJMAN & ORS ...APPELLANTS

VERSUS

SRI RAJENDRA SINGH & ORS. ...RESPONDENTS

SUBMISSIONS ON BEHALF OF PLAINTIFFS IN SUIT-5 BY SH. C. S. VAIDYANATHAN, SR. ADVOCATE

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INTRODUCTION

1. The case of the Plaintiff in Suit 5 is that the disputed property measuring 1460 sq.yd. is the place of birth of Lord Rama has been treated as sacred and impressed with divinity and has been worshipped as such by the Hindus from time immemorial. It is further their case that the place was worshipped even without an Idol or Temple and thereafter a Temple was put up and improved from time to time. It is the further case that during the Mughal rule the temple was demolished and a Mosque was put up, but notwithstanding the same, the divine character of the place was not affected and the devotees and the faithful continued to flock to the RamJanma Bhoomi and offer worship. Appropriate relief of declaration and consequential relief was sought on this premise.

The basis upon which relief was claimed is set out at **Paragraph 20 of Plaint in Suit No. 5 at page 244 of Volume 72.**

> That the place itself, or the ASTHAN SRI RAMA JANMA BHUMI, as it has come to be known, has been an object of worship as a Deity by the devotees of BHAGWAN SRI RAMA, as it personifies the spirit of the Divine worshipped in the form of SRI RAMA LALA or Lord RAMA the child. The Asthan was thus Deified and has had a juridical personality of its own even before the construction of a Temple building or the installation of the Idol of Bhagwan Sri Rama thereat.

2. The reliefs claimed by the Plaintiffs in Suit No. 5 are set out at Paragraph 39 of the Plaint **at Page 258 of Volume 72**.

PRAYER

(A) declaration that the entire premises of Sri Rama Janma Bhumi at Ayodhye, as described and delinated in Annexures I, II and III belong to the plaintiff Deities.

(B) A perpetual injunction against the Defendants prohibiting them from interfering with, or raising any objection to, or placing any obstruction in the construction of the new Temple building at Sri Rama Janma Bhumi, Ayodhya, after demolishing and removing the existing buildings and structures etc., situate thereat, in so far as it may be necessary or expedient to do so for the said purpose.

3. The Waqf Board contested the suit on the basis that there was no temple at the suit premises, no temple was demolished, that the place is not the sacred place of birth of Shree Rama, that the faith of the Hindus in regard to place of birth was in respect of a temple across the road about 60 paces away. It was their further case that there was no structure when the Mosque was put up and that they continued to remain in possession till the night of 22nd and 23rd December, 1949 and they are entitled to the relief sought by them in Suit 4 and consequently Suit 5 was to be rejected.

It is now conceded: -

i. By statement under Order 10 Rule 2 CPC that the faith and belief of the Hindus is that Lord Rama was born in Ayodhya.

ii. That even though they had put forth a case of another temple across the road which was believed and worshipped by the Hindus as Ramjanma Bhoomi, in view of the decree in Suit No.61/280 in 1885 which has

not been challenged by them, the Ram Chabutra in the outer courtyard in the suit property is believed by the Hindus to be the place of birth of Lord Rama.

iii. That the Hindus were allowed to worship in the suit property, even though it was a Mosque but this was only as a concession by way of easementary right.

4. It is their further case that Valmiki Ramayana, Skanda Purana, Ayodhya Mahatmayam etc. do not identify any place as Ramjanma Bhoomi. That the travelogues and gazetteers do not refer to the central dome of the Mosque in the inner courtyard of the suit property as Ramjanma Bhoomi, being the faith and belief of the Hindus and such a claim has been asserted only from 1949.

5. Having taken a stand that there was no structure standing at the time of the construction of the Mosque and having also taken the stand that it was not on demolition of any temple or other structure or on the ruins of any such structure the Mosque was built, and having thereafter found irrefutable archaeological evidence of a structure beneath the Mosque, the Muslim parties are now contending that the structure was an Idgah and not a Hindu temple.

6. Strangely no such plea was taken even in the Written Statement in Suit 5. The present stand will amount to saying that the Mughals demolished an Idgah put up during the Sultanate period or put up a Mosque on the ruins of the Idgah. The Muslims never claimed possession prior to 1528 and this negates the case of Idgah.

7. It is therefore apparent from the aforesaid that the faith and belief of the Hindus in respect of the place where the disputed structure was put up during Mughal time was the

birth place of Lord Rama and has been, since ages, worshipped as such. The place is impressed with divine and sacred character. The place has been worshipped as possessing divinity and as offering religious blessings by worship there at, without the need for worshipping any Idol. The place itself is therefore the Deity.

8. Once it is conceded that Lord Rama was born in the Palace of Dasaratha in Ayodhya and the palace was situated in Ramkot where the disputed structure exists, it is unnecessary to identify a particular spot or room as a place of birth. The small area of 1460 sq.yd. cannot be partitioned, more so if the Suit 3 and Suit 4 are held to be time barred.

REPONSE TO NOTE A45 ON METHODOLOGY

1. It is unfortunate that the waqf board has characterized the Judgment of the High Court as based on "Guess Method" and on guesses and conjectures.

2. The Judgment has been rendered on assessment of evidence and balance of probabilities.

3. The expression "proved" and "disproved" in the Indian Evidence Act, 1872 reads as follows :

> "Proved" – A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> "Disproved" – A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

4. Sarkar on the Law of Evidence 17th edition page 145 says

> Probability – By probability is meant the likelihood of anything to be true, deduced from its conformity to our knowledge, observation and experience. When a supposed fact is so repugnant to the laws of nature that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible, or physically impossible. There is likewise moral impossibility, which,

however, is nothing more than a higher degree of improbability.

5. In the context of assessment of evidence even in criminal cases this Hon'ble Court held in State of UP Vs. Krishna Gopal AIR 1988 Supreme Court 2154 as follows :

> "The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

6. The criticism advanced by the Waqf Board is a trivialization of the Judicial Process.

ALLEGATION OF CLAIM BASED ON ILLEGALITIES

1. The submission that the Hindus are claiming rights based on illegalities is mischievous, unfortunate and intended to promote communally divisive feelings. Reference has been made to the incidents of 1934, 1949, 1992.

2. The plaintiffs in Suit 5 have scrupulously avoided any argument which will incite such communal divide and disrupt amity and peace. They have not invoked such arguments as wanton destruction of Hindu temples by the marauding Muslim forces and loss of life and atrocities committed by them, to keep the Hindus from protesting against such wanton destruction and deliberate insult to the sacred places of worship and desecration of the Temples.

3. The travelogues and gazetteers and the orders in the Suit of 1885 amply bear out the illegalities perpetrated during the Mughal rule.

4. The appeals have to be decided on the merits as borne out by the pleadings and evidence and ignoring such needless prejudicial arguments.

RESPONSE TO SUBMISSIONS ON RAM JANMABHUMI, RES NULLIUS, JURISTIC PERSONALITY

1. In Roman Law (the Institutes of Justinian) res sacra is also treated as res nullius. See the Elements of Roman Law by R.W. Lee:

> Page 106
>
> "Things belonging to no one (res nullius) , comprising :- (i) sacred things (res sacra), i.e. churches and other things dedicated to the service of God; (ii) religious things (res religiosae), i.e. graveyards and graves; (iii) sanctioned things (res sanctae) such as city walls and gates."
>
> Page 111
>
> "Things belonging to no one are sacred things, religious things, sanctioned things; for a thing which is subject to divine law is owned by no one. Those things are sacred which are duly consecrated to God by the Bishops, such as sacred buildings, and offering dedicated to the service of God; which things, as our constitution enacts, may not be alienated or pledged except for the redemption of captives."

ANNEXURE A-1

2. In the *Hindu Law of Religious and Charitable Endowments, B.K. Mukherjea 5th Edition* ***(A 49 Page 27 – 28),*** it is noted:

> "The religious institutions like mutts and other establishments obviously answer to the description of foundations in Roman law. The idea is the same, namely when property is dedicated for a particular purpose, the property itself upon which the purpose is impressed, is raised to the category of a juristic person so that the property which is dedicated would vest in the person so created"
>
> "Principle as to personality of institutions.- Apart from natural persons and corporations, which are recognized

by English law, the position under Hindu law is that if an endowment is made for a religious or charitable institution, without the instrumentality of a trust, and the object of the endowment is one which is recognized as pious, being either religious or charitable under the accepted notions of Hindu law, the institution will be treated as a juristic person capable of holding property"

(Page 29)

"The innate practical sense of the Roman Jurists found a way out of this difficulty. They indeed were fully conscious of the fact that the purpose or intention of the founder was the primary thing in an endowment, but as purpose without any material basis could not figure as a legal person they personified the endowment itself which was dedicated for a particular purpose. Though these principles are nowhere expressly discussed by the Hindu Jurists, it seems that institutions like Mutts and satras which were not gifted to any particular donee or fraternity of monks were regarded as juristic persons in Hindu law to which the endowed property of these institutions belonged. With regard to to Debuttar, the position seems to be somewhat different. What is personified here is not the entire property which is dedicated to the deity but the deity itself which is the central part of the foundation and stands as the material symbol and embodiment of the pious purpose which the dedicator has in view. "The dedication to deity", said Sir Lawrence Jenkins in Bhupati v.Ramlal, "is not but a compendious expression of the pious purpose for which the dedication is designed". It is not only a compendious expression but a material embodiment of the pious purpose and though there is difficulty in holding that property can reside in the aim or purpose itself, ti would be quite consistent with sound principles of Jurisprudence to say that material object which represents or symbolizes a particular purpose can be given the status of a legal person, and regarded as owner of the property which is dedicated to it"

3. The concept of res nullius is evolved from the concept of personality in Roman law invested in a purpose. Personality in Roman Law by **P.W. Duff 1938 APA 6th Edition at page 220**

> For Brinz, there are no persons except individual men and women. The property supposed to be owned by juristic Persons does not belong to anybody: Gaius is strictly accurate in calling it res nullius. But it does 'belong for' a purpose, and that is the essential fact about it. For Barker, the purpose actually owns the property. 'It is a common and continuing purpose, continuously entertained by a continuing body of persons, which owns the capacity and constitutes the legal person.

4. In the ***Law Relating to Hindu and Mohamadan Endowments by Ganapathi Iyer***, it is observed at page 229 that:

> "There are thus three views possible: - Firstly, that the idol or charitable foundation should be regarded as a juridical person. Secondly, that the purposes or object for which the dedication is designed are the real legal persons to which the ownership is to be ascribed; and thirdly, the community for whose benefit the endowment is made is the true legal person. In Salmond's Jurisprudence it is stated that the tendency of the English law is to prefer the process of 'incorporation' (of human beings) to that of 'personification' (of objects e.g., a charity, or of institutions, e.g., a church). The Hindu law will rather regard the objects of purposes as the legal person"

5. The Privy Council in the case of ***Vidya Varuthi Thirtha v. Balusami Ayyar & Ors. (1921) 48 IA*** *302* recognizes the **dedication of property to "religious purposes". See Page** 311 and 324 of **A44** (Internal page 10 and 23)

> "Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system; to brahmans, goswamis, sanyasis."

"But notwithstanding that property devoted to religious purposes is, as a rule inalienable"

6. The Privy Council also recognized that when the property is devoted to religious purposes it is inalienable. Since at the relevant time and on the facts of the case the dedication was to an idol or a temple or a shrine there was no occasion for the Privy Council to go into the question of the formless God being recognized as a juristic personality. The decision is also significant for the distinction drawn between a specific trust and a trust for general pious or religious purposes and the need to decide the case on the law applicable to Hindu and Mohamaddan institutions rather than applying English law of Trusts.

"Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Mahommedan law was overlooked, and the case was decided on analogies drawn from English Law inapplicable in the main to Hindu and Mahommedan institutions." **(Page 321 of A44)**

"The purposes the dedication must therefore be gathered from established usage and practice, and that has been found by the Courts in India"**(Page 327 of A44)**

7. In any case, a place with such spiritual significance or impressed, with divine character is *"res sacra"* is not disputed. 'Res sacra' is *'res extra commercium'* and cannot be traded. It is inalienable. Being inalienable there can be no adverse possession and no claim can be made to title based on adverse possession. The divine character cannot be lost or destroyed. Even though, the place is aggressed and built up on by force.

8. The decisions in international law on *terra nullius* is entirely in a different context in respect of occupation of uninhabited or deserted territory and whether there can be

acquisition of sovereignty over such land. It is in this context that the decisions have been rendered in *Mabo v Queensland* 1992 175 CLR 1 set out in A48. Equally irrelevant and out of context are the decisions relating to animals dedicated to an idol but let loose. The criticism addressed on the holding of this Honorable Court in paragraph 15 and 16 *Thayarammal's* case 2005 1 SCC 457 is therefore misplaced.

9. That a "place" of spiritual significance can be given recognition of a juristic personality is seen from two Judgments of the Privy Council. In the case of *Rajah Varma Valiah v Ravi Vurmah Kunhi Kutty, ILR 1876 Vol. 1 Page 235* it is noted at page 240:

> "it appears that the so-called pagoda is not a pagoda in the ordinary sense of the word, but a mere platform in the middle of the forest, upon which, once in every year, certain ceremonies take place in honour of a particular idol; tat to this annual festival a large number of persons resort; that considerable presents and offerings are made there by the worshippers; and that the festival is a matter of general interest to the Hindu inhabitants of that part of the country"

Thus, a mere platform in the middle of a forest was recognized as a Pagoda, namely, the Tracharamana Pagoda and was treated as inalienable. The property dedicated thereto were treated as "*extra commercium*". See page 250:

> *"It was sufficient to say that the jewels having been devoted to the service of an idol, were extra commercium, and could not pass under the assignment"*

10. The submission by the Sunni Waqf Board regarding the case *Madura v. Alikhan Sahib (1931) 34 LW 340* was that a portion of the unoccupied hill in the case was given to the Muslims as they were worshipping there. It was argued that this aspect was not placed before this Hon'ble Court. However, this aspect of the case is irrelevant. In Paragraph 2 the Privy

Council did not have to go into that question at all because the claim in the case was made only to the base of the hill and not any other part.

> "In the trial Court, the temple, represented by its manager, was the plaintiff. He claimed the whole hill, with the **exception of certain cultivated and assessed lands and the site of the mosque, as temple property.** The Mohammedan defendants asserted their ownership of the particular eminence upon which the mosque stands, and of a portion of the main hill known as Nellitope"

The claim by the Hindu's in this case was never raised to the Nelliptope. The Judgment records the order of the Trial Court:

> "The suit was tried by the Subordinate Judge of Madurai. **He decided against the Government claim and in favour of the temple, except in respect of the Nellitope.**"

Therefore, the question claiming the entirety of the hill was never at issue in this case.

11. Form is not required for worship:

It is observed by **B.K. Mukherjea in the 5 Ed. of "The Hindu Law of Religious and Charitable Trusts"** regarding the form of image worship;

> **Page 26-27 – Para "1.33: Idols representing same divinity** – One thing you should bear in mind in connection with image worship viz. that the different images do not represent separate divinities; they are really symbols of the one Supreme Being, and in whichever name and form the deity might be invoked, he is to the devotee the Supreme God to whom all the functions of creation, preservation and destruction are attributed. In worshipping the image therefore the Hindu purports to worship the Supreme Deity and none else.

The rationale of image worship is thus given in a verse which is quoted by Raghunandan:

"Chinmayasyaadwitiiyasya Niskalasyaashariirina

Saadhakaanaam Hinaathayi Brahmanii Roopakalpanaa."

"It is for the benefit of the worshippers that there is conception of images of Supreme Being which is bodiless, has no attribute, which consists of pure spirit and has got no second."

Temples and mutts are the two principal religious institutions of the Hindus. There are numerous texts extolling the merits of founding such institutions. In *Sri Hari Bhaktibilash* a passage is quoted from Narasingha Purana which says that "whoever conceives the idea of erecting a divine temple, that very day his carnal sins are annihilated; what then shall be said of finishing the structure according to rule.....He who dies after making the first brick obtains the religious merits of a completed Jagna."

Page 154 – Para "4.5. Images – their descriptions. – Images, according to Hindu authorities, are of two kinds: the first is known as Swyambhu or self-existent or self-revealed, while the other is Pratisthita or established. The **Padma Puran says: "The image of Hari (God) prepared of stone, earth, wood, metal or the like and established according to the rites laid down in the Vedas, Smritis and Tantras is called the established; ..... where the self possessed Vishnu has placed himself on earth in stone or wood for the benefit of mankind, that is styled the self-revealed."** A Swyambhu or self-revealed image is a product of nature, it is Anadi or without any beginning and the worshippers simply discover its existence. Such image does not require consecration of Pratistha. All artificial or man-made images require consecration. An image according to Matsya Purana may properly be made of gold, silver, copper, iron, brass or bell metal or any kind of gem, stone or wood, conch shell, crystal or even earth.

Some persons worship images painted on wall or canvas, says the Brihata Purana and some worship the spheroidical stones known as Salgram. Generally speaking, the Pouranic writers classify artificial images under two heads: viz. (1) Lepya and (2) Lekhya. Lepya images are moulded figures of metal or clay, while Lekhyas denote all kinds of pictorial images including chiselled figures of wood or stone not made by moulds. In the case of Goswami Geeridhariji v. Ramanlalji which went up to the Privy Council, the subject matter of dispute was the pictorial image of the head of the Ballavacharya Sect and not of any deity. Images again may be permanent or temporary. Temporary images which are set up for periodical Pujas like Durga, Saraswati, etc. are generally made of clay and are immersed in a river or tank after the puja is over."

(IV. WORSHIP AND RECONSTRUCTION)

Page 156 – Para "4.7. Worship of the Idol. – After a deity is installed, it should be worshipped daily according to Hindu Sastras. The person founding a deity becomes morally responsible for the worship of the deity even if no property is dedicated to it. This responsibility is always carried out by a pious Hindu either by personal performance of the religious rites or, in the case of Sudras, by the employment of a Brahmin priest. The daily worship of a consecrated image includes the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with sweets and water and other practices." **The deity in short is conceived of as a living being and is treated in the same way as the master of the house would be treated by his humble servant.** The daily routine of life is gone through, with minute accuracy, the vivified image is regaled with necessaries and luxuries of life in due succession even to the changing of clothes, the

offering of cooked and uncooked food and the retirement to rest."

Page 156-157 – Para "4.8. Reconstruction or purification of idols in case of defilement or destructions. – According to Hindu sages, an image becomes defiled if it is not worshipped regularly. Reconstruction or purification of the image is ordained in cases where the image is mutilated, broken, burnt, fallen down or removed from its place or is defiled by a beast or the touch of an out-caste or even when hymns appropriate to other gods are recited before it. The rules for reconstruction or replacement of an idol are thus laid down in Hayasirsha Pancharatram. "Whatever is the material and whatever the size, of the image of Hari (God), that is to be renewed; of the same material and of the same size, an image is to be caused to be made; of the same size, of the same form and of the same material, should be placed there, either on the second or the third day (the image of) Hari should be established; if it be established after that, even in the prescribed mode, there would be blame." **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. It is enough if an image is established substantially representing the old or is treated as such, and the fact that the replacement was not made within the prescribed time, though blamable from the orthodox point of view, does not affect the validity of replacement.** Where the settler had provided for Puja being performed in a specified Bhajana Matam, and subsequently that building was lost to the trust, it was held that that did not extinguish the trust, as a new Bhajana Matam could be constructed and Puja performed there."

Page 158 – Para "4.10. Dedicated property vests in the idol as a juristic person. – When property is given absolutely by a pious Hindu for worship of an idol, the property vests in the idol itself as a juristic person. This view, as I have explained in the first lecture, is quite in accordance with Hindu ideas and has been uniformly

accepted in a long series of decisions of the different High Courts in India as well as by the Judicial Committee. As West, J. observed in Manohar Ganesh v Lakshmi Ram: "The Hindu law recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also juridical subjects or persons called foundations."

Page 158-159 – Para "4.10A. Existence of idol is necessary for temple. - **While usually an idol is instituted in a temple, it does not appear to be an essential condition of a temple as such. In an Andhra case, it was held that to constitute a temple, it is enough if it is a place of public religious worship and if the people believe in its religious efficacy, irrespective of the fact whether there is an idol or a structure or other paraphernalia. It is enough if the devotees or the pilgrims feel that there is one superhuman power which they should worship and invoke its blessings. However, in almost all cases the temple does possess an idol.**

Ramanasramam By Its Secretary The Commissioner For Hindu, Religious, Endowments AIR 1961 Mad 265

28. The use and purpose of the symbol is two fold : (1) to set forth in visible or audible likeness what cannot really or fully expressed to the physical eye or ear, or even clearly conceived by the limited faculties of the human mind. All language is in the last resort symbolic, and religious language in an especial degree, for it endeavours to present a mystery, a reality too deep for words. The Hindu faith had at its service a language of the utmost delicacy and flexibility, with a vigorous and fertile growth and an almost unlimited vocabulary and found itself in a world of tropical luxuriance, with a tropical wealth of beauty and suggestiveness.

It was not to be wondered at that it became profuse in type and symbol and laid under contribution all the facts and phenomena of nature to serve its religious and priestly ends. All the great Gods had their resemblances, animal or material forms, in which they presented

themselves embodied to human sight, which served to recall to the worshipper the deity, those mind and character they more or less inadequately reflected. Other more rare and refined symbols were presentative of qualities or attributes, a3 the Lotus, the emblem of spotless purity preserved under the most unfriendly conditions. All idols, totems fetishes are symbols. The wise man does not worship the symbol, the shape in clay or wood or stone, but is thereby reminded of the invisible substance or reality which they each represent.

(2) The image or symbol serves the purpose also of providing in material and suitable form a convenient object of reverence, to meet the religious need of those whose minds, through darkness and ignorance, are unable to grasp the conception of an unseen formless deity. Such men, if left without a visible object to which their reverence and fear may attach themselves, will wander an a maze of doubt, disquiet and unbelief. It is better that they would worship erroneously, worship a thing, than that they should not worship at all. There is much. that might be urged an favour of the Hindu view that regards the worship of the external symbol as a stepping-stone to higher, clearer forms of belief; it is a view unacknowledged perhaps but not unknown to other faiths. And in Hinduism, whatever may be said of or claimed by the wise and instructed thinker, the puja of the multitude to the image of the God is reverent and sincere. In some respect also and within definite limits the Indian contention has justified itself that the symbol has proved a signpost and a guide to better, higher thoughts and to a truer worship of Him whom no form can express or language describe. See Hastings, Encyclopedia of Religion and Ethics, Vol. 12, p. 142).

12. The Test to determine the status of a religious institution:

***Commr. HRCE v Narasimha Pigudu* AIR 1939 Mad 134**

The test is not whether it conforms to any particular school of Agama Sastras; we think that the question must be decided with reference to the view of the class of people who take part in the worship. If they believe in its

religious efficacy, in the sense that by such worship, they are making themselves the object of the bounty of some super-human power, it must be regarded as "religious worship.

13. Definition of Status:

***Mahalinga Thambiran Swamigal v. Arulnandi Thambiran Swamigal*, (1974) 1 SCC 150 at page 160**

It is rather a matter for a court to decide at the time of action whether a particular condition does or does not involve a sufficient degree of social interest to be characterised as status, assuming that all other features of status are present" [See R. H. Graveson, "Status in the Common Law", p. 127] . Bentham's idea of status was that it was "a quality or condition which generates certain rights and duties" [See Allen, "Legal Duties", p. 33] . Beale defines status as a personal quality or *relationship* not temporary in nature nor terminable at the mere will of parties with which third parties and even the State are concerned [See "Treaties on the Conflict of Laws" (1935), p. 649] . C.K. Allen said that status is a condition of belonging to a particular class of persons to whom law assigns certain capacities and incapacities [See "Status and Capacity", 46 Law Quarterly Review, 277] . Status is defined by Graveson as a special condition of a continuous and institutional nature, differing from the legal position of the normal person which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern [See "Status in the Common Law", p. 2] .

Gajanan v Ramrao (1954) Nagpur 212

The question of religious institutions, however, **depends upon the status that has been given to them by religious usage**, and if the conditions which have transformed an idol or a 'math' into a juridical personality are present, we see no reason why the fiction of law applying to an idol or a 'math' should not be extended to their case.

It is the intensity of the veneration behind a religious teacher that gives to the institution, founded in his name, spiritual animation. In the case of a temple, the building is obviously intended for the abode of a deity, and until the idol is consecrated, it is only a structure of brick and lime, devoid of life and soul; whereas, in the case of a Sansthan, the object associated with the religious teacher and installed in the institution, may itself symbolise the spirit of the sage and impart to it a spiritual existence. The religious instinct of the Hindus has, in this respect, remained untrammelled by the limitations of form and has given to consecrated objects the spirit of the sanctified sages with whom they are associated.

ILR 15 BOM 625 Page 635- Shri Ganesh Dharnidhar Maharajdev Vs. Keshavrav Govind Kulgavkar

Upon the whole, therefore, we have come to the conclusion that the two villages comprised in the mortgage on which this suit is brought must in this suit be held to be devasthan property, granted for religious and charitable purposes, and, therefore, except under special circumstances, inalienable.

ILR 12 BOM 247 Page 263 - 266 - Manohar Ganesh Tambekar and Others vs. Lakhmiram Govindram and Others

The Hindu law, like the Roman Law and those derived from it, recognizes, not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu, who wishes to establish a religious or charitable institution, may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it so far, at any rate, as it is consistent with his own dharma or conceptions of morality. A trust is not required for this purpose: the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English law. In early times a gift placed, as it was expressed, "on the altar of God" sufficed to convey to the

church the lands thus dedicated. Under the Roman law of pre-Christian ages such dedications were allowed only to specified national deities.

Property dedicated to a pious purpose is, by the Hindu as by the Roman law, placed extra commercium, with similar practical savins as to sales of superfluous articles for the payment of debts and plainly necessary purposes. Mr. Macpherson admitted for the defendants in this case that they could not sell the lands bestowed on the idol Shri Ranchhod Raiji. This restriction is like the one by which the Emperor forbade the alienation of dedicated lands under any circumstances. It is consistent with the grants having been made to the juridical person symbolized or personified in the idol at Dakor. It is not consistent with this juridical person's being conceived as a mere slave or property of the shevaks whose very title implies not ownership, but service of the god. It is indeed a strange, if not willful, confusion of thought by which the defendants set up the Shri Ranchhod Baiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but, as a mere block of stone, their property for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land.

It is only as subject to this control in the general interest of the community that the State through the law courts recognizes a merely artificial person. It guards property and rights as devoted, and thus belonging, so to speak, to a particular allowed purpose only on a condition of varying the application when either the purpose has become impracticable, useless or pernicious, or the funds have argumented in an extraordinary measure. This principle is recognized in the law of England as it was in the Roman law, whence indeed it was derived by the modern codes of Europe. It is equally consistent with the Hindu law, which, as we have seen, undoubtedly recognizes artificial juridical persons, such as the institution at Dakor, and could not, any more than any other law, support a foundation merely as a means of

squandering in waste or profligacy the funds dedicated by the devout to pious uses.

ILR 8 BOM 432 Page 452, 455- 457 – Thackersey Dewaraj and Others Vs. Hurbhum Nursey and Others

The answer to this question depends on whether this temple is a public, religious, and charitable institution. All such institutions are under the superintendence of the Crown as parens Patrice, and those who manage them can at any time be called to account for their management. Story (Equit, Jurisp, Vol. II, page 595) reviews all the authorities, and says: "The king, as parens Patrice, has a right to guard and enforce all charities of a public nature by virtue of his general superintending power over the public interests."

The general rule in Hindu law is that property dedicated to a god is irrevocable – The Collector of Thana V. Hari. Morley (Dig. N.S. Vol. I page 351) says: "A house dedicated to Mahavisha is inalienable and for ever set apart for purposes of religion."

In short, the deity of the temple is considered in Hindu law as sacred entity or ideal personality possessing proprietary rights. The managers hold these rights as trustees, and any alienation or infringement is a kind of sacrilege. The money one entered in the temple books is dedicated to the god , and becomes res sacra. It is laid down by the Trivy Council that the intention of the donors in these temple lands must be gathered from the deed of foundation, and, in the absence of such a deed, from their acts - Greedharidoss Vs. Nandokisore.

14. The contention of the Waqf Board to oppose the claim of 'Bhumi' that Swayambhu necessarily has to have a form is inconsistent with their own submission on the form of worship during the Vedic times. P.V Kane at page 896, History of Dharmashastra by Pandurang Vaman Kane, Page 32 (**A 52)**

"The worship of god can be done in two ways, viz without any outward symbol and with a symbol. The first is

achieved by a prayer and offering oblations into fire; the second by means of images. But even images worshippers are quite conscious that god is pure consciousness, 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.

The worship of god through the medium of images is again two – fold, viz. done in one's house and in a public temple. The latter is, according to many works, the best and the completest, since it allows of the celebration of festivals and the performance of the varied items or modes of worship (*upcara).* Private worship of idols in one's house has already been dealt with above (pp. 726 – 736) under Devpuja. Now the worship of images can be lifted up, moved to another place and *sthirarca (where the image is fixed on a pedestal or is not meant to be lifted up or moved).*

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Annexure A-1

CUPIDAE LEGUM JUVENTUTI

THE ELEMENTS OF ROMAN LAW

with a translation

of the

INSTITUTES OF JUSTINIAN

BY

R. W. LEE, D.C.L., F.B.A.,

READER IN ROMAN LAW OF THE INNS OF COURT

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BOOK II

THE LAW OF PROPERTY

I. Preliminary

131. The second principal branch of the Roman Private Law is the Law relating to Things. This is treated by Gaius in Books II and III. In Justinian's Institutes it extends also to the first five Titles of Book IV. By "Thing" (res) the Romans understand any unit of economic value. "The true point of contact between the various res seems in reality to be the fact that whoever has a res is actually or prospectively so much the better off" (Moyle). "Res . . . means any economic interest guaranteed by law, any right or rights having a money value, any interest expressible in terms of money which the law will protect" (Buckland). The Law relating to Things, therefore, is the Law relating to Property, understood in a sense wide enough to include the Law of Obligations and the Law of Succession. In this book the term "Law of Property" is used in a more limited sense, exclusive of Obligations and Succession.

132. Classification of Things.—Things may be classified according to their physical nature, or according to the technical rules of the legal system in question. Thus, if we classify things as movable and immovable we have regard to their physical nature; if we classify them as real and personal, as in English Law, or as mancipable and non-mancipable (res mancipi—res nec mancipi), as in Roman Law, we have regard to arbitrary distinctions created by law. But the first principle of classification is not so simple as it looks; for it is often difficult to say whether for legal purposes a thing is to be regarded as movable or immovable, and a thing which is treated as movable for one purpose may for another be treated as immovable. So that, in the last resort, we are concerned not with the question, what things are in themselves, but with the question, what is the attitude of the law with regard to them. The classifications adopted by the Roman lawyers are, in the main, the result of historical development or practical convenience. They display little inclination towards scientific analysis.

133. Justinian begins his second Book by saying, "Things

I. 1 pr. are either in our patrimony or outside our patrimony"; by which he means that there are certain things which in law or in fact are not the subject of private ownership.[1] These are:—(a) Things common to all men (res communes)—the air, running water, the sea and the sea-shore; (b) things public (res publicae)—rivers and harbours; (c) things belonging to a corporate body, such as theatres, race-courses and the like in cities (res universitatis); (d) things belonging to no one (res nullius), comprising:—(i) sacred things (res sacrae), *i.e.* churches and other things dedicated to the service of God; (ii) religious things (res religiosae), *i.e.* graveyards and graves; (iii) sanctioned things (res sanctae), such as city walls and gates. They are said to be sanctioned, because any offence against them is punished capitally; and penalties imposed by law are termed "sanctions". The first two of these are said to be matter of divine right (divini juris), and the term applies in a way to the third as well (quodammodo divini juris sunt).

134. All this is very confused. The distinction between things common and things public is ill-defined, and has no practical value. As to the sea-shore, there is no reason in the nature of things why it should not be owned by private persons, as it may be in English Law by grant from the Crown. Indeed, there are texts which say that one may become owner of a portion of the shore by building upon it, remaining owner, however, only so long as the building stands.[2] But, in general, the shore was not owned by individuals. One text suggests that it was the property of the Roman People.[3] More often it is regarded as owned by no one, the public having undefined rights of use and enjoyment. Rivers are said to be public. But a river was not public unless it flowed perennially, *i.e.* all the year round, though it did not lose its character if it happened to go dry in a single summer.[4] The public had rights of fishing and navigation and of incidental use of the banks. Whether the river-bed belonged to the Roman People, or to the riparian owners, or to no one was never clearly defined. There was, no doubt, a tendency, which became more pronounced as time went on, to regard all res publicae as the property of the Roman People, or, as we should say, of

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[1] In nostro patrimonio—extra nostrum patrimonium. Res in commercio—extra commercium—things susceptible or not of private transactions—mean much the same.

[2] Dig. 1. 8. 6 pr. (Marcianus); 41. 1. 14. (Neratius).

[3] Dig. 43. 8. 3 pr. (Celsus).

[4] Dig. 43. 12. 1, 2.

the State,[5] and, similarly, res universitatis were regarded as the property of the universitas.

185. The phrase res nullius is used in various senses:—
(a) to include all things which according to Roman ideas are not susccptible of private ownership;
(b) specifically, as above, of things sacred, religious and sanctioned;
(c) of things which, though susceptible of ownership, are not at the moment owned, *e.g.*, wild animals uncaptured, or things which have been abandoned by their owner (res derelictae).

186. Things are distinguished as corporeal and incorporeal (res corporales—res incorporales). "Corporeal things are things which can be touched, as land, a slave, a garment, gold, silver and other things innumerable." "Incorporeal things are 2. 2. 1.
things which cannot be touched. Such are things which consist in a right, as an inheritance, usufruct, obligations in whatever way contracted." It is commonly objected that this 2. 2. 2.
classification is illogical, because it confounds physical things with rights. But from the Roman point of view there is no confusion. I can own "this thing" and I can own "this right"; each is an asset of value to me and therefore a res. No doubt, ownership of a corporeal thing is a right or a bundle of rights. But usage identifies ownership of a corporeal thing with the thing owned, so that ownership, alone of rights, is regarded as corporeal; or, rather, the thing is substituted for the right. All other rights remain incorporeal.

187. Through the whole course of Roman Law, until the distinction was formally abolished by Justinian,[6] things were distinguished as mancipable and non-mancipable (res mancipi —res nec mancipi). Mancipable things were things which were transferred by mancipation. All other things were non- G. 2. 22
mancipable. Particulars will be given when we come to speak of modes of acquisition.

188. The classification of things as movable and immovable was not of cardinal importance in Roman Law, because for most purposes the law did not distinguish between them. It is true that Italian soil, as will be seen, being a res mancipi, required a special method of conveyance. But this was limited in area and came to be an unessential formality. In the

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[5] Any State-owned property was in a sense res publica, but not in the special sense in which the term is used in this context. It was said to be in patrimonio or in pecunia populi (Dig. 41. 1. 14 pr.; 18. 1. 6 pr.) or in patrimonio fisci (Dig. 43. 8. 2, 4.)

[6] Cod. 7. 31. 1, 5.

classical era land no less than movables might, in effect, be conveyed by simple delivery. But there were some differences between movable and immovable property. The periods of usucapion were not the same (§ 162). Movables could be stolen, land not (§ 584). In relation to possession and the possessory interdicts the rules were different.[7] Some distinctions result from the nature of the things themselves. What are called real or praedial servitudes (rights of way, rights of support, etc.) are naturally inapplicable to movables. In the later Empire the distinction between movables and immovables became more prominent owing to the introduction of special modes of conveyance applicable to land (§ 196). In the Middle Ages this became the principal basis of classification and it has persisted in modern systems of law. In English Law it has tended more and more to replace the old classification of things as real and personal.

189. It might be expected that before going on, as Justinian does, to consider the methods by which ownership is acquired, he would have said something about the nature of ownership in general and of Roman ownership in particular. But this he does not do. The Institutes is an admirable introduction to the study of Roman Law. It is not a manual of Jurisprudence[8] or of Legal History. It becomes necessary, therefore, to mention some distinctions which perhaps have more interest for us than they had for the compilers of the Institutes.

140. Roman ownership, or, as it was called, ownership by quiritary title (dominium ex jure Quiritium), implies a Roman owner of a Roman thing acquired by Roman process. It was not available (privileged cases apart) to peregrines, because they were not citizens. It was inapplicable (privileged cases apart) to provincial land, because provincial land (technically) was not owned by individuals, but by the Roman People or the Emperor.[9] It was not a consequence of transfer by tradition of a res mancipi, because ownership of a res mancipi could not be transferred by tradition. But long before Justinian these distinctions had become unimportant. The constitutio Antoniniana of A.D. 212 had extended citizenship to the whole Roman world (§§ 74, 82); the difference between Italian and provincial soil was merely formal; a perfectly satisfactory (praetorian) title to res mancipi could be procured by tradition.

G. 2. 7.

[7] Inst. 4. 15. 4a.

[8] Except, indeed, that legal science has been built upon a Roman Law foundation, and has borrowed from Roman Law much of its terminology (see Preface to this book).

[9] G. 2. 7, 21. See note on Inst. 2. 1. 40, *infra*.

While these distinctions lasted they gave rise in classical law to "inferior modes of holding which may be called Ownership".[10] These were :—1, Ownership by peregrines; 2, ownership of provincial land; 3, the so-called "bonitary ownership" of mancipable things conveyed by tradition. The first two did not come within the normal vision of a Roman lawyer. The third is more important. We shall meet with it again when we come to speak of the law of usucapion (§ 160). It is effective ownership separated from civil law title.[11]

141. The Roman classification of things as corporeal and incorporeal obscures the separate position in the legal system of the Law of Succession and the Law of Obligations. Justinian does not, in fact, in any part of the Institutes consider "things", in the wider sense which he gives to the word, as a single and separate topic. After the preliminary observations on the classification of things summarised above, he goes on to consider the ways in which things are acquired by particular title (not things in general, but corporeal things). It is only when he has described the modes of acquisition by natural law, devoting to this subject the remainder of the first Title of his Second Book, that in Title II he distinguishes things corporeal and things incorporeal. This is made the occasion for a description of praedial servitudes, rustic and urban, and of usufruct, use and habitation, commonly described, but not in the Institutes, as personal servitudes, together with the ways in which these rights are created and determined (Tits. III to V). Then, reverting to the acquisition of things, he describes the principal subsisting mode of acquisition by civil law, namely, usucapion, and its later development, long-time-prescription (Tit. VI). Title VII is devoted to donation, described as "another mode of acquisition". The subject of Title VIII is "Persons who may, and who may not alienate", of Title IX "Persons through whom we acquire". The last section of this Title prepares the reader for a transition to modes of acquisition by universal title. The subject of inheritance, testamentary and intestate, together with its

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[10] Buckl. *T.* p. 189; *M.* 113.

[11] G. 2. 40, 41. Normally civil law title and effective ownership go together. When they are separated the first is called "bare Quiritary title" (nudum jus Quiritium), the second has come to be known as "bonitary ownership". The term is an invention of the commentators. Theophilus has the phrase "bonitary owner". The classical writers say that a man "has a thing in his goods", or that "it is in his goods" (in bonis habere—in bonis esse). There were other cases of bonitary ownership besides that mentioned above, especially bonorum possessio (§ 373) and bonorum emptio (§ 736). Buckl. *M.* p. 114.

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praetorian equivalent, possession of goods, occupies the remainder of Book II and the first nine Titles of Book III. Titles X—XII of Book III treat of acquisition by adrogation and some other modes of universal succession. Then in Title XIII we are introduced abruptly to the topic of obligations with the remark "Let us now pass to obligations".

142. This arrangement of the subject-matter, however imperfect, brings into view *seriatim* most of the topics, which in a textbook on the private law of Rome we might expect to find occupying a central position between the Law of Persons on the one hand and the Law of Actions on the other. But for some other such topics we look in vain. There is no discussion of possession, or of real rights other than servitudes.[12] Whatever may have been the Roman point of view, it is here that a modern reader expects to find these subjects treated. We supply these gaps, therefore, in this commentary; and, departing from the comprehensive terminology of the Institutes, divide the Law of Things into three principal sections, dealing with:—I. The Law of Property (including Ownership, Real Rights less than Ownership, and Possession); II. The Law of Succession; III. The Law of Obligations. It would be more logical to reverse the order of these two last topics, but in conformity with the purpose of this book we adhere to the order of the Institutes.

THE INSTITUTES

BOOK II (Tits. I and II)

TITLE I

Of the classification of things

§ 133. In the first Book we have explained the law of persons. We are now to speak of things; which are either in our patrimony, or outside our patrimony. Some things are by natural law common to all men, some are public, some belong to a corporate body, some belong to no one, most things belong to individuals, and are acquired by various methods, as will appear from what follows.

1. By natural law the air, flowing water, the sea, and therefore the shores of the sea are common to all. Consequently, no one is forbidden to approach the shore, provided that he does not interfere with dwelling-houses, monuments and buildings, for these are not subject to the jus gentium, as the sea is. 2. All rivers and harbours are public; consequently the right of fishing in a harbour and in rivers is common to everyone. 3. The sea-shore extends to the

[12] The explanation of the omission is that the Roman tradition did not assign these topics to the Law of Things. Buckl. *Main Institutions*, pp. 108, 144.

limit reached by the highest winter flood. 4. The use of river-banks is public and juris gentium, like the use of the river itself; and so every one is free to put in at the bank, to fasten ropes to trees growing on the bank, or to land a cargo, just as every one is free to navigate the stream. But the ownership of the banks and of trees growing on them is vested in the riparian proprietors. 5. The use of sea-shores too is public and juris gentium, like the use of the sea itself, and so any one may set up a hut to retire into, may dry his nets, and draw them up from the sea. But the ownership of the shores may be supposed to be vested in no one, and to be governed by the same law as the sea and the sea-bottom.

6. Things belonging to a corporate body, not to individuals, are, for example, things in cities, such as theatres, race-courses and the like, and any other things which are the common property of cities.

7. Things belonging to no one are sacred things, religious things, sanctioned things; for a thing which is subject to divine law is owned by no one. 8. Those things are sacred which are duly consecrated to God by the Bishops, such as sacred buildings, and offerings dedicated to the service of God; which things, as our constitution [13] enacts, may not be alienated or pledged except for the redemption of captives. If any one by his own authority purports to make a thing sacred, it is not sacred, but profane. A site on which sacred buildings have been built remains sacred (as Papinian wrote) even after the destruction of the building. 9. Any one may make a place religious at his pleasure by burying a corpse in his own ground. If ordinary ground is owned in common one co-owner may not use it for burial without the consent of the rest, but it is different in the case of a burial-place owned in common. Similarly, if property is subject to a usufruct the owner may not § 31. make it religious without the consent of the usufructuary. A person may bury in another man's land with the consent of the owner. Subsequent ratification is equivalent to consent.

10. Sanctioned things too, such as city-walls and gates, are in a way matter of divine law, and, therefore, no one's property. City walls are said to be sanctioned because capital punishment is ordained against those who violate them. The part of a statute ordaining a penalty in the event of its infringement is called a sanction.

[For sec. 11, see p. 123.]

TITLE II

Of incorporeal things

Some things are corporeal, some incorporeal.

1. Corporeal things are things which by their nature are tangible, such as land, a slave, a garment, gold, silver and other things innumerable. 2. Incorporeal things are intangible; such are things consisting in a right, for example an inheritance, usufruct, use, obligations howsoever contracted. Nor does it make any difference that

[13] Cod. 1. 2. 21.

NOTE ON ARCHAEOLOGY

1. The Archaeological Survey of India, as the expert Government agency, was tasked with carrying out excavation in the disputed site, excluding the area below the central dome. The report was principally relied on, in support of the submission of the plaintiff in Suit 5 that the Mosque had been put up during the Mughal rule at a place where there was already a structure which was the place of worship as Ramjanma Bhoomi. The averment to this effect is set out in the plaint at Para 23 in No. 5 (**Page 248 in Volume 72)**

> "23. That the books of history and public records of unimpeachable authentiucity, establish indisputably that here was an ancient Temple of Maharaja Vikramaditya's time at Sri Rama Janma Bhumi, Ayodhya. That Temple was destroyed partly and an attempt was made to raised a mosque thereat, by the force of arms, by Mir Baqi, a commander of Baber's hordes. The material used was almost all of it taken from the Temple including its pillars which were wrought out of Kausauti or touch- stone, with figures of Hindu gods and goddesses carved on them."

2. The response of the Waqf board to the same was in paragraphs 23, 24, and 24B **(Page 281 Volume 72 – Pleadings)**

> 23. That the contents of para 23 of the plaint are also incorrect and hence denied as stated and in reply thereto it is submitted that there has never been any temple of Maharaja Vikramaditya's time at the site of the Babri Masjid and no authentic books of history and no public record of any unimpeachable authenticity can be cited in this respect. It is also incorrect to say that the mosque in question was raised at the site of any temple or after destroying any temple by force and arms. It is

also not correct to say that the material used in the construction of the said mosque was almost all of it taken from any temple, and it is also incorrect to say that the pillars of the said mosque were wrought out of Kasauti or touchstone with figures of Hindu Gods and Goddesses carved on them. The fact is that such pillars are available at some other places also.

Page 282 Volume 72 – Written Statement to Suit No. 5 of the Sunni Waqf Board:

24. That the contents of para 24 of the plaint are also incorrect and hence denied as stated. At no point of time there ever existed any temple at the site of the Babri Masjid and it is absolutely incorrect to say that the said mosque was constructed, after destroying any ancient temple, with the material of the alleged temple. The mosque in question has always been used as a mosque since its construction during the regime of Emperor Babar.

(B) That the contents of Para 24(B) of the plaint are also incorrect and hence denied as stated. The land in question undoubtedly belonged to the state when the Mosque in question was constructed on behalf of the State and as such it cannot be said that it could not be dedicated for the purposes of the mosque. Emperor Babar was a Sunni Muslim and the vacant land on which the Babri Masjid was built lay in his State territory and did not belong to anyone and it could very well be used by his officers for the purposes of the mosque and specially so when the Emperor Babar himself consented and gave approval for the construction of the said mosque. It is absolutely incorrect to say that the site in question was the site of any temple and any temple was destroyed by Meer Baqi.

Further in the Plaint in Suit No. 4 it was stated: (Page 85 Volume 72)

> That in the town of Ajodya, pergana Haveli Oudh there exists an ancient historic mosque, commonly known as Babri Masjid, built by Emperor Babar more than 433 years ago, after his conquest of India and his occupation of the territories including the town of Ajodhya, for the use of Muslims in general, as a place of worship and performance of religious ceremonies.

3. It is therefore apparent that the Waqf board and the Muslim parties were initially contending that there was no such structure before the Mosque was put up.

As the excavation progressed on the directions of the High Court, under the supervision and monitoring of the Court appointed observers, in the presence of representatives of the contending parties, it was realized that there indeed were the remains of a massive wall and structure beneath the Mosque.

The Muslim parties therefore changed the stand and argued that the structure was only an Idgah wall put up in the 11th or 12th Century by which time the Sultanate had assumed control of Avadh and are therefore essentially contesting the finding of the ASI in respect of the following :-

1) That the structure dated back to the 2nd Century BC

2) That the structure was not just a wall but was a massive multi pillared public place

3) That the structure indicates that it was a place of public worship of the Hindus.

4. Significantly the case of Idgah having been put up during the Sultanate is not pleaded and not spoken of by the fact

witnesses but by 3 Archaeologists who appeared on behalf of the Muslim parties. At no time was there such a pleading in this regard and on the other hand the admission in the pleading is that the Muslims had possession of the land only from the time of Babar who put up the Mosque in 1528. Surely it cannot be the case that Babar demolished an Idgah and put up the Mosque. Moreover, Idgahs are admittedly put up outside the main living area and Ramkot area was full of habitation as seen from the travelogues.It is apparent that what was a small structure was built in 2nd Century BC. Improvements and additions were made from time to time to the pre-existing structure.

5. The use of lime Surki is not indicative of Islamic structure. It had been in use much earlier. The various artefacts which had been found and the presence of a circular structure with Pranala are additional indicators of a temple.

6. The ASI carried out a very difficult and sensitive task in a limited time with all the constraints pointed out by them in the report. The attempt to tarnish the Organisation which is recognized the world over, by alleging malafide, is most unfortunate. Besides they were performing under the constant gaze of monitoring and supervision by the court and court appointed observers and in the presence of representatives of all the parties and possibly could not have made any such mistake or any such partisan Act.

7. The field of archaeology is a well-recognized science and the criticism advanced will throw doubts on civilizational history. To compare Archaeology with hand writing analysis and to doubt the evidentiary value, reflects erroneous appreciation of the skills required in archaeology. What is excavated and found is a fact. To relate it in the historical

contact and to arrive at a conclusion cannot be condemned as conjectural and hypothetical to be discarded.

8. The report of the ASI which was directed to be submitted by the Court under Order 26 Rule 10A of the CPC cannot be subjected to criticism like in the case of expert evidence produced by parties under Section 45 of the Evidence Act. The two are vastly different. More so, when none of the parties have chosen to put their objection to the Archaeologists, a right which they could have exercised under sub rule 2 and sub rule 3 of Rule 10 of Order 26 of CPC. The Archaeologists could then have explained their conclusions.

9. The report of ASI was submitted to the High Court pursuant to the direction issued under Order 26 Rule 10A of the CPC. This cannot be equated to the expert evidence produced by the parties for determining its credibility and evidentiary value.

10. This Hon'ble Court has considered the scope of Order 26 CPC and Order 46 of the Supreme Court Rules in regard to appointment of Commission, in the case of Bandhua Mukti Morcha reported in 1984 3 SCC 16. In para 14 of the said Judgment it was observed:-

Bhagwati J (Para 14)

" It is for this reason that the Supreme Court has evolved the practice of appointing Commission for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of the society. The report of the commissioner would furnish prima facie evidence of the facts and data gathered by the commissioner and that is why the Supreme Court is careful to appoint a responsible person as commissioner to make an enquiry or investigation into the facts relating to the complaint.

It is interesting to note that in the past the Supreme Court has appointed sometimes a district magistrate, sometimes a district Judge, sometimes a professor of law, sometimes a journalist, sometimes an officer of the Court and sometimes an advocate practicing in the Court, for the purpose of carrying out an enquiry or investigation and making report to the Court because the commissioner appointed by the Court must a responsible person who enjoys the confidence of the Court and who is expected to carry out his assignment objectively and impartially without any predilection or prejudice. Once the report of the commissioner is received, copies of it would be supplied to the parties so that either party, if it wants to dispute any of the facts or data stated in the report, may do so by filing an affidavit and the court then consider the report of the commissioner and the affidavits which may have been filed and proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the commissioner and to what extent to act upon such facts and data. But it would not be correct to say that the report of the commissioner has no evidentiary value at all, since the statements made in it are not tested by cross-examination.

Pathak J (Para 69)

I also find difficulty in upholding the objection by the respondents in regard to the admissibility and relevance of the material consisting of the report of the two advocates and of Dr. Patwardhan appointed as commissioners. It is true that the reports of the said commissioners have not been tested by cross-examination, but then the record does not show whether any attempt was made by the respondents to call them for cross-examination."

11. Such power has been used in respect of matters relating to iron ore mine in Karnataka, Goa and Odissa and the report has been acted upon in ***Goa Foundation v Union of India, 2014 6 SCC 590, Samaj Parvivartan v State of***

Karnataka, 2013 (8) SCC 219, Common Cause v Union of India and ORs (2017) 9 SCC 499.

12. Similarly in respect of ship-breaking activity, this Hon'ble Court constituted a committee of technical experts for making an environmental impact assessment and thereafter acted upon the same. Please see Research Foundation for Science Technology & Natural Research Policy reported in 2007 15 SCC 193.

***Research Foundation for Science Technology & Natural Resource Policy v. Union of India*, (2007) 15 SCC 193 at page 197**

> **"3.** Alang is located on the west coast of Gujarat. It is the largest ship recycling yard in the world. It is one of the choicest ship-scrapping destination for the ship-owners around the world. There are 183 plots in all to carry out the ship recycling activities. Till today Alang has provided approximately 23 million tonnes of steel in the last 10 years. On 17-2-2006 [**Ed.**: The order is reproduced in para 4, below.] when the above writ petition came up for hearing before this Court, we found the controversy concerning ship-breaking a recurring controversy. Therefore, this Court decided to lay down norms concerning infrastructure, capacity of Alang to handle large volume of ship-breaking activity, safeguards to be provided to the workers who were likely to face health hazard on account of the incidence of ship-breaking activity, the environmental impact assessment, regulation of the said activity and strict regulation of the said activity. Accordingly, this Court constituted a committee of technical experts to submit a report on the aforestated aspects."

"6. Ultimately, TEC submitted its report on the aforestated aspects on 10-5-2007. That report has been accepted by this Court vide order dated 6-9-2007 [*Research Foundation for Science* v. *Union of India*, (2007) 8 SCC 583] in Writ Petition No. 657 of 1995, etc. We accepted that report mainly because it is all-pervasive. It contains opinions of experts including retired naval officers. It indicates state of the art mechanism to regulate removal of asbestos. The report clarifies that "beaching" is an irreversible process. TEC has also examined the recycling plan and the dismantling plan submitted by the recycler. Apart from GMB and GPCB, various other authorities like Gujarat Enviro Protection & Infrastructure Ltd. (GEPIL) have also contributed their knowledge and expertise in the preparation of the report dated 10-5-2007. There was also an apprehension rightly expressed by the petitioner regarding radioactive material on board the vessel *Blue Lady*. Therefore, an immediate inspection of the said vessel beached at Alang since 16-8-2006 was undertaken by the Atomic Energy Regulatory Board (AERB) and by GMB. The apprehension expressed by the petitioner was right. However, as the matter stands today, AERB and GMB have certified that the said vessel *Blue Lady* beached in Alang no more contains any radioactive material on board the ship."

13. Reference may made to Section 293 of the Court of Criminal Procedure 1973 which enable the report of an expert being used as evidence without examining him in Court. It was held by this Hon'ble Court in Phool Kumar Vs. Delhi Administration 1975 1 SCC 797 Para 3:

"The clinching evidence against the appellant was his thumb impression on the kunda of the cash box. It was conclusively proved to be his on the opinion of the expert. The report of the expert was used as evidence by the prosecution without examining him in court. Neither the Court thought it fit nor the prosecution or the accused filed any application to summon and examine the expert as to the subject matter of his report. The Court was bound to summon the expert if the accused would have filed any such application for his examination. That not having been done the grievance of the appellant apropos the report of the expert being used without his examination in court made in the High Court and repeated in this Court had no substance."

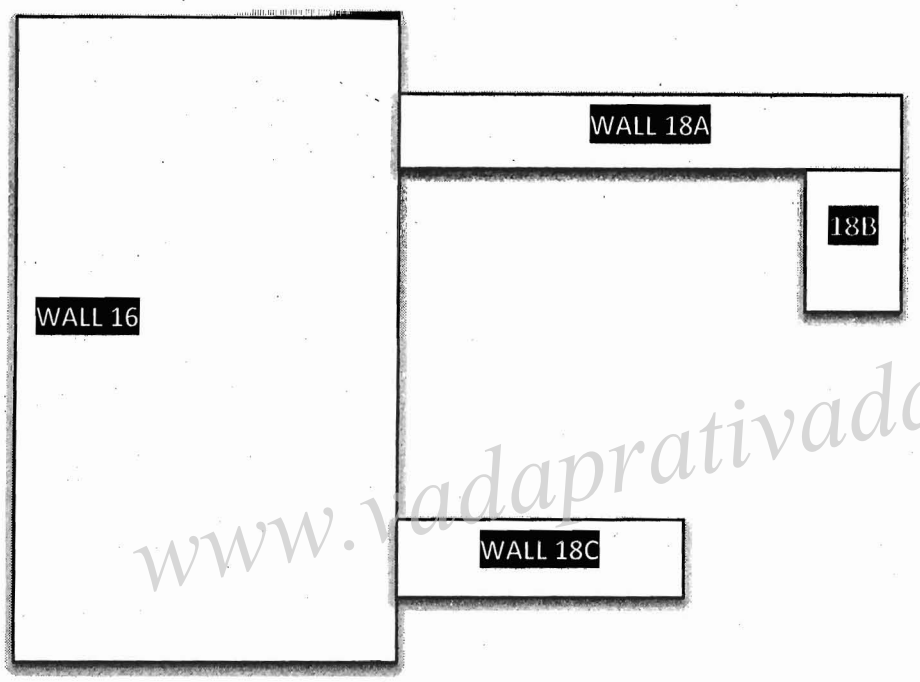
14. IDGAH OR KANATI MASJID NEITHER PLEADED NOR THE NATURE OF STRUCTURE SUPPORTS SUCH A PLEA.

14.1 The contention of the counsel for the Waqf Board that the earlier structure which was found during excavation was an Idgah or Kanati Masjid is against their pleaded case. Neither in the Written Statements filed in Suit-1 or Suit-5 nor in the their Plaint of Suit-4 they have pleaded that there existed such a structure over which the Mosque was constructed by the Babar. On the contrary they plead their possession from 1528 only.

14.2 Moreover, except the Expert Archaeologist Witnesses namely PW 29 Dr. Jaya Menon (at Volume 41 pages 6411 and and pages 6422), PW 32 Dr. Supriya Verma (Volume 44 pages 7068, 7199) and PW30 RC Thakran (Volume 45 Pages 7340, 7342, 7343, 7351) none of the plaintiff and other Witnesses of Facts produced on behalf of the Muslim Parties

have stated about existence of any Idgah/Kanati Mosque at the disputed site before the construction of alleged Mosque.

14.3 It is submitted that for Idgah, there has to be only a single wall and no other structure or wall can be there apart from that. The presence of other structures and walls (Wall18A, 18B, 18C; Pilla Bases) on other sides of Wall 16 itself falsifies the claim of Idgah/Kanati Mosque. It can be demonstrated as under:



(Based Upon Figures at Pg 48 and 51A of Volume 83 ASI REPORT)

14.3 Hon'ble High Court had noted such stance of the Muslim Parties and has held as under:

Para 3809. Initially the case set up by the plaintiffs (Suit-4) was that the building in dispute was constructed at a place where neither there existed any Hindu religious structure nor the place in dispute was place of worship nor there exist any evidence to show birth of Lord Rama thereat. However, when the excavation proceedings progressed, a marked change in the approach of plaintiffs (Suit-4) became evident. Some of the Archaeologist,

who also deposed later in favour of plaintiffs (Suit-4), against ASI report, tried to set up a new case that there appears to be an Islamic religious structure existing beneath the disputed building or that there existed an Islamic religious structure when the disputed building was constructed. The suggestion was that it could be either an Idgah or a Kanati Masjid wherein only one long wall on the western side was constructed with a niche. The consensus appears to be amongst the eight experts of Muslim parties, more or less accepting the existence of a structure beneath the disputed structure. The above approach that the earlier structure was a Islamic religious structure excludes the possibility of a non religious structure at the disputed site beneath the disputed structure. It narrows down our enquiry to the question whether such structure could be an Islamic religious structure or non Islamic structure i.e. a Hindu Religious Structure.

15. The Objections against the ASI Report are 'out of context':

15.1 The issue which goes to the root of the present dispute is whether the disputed structure was constructed after demolishing an existing temple. The Presidential reference of 1993 also sought the answer to the same question i.e. Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?

15.2 Barucha, J. in his opinion (minority Judgment) while holding that reference must not be answered held that the evidence in relation to the question referred requires evidence which includes evidence of Archaeologists.

***M. Ismail Faruqui (Dr) v. Union of India, (1994) 6 SCC 360*, at page 441 :**

> ***"151.*** *Thirdly, there is the aspect of evidence in relation to the question referred. It is not our suggestion that a court of law is not competent to decide such a question. It can be done if expert evidence of archaeologists and historians is led, and is tested in cross-examination..."*

15.3 It may be noted that under the *aegis* of Archaeological Survey of India, Prof. B.B. Lal conducted excavation at various sites including Ayodhya particularly near to Western wall of the disputed site and published articles in the journal published by the Archaeological Survey of India (ASI) which were filed as Exhibits by the Muslim Parties. [Exhibit E2/1 (Suit-5), Exhibit E 1/1 (Suit-5), Exhibit E 4/1 (Suit-5), Exhibit E 3/1 (Suit-5)]

15.4 The Hon'ble High Court taking clue from the above observations of Supreme Court and other materials decided to have a scientific investigation at the disputed site and vide order dated 1.8.2002 invited views/ suggestions of the parties regarding excavation of the disputed land by the ASI and also directed Ground Penetrating Radar (GPR) Survey to be conducted by the ASI. The excavation was accepted by all the Muslim parties and Shri Jilani, Counsel for the Plaintiff in Suit 4 infact made a statement before the Court that he has no objections on GPR Survey of the site.(See Page 220 para 213)

15.5 The relevant portion of order dated 1.8.2002 is reproduced hereunder (See page 3840-41 Vol. 3)

> *"The basic issue in all the suits is as to whether there was a Hindu temple or any Hindu religious structure*

existed and the alleged Babri Masjid was constructed after demolishing such temple at the site in question.

"The Archaeological Science can help to resolve the question. In the modern age the Archaeological Science has achieved the great accuracy and points out from the excavation the past history particularly in regard to the past existence of the construction."

15.6 The GPR Survey was conducted by M/s Tojo Vikas International Pvt. Ltd. and the Survey report was submitted through ASI on 17.02.2003, which suggested as follows:

"...9. In conclusion, the GPR survey reflects in general a variety of anomalies ranging from 0.5 to 5.5 meters in depth that could be associated with ancient and contemporaneous structures such as pillars, foundations walls slab flooring, extending over a large portion of the site. However, the exact nature of those anomalies has to be confirmed by systematic ground truthing, such as provided by the archeological trenching."

15.7 The GPR Survey therefore, suggested the existence of certain ancient and contemporaneous structures.

15.8 After considering the GPR SURVEY REPORT, High Court vide order dated 05.03.2003, inter alia passed an order directing ASI to excavate the disputed Site with an exception not to excavate the portion where Idol of Sri Ram Lalla was installed. The order reads as under:

"...Considering the entire facts and circumstances, the Archaeological Survey of India is directed to get the disputed site excavated as under:-

(1) The area shown in the report of the Commissioner submitted in Suit No. 2 of 1950 (0.O.S. No. 1 of 1989) covering an area of approximately 100x100 shown in the map plan No. 1 referred to by letters A, B, C, D, E, F and thereafter northern portion up to the end of the raised platform and further to the west, south and east to the said site to the extent of 50 feet.

(2) If it is necessary to excavate towards north or any area more than 50 feet to the disputed area, it can do so to find out the true position as regards to any foundation.

(3) It is made clear that the Archaeologists (Excavators) shall not disturb any area where the idol of Shri Ram Lala is existing and approximately 10 feet around it and they shall not affect the worship of Shri Ram Lala and thus, status quo as regards His Puja and worshippers' right of Darshan shall be maintained."....

(8) Learned counsel for the parties can also appoint nominee including Archaeologist to watch the excavation work. It is made clear that only one nominee of each contesting party at one time shall be entitled to remain present.

15.9 Therefore, the question formulated for ASI was whether there was any temple/ structure which was demolished and a mosque was constructed on the disputed site.

15.10 The objective of the excavation by the ASI was therefore fixed by the High Court to confirm the structures which were suggested in the GPR Survey Report.

15.11 The scope of inquiry was therefore limited. The ASI was acting as a Commissioner only under Or. 26 Rule 10 A,

only to ascertain certain facts namely whether any structure existed prior to the constructed of the disputed building as claimed by the Hindus or the disputed structure was built on a vacant land as claimed by the Muslims.

15.12 Be it noted that it was not an excavation which ASI normally undertakes. The ASI was neither required to answer nor can it answer whether there existed Ram Janam Bhoomi temple as suggested by the Counsel for the Waqf board before Supreme Court. In fact such a suggestion was erroneous and out of context.

15.13 The objections of the Counsel for the Waqf Board with respect to Stratigraphy and non-examination of animal bones, dating of Pottery etc. are therefore not relevant for the purpose with which the excavations were carried on ASI.

15.14 The excavation as directed the Court is focused to resolve the issue before the Court. "The excavation must be problem oriented with the sound research strategy. Brian M. Fagan *In The Begining An Introduction to Archaelogy*, Third Edition, pp. 198 (Canada 1978): " Unfocused excavation is useless, for the manageable and significant observations are buried in a mass of irrelevant trivia. A problem focus is essential for every excavation, to hold the observations to a reasonable and controllable limit. Any excavation must be conducted from a sound research design that seeks to solve specific and well defined problems."

15.15 It is submitted that "Archaeology is a scientific study of the human past via the material (or physical) record, from the earliest times right up to the present. As such, most archaeology is part of a much wider discipline, anthropology, which studies all aspects of humanity, ancient and modern.

But Archaeologists are unique among scientists in that they study changes in Human cultures over long periods of time." (Archaeology: A brief introduction-Brian M. Fagan and Nadia Durrani, 12th Edition)

15.16 Archaeological excavation and its findings are always contextual. The expertise of Archaeologist is to interpret and understand the artefacts, ecofacts, and features which are the basic building blocks of archeological data, but they are not themselves Archaeological Data. The Archaeological Data consists of the relationship between and among artefacts, ecofacts and features; that is, archeological Data are archaeological materials in context. The Archaeological record consists of artefacts, ecofacts and features. Artefacts are movable objects of Human use or manufacture. Ecofacts are natural objects that have been used or altered by Humans. Features are objects of Human manufacture that cannot be moved from a site- they are part of or embedded in the context of the site. While the Archaeological record consists of these material objects it is the context between and among artefacts, ecofacts, and features that make up Archaeological data. Archaeological sites are locations where artefacts, ecofacts and features are preserved in context and can be recovered by a trained Archaeologist.

15.17 Archaeologists use a variety of theories to interpret and bring meaning to the Archaeological record. Culture-Historical theories suggest that we can use the archaeological record to reconstruct the history of Human habitation in a given locale. Behaviorist theories go beyond to suggest that the archaeological record can be used to reconstruct ancient behaviors. Interpretive theory suggest we can use

the Archaeological record to understand the arts, motivations and beliefs of ancient people. Taphonomic theories caution that the Archaeological record is more a record of natural processes affecting artefacts, ecofacts and features than it is a record of Human history, behavior or thought. Finally, reactionary theories suggest that the archaeological record is a mirror that reflects only ourselves not a real past.

15.18 Therefore, applying the Report of ASI without looking at the 'Context" in which it was made would be highly erroneous.

16. The contention of the Waqf Board that the expert witnesses produced by them do not support the ASI Report is also not borne out from the testimonies of those witnesses.

P.W. 16, Suraj Bhan in fact says *"I agree with the report of ASI about the remains of Temple to the extent that these remains may have been of some temple.* (See page 2190).

P.W. 24, D. Mandal says, *"...a decorative stone has been fixed in wall no. 17. This decorative stone is floral motif, it is used in Hindu Temples."* (See page 2200)

"It is correct to say that construction activities had been carried out at the disputed site even before the Mughal Period". "As an Archaeologist I admit discovery of structures beneath the disputed structure during excavation." (See page no. 2201).

P.W. 32, Supriya Verma said, *" ...I agree with the finding of ASI regarding existence of the structure but I disagree with the interpretation arrived at by ASI. Further, it is correct to say the disputed structure was not constructed on the virgin land."* See page no. 2210

PW. 31, Dr. Ashok Dutta says, *" ...I agree with the opinion of ASI that there lie a number of structures in the form of walls and floors beneath the disputed structure. Wall no. 1 to 15 may be related to the disputed structure. Wall no. 16 onwards are walls belonging to a period before the construction of the disputed structure." (See Page 2210).*

17. OBJECTIONS ON PILLAR BASIS:-

The Objections of the Counsels for Counsel for the Waqf Board regarding Pillar Basis being at different floors is a complete misreading of the ASI Report. It is submitted that in all 50 pillar basis have been unearthed of which 12 were fully exposed, 35 were partly exposed and 3 were traced in section (See pg.81, Vol. 83). 46 pillar basis belong to floor no.3 of period 7 dateable to 12th Century A.D. whereas 4 pillars belong to floor 4 datable to 11th Century A.D. the pillar basis are constructionaly well founded. Besides the 3 pillar basis partly also available in section in trench no. F2-G2, Pillar base no. 20 (pg. 88), F8-F9, Pillar base no. 40-41(pg. 95), F8-F9 are constructionally well embedded and cannot have been created or manufactured by the excavators under any circumstance as the section reflects only the pre-existing things.

Moreover, the GPR Survey Report states "in conclusion GPR Survey reflects in general a variety of anomalies ranging from point 5 to 5.5 metres in depth that could be associated with ancient and contemporaneous structures such as pillars, foundations, walls, slab flooring extending over a large portion of the site. However, the exact nature of these anomalies has to be confirmed by systematic ground truthing, such as provided by archaeological trenching. The ASI report has now confirmed the GPR Survey regarding existence of pillar basis.

The High Court rendered finding after rejecting the objections and held at **Para 3917, 3918 @ page 2390** as under:

3917. One of the objection with respect to the pillar bases is that nothing has been found intact with them saying that the pillars were affixed thereon. The submission, in our view, is thoroughly hollow and an attempt in vain. The other parties i.e. Hindus categorically claimed that the erstwhile structure was removed i.e. demolished so as to construct the disputed structure. If we assume other cause to be correct for a moment, in case of demolition of a construction, it is a kind of childish expectation to hope that some overt structure as it is would remain intact. There cannot be any presumption that the pillar bases was remained intact along ancillary material. Whatever has been found that has to be seen in the context and not what is not found. All the things have to be seen carefully and nothing independently and in isolation. The pillar bases were detected by B.B.Lal also in 1976-77 when he made excavation on the western and southern side of the disputed site along with a wall structure. The Archaeologist said that the matter needs further investigation. It is thus further investigation which has infact fortified and explained the earlier structure also. The pillar bases in general were found during excavation in regular phases for columns constructed in a proper pattern with equal distance pattern in regular style. The calcrete stones were topped by sandstone blocks over which pillars must have rested. Brickbats were used in their foundation in the same manner as brick aggregates were used in foundation of walls. The brickbats course of the foundation rested under the ground. The question of falling apart of the brickbat foundation could not have arisen. The calcrete blocks topped by the sandstone blocks is capable of supporting pillar bearings, the load of the roof. Even if there is

some minor variation in the measurement of the pillar bases that would not invite the approach of total rejection of something which is otherwise apparent from the existence of the above pillar bases. There may be a reason for having variation in the measurement of the pillar bases that the actual centre of the pillar bases could not have been pointed out since the top sandstone blocks are missing from most of them. Figure 3A in any case has been confirmed to be correct by most of the Experts (Archaeologist) of plaintiffs (Suit-4).

3918. In general, therefore, we do not find any substance in the objections relating to pillar bases and the same is hereby rejected.

It is therefore submitted that the Counsel for the Waqf Board, even tried to doubt the existence of Pillar Bases before the High Court.

18. OBJECTIONS REGARDING LIME SURKHI:-

The contention of the counsel of defendant that the use of lime surkhi as only used in Islamic Structure is erroneous and it is wrong to say that lime surkhi in India made its appearance from Islamic period. It was used in gangetic plane from 2nd Century B.C. for example at Kaushambi (for reference excavations at Kaushambi by Prof. G.R. Sharma, 1960), Ganwaria (Perspective in Social and Economic History of Early India by R.S. Sharma, 1983), Mathura. The opinion of some of the experts even suggest that Surkhi is purely indeginous and was not brought in India from Central Asia.

The lime mortar, lime plaster, surkhi chuna is said to be used in India continuously before the arrival of Muslims in India. The inference which is sought to be drawn by the Counsel of the Waqf Board upon lime surkhi to attribute the structure

below the disputed structure as Islamic is wholly misconceived.

Infact, PW 16 Suraj Bhan has stated in his deposition has stated that "it is correct to say that lime water was found to have been used in the 3rd Century A.D. during the Kushana period in Takshshila and Pakistan....." See Page 2190, Vol.2.

Similarly PW 29, Dr. Jaya Menon also admitted in her testimony that ".....lime mortar was definitely used from neolithic period" See page 2201, Vol. 2.

19. OBJECTIONS ON CIRCULAR SHRINE:-

The objection raised with regard to Circular Shrine was with respect to 'Parnala' and that too on the basis of two photographs and it was argued that Parnala in photo no.1 at Plate 59 (page 66, Vol. 85) is not visible while it became visible in photo no. 2 Plate no. 60 (at page 67, Vol.85) and therefore, it was argued that the same was manufactured by Archaeologists to project this structure as Shivling.

In this regard it is stated that it is only a difference due to reflection from the angle/side/elevation etc. from which the photographis taken. Two photographs can be compared only if they are taken from the same distance, same angle and same height. A long shot and a close up clicked picture cannot be compared as shadows, light etc. create some difference. Picture 1 at Plate 59 (page 66, Vol. 85) is the top view of the Circular Shrine and therefore the grooving of Parnala which is in the shape of a 'V' is not visible whereas the same is clearly visible in Plate no. 60 (at page 67, vol.85) which is the picture taken from the west side.

High Court while accepting the finding of ASI and rejecting the objection of the defendant held at **para 3942 to 3944** as under:- "

3942. Thus, on the one hand the dimension of this structure are too small for a tomb and on the other the gargoyle was never in tombs while it was an integral feature of the sanctum of Shiva temples to drain out water poured on the Sivlinga.

3943. Shrine is a holy place where worship is performed. It is a structure where holiness is enshrined. Denial for the sake of denial should not be allowed. "No evidence to make this structure a shrine" and "a sheer figment of imagination and a conjecture without any evidentiary basis", such comments grossly lack technical acumen and clearly show the dearth of logical thinking. These themselves are mere arguments lacking "evidentiary basis". By these and many like arguments show the 'ostrich attitude' of the plaintiff.

3944. A structure is identified by its shape and/or by the use it was put to or by the function it was supposed to perform. This circular structure was found with a well defined 'Pranala' (water chute to drain out ablution liquids).The pranala could well have been denoted as Cicain but the area from where it was issuing was only 40 x 60m (including the squarlsh-hollow chamber for fixing the object of worship and the small entrance of the east) which could not be used for bath room or for kitchen, a few alternatives where water is required to be drained out, thus, the only valid explanation was it being a 'pranala' of a shrine, small only a subsidiary one and not the main shrine holding central/main deity.

20. DATING

In this case, bones have been recovered from the filling; therefore, they cannot determine the age of the layer or Strata.

It was not feasible within the time given by Court to get Thermoluminisence dating of pottery since the facility was not available, in Birba Sahni Institute of Palabotany, Lucknow and sending sample abroad would have taken quite long time. There was also no need to do it since Charcoal samples were available which have been dated for C14. TL dating is done mostly in those cases where charcoal samples for C14 are not available.

21. EXPERT WITNESSES OF MUSLIM PARTIES AND CONCLUSIONS OF HIGH COURT ON ASI REPORT

The approach of the defendant and the witnesses produced by them was wholly erroneous and was tailor made by them only to criticise the report of the ASI, even though they had agreed for the excavation of disputed land by ASI. High Court noticed such attitude at various instances and observed as under:

"...The self contradictory statement, inconsistent with other experts made against ASI of same party i.e. Muslim, extra interest, and also the fact that they are **virtually hired experts** reduces trustworthiness of these experts despite their otherwise competence..." (Para 3879)

"3986. Normally, it does not happen but we are surprised to see in the zeal of helping their clients or the parties in whose favour they were appearing, these witnesses went ahead than what was not even the case of the party concerned and wrote totally a new story. Evidence in support of a fact which has never been pleaded and was not the case of the party concerned is

impermissible in law. Suffice it to mention at this stage that even this stand of these experts make it clear that the disputed structure stood over a piece of land which had a structure earlier and that was of religious nature. Minor mistakes and irregularities in ASI report, if any, do not shake the basic finding that the disputed structure claimed was not raised on a virgin land or unoccupied land but there existed a structure and using some part thereof either in the form of foundation or using the material thereof, the disputed structure was created. Whether lime mortar or lime plaster from a particular period or not, whether glazed ware were Islamic or available in Hindustan earlier are all subsidiary questions particularly when this much at least came to be admitted by the experts of the objectionists parties i.e. the plaintiffs (Suit-4) that there existed a structure, walls etc. used as foundation walls in construction of the building in dispute and underneath at least four floors at different levels were found with lots of several other structures."

3988. It is contented that the ASI report does not answer the question framed by this Court, inasmuch as, neither it clearly says whether there was any demolition of the earlier structure if existed and whether that structure was a temple or not.

3989. In our view, the conclusion drawn by the ASI in the project accomplished within an extra-ordinary brief period and with such an excellence precision and perfection deserve commendation and appreciation instead of condemnation. It normally happens when an expert body tender an opinion, the party, who finds such opinion adverse to its interest, feels otherwise and try to rid of such opinion by taking recourse to all such measures as permissible but in the present case we hoped a better response particularly when the expert body involved is a pioneer and premier archaeological body of this country having

International repute. We are satisfied that the report of ASI not only deserve to be accepted but it really helps this Court in forming its opinion on an important issue in this regard. All the objections against ASI, therefore, are rejected.

3990. ASI, in our view, has rightly refrained from recording a categorical finding whether there was any demolition or not for the reason when a building is constructed over another and that too hundreds of years back, it may sometimes be difficult to ascertain as to in what circumstances building was raised and whether the earlier building collapsed on its own or due to natural forces or for the reason attributable to some persons interested for its damage. Sufficient indication has been given by ASI that the building in dispute did not have its own foundation but it was raised on the existing walls. If a building would not have been existing before construction of the subsequent building, the builder might not have been able to use foundation of the erstwhile building without knowing its strength and capacity of bearing the load of new structure. The floor of the disputed building was just over the floor of earlier building. The existence of several pillar bases all show another earlier existence of a sufficiently bigger structure, if not bigger than the disputed structure then not lessor than that also.

22. OBJECTIONS REGARDING NON-SUBMISSIONS OF NOTES

The objections regarding non-submission of Notes by ASI is clearly not made out from the perusal of record.

The list of all the items including notebooks has been mentioned by Hon'ble High Court at Page 251 (volume-1) and it is further submitted that in the order dated 20.1.2004 it was recorded by the High Court that notes prepared by the

members of ASI team at the time of studying the artefacts were destroyed after transmitting the data in the hard disc of the computer.

It is further pointed out that CPU including the hard disc were submitted to the Court by the ASI. It may further be noted that affidavits was filed by Sh. Hari Manjhi that all the material including notes has been submitted before the Court.

23. REGARDING OCTAGONAL STONE BLOCK

The ASI Report clearly indicates that Octagonal Stone Block found during excavation was used over the Pillar Base and in fact they suggested that such type of Octagonal Stone Block were also used in Sarnath and at Plate 40 a picture of similar Stone Block recovered Dharmachakrajina Vihar, Sarnath is provided.

It may be noted here that the said temple at Sarnath was also constructed by the Queen of Garhwal Dynasty during the same time when the temple at Ayodhya was renovated by the King of Gharwal Dynasty.

24. FINDINGS

After considering the report the High Court rendered finding taking into consideration of the report of ASI and along with other material evidence on record and held as under:

"4055. The ultimate inference, which can reasonably be drawn by this Court from the entire discussion and material noticed above, is:

(i) The disputed structure was not raised on a virgin, vacant, unoccupied, open land.

(ii) There existed a structure, if not much bigger then at least comparable or bigger than the disputed structure, at the site in dispute.

(iii) The builder of the disputed structure knew the details of the erstwhile structure, its strength, capacity, the size of the walls etc. and therefore did not hesitate in using the walls etc. without any further improvement.

(iv) The erstwhile structure was religious in nature and that too non-Islamic

(v) The material like stone, pillars, bricks etc. of the erstwhile structure was used in raising the disputed structure.

(vi) The artefacts recovered during excavation are mostly such as are non Islamic i.e pertaining to Hindu religious places. Even if we accept that some of the items are such which may be used in other religions also. Simultaneously no artefacts etc., which can be used only in Islamic religious place, has been found.

4056. The claim of Hindus that the disputed structure was constructed after demolishing a Hindu temple is pre-litem and not post-litem hence credible, reliable and trustworthy. Till late, no person of any other religion except the Hindus have been continuously staking their claim over the site in dispute on the ground that this is the place of birth of Lord Rama and there was a temple. In normal course, there could not have been any reason for such persistent attachment to the site had there been no basis or substance for the same particularly when this kind of persistence is continuing for the last hundreds of years. The various non-Indian writers, who have mentioned these facts, clearly stating that a Hindu temple was demolished for constructing mosque in question, may have some motive if it would have been a case of only post nineteenth century when

the British Government virtually came in power and sought to evolve the theory of "Divide and Rule" but even prior thereto, these facts have been noticed and recognized. Tieffenthaler was a missionary having no motive in making such remark when he visited Oudh area between 1766 to 1771 and such work was published in 1786.

4057. This belief is existing for the last more than 200 years from the date the property was attached and therefore, having been corroborative by the above it can safely be said that the erstwhile structure was a Hindu temple and it was demolished whereafter the disputed structure was raised.

PROOF OF FAITH AND BELIEF

1. The contention of the waqf board that the travelogues and gazetteers recording the faith and belief in regard to the place of birth of Lord Shri Ram are hearsay and ought not to be given credence is untenable.

2. The submission is reflective of the deep rooted prejudice of the Western historians and rejection of the oral tradition in the Orient. The recording of the history in India, unlike in Europe, is not one of recording dates and events, it is more in respect of culture, practices etc.

3. Documentation of history before the Christian era and even up to medieval time is rare and sporadic. Transmission of history, tradition and Dharma has been oral in poetry, in music and in sloka etc. Shruti and Smriti are the sources of Hindu law.

4. It is exceptionally that some inscriptions are found in public places including temple. Similarly archeological excavation have yielded some old forms of recording. Manuscript in Palm of leaves or otherwise are of comparatively recent origin.

5. This is so not only in India, it is so even in West Asia and the Middle East where Islam originated and spread.

6. It is in this context that the Privy Council opined in Gulam Rasul Khan Vs. Secretary of State for India. Volume 52 Indian Appeal 201 at Page 206 (A77 page 12).

   In such a case as the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized

agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. Taylor's Law of Evidence, 10th ed. S 1591. In many cases, indeed in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence.

Annexed hereto are pages 1 to 25 of Mulla Hindu Law 22nd edition (Annexure A-2) and Mulla Mahomedan Law 20th edition pages xxiii to xxv (Annexure A-3).

ANNEXURE - A2

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MULLA
HINDU LAW

by
Sir Dinshaw Fardunji Mulla

With a General Introduction to Hindu Law
and with
Commentaries on

The Hindu Marriage Act, 1955
The Hindu Succession Act, 1956
The Hindu Minority & Guardianship Act, 1956
The Hindu Adoptions & Maintenance Act, 1956

22nd Edition

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B. Com., LL.B., Advocate, Gujarat High Court

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INTRODUCTION

SYNOPSIS

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INTRODUCTION

Wherever the laws of India admit the operation of a personal law, the rights and obligations of a Hindu are determined by Hindu law, i.e., his traditional law, sometimes called the law of his religion, subject to the exception that any part of that law may be modified or abrogated by statute. Hindu law, as it is generally agreed, has the most ancient pedigree of any known system of jurisprudence. The study of any developed legal system requires a critical and analytical examination of its fundamental elements and conceptions, as also the practical and concrete details, which go to make the contents or body of that law. It also requires consideration of the line of development it has pursued. The abstraction and exposition of the principles or distinctions necessarily involved in Hindu law and the consideration of the line of development which it has pursued, are the appropriate matters of jurisprudence and legal history. The concrete legal system, which deals with the contents or body of Hindu law, is a matter of positive law and the questions that arise for consideration at the outset are: What is Hindu law? What are the sources from which knowledge of Hindu law must be derived?

Dharma.

Law as understood by the Hindus is a branch of *dharma*. Its ancient framework is the law of the *Smritis*. The *Smritis* are institutes, which enounce rules of *dharma*. The traditional definition of *Dharma* is: 'what is followed by those learned in the *Vedas* and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection'.[1] *Dharma* is an expression of wide import and means the aggregate of duties and obligations—religious, moral, social and legal.[2] In Sanskrit, there is no term *strictissimi juris* for positive or municipal law, dissociated from the ethical and religious sense. In a system of law necessarily influenced by the theological tenets of the *Vedic* Aryans, and the philosophical theories which the genius of the race produced, and founded on the social and sociological concepts of a pastoral people, the admixture of religion and ethics with legal precepts was naturally congruent. It was not possible, indeed, always to draw any hard line of logical demarcation between secular and religious matter, because certain questions, for instance, such as marriage and adoption, had the aspects of both. Any attempt, therefore, to isolate completely, any secular matter from its religious adjuncts, would fail to give a comprehensive idea or proper perspective of the true juridical concepts of Hindu law.

Secular Law and Religious Ordinances.

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[1] *Manusmriti,* II, 1. *Medhatithi*, one of the earliest commentators on *Manusmriti* explains the term '*dharma*' as duty—*Dharmashabdah Kartavyata vachanah,* VII, 1. For *Medhatithi*, see p. 26.

[2] See also *Ulpian's statement of the Commandments of the law*, containing a broad summary of a lawful man's duties, preserved in the introductory chapter of Justinian's Instituties: '*Juris precepta sunt haec—Honeste vivere, alterum non laedere, suum cuique tribuere*'— Commandments of the law: To live honestly; not to injure anyone: to give every man his due.

Smritis : the basic structure.

Where not modified or abrogated by legislation, Hindu law may be described to be the ancient law of the Hindus rooted in the *Vedas* and enounced in the *Smritis* as explained and enlarged in recognised commentaries and digests and as supplemented and varied by approved usage. Its basic structure was the law of the *Smritis* and it was from time to time supplemented and varied by usage. That was its early character. Then it made remarkable progress during the post-*Smriti* period (commencing with about the seventh century AD), when a number of explanatory and critical commentaries and digests (*nibandhas*) were written on it and which had the effect of enlarging and consolidating the law. The body of law so developed bears upon it many marks of its origins. Unfortunately, many ancient works on law are not available in their integrity and a number of them are probably irretrievably lost. However, historical research by Orientalists, both European and Indian, during last hundred years has brought to light a wealth of variegated material that had contributed to the growth of this ancient system of law.

Legal literature.

Smritis in part based on immemorial customs.

The ancient law promulgated in the *Smritis* was essentially traditional, and the injunction was that time-honoured institutions and immemorial customs should be preserved intact. The law was not to be found merely in the texts of the *Smritis* but also in the practices and usage which had prevailed under it. The traditional law was itself grounded on immemorial custom[3] and provided for inclusion of proved custom, i.e., practices and usages that from time to time might come to be followed and accepted by the people.[4] The importance attached to the law-creating efficacy of custom in Hindu jurisprudence was so great that the exponents of law were unanimous in accepting custom as a constituent part of law.

Era of Legislation.

It would be pertinent here to note one or two matters of more practical importance. The last century and a half of judicial decisions has, though not in theory but in effect, remodelled on many points on both textual and customary law. Many of the important points of Hindu law are not to be found in the law reports.

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[3] *Manusmriti* states: 'Here the sacred law has been fully stated...and also the traditional practices and usages of the four *varnas*'—I, 107. A popular verse from the *Mahabharata* is: '*Dharma* has its origin in good practices and *Vedas* are established in *Dharma*'—*Achara sambhavo dharmo dharmo vedah pratishthitah—Vana parva,* 150 Ch. 27. Vasishtha observes: 'Manu has declared that the (peculiar) practices and usages of countries, castes and families may be followed in the absence of rules of revealed texts'—1, 17 (*SBE*, Vol XVI).

[4] *Athatah samayacharikan dharman vyakhyasyamah*—We shall now propound the acts productive of merit (obligations) which are sanctioned by tradition and current usage—*Apastamba Dharmasutra* 1, 1.1.1. Haradatta explains this by stating: *Samayacharikah paurisheyi vyavastha*—current practices and conventions of the people. For Apastamba, see later part of the discussion.

Moreover, material and substantial changes and modifications in the law have been brought about by a number of enactments, which aim to ensure a uniform civil code of personal law for Hindus in the whole country. The changes, no doubt radical, proceed in the principle of equality stressed in the Constitution for evolving a just social order after taking due note of existing conditions and ideas. Of those enactments, it will suffice here to draw attention to the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956. The outstanding feature of the changes effected in the law of marriage is that monogamy is the rule, and dissolution of marriage is permissible in certain cases. The alterations made in the law by the latter enactment is that in effect it eliminates all disparity in the rights of men and women in matters of succession and inheritance. These enactments, from their very nature, cannot be and are not (except on few matters expressly so stated) retroactive in their operation and even in matters where they apply retrospectively, it will become necessary to know the law as it previously existed. Besides, even now a part of Hindu law and usage, as has hitherto been applicable, remains unabrogated by statute and the importance and necessity of a study of the entire system cannot be minimised of this hereafter.[5]

Sources of Hindu Law.

The sources from which knowledge of Hindu law is to be derived are the indices of *dharma* have been stated by Hindu jurisprudents. The *Veda*, the *Smriti*, the approved usage, and what is agreeable to good conscience are according to Manu,[6] the highest authority on this law, the quadruple direct evidence (sources) of *dharma*. Law did not derive its sanction from any temporal power; the sanction was contained in itself. The *Smritikars* and those who preceded them declared and emphasised the divine origin and sanction of the rules of *dharma*. 'Since law is the king of kings, far more powerful and rigid than they, nothing can be mightier than the law by whose aid, as by that of the highest monarch, even the weak may prevail over the strong...'[7] The minutest rules were laid down for the guidance of the king. It was his duty to uphold the law and he was as much subject to law as any other person. He did not claim to be the lawmaker; he only enforced law. One of his chief duties was described to be the administration of justice according to the local usage and to written Codes.[8] It was obligatory on him not only to enforce the sacred law of the texts, but to make authoritative the customary laws of the subjects as they were stated to be. These included customs of

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5 See p. 76; introductory notes to the two enactments.

6 *Manusmriti*, II,12. The variant text of Yajnavalkya adds one more source 'desire sprung from due deliberation'. see p. 22.

7 *Shatapatha Brahmana*, XIV, 4.2.26—*Tadetat Kshatrasya Kashatram yad Dharmah tasmat Dharmatparannasti athovaleeyanna-valeeyan samashante dharmena.*

8 *Gautama*, XI, 19, 20 (*SBE* Vol II); *Manusmriti*, VIII, 41,46.

countries, districts, castes and families. So also of traders, guilds, herdsmen, moneylenders and artisans, for their respective classes.[9]

Shruti. It was an article of belief with the ancient Hindu, that his law was revelation, immutable and eternal. *Shruti*, which strictly means the *Vedas*, was in theory the root and original source of *dharma*.[10] It was the fountainhead of his law. *Shruti* means, literally, that which was heard. It was supreme to the early Hindu like the *Decalogue* to the later Christian. The *Vedas*,[11] however, do not contain much that alludes to positive or municipal law.

Smriti. The few statements of law that are to be found in the *Vedas* are mostly incidental. *Smriti* literally means recollection. The *Shruti* was accepted as the original utterings of the great power. The *Smritis*, though accepted as precepts emanating from that source, were couched in the words of the *rishis* or sages of antiquity, who saw or received the revelations and proclaimed their recollections.[12]

The authority of these two primordial sources is described by Manu:

> By Shruti, or what was heard from above, is meant the *Veda*. By *Smriti*, or what was remembered from the beginning, the body of law—from these two proceeds the whole systems of duties.[13]

Theoretically, if a text of the *Smriti* conflicted with any *Vedic* text, it had to be disregarded: 'Where there is a conflict between the *Vedas* and the Smritis, the *Vedas* should prevail'.[14] However, as there was not much of positive law in the *Vedas*, an equation was established whereby the *Smritis* were understood as having been based on lost or forgotten *Shrutis*. By inflexible rule of Hindu jurisprudence, the *Smritis* were in practice never understood as in discord with *Vedas*. For all practical purposes, therefore, the *Smritis* were accepted as the effective source of Hindu law.[15]

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9 *Brihaspati*, II, 26-31 (*SBE* Vol XXXIII); *Manusmriti*, VII, 203; VIII, 41.

10 *Shrutistu vedoanjeneyo Dharmashastram tu vai Smritih*; *Manusmriti* II.10.

11 The *Vedas* comprise of: (1) *Rig Veda*, the *Veda* of the verses; (2) *Sama Veda*, the *Veda* of chants consisting of prayers composed in metre; (3) *Yajur Veda*, the *Veda* of sacrificial formulae; and (4) *Atharva Veda*, consisting inter alia of incantations, imprecatory formulae and prayers for averting calamities. The *Vedas* are of composite origin and include hymns by many generations of the early Aryans. Originally, they were transmitted orally by preceptor to disciple. The Vedic language was related to the classic Sanskrit, just as Attic was to Homeric Greek.

12 According to Blackstone, all human laws rested on the twin foundation of the law of revelation and the law of nature. The theory of Canonical law, which affected all European systems of law, was that the fundamental rules of law had been derived from a divine source. The Muslims believe a part of the Quranic law to contain the *ipsissima verba* of the divine revelation and the rest to be inspired by God, but expressed in the Prophet's own words.

13 *Manusmriti*, II, 10.

14 *Vyasa*, 1.4. *Manusmriti*, II, 13, 14.

15 The formula affirming this equivalence was critically discussed by the leading *mimansakars*, and particularly by Kumarila. The practical summation of Kumarila in his *Tantra-Vartika* is—*Tena sarvasmritinam prayojanavatee prama-nyasiddhih.*

Three stages of the legal literature.

Considered chronologically, and having regard to the stage of its legal literature, the Hindu law falls under three main epochs:

(i) the *Vedic* epoch. This is also referred to as the pre-*Sutra* period;

(ii) the era of the *Dharmashastras*. This is often sub-divided into:

(a) the Smriti period;

(b) the Sutra *period;*

(iii) the post-*Smriti* period.

Vedic or pre-*Sutra* period.

The fixation of the chronology of the *Vedic* period is a matter about which it is indeed difficult to say anything definite. The authentic history of this period of Hindu civilisation has not been preserved. The philosophic do-ctrines of the ancient Hindus did not encourage any desire to leave historical records for posterity, and the Aryans or Indo-Aryans did not preserve any evidence comparable to the Tablets of the Babylonians or the Papyrii of the Egyptians; nor have we anything comparable to the Annals of Livy. There has been considerable diversity of opinion amongst the Western and many Indian scholars on the question of the chronology of the *Vedic* or pre-*Sutra* period. The former have given later dates, while the latter have accepted much earlier dates. After the archaeological discoveries at Mohenjodaro and Harappa, and the recent discoveries at Lothal and Rangpur and in the southern Narmada valley, some added support has been lent to the opinion of scholars who had assigned a hoary antiquity to the Rig-*Vedic* age. It is not difficult now to accept the view expressed by many Indian jurists and scholars that the age of the *Vedic Samhitas* and other works of the pre-*Sutra* period was approximately 4000-1000 BC. It is possible that some *Vedic* hymns may have been composed at a period earlier than 4000 BC.[16]

Vedas.

The *Vedas* were the outpourings of the Aryans as they streamed into the rich lands of the Punjab and the Doab from their ancient home beyond the Hindu Kush Mountains.[17] Totalitarian claims apart, it is now established history that those early Aryans were a vigorous and unsophisticated people full of the joy of life, and though not given to much intellectual broodings—the era of the *Yoga* system of philosophy of cordial harmony between God and man was yet to come—had behind them ages of civilised existence and thought. The dedication in *Rig Veda* appropriately states: 'To the seers, our ancestors, the first

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[16] Mahamahopadhyaya Kane, *History of Dharmashastra* Vol II, Pt I, p. XI. In the opinion of Sri BG Tilak, 'the traditions recorded in the *Rigveda* unmistakably point to a period not later than 4000 BC when the vernal equinox was in Orion'. The same view was expressed by Jacobi.

[17] In a conglomeration of what may seem stereotyped bucolic hymnology, there are to be found some natural outpourings of the heart in language which is sheer lyrical poetry: *Ritasya jihva pavate madhuah* Rig IX, 75:2. One prayer is: 'Lord, be near us, hearken to us and make our speech truthful'. Rig. I.82: I. 'O Faith, endow us with belief'.

pathfinders'. Those early Aryans primarily invoked the law of divine wisdom, by which according to their theological conceptions, all things in heaven and in earth are governed. Their appeal was to the divine law and the universal order[18] to judge of their rectitude or obliquity. This was natural law or the law of reason, the unwritten law. Then came to be stressed the conventional and customary law, which a body of rules dealing with the right, the wrong, rights and duties and obligations as established and accepted by the people for themselves but with greater stress on duties and obligations. There is intrinsic evidence in the *Shrutis* that those Aryans of the *Vedic* age had robust concepts of a lawful man's duties. The emphasis was on the practice of *dharma*, an expression which came to signify 'the privileges, duties and obligations of a man, is standard of conduct as a member of Aryan community, as a member of one of the castes and as a person in a particular state of life'.[19]

Vedas, primordial source.

Although, the Hindus appeal to the *Shrutis* as the primary source of their law and religion, the *Shrutis* do not contain much that can be regarded as positive or lawyers' law. The references on these to secular law are mingled with matters ethical and religious and direct statements of law are rather few. A number of rules of law to be found there are incidental and at time metaphorical. The existing *Dharmashastras* belong to the second period. However, we find references in the *Dharmashastras* to previously existing laws and customs. It is obvious that for many centuries, there existed *Gathas* which are mentioned in the *Manusmriti* and the *Sutras* of Gautama, Vasishtha and others, but of the original form of those *Gathas* we know very little. The

Early Gathas.

Smritikars are agreed and common traditions have always accepted that the earliest exponent of law was Manu. The *Smritis* purport to embody one traditional law, namely the pronouncements of Manu.[20] The *Rig Veda* enjoins observance of the ancient rules of Manu: 'Do not take us far away from the path' (rules of *dharma*) prescribed by Manu and came down to us from our forefathers.[21] The material of that period available to this day does not render much assistance in collating an authenticated account of that body of original law, traditionally accepted as Manu's law, which indubitably existed. It was the unsophisticated

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18 The expression chosen for the universal order and law was '*Rita*'. 'The down follows the path of *Rita*, the right path as if she knew that before. She never oversteps the regions. The sun follows the path of Rita'. See also 'He gave to the sea his decree, that the water should not pass his commandment': Proverbs 8.29. The expression '*Rita*' also came to mean the fountain of justice and the path of morality to be followed by men. One prayer was: 'O Indra, lead us on the path or *Rita*, on the right path...' *Rig Veda*, X 133:6.

19 Even when later on rights were naturally the topic of forensic discussion, the accent was on obligation rather than on rights. Curiously enough, there is no equivalent expression in Sanskrit for the word 'rights' as used by modern writers on jurisprudence.

20 See *Smriti*, Introduction to the book.

21 *Manah pathah pitrayan dooram naishta: Rig Veda*, VIII, 40: 3.

Early *Sutras*.

age during which were composed a catena of *Sutras* simple and naive, yet adequate for the purposes of a pastoral people and their corporate life. Those early *Sutras*, composed at a time when knowledge was imparted catechetically, are so far matters of legendary history and what we know of them is only from references to some of them in the extant *Dharmashastras*. Jurisprudence in the *Vedic* age was nascent and creative. There is ancient literature reflecting the continued cultural existence of many centuries during the *Vedic* period, but we do not have that abundant data requisite for the purposes of the history of that epoch and we know much less of its legal history. The initial difficulty has been the lack of any genuine works of historiography and no historical survey of that first epoch of legal literature has so far been accomplished. There is, however, reliable data of a long period of transition between the first epoch and the era of the *Dharmashastras*. The *Brahmanas*,[22] which form the second part of the *Vedas*, and deal with rituals, and sacrificial rites, belong to this period during which were formed numerous *Shakhas* or Schools of the *Vedas* and greater emphasis was placed on the supremacy of the *Vedas* and observance of castes and stages of life. All these and the rise in power and dominance of the priestly caste are the features of the period of transition. In the ancient Brahminical society, several groups called *Charanas* had been formed. Each of these *Charanas* had its own *Shakha* (branch) of the *Veda* and had its own ritualistic and legal codes. Every *Charana* had also *Kalpasutras,* which included the *Shrauta*, the *Grihya* and the *Dharma Sutras*.[23] The *Charanas* of the *Vedic* period were called the *Sanhita Charanas*. There were similar *Charanas* also in the *Brahmana* period that followed. After that, came the period of the *Sutra Charanas*. The *Charanavyuha*, the writings of the early *Mimansakars*, and the available *Kalpasutras* are full of references to those early works and draw attention to that mass of early literature in the form of *Grihyasutras* which states the duties and obligations of the Aryan as an individual and as a householder. During this period of priestly dominance, a good deal that was written was full of elaborate sacrificial technique and religion assumed a stereotyped form verging on syncretism. However, it was also the age of protest against that rigid formalism and the time when the older *Upanishads*[24] were composed. The bold philosophical speculations embedded in the *Brihadaranyaka* and

Period of transition.

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[22] The *Brahmanas* are theological treatises in prose attached to the *Vedas*. The principal *Brahmanas* are *Aitareya*, *Shatapatha*, *Panchavimsa* and *Gopatha*. They mainly deal with rituals and efficacy of sacrifices.

[23] See *Dharmasutra*, Introduction to the book.

[24] The *Upanishads* are philosophical discourses described as 'ancient rhapsodies of truth' and denominated as the *Vedanta* or the concluding treatises of the *Vedas*. Schopenhauer made it clear that his philosophy was shaped by the fundamental ultimate of the *Upanishads*. He stated: 'From every sentence, deep, original and sublime thought arise... It has been the solace of my life, it will be the solace of my death'.

other early *Upanishads* are a reminder of the long journey from naturalistic polytheism to almost cabalistic ritualism and ultimately to monism. The emphasis now was on self realisation.[25] In the field of law also there was progress. A number of *Sutra*-works written during the later part of the *Vedic* epoch dealt with legal injunctions and customs. These are quoted in Yaska's *Nirukta* a series of legal maxims in the *Sutra* style.[26] There is also a date which shows that towards the end of the *Vedic* epoch, philosophical and at times legal disputations were carried on in learned assemblies or *Parishads*. These debates were responsible for the rise and development of Schools of philosophers, principles of reasoning (dialectics) and the practice of the art of discussion. A parallel to this may be noticed in the use of the art of debate by Socrates for the purpose of eliciting the truth and in the logical treatises of Aristotle. However, of those legal disputations in the *Parishads* of the learned, no record has been preserved just as no record exists of those early *Sutra*-works from which only a few quotations are to be traced. All that is known today is that there existed in the *Vedic* Epoch, rules of Dharma traditionally regarded as promulgated by Manu and *Sutra*-works containing aphorisms on law. It would be a misnomer, therefore, to call this as even a bare outline of the legal literature of that first epoch of Hindu law.

Era of Dharmashastras.

In the three periods stated above are discernible successive strata of legal thought, progressive evolution and expansion and growth of a system of traditional law claiming its foundation in the law of Revelation, and having the *Smritis* as its ancient framework. The era of the *Dharmashastras* was the golden age of Hindu law. No doubt the more critical period was the post-*Smriti* period when the system became more refined and ampler, but this second was the productive period of Hindu law. It was synchronous with the age of some of the leading *Upanishads* which are instinct with a spirit of inquiry and a passion for the search of truth about the hidden meaning of things. 'Truth wins ever; not falsehood' was the favourite axiom,[27] and the famous invocation was: 'Lead me from the unreal to the real: Lead me from darkness to light: Lead me from death to immortality'.[28] The spirit of the time was naturally reflected in the aphorisms of law then promulgated and

The golden age.

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[25] One supplication was for the removal of the veil or obstacle that hides the real. The obstacle was described in one of the most quoted of the *Upanishads* as 'The golden lid that covers the face of Truth'.

[26] Yaska who is very ancient himself, quotes earlier grammarians and etymological exegetes. Manu emphasised the importance of *Nirukta*, XII, III.

[27] *Satyameva jayate nanrutam.*

[28] *Asato mam sadgamaya; tamaso mam jyotirgamaya; mrityor mamritamgamya.*

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the influence on secular matters of the philosophical impulses and tendencies is easily discernible. However, care was taken, in laying down the minimal standards of conduct appropriate to the society that was being governed, to see that ethical judgement should not be allowed to control the operation of every rule of universal application. Even modern jurisprudence according to which the functions of law and ethics may differ does not require that laws must be ethically neutral.

The *Smriti* Period.

Nature of *Smritis*—The Hindu jurisprudence regards the *Smritis*, which are often designated as *Dharmashastras*, as constituting the foundation and important source of law. The term 'sources of law' used in many legal treatises on Hindu law and in decisions of the Privy Council is somewhat ambiguous. Possibly it was borrowed from that department of Roman law entitled *De juris fontibus*. It has in any case been found convenient and useful because in one acceptation of the term, sources of law are the earliest extant monuments of documents by which existence and purport of the body of law may be known.[29] The *Smritis* of *Dharmashastras* are the earliest extant treatises from which our knowledge of the line of development which Hindu law had pursued during the second epoch of its history is derived.

Nature of *Smritis*.

Mostly in metrical redactions and in some cases both in prose and metre the *Smritis* are collections of precepts handed down by *Rishis* or sages of antiquity. Composite in their character, the principal *Smritis* blend religious, moral, social and legal duties. They contain some metaphysical speculations, matter sacramental and also ordain rules of legal rights and obligations. Ethico-religious obligations were regarded by these exponents of *Dharma* as more important than legal obligations. The *Smritikars* were not always punctilious about stressing a clear distinction between the positive or lawyers' law and moral law, but this is not to suggest that they were unmindful of this distinction. When necessary they took care to define this distinction as for instance in the case of the pious and legal obligation of a son to pay the debt of the father when the debt was not for an immoral or illegal purpose. The charge levelled by some Western scholars against the authors of the *Smritis* for a want of precision and discrimination between moral and legal maxims is unreasonable and unfounded but it is unnecessary now to take any serious notice of the same. The *Smritis* are *Dharmashastras* enouncing rules and precepts of *Dharma*, an expression understood in a broad and comprehensive sense. A clear perspective of Hindu law is not possible unless it is properly appreciated that the blending of religion and ethics with law by these juris-theologians was in a large measure the natural results of a philosophy of life which laid emphasis on the supremacy of inward life over things external.

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[29] The expression used by many *Smritikars* is *'Dharmamoola'*, which is also used by Manu. *Dharmasya Lakshanam* is another expression used by Manu, which means direct evidence of *dharma*.

The acceptance by a corporate society of the connotation of duty (*Dharma*) which associated religious and ethical concepts with secular matters was bound to be projected into its codes of positive law. There are to be found, however, numerous texts in the *Smritis* illustrative of distinction between law and morality applicable to questions where it was felt necessary to emphasise any such point of distinction. The distinction when not observed was because the best rule was regarded as that which advanced *Dharma*.[30] Religious injunctions and legal precepts were at times apt to be mingled up unless the rules of logic and certain accepted canons of construction were brought in aid of the ascertainment of the distinction which nevertheless obtained.[31] It may also be observed that Yajnavalkya and some other *Smritikars* divided their treatment of subjects into three sections, *Achara, Vyavahara* and *Prayashchitta*. The first and the last relate to rules of religious observances and expiation. The early writers laid greater stress on these rules than on rules of *Vyavahara* that is of civil law. The later *Smritikars* mentioned above have treated rules of *Vyavahara* in separate sections (*Prakaranas*) and exhaustively considered rules of positive law and Narada and some *Smritikars* have compiled rules only of *Vyavahara*.[32] The shrewd practical insight of the Hindu *Rishis*, who were both sages and virtually lawmakers left very little that was undefined. At a very remote period, law was treated under eighteen heads and one hundred and thirty-two sub-divisions and laid down rules of law both substantive and adjectival. Founders of their own jurisprudence these philosophical jurists enunciated and expounded a system of law which does not suffer in comparison with Roman law which inspired the continental codes and much of English case law. By the Austinian principles of jurisprudence or theories of Bentham much of the traditional law of ancient India would be termed as 'morality' because that law was not 'a direct or circuitous command of a monarch or sovereign number to persons in a state of subjection to its author'. The *Smritis*; some of which deal exhaustively with various topics of law and are generally referred to as Institutes or Codes, were not codes in the strict sense in which a code is understood, ie, a single comprehensive legislative document on any particular topic or branch of law. The extant *Smritis* were compiled at different times and in different parts of the country but they all purported to record on traditional law.

Vyavahara : Positive Law.

Law by acceptance: *jus receptum.*

The *Smriti* was not autonomic law, which is the result of a true form of legislation or is promulgated by the State in its own person. It was not imposed by any superior authority *in invitos*

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30 See also *maxim summa ratio est quae pro religione* for it.
31 See *Dharma*, Introduction to the book.
32 *Vyavahara* embraces forensic law and practice as well as rules for private acts and disputes.

There was no dogmatic insistence upon any fundamental notions of command of a sovereign and habit of obedience to a determinate person. What was accepted was the rule-dependent notion of what ought to be done as agreeable to good conscience and in conformity with the cherished article of belief that the fundamental rules of law had been derived from a divine author. A legal system is a system of rules within rules; and to say that a legal system exist entails not that there is general habit of obedience to determinate persons but that there is a general acceptance of a constituent rule, simple or complex, defining the manner in which the ordinary rules of the system are to be identified. One should think not of the sovereign and independent persons habitually obeyed but of a rule providing a sovereign or ultimate test in accordance with which the laws to be obeyed are identified. The acceptance of such fundamental constituent rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course evidenced by obedience to the law.[33] The general effective motive, according to these *Smritikars*, was observance of *Dharma* and the sanctions recognised by the people themselves. Enforcement of law (*Danda*) in the nature of things proceeded from the sovereign but one view of the genesis of legal institutes was that the king and the law were created by the people. Medhatithi and Vijnaneshvara as also the *Mahabharata* and the *Arthashastra* of Kautilya maintain the view that law as enjoined in the *Vedas* and the *Smritis* was of popular origin. It was law by acceptance—*jus receptum*—and constituted in part of recollections of precepts claimed as of divine origin and in part of conventional and customary law. The law rested on the quadruple source already mentioned and the sanction behind that law was not the will of any supreme temporal power but that which was inherent in the law itself and the nature of and sanctity attached to its sources.

Smritikars.

The *Rishis* who compiled the *Smritis* did not exercise temporal power nor did they owe their authority to any sovereign power. The authority or imperative character of their legal injunctions was partly derived from the reverence in which they were held and the accepted principle that what they laid down was agreeable to good conscience. What the *Smritikars* said was regarded as the principle direct evidence of *Dharma*. The *Smritikars* did not arrogate to themselves the position of lawmakers but only claimed to be exponents of the divine precepts of law and compilers of traditions handed down to them and clung to that position even when introducing changes and reforms. Changes in the law were primarily effected by the process of recognition of particular usages (unless they were repugnant to law) as of binding efficacy. Brihaspati ruled that 'immemorial usage legalises

[33] See *Professor Hart's Introduction to Austin's Province of Jurisprudence Determined*, pp. xi–xiii. Prof. Hart also refers to Bryce, Kelsen and Salmond, *General Criticism of Austin's Doctrine of Sovereignty.*

any practice' and that: '"a decision must not be made solely by having recourse to the letter of written codes; since if no decision were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice".[34]

Acting on these principles the *Rishis* abrogated practices which had come to be condemned by the people and ordained and prescribed rules based on practices and customs which had come to be recognised and followed by the people.

Smritikars were great jurists.

The *Smriti* texts evince profound acute thinking of the sages and jurisconsults responsible for them. A remarkable instance of this is furnished by their treatment of 'ownership' and its comprehensive signification. Salmond in defining ownership states that 'ownership' in its wide sense 'extends to all classes of rights, whether proprietary or personal, *in rem* or *in personam*, in re *propria* or *in re aliena*....'. There are a number of texts in the *Smritis* on the subject of ownership which show that the jurisprudential concepts reflected through them remarkably accord with the view of the most modern writers on jurisprudence. The basis of what we know as Holland's theory of 'ownership' as 'plenary control over an object' and the necessary qualification to the same that the right of ownership must be enjoyed without interfering with the rights of others has been logically considered by the *Smritikars* and those who followed them[35] with due regard to the refinements implicit in this theory. Another remarkable instance was the recognition of 'prescriptions'. Although Roman law accepted extinctive and acquisitive prescriptions as sanctioned by jurisprudence, modern western lawyers, as pointed out by Sir Henry Maine, viewed them 'first with repugnance, afterwards with reluctant approval'. Law, it was said by these *Smritikars*, should help those who were vigilant in asserting, their rights and not those who slumbered over them. In their treatment of the law of prescription, these lawmakers evinced practical insight and legal acumen of a high order. Yajnavalkya laid down a period of twenty years for recovery by the lawful owner of land and ten years for the recovery of a chattel enjoyed by stranger,[36] and Brihaspati ruled that in case of continuous and uninterrupted possession of land for the prescriptive period there would even as against the original owner be created possessory title in favour of the person in actual possession.[37] Thus lapse of time was recognised both as destructive and creative of title. A further instance is equally remarkable. 'A fact', it was said in an apophthegm, 'cannot be

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[34] *Brihaspati*, II, 26, 28 (*SBE*, Vol XXXIII).

[35] There is an instructive dissertation by Vijnaneshvara on the juridical concept of ownership in Ch. II of the *Mitakshara*.

[36] Grounds of legal disability were recognised. Thus, for instance, there was exemption from operation of limitation in case of minors, property of the king and deposits involving the element of trust.

[37] *Brihaspati*, IX, 6, 7 (*SBE* Vol XXXIII).

altered by a hundred text'.[38] An act done and finally competed, though it may be in contravention of hundred directory texts (as distinguished from any mandatory text), will stand and the act will be deemed to be legal and binding. This maxim of Hindu law has been recognised and applied by the courts in cases of certain questions relating to the validity of marriage and adoption. The doctrine of Roman law corresponding to this maxim was *factum valet quod fieri non debuit*. Also notable was the logical acumen of the *Smritikars* and those who followed them to harmonise rules not easily reconcilable. The fallacy of rigid literal construction was not overlooked. Synthesis was as far as possible achieved by in effect rejecting that meaning which was apt to introduce uncertainty, confusion or friction.[39] In their desire to adapt the more ancient law to progressive conditions, they sometimes resorted to the favoured contrivance of the jurist by evolving a number of beneficent and elegant fictions. To mention only one, they announced the identity of the husband and wife and on that assumption rested the rule that in case of a person who died sonless his widow could succeed in preference to all other heirs recognised by law.[40] A maxim that found favour was that reason and justice are more to be regarded than mere texts. Some of the ancient rules of law propounded by these lawmakers surprise us by their strikingly modern character and remarkable insight into jurisprudential concepts, for insight does not depend on modernity.

Smritis sometimes divided into.

The *Smritis* or *Dharmashastras* are divisible into two classes. The first of these are the *Sutras*. Complete *Sutra* works contain aphorisms on sacrifices (*Shrauta*); aphorisms on ceremonies requiring domestic fire (*Grihya*) and aphorisms on law and custom treating of temporal duties of men in their various relations (*Samayacharika*). The last one of these three kinds of *Sutras* are referred to as *Dharma-sutras*.[41] Some of them were written in prose and some both in prose and verse.[42] The extant *Dharmasutras* though part of the *Smritis* of *Dharmashastras*, being more ancient, are sometimes differentiated from the metrical versions more specifically referred to as the *Smritis*. The principal extant

Dharmasutras and *Metrical Smritis*.

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38 There has been some conflict of opinion among Indian jurists on the question of the correct meaning of the maxim as stated by Jimutavahana: *Vachanashatenapi vastunonyathakara-nashaktch;* Ch. XXII, § 434.

39 Roman law.

40 *Yo Bharta sa Smritangana—Manusmriti*, IX, 45. *Jeevatyardhashareerertham Katham anyah samapnuyat... Asutasya prameetasya patnee: tadbhagahareem—Brihaspati* cited in *Smritichandrika*, Mysore Series No 48, p. 678. The provisions of the Hindu Women's Rights to Property Act, 1937 (now repealed by the Hindu Succession Act 30 of 1956) adapted this *fictio juris*.

41 The expression means 'strings or threads of rules of *dharma*'.

42 The objective of the *Sutras* or aphorisms was to give, in a compressed style of composition, principles and rules with the utmost brevity. The aphorismic style helped to avoid overburdening the memory. A trite saying was 'and author rejoiceth in the economising of half a vowel as much as in the birth of a son'.

Dharmasutras are those of Gautama, Baudhayana, Apastamba, Harita, Vasishtha and Vishnu. The *Smritis* more specifically, the Institutes of Manu, of Yajnavalkya, Narada and the *Smritis* of Parashara, Brishaspati, Katyayana and others belong to the second category of *Dharmashastras* and are later in age than the *Dharmasutras*. The *Dharmasutras* are sometimes divided into *Purva* and *Apara Sutras*, the former being the more ancient of them, but no list intended to be exhaustive. The *Sutras* generally bear the names of their authors and in some cases the names of the *Shakha* or School to which the authors belonged. It will suffice to refer only to some of them in the present context. The Gautama *Dharmasutra* belonged to the *Samavedins*. The Vasistha *Dharmasutra* belonged to the Vasishtha group of *Rigvedins* and the *Apastamba* and the *Baudhayana* to the *Taittiriyas*. The rituals of the groups differed in details. The *Dharmasutras*, however, dealt mainly with duties of men in their various relations and in course of time began to be accepted as of authority by members of all the groups.

Dharmasutra-The Sutra Period.

Dharmasutra-The *Dharmasutra* of Gautama, Baudhayana, Apastamba, Harita and Vasishtha are now considered and accepted to be the most ancient of the extant recorded aphorisms on law and custom treating the duties of men in their various relations.

As has been observed:

> Though the texts of the *Dharmasutras* have not always been preserved with perfect purity, they have evidently retained their original character. They do not pretend to be anything more than the compositions of ordinary mortals, based on the teachings of the Vedas, on the decisions of those who are acquainted with the law, and on the customs of virtuous Aryans... It is further still possible to recognise, even on a superficial examination for what purpose the *Dharmasutras* were originally composed. Nobody can doubt for a moment that they are manuals written by the teacher of the *Vedic* Schools for the guidance of their pupils, that at first they were held to be authoritative in restricted circles, and that they were later only acknowledged as sources of the sacred law.[43]

The *Dharmasutras* were fascicular rules, which came to be accepted as records of the one traditional law. They were not bodies of law struggling with each other for recognition. Composed in different parts of the country and at different times, they did not present any anomaly but tended to slide into each other. In common with most of the *Dharmashastras*, they mingled religious and moral precepts with secular law. Some of them are remarkable for the manner and vigour of

[43] Dr Buhler: *Introduction to 'The Laws of Manu'*, Sacred Books of the East Series, Vol 25, p. XI. The *Smritis* of Manu and some others were largely based on law, which had partly been systematised by the *Sutrakars*. The *Dharmasutras* supplied the ground plan for those works.

their expression and the multifariousness of the subjects of living interest covered by them. Some of these teachers give the impression that they were free willed, creative, ideal-harbouring human beings who did not feel bound by everlasting orthodoxies. In their texts there are no urgings to docile and sedulous conformity to every authoritarian mandate of the ritualists. If anything, they suggest that confining and endless conformity is bad for the human spirit. The authors of these *Dharmasutras* took the law from earlier *Gathas* and *Sutras* and customs which had grown up bit by bit and reduced them to some sort of order and symmetry. Some of these *Sutrakars* have evolved idioms of expression and contributed a significant quota to the language of law.

Apastamba.

The *Apastambasutra* is probably the best preserved of these *Sutras*. In a distinguished manner not free from archaic phraseology, Apastamba treats certain aspects of the law of marriage and of inheritance and criminal law. A notable feature of this *Sutra* is the clarity and forcefulness of its language. Untampered with by later redactors, it is one of the most quoted of the *Sutras* and accepted as a high authority. Apastamba hailed from the South and it is believed that in his work were embodied the customs of his part of the country. Haradatta has written a commentary on this work. It is entitled *Ujjvala*. Apastamba emphasises the traditional view that the *Vedas* were the source (*pramana*) and nucleus of all knowledge. He takes care, however, at the end of his work, to impress his pupils with statement; 'Some declare that the remaining duties (which have not been taught here) must be learnt from women and men of all castes'.[44] He also states; 'The knowledge which...women possess is the completion of all study'.[45] Haradatta explains this as in part referable to the science of useful arts and other branches of *Arthashastra* which latter expression he uses as embracing all general knowledge. The classical Sanskrit writers including Kalidasa endorse this pithy maxim in some choice phrase. The expressions 'knowledge' and 'completion of all study' were presumably used by Apastamba bearing in mind the rule that wide and comprehensive meaning must be attributed to word if they are fairly susceptible of it.

Gautama.

The *Gautamadharmasutra* is probably the oldest of the extant works on law and as already pointed out belonged to the *Samavedins*. The injunction that it was the duty of the king to preserve intact the time-honoured institutions of each country and make authoritative the customs of the inhabitants of different parts of the country just as they are stated to be, favoured by Manu, Brihaspati, Devala[46] and other writers of the metrical *Smritis*, does

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[44] II, 11, 29, 15.
[45] II, 11, 29, 11.
[46] *Yasmin deshe pure grame traividye nagarepiya; yo yatra vihito dharmastam dharman na vichalayet.*

not appear to have been quite established at the time of Gautama.[47] It would seem, however, that by the time of Baudhayana the rule was firmly established.[48] *Gautamadharmasutra* is in prose and treats extensively of matters legal and religious. These include questions of inheritance, partitions and *Stridhana*. Gautama attaches adequate importance to tradition and practices and usages of cultivators, traders, herdsmen, moneylenders and artisans.[49] Haradatta has written a commentary also on the work of Gautama.

Baudhayana. *Baudhayanasutra* is not available in its integrated form. What we have is a dismembered work, which according to the researches of Dr Burnell consists of four *Prashnas* of which the last would seem from intrinsic evidence to be an interpolation. There is evidence both internal and external to suggest that *Budhayanasutra* is older than *Apastambasutra*. Dr Buhler has examined various arguments which go to establish the high antiquity of this work.[50] Baudhayana is rather elaborate in his treatment and discursive. He himself says: 'This teacher is not particularly anxious to make his book short'. Baudhayana treats of a variety of subjects including inheritance, sonship, adoption and marriage. He mentions a number of usages and practices of the people and refers to certain customs prevalent only in the South, one of them being marriage with the daughter of a maternal uncle. He also mentions some customs which were peculiar to the people living in the North, two of them being trading in arms and going to sea.[51] He also speaks of the levy of sea-customs *ad valorem*[52] and of imposition of excise duty on traders by the king.[53]

Harita. Harita is another *sutrakar* whose work deserves special notice. One of the most quoted of the early exponents of law, he is mentioned as an authority by Apastamba and some other compilers of *Dharmasutras* and it is possible that his work is one of the oldest *Dharmasutras* so far known to be in existence. His treatment follows the same pattern that is adopted by the early *Sutrakars*. Harita is freely quoted also by the commentators. A verse ascribed to Harita is reminiscent of the stage of progress that Hindu law had made even during the first period of the era of the *Dharmashastras*: when the defendant avers that the matter in controversy was the subject of a former litigation between him and the plaintiff when the latter was defeated, the plea is a plea of former judgment—*pragnyaya*. This is similar to the doctrine of *res judicata* and the *exceptio res judicatae* of Roman law.

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47 Gautama, however, does say that the laws of countries, castes and families should be recognised in administering justice—XI, 20.
48 See *Baudhayana*, I, 1, 2, 1–8.
49 *Gautama*, XI, 21.
50 *SBE*, Vol XIV, p. xxxvii.
51 I, 1, 11, 1–4.
52 I, 10, 18, 14.
53 I, 10, 18, 15.

Vasishtha.

Of the *Dharmasutra* of Vasishtha, not much is extant. He deals *inter alia* with source and jurisdiction of law and rules of inheritance, marriage, adoption and sonship. Vasishtha stresses the importance of usage and describes it as a supplement to law. A number of manuscripts of this *Sutra* have been translated and published and opinion is divided on the question of the authenticity of certain chapters. Vasishtha gives an interesting description of *Aryavarta* (the country of Aryas).

He adds that, according to many writers, its northern and southern boundaries were respectively the Himalayas and the Vindhya range[54] and goes on to state that customs which are approved in any country must be everywhere acknowledged as authoritative.[55]

Vishnu.

Vishnu is another *sutrakar* whose collection of aphorisms is entitled to consideration among the ancient works of this class which have come down to our time. Vishnu is one of the *Smritikars* mentioned in the enumeration of Yajnavalkya[56] but an examination of the extant work clearly show that its author has copiously borrowed from Manusmriti and other standard works and must have adopted as the basis of his work an ancient collection of aphorisms intituled *Vishnusutra*. The bulk of the extant work consists of rules in prose composed in the laconic style of the early *Sutrakars* but most of the chapters conclude with metrical verse. It deals with rules of criminal and civil law, inheritance, marriage, debt, interest, treasure trove and various other subjects. Nandapandita, himself and erudite writer on law, has written a commentary of *Vishnusutra* known as the *Vaijayanti*.[57]

Some other authors of *Dharmasutras*.

Of other ancient authors of *Dharmasutras* very little is known although the aphorisms of some of them, mostly remnants, are to be found mentioned in the works of later compilers of the *Dharmashastras*. Of those, mention must be made of the brothers Shankha and Likhita the co-authors of a *Dharmasutra* bearing their names. In and oft-quoted verse from *Parasharasmriti*, the *Dharmasutra* of Shankha-Likhita is given considerable prominence. The *Dharmasutra* of Ushanas is mentioned by Yajnavalkya in his enumeration. The author appears to have ascribed his work to Ushanas[58] who is probably *Shukra* the mythological preceptor and the regent of the planet Venus. An oft-quoted text of Ushanas it that the son is under no pious obligation to pay a fine or the balance of a fine or a tax (or toll) due by the father; nor is he bound to pay a debt due by the father which is not proper.[59]

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54 I, 8, 9, 12, 13.
55 I, 10, 11—Provided they are not contrary to the policy of law.
56 See *Smritikars*, Introduction to the book.
57 A translation of *Vishnusutra* by Dr Jolly was published in the *SBE* Series, (Vol VII).
58 Ushanas in mentioned as an ancient *seer* in the Bhagavad Gita Discourse X, 37.
59 *Na vyavaharika.*

Importance of the *Dharmasutras.*

The great importance of those works today is not so much in their texts as in the concepts of jurisprudence reflected through their medium and the historical value of their contents and the reference that is traceable in them to previously unrecorded custom, and crystallisation in the form of precepts of usages and practices and the transformation of these into constituent law. Gautama in enumerating the sources of the sacred law speaks of the *Vedas* and the tradition and practices of those who know (the *Vedas*). The chapter on duties of a king also states that his administration of justice shall be regulated by the *Veda*, the Institutes of the sacred law and the laws of countries, castes and families provided they are not repugnant to the sacred records.[60] There are similar express texts recognising custom as a source of law (*Dharmamoolam*) and also references both direct and implied to various customs in the *Dharmasutras* mentioned above showing that the law was traditional and that custom was a constituent part of it.[61] It may be of interest to underline some of the liberal rules relating to the status and rights of women which found favour with these early exponents of law. Remarriage of widows and divorce are recognised in some of the old texts.[62] In *Vishnusutra*, it is stated that on partition between brothers after the father's death, not only are the mothers entitled to share equally with their sons but unmarried sisters also are entitled to their aliquot shares.[63] These teachers of the *Vedic* Schools brought a virile mind to the deposits of the legal thought and traditions of the past. Acclaimed propounders of the early *Smriti* law, these *Sutrakars* primarily sought to express the *communis sententia* of the Indo-Aryans and were unanimous in their appeal to customary law. This adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law to see that customs, practices and family usages prevailed and were preserved is one of the outstanding features of Hindu jurisprudence.

Chronology of *Dharmasutras.*

Of the *Dharmasutras*, we have some reliable history though the task of the historian in fixing the chronology of these works has been indeed hard. However, the problem of determining the dates of the leading *Dharmasutras* and *Smritis* was so fascinating and opened up such a vast field for reconstruction that during the last hundred years some jurists and scholars both European and Indian have critically and with meticulous care examined the available data and relevant criteria and assigned the approximate

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60 I, 1, 2; XI, 19–21, *SBE*, Vol II.

61 According to Roman jurisprudence 'customary law' obtains as positive law by virtue of the *consensus utentium*. Justinian states: *nam quid interest, populus suffragio vluntatem suam declaret, an rebus ipsis et factis? Digest*, 1, 3, 32.

62 Vasistha, XVII, 72–74 *SBE*, Vol XIV. This was in consonance with *Rig veda*, 10M 18, 7.

63 *Matarah putrabhaganusarena bhagaharinyah anudhhasha[illegible]ia duhitarah*—Vishnu, 18, 35.

dates of the compilation of these works. There have been many handicaps to the task of fixation of the dates of the various *Dharmashastras*. A number of early *Dharmasutras* are not available. Nor are available the complete texts of all the extant *Smritis*. Then again some texts attributed to some of the ancient exponents of law are to be gathered only from later works which quote them as authority. Of the available *Dharmashastras* some quote with approval previous works but do not throw any light on the question of their age. In case of some of these *Dharmashastras*, it is not possible to rule out the existence of interpolations and in case of one or two of them there are manifest indications of subsequent remodelling of the texts. In these circumstances the conclusions reached must often of necessity rest with the fixation of the approximate century during which the particular *Dharmashastras* must have been compiled. There was a sharp controversy amongst some earlier Western and Indian scholars on the question of the chronology of the *Dharmashastras*. There is some difference of opinion amongst the Indian jurists and scholars themselves as to the time when some of the *Dharmashastras* where first reduced to writing in the form in which they are extant. According to some of the earlier Western writers, the *Smritis* were reduced to writing some centuries later than the dates assigned to them by Indian jurists and scholars. It has been the opinion of the Indian critics that on this point some Western scholars often indulged in *a priori* reasoning and based their conclusion on unsound analogy. An analysis of the reasons in support of their conclusions given by some eminent jurists and scholars both European and Indian would suggest that the *Dharmasutras* of Gautama, Budhayana, Apastamba and Vasishtha must have been recorded between about 800 BC and 300 BC. Dr Jolly has tried to prove that the *Apastambasutra* is the oldest of these. Mahamahopadhyaya Kane puts the time of *Gautamadharmasutra* before the spread of Buddhism and his opinion is that this *Sutra* cannot be placed later than the period between 600–400 BC.[64] The age of Chandragupta Maurya which is reliable fixed as 321 BC to 297 BC is the sheet anchor of Indian chronology. Almost equally useful is the date of Panini who lived 'probably soon after 500 BC'.[65] Some Sanskritists on the other hand have made claims of greater antiquity for some of the extant *Dharmashastras*. They also rely on certain data. However, it seems unnecessary to join in the desire to go as far back as possible for the purpose of enhancing the importance of these ancient authorities on law.

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[64] Part I, p. 16.

[65] Macdonell, *India's Past,* p. 136. Panini is the author of a work on grammar described as 'monument of thoroughness and algebraic brevity'. Panini gives some data of considerable importance to the historian (Dr RK Mookerji, *Hindu Civilization,* Ch. VI).

Yajnavalkya's enumeration of *Smritis.*

In a verse of Yajnavalkya are enumerated twenty of the *Dharmashastras* all bearing the names of the *Rishis* to whom their authorship was ascribed. Manu, Arti, Vishnu, Harita, Yajnavalkya, Ushanas, Angiras, Yama, Apastamba, Samvarta, Katyayana, Brishaspati, Parashara, Vyasa, Sankha, Likhita, Daksha, Gautama, Shatatapa, and Vasishtha are mentioned as founders of *Dharmashastras.*[66] The verse obviously was penned by a later redactor and the list is illustrative and not exhaustive. Narada, Budhayana and some others not mentioned here are among the recognised compilers of law.[67]

Smritis supplementary to each other.

Of the numerous *Smritis* the first and foremost in rank of authority is *Manusmriti* or the Institutes of Manu. There is a striking resemblance and agreement among the *Smritis* on many questions and they purport to embody one traditional law. All the *Smritis* in course of time came to be regarded as of universal application. No greater authority was attached to one than to another *Smriti*, except in case of Manusmriti which was received as of the highest authority. It was not as if any one *Smriti* was taken as in substitution for another on any particular aspect or branch of law or as of greater authority in any part of the country but they were all treated as supplementary to each other.

Manusmriti.

Manusmriti or Institutes of Manu is by common tradition entitled to place of precedence among all the *Smritis*. The other *Smritikars* themselves subscribe to this view. Opinion, however, is divided on the question of the identity of Manu. It seems impossible to offer any strong data one way or the other on the somewhat fascinating riddle as to the identity of the original lawgiver or to point out the specific rules of law promulgated by him and preserved as part of the extant Code. There is striking resemblance and agreement among the *Smritis* and they purport to embody one traditional law often stated to be the pronouncements of Manu who was accepted as the first expositor of law and often reverently referred to by the *Smritikars* in the *pluralis majestatits*. The ancient law existed before writing was invented and human memory had to be its sole repository. It was not static but a growing system and was handed down for centuries from preceptor to disciple in succession. In course of time had come the *Gathas* and *Sutras* of the Brahmana period, and after that came the *Dharmasutras*. All these were supplementing, altering and gradually moulding the ancient traditional law into

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[66] *Dharmashastraprayojakah* I, 4, 5. In his *Nirnayasindhu*, Kamalakara refers to over 100 *Smritis*. Many of those mentioned by him have not been found.

[67] The *Padmapurana* lists 36 compilers of law. The name of Arti mentioned in *Yajnavalkyasmriti* is not mentioned. To the other 19, are added Marichi, Pulastya. Prachetas, Bhrigu, Narada, Kashyapa, Vishvamitra, Devala, Rishyashringa, Gargya, Baudhayana, Paithinashi, Javali, Samantu, Parashara, Lokakshi and Kuthumi.

system. This evolution was going on for many centuries and so was going on the process of lawmaking with a body of customs taking and receiving recognition from time to time and itself forming a constituent part of the traditional law. The rules of law attributed to Manu, the first patriarch, were bound to come up continuously for consideration and application and the exponent or interpreter of law had to take account of the law at the time extant and also attach adequate importance to growing usages and customs. The accretions were naturally accepted as part of the same law and having the same obligatory force as the original rules. The fixation of these rules was obtained when the Code itself was compiled and bore the name of Manu, the original exponent of law. The Code is not in the language of *Vedic* time and it is obvious that it was reduced to writing at a later period. The date of this compilation in its extant form can now fairly reliably be fixed as about 200 BC but there is little historical data about its actual author. The Code contains interesting parallels with other works and the author, whatever his real identity was, appears to have compiled an exhaustive code binding on all and identified it with the most familiar and venerated name of Manu, the primeval legislator. The *Dharmashastras* right from the *Rig-Vedic* age copiously refer to the opinions of Manu and of Manu *Svayambhuva*. Then again there are references made to *Prachetasa* Manu and *Virddha* Manu. References are also made to *Manudharmasutra*. Evidence about Manu traditionally accepted as the first exponent of law cannot altogether be said to be scanty, nor is there any conclusive data to establish his identity. There is not much reason however, for the student of Hindu law to make himself uneasy over the paucity or uncertainty of evidence regarding the identity of the real author of the extant *Manusmriti* or of the original Manu whose name it bears. What is of importance and consequence is the paramount authority of Manu. It has been repeatedly asserted and affirmed that the authority of the precepts contained in the *Manusmriti* was beyond dispute.

Manu, the first Patriarch.

Identity of the actual compiler of the code is not known.

The extant Code of Manu compiled in about 200 BC was obviously an answer to a long-felt desideratum because the legal literature of the *Dharmasutra* period had not produced any work which could meet the requirements of a compendium of law in all its branches. The unique position acquired by it as the leading *Smriti* and effectually of the most authoritative reservoir of law was due both to its traditional history and the systematic and cogent collection of rules of existing law that it gave to the people with clarity and in language simple and easy of comprehension. Analogy, though imperfect, of the *Codex Theodosianus*, a compilation promulgated in 429 AD and the *Codex Justinianus* compiled in 528 AD may serve to give and idea of the purpose

Corpus Juris of ancient India.

achieved by the institutes of Manu.[68] Virtually amounting to a recasting in a convenient and easily accessible form of the whole of the traditional law it appears to have in practice replaced on matters covered by it the use of the rules of law stated in earlier *Gathas* and *Sutras* and the chapters on *Vyavahara* in the *Dharmasutras* most of which it has practically embodied. The Code is divided into twelve chapters. In the eighth chapter are stated rule on eighteen subject of law—intituled titles of law—which include both civil and criminal law.[69] In the later treatises other *Smritikars* have mostly followed this division and the nomenclature adopted in the Code except that the ninth division of Manu was dropped and the title of *Prakirnaka* (miscellaneous) was supplemented.[70] The author of the extant *Smriti* may not have been the originator of the famous division but it appears to have been a traditional classification accepted and popularised by him. The rules of law laid down in *Manusmriti* and its most characteristic doctrines have today their practical importance in this that the Code is a landmark in the history of Hindu law and a reservoir to which reference may at time become necessary for the proper appreciation of any fundamental concept or any question involving first principles. Law of inheritance, property, contracts, partnership, master and servant are some of the branches of law comprising the Code. The Code records many genuine observances of the ancient Hindu and gives a vivid idea of the customs of the society then extant. The ordinance of Manu is based on ancient usages. Predominance was to be given to approved usage in all matter: 'Let every man, therefore... who has a due reverence for the supreme spirit which dwells in him, diligently and constantly observe immemorial custom. Thus have the holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of all piety goods usages long established. A King... must inquire into the law of castes (*jati*), of districts (*ganapada*), of guilds (*shreni*), and of families (*kula*), and settle the peculiar law of each'.[71] In his survey of the duties of the king, Manu stresses the importance of *danda*, which connotes the sanction behind the power of the king restrain transgressions of

Eighteen titles of law.

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[68] An examination of the departments of law dealt with in *Manusmriti* will show that it was a complete code embracing all branches of law and was suitable to conditions then prevalent and the exigencies of the time. The colonial expansion of India at one time embraced almost the whole of South-east Asia. It may be of some interest to notice that the name of Manu was authoritatively associated with the laws of many countries in that vast region. On the facade of the legislature building in Manila, the capital of the Philippines, are four figures representing the culture of that country. One of the figures is of Manu.

[69] *Manusmriti*, VIII 4–7. The 18 titles are: I. Recovery of Debts; II. Deposit and pledge; III. Sale without ownership; IV. Concerns amongst partners; V Resumption of gifts; VI. Non-payment of wages or hire; VII. Non-performance of agreements; VIII. Rescission of sale and purchase; IX. Disputes between master and servant; X. Disputes regarding boundaries; XI. Assault; XII. Defamation; XIII. Theft; XIV Robbery and violence; XV. Adultery; XVI. Duties of man and wife; XVII. Partition (of inheritance); and XVIII. Gambling and betting.

[70] For instance, see *Naradasmriti*, XVIII.

[71] *Manusmriti*, VIII, 41, 46.

law and to inflict punishment on offenders. The *danda* 'alone governs all protected beings, alone protects them, watches over them while they sleep; the wise declare it (to be identical with) the law'.[72] Other leading *Smritikars* echo this punitive element of the theory of kingship. Of the numerous English translations of the Code, the one that has often been referred to is that by Dr Buhler which was published in the *Sacred Book of the East Series* in 1886.[73] A number of commentaries were written on Manu's Code during the post-*Smriti* period by Medhatithi, Govindaraja, Kulluka and others. Kulluka's text has been referred to for centuries in India and Dr Buhler's translation was made from a recension of Manu given by Kulluka. Mahamahopadhyaya Sir Ganganath Jha has published volumes on the *Manusmriti* with Medhatithi's commentary.

Commentaries on Manusmriti.

Of the commentaries on *Manusmriti*, the most notable is *Manvarthamuktavali* of Kulluka.

Kulluka.

In the preface to his translation of *Manusmriti*, William Jones observed:

> It may perhaps be said very truly that it is the shortest yet the most luminous, the least of ostentatious yet the most learned, deepest yet the most agreeable, commentary ever composed on any author, ancient or modern.

Obviously, this was superlative praise. Kulluka freely quotes Medhatithi and Govindaraja and attack some of their explanations and comments in a trenchant manner. He directed the shafts of his sarcasm against them and his remarks when he derides them are spiced with malice and made in poor taste. He refers to some of the observations of Govindaraja with sarcastic mockery and in a manner reminiscent of some of the neatest and most pointed of the eighteenth century English satirists. There was no limitation to Kulluka's egotism as might be seen from his own assessment of his exposition and ability as a commentator,[74] but it cannot be said that he was a legist of the first rank. His forte was an ability to reduce difficult rules to the simplest language and logic. There is no obscurity about his style. Master of his subject, he is not altogether free from sophistry in his reasoning. There can, however, be no doubt that the merits of Kulluka's work and of his original technique as a critic are outstanding. His elucidations and amplifications of some laconic expressions and curious terms used by Manu and the occasional obscurity of Manu's texts have for centuries been of great assistance and his *Manavarthamuktavali* is a very valuable production.

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[72] VII, 18.

[73] Mention here may be made of the translation of *Manusmriti* by William Jones, which came out in 1794. In his preface, he observed: The style of it (*Manusmriti*) has a certain austere majesty, that sounds like the language of legislation and exhorts a respectful awe; the sentiments of independence on all beings but God and the harsh admonitions even to kings are truly noble...

[74] *Vyakhyataro na jagurapare pyanyato durlabham vah.*

ANNEXURE-A-3

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MULLA

Principles of

MAHOMEDAN LAW

by

Sir Dinshaw Fardunji Mulla

20th Edition

with a Foreword by

Shri Salman Khurshid

Union Minister
Ministry of External Affairs, Government of India

Revised by

Professor Iqbal Ali Khan

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Twentieth Edition	2013	Professor Iqbal Ali Khan

so when *Qiyas* (infra) was developed. The Traditionist followed the teachings of Ahmed ibn Hanbal (780-855 A.D.). Born at Baghdad, Ahmed ibn Hanbal was a pupil of Imam Shafei. He perfected the doctrine of *usul* (infra). He was author of several books chief among which are *Musnad al-Imam Hanbal, Taat-ur-Rasul* and *Kitab-ul-Alal.* The most exhaustive work on Hanbali doctrines has been written by Muwaffak al-Din. Two Hanbali scholars (ibn Taymiyya and his pupil Ibn Kayyin-al-Jawayza) wrote on *Siyasa* and *Sharia* (infra).

The Hanbalis spread to Persia but lost ground to the Shiites. Hanbalis are to be found in Syria and Palestine. The Wahabi movement in Saudi Arabia (started by Mohammad ibn Abd-ul-Wahab about the middle of 18th century) has introduced a puritan attitude and all innovations based on *qiyas* (infra) and *rai* (infra) are rejected as opposed to Traditions of the Prophet.

In India there is a sect known as *Ghair Muqqallad,* who do not strictly follow any school and who are akin to *wahabis.*

The Shia School

The Shia School owes its origin to Imam Jafar as-Sadik the 6th Imam of the Imamias. This makes it earlier in point of time to most of the Sunni schools discussed above. There are many differences between *Shia* and *Sunni* jurisprudence. Shias do not accept any Tradition attributed to the Prophet (infra) unless it comes from the household of the Prophet *(ahl-i-Bait).* They also do not accept the validity of any decision not endorsed by an Imam. The Imamia Shias are divided into two main branches –*Akhbari* and *Usuli.* The *Akhbaris* accept certain resolutions of former scholars but not the *Usulis.* The latter accept only those which are approved by their Imams. As, however, the Imams may not be available it is permissible to interpret by the application of reason *(aql).* In other words *ijmaa* is valid only if the Imam could not be consulted. Conversely there is no room for equity, public policy or analogical deduction if the Imam were available.

The Shias are found in Persia where they form the largest majority. Elsewhere they are generally in minority.

The School of Mutazilas is a rationalist branch founded by Wasil bin Ata. He was a pupil of Imam Hasan of Basra, a liberal philosopher, but went beyond his master and is known as a dissenter.

E. Degrees of Obedience: Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.

(i) **First degree:** *Farz.* Whatever is commanded in the Koran, *Hadis* or *ijmaa* must be obeyed.

Wajib. Perhaps a little less compulsory than *Farz* but only slightly less so.

(ii) **Second degree:** *Masnun, Mandub and Mustahab:* These are recommended actions.

(iii) **Third degree:** *Jaiz or Mubah:* These are permissible actions as to which religion is indifferent.

(iv) **Fourth degree:** *Makruh:* That which is reprobated as unworthy.

(v) **Fifth degree:** *Haram:* That which is forbidden.

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F. Sources of Islamic Law: There are four sources of Islamic Law. They are (i) *Koran;* (ii) *Sunna* or Tradition; (iii) *Ijmaa* or consensus of opinion and (iv) *Qiyas* or analogical deductions.

(i) The Koran

The word *'Islam'* means 'peace' and 'submission'. In its religious sense it denotes 'submission to the Will of God' and in its secular sense, the establishment of peace. The word *'Muslim'* in Arabic is the active participle of *Aslama,* which is acceptance of the faith, and of which the noun of action is *Islam.* In English the word Muslim is used both as a noun and as an adjective, and denotes both the person professing the faith and something peculiar to Muslims, such as Law, Culture, Art etc.

Muslims believe in the Divine origin of their Holy Book which according to their belief was revealed to the Prophet by Gabriel. The Koran is *Al-furqan,* i.e. one showing truth from falsehood and right from wrong. The Koran contains about 6000 verses but not more than 200 verses deal with legal principles and if we leave out of account those which concern the State as such, there are about 80 verses, more or less, which deal with the law of personal status. Most of them are concerned with inheritance, marriage, divorce and such like matters. The Koran does not even set them out as a code in one place. They are found in the portion of the Koran revealed to the Prophet at Medina. The portion which was revealed at Mecca is singularly free of legal matters and contains the philosophy of life and religion and particularly Islam. The legal verses embody broad principles but do not explain or expound them. As the Koran is of Divine origin, so are the religion and its tenets and the philosophy and the legal principles which the Koran inculcates. Since the Koran has no earthly source, it is obvious that none of this can be altered by any human agency or institution.

The Koran was compiled from memory after the Prophet's death from the version of Osman the third Caliph. During the Caliphate of Abu Bakr and Omar, the work of compilation of the Koran was begun under the supervision of Hazrat bin Sabit. The leaves of paper on which he scribed the texts remained in the custody of the first two Caliphs. Later they were kept with *Umme Hafsa* (wife of the Prophet and daughter of Omar). According to Henri Masse in his book *Islam* (translated into English from the original French by Halide Edib): 'The first version of the Koran had no official standing beyond being a personal enterprise of Abu Bakr and Omar; but a few years later this text acquired a great importance when the Caliph Osman set out to establish the canonical text of the Koran... The Original Leaves *(sohof)* had now lost their importance and became nothing more than souvenirs for the widow of Muhammad.'

There were other editions of the Koran, particularly by Obay ben Kaab, Abdullah ben Masud, Abu Musa Abdullah al Ashari and Miqaad ben Amr. There were many divergences between the texts. It was General Hodaifa, who advised Osman about 650 A.D. to get prepared an authentic edition of the Koran. The work was entrusted to Zaid ben Sabit but other Kureishites also collaborated; In fact Osman himself added certain portions. The official Koran contained two chapters less than the Obay edition and two chapters more than the Ibn Masud edition. There were other differences also. The Khardijites objected to Chapter 12 where the story of Yusuf and the Egyptian Queen is told. The Shiites charged the editors with suppression of certain passages concerning Ali. Even the edition of Osman (as it came to be known later) underwent minor emendations. The other editions were suppressed by Osman's orders.

The Indian Council for Cultural Relations *(Anjuman Rawabat~e-Farhangi-ai-Hind)* has recently found certain remarks written by Maulana Abul Kalam Azad on the margins of

books in his private collection. On the margin of *Haqiqat-ul-Mazhab* of Mohammad Abdus Salam Khan (Rampur State Press, 1911) the following comments appear: *(Page* 90*).*

The author had written that after the *wahis* came, they were committed to memory and after the Prophet had heard and approved the text, the scribes wrote them down and thus the Koran came to be compiled within two years of the Prophets death in the time of the First Caliph. *Azad:* It is established from Bukhari that the scribes of *Wahis* were there from the very begining and the internal evidence from the Koran proves that the Koran in book form was available in the Prophet's time. Azad cites from the Koran the words *'Al-kitab'; 'Kitab Manshur fi warq manshur; 'Sahaf-e-Mitahra'* in proof of the statement.

(Page 91*)*

The author remarks that in view of differences the Koran was rewritten in the Third Caliph's time, and the present Koran is from the Third Caliph's time.

Azad: This is not correct. Osman did no more than publish four copies of Zaid-ibn-Sabit's edition. The collection and arrangement of the *Wahis* took place in the Prophet's time and all differences were resolved in the First Caliph's time. [See: *Islam aur Asr-i-Jadid* Vol. VIII (1) 1976] pp. 89, 90.

It is obvious that there are two versions. There is nothing to show what was the source of Maulana Azad's opinion and we cannot give preference to his views on the basis of an *argumentum quae rei dubiae facit fidem.*

Good translations of the Koran are: Sole (English) Du Ryer and Savory (French), Suruf Ali (Urdu).

(ii) Sunna or Tradition

The word *'sunna'* means 'the trodden path' and as this meaning shows, it denotes some kind of practice and precedent. At first this word was applied to custom and to the practice of the early schools of law but later and finally it means the practice and precedents of the Prophet. The principles which were stated in the Koran found their application in the hands of the Prophet. This gave birth to *hadis* (practice — pl. *Ahadis)* of the Prophet. As a source of law *hadis* is as binding as the principles of Koran. The term *'sunna'* is sometimes applied to the precedents created by authorities other than the Prophet but this is a wrong use of the term and is best avoided. The number of *ahadis* is very large. Ahmed ibn-Hanbal in his *Musnad* collected over 80,000 *ahadis,* and in other collections the number is still larger because many of these precedents are not authentic. The words of the Prophet and his actions were noted and written down immediately and on many an occasion persons attempted to make a point by quoting the practice and precedent of the Prophet because they were genuinely of the opinion that the Prophet would in fact have reacted as they reported. But it was one thing to report a *hadis* which was true and quite another to originate a *hadis* which really had no validity as a binding precedent. Much scrutiny is, therefore, applied before a *hadis* can be accepted. Generally a *hadis* based on single testimony *(Khabar-al-wahid)* is considered insufficient. One of the greatest differences between the *Sunnis* and *Shias* lies in the fact that the *Shias* do not give credence to a *hadis* unless it emanates from the household of the Prophet, particularly from the. household of Ali. There are many collections of Traditions. Most of them deal with the principles of Islam as distinguished from Islamic Law. The authoritative collections are Bukhari, Muslim, Ibn Maja, Nasai, etc. The *Sanin Kubra* is also very important.

According to the classical belief of the Muslims the word of God is law and law is the command of God. This law is known as *sharia. Fiqh,* which is jurisprudential in

character is the ascertainment of the right principle. In the word of God is included, of course, the Koran, but the Divinely inspired *sunna* of the Prophet ranks equal. These two are immutable and the only room for the exercise of human reason is in their understanding. These two sources, namely, the Koran and *sunna* may thus be said to form the fundamental roots of Islamic law.

(iii) Ijmaa

It was equally binding on the people to act on a principle (not contrary to the Koran or *Hadis*) which had been established by agreement among highly qualified legal scholars of any generation. This was supported by the Hanafi doctrine that the provisions of law must change with the changing times and of the Malikis that new facts require new decisions. The validity of *ijmaa,* as containing a binding precedent, is based upon a *hadis* of the Prophet which says that God will not allow His people to agree on an error. *Ijmaa* thus became a source of law. *Ijmaa* is, however, to be distinguished from mere novelty or heresy for which the name is *Bidat. Ijmaa* was a feature of all the schools of *Sunni* Law and the rules deduced by *ijmaa* are equally valid and binding in each school. Some Western writers have derisively described *ijmaa* as a means of "Muslims shaping Islam" instead of "Islam shaping Muslims". As a matter of fact without *ijmaa* which is responsible for a vast body of principles, the rules of Islamic law as contained in the Koran would have been extremely sparse. Authority for *ijmaa* is said to emanate from a verse of the Koran *(Amrahum shura baynahum"* (the way is by counsel in their affairs). This has prompted another non-muslim writer to say that "the writ of the Quran runs by *ijmaa*".

Imam Shafei cited: '*Vaman Yushaqiqir Rasoola min badi ma tabayana lahul huda vayattabi ghaira sabilil mominine nuvallehi ma tavalla va nuslehi jahannuma va saat masira*', (4; 115). (After the Prophet has shown *the* right path to him, the one, if he breaks away from the Prophet and follows other than Muslims, We shall give unto him what he has chosen and put him in Hell). The Prophet always spoke in the name of God. The Hadis undoubtedly reads: *Ummati la tajtameou alal khatai va alazaalalati,* (My people who follow Me, will never agree on what is wrong). But the paraphrase expresses the meaning.

Rules deduced on the basis of *ijmaa* have varying degrees of sanctity in the different schools. But all schools are agreed that where there is valid consensus, no disagreement can thereafter be allowed. In other words, *ijmaa* once established cannot be repealed. The Hanafis regard *ijmaa* as a fundamental source but the Shafeis regard it as of minor importance. Malikis place *ijmaa* of scholars of Medina above others and generally follow the Medinese thought. *Ijmaa* thus means a kind of 'communal legislation' by great scholars.

In developing Islamic law by consensus the doctrine of *ijtihad* was employed. *Ijtihad* means "one's own exertions" and it denotes the exercise of one's reason to deduce a rule of *sharia* law. Although it can be stated as a general rule that the principles laid down by the Koran and the *Hadis* must always be followed, the development of Islamic law in the time of the first four Caliphs and much later was done by the application of this doctrine. In deducing a new principle the text of the Koran and the *Hadis* were not lost sight of but exigency of the time and public interest were also borne in mind. It is not wrong to say that the development and advance in legal principles was the result of compelling necessity when the Koran and the *Hadis* did not disclose the precise line to follow. Where a principle was silent to cover an individual case an independent effort had to be made and this is what is meant by *ijtihad.* As public policy and equity played a great part, a conflict is noticeable between the approach in different schools. But this divergence of opinion *(ikhtilaf)* was not of much consequence because the Prophet had said that disagreement in the community of Muslims was a sign of divine indulgence.

EVIDENCE WITH REGARD TO FAITH, BELEF, AND CONTINUOUS WORSHIP

1. There is evidence of the Darshan of Lord Ram by Guru Nanak Dev on his pilgrimage to Ayodhya. Guru Nanak started on pilgrimage in 1507 and had darshan of Ram Janmabhumi Mandir between 1510 & 1511. In 'Adi Sakhian' (1701) and 'Puratan Janma Sakhi Shri Guru Nanak Dev Jiki (1734) it is recorded that during his pilgrimage Guru Nanak Dev went to Ayodhya, among other places, and had darshan. [Ex. 68 (Suit-4) "Bhai Bale Wali-Sri Guru Nanak Dev Ji ki Janam Sakhi" also proved by SW1/1 Sardar Rajendra Singh through various books filed by him]

2. Travellers' Account of William Finch who visited India between 1607 to 1611. His Traveller's Account has been published by William Foster in his book "Early Travels in India" (Exhibit 19 Suit 5), William Finch has said:

   "the castle built four hundred yeares agoe. Heere are also the ruines of Ranichand(s) castle and houses, which the Indians acknowled(g)e for the great God, saying that he tooke flesh upon him to see the tamasha of the world. In these ruines remayne certaine Bramenes, who record the names of all such Indians as wash themselves in the river running thereby; which custome, they say, hath continued foure Iackes of yeeres ..."

3. Father Joseph Tieffenthaler, who visited Oudh area sometimes between 1766 to 1771. He referred to the visit of Hindus and their worship in the disputed site by going for parikrama thrice and prostrating on the ground. (Exhibit-133 Suit-5)

4. Walter Hamilton's "East India Gazetteer" (1828). On page 353 under heading 'Oude', he says:

"This town is esteemed one of the most sacred places of antiquity."

Pilgrims resort to this vicinity, where the remains of the ancient city of Oude, and capital of the great Rama, are still to be seen; but whatever may have been its former magnificence it now exhibits nothing but a shapeless mass of ruins. .... among which are the reputed site of temples dedicated to Rama, Seeta, his wife, Lakshman, his general, and Hanimaun (a large monkey), his prime minister. The religious mendicants who perform the pilgrimage to Oude are chiefly of the Ramata sect, who walk round the temples and idols, bathe in the holy pools, and perform the customary ceremonies."

5. In 1838, "The History, Antiquities, Topography And Statistics Of Eastern India" by Montgomery Martin (Exhibit- 20 Suit-5). The relevant extract is reproduced under:

"The bigot by whom the temples were destroyed, is said to have erected mosques on the situations of the most remarkable temples; but the mosque at Ayodhya, which is by far the most entire, and which has every appearance of being the most modern, is ascertained by an inscription on its walls (of which a copy is given) to have been built by Babur, five generations before Aurungzebe.....The only thing except these two figures and the bricks, that could with probability be traced to the ancient city, are some pillars in the mosque built by Babur. These are of black stone, and of an order which I have seen nowhere else, ... they have been taken from a Hindu building, is evident, from the traces of images being observable on some of their bases; although the images have been cut off to satisfy the conscience of the bigot." (Para 3515)

Martin is the first person to tell us about inscription on the wall of the disputed building to say that it was built by Babar. He noticed in the year 1838. (Para 1601 Vol. II)

6. "Gazetter" of Edward Thornton (1858) (Exhibit 5, Suit-5). mentions building of a Mosque after demolition of a

temple. Edward Thornton in his Gazetteer published in 1858, mentions that the Hindus used to visit the property in suit. It also talks of a quadrangular coffer of stone, whitewashed, five ells long, four broad, and protruding five or six inches above ground as the cradle in which Rama was born as the seventh avatar of Vishnu; and is accordingly abundantly honoured by the pilgrimages and devotions of the Hindus.

7. The application dated 28th November, 1858 of Sheetal Dubey, Thanedar (Exhibit-19, Suit-1) which says as that Hawan and Puja within the premises of the Masjid.

8. The Complaint dated 30th November, 1858 (Exhibit 20, Suit-1) made by Syed Mohd. claiming to be a Khateeb (Moazzim Maszid Babri) at Oudh admitted that "...Previously the symbol of Janamasthan had been there for hundreds of years and Hindus did Puja..." He had prayed for *removal of the symbol and the idol and washing of the writing on the walls.*

9. Application dated 05.11.1860 by Mir Rajab Ali [Exhibit 31 Suit-1] complaining about Chabootara and a pillar made within Babari Masjid Oudh.

10. Application dated 12th March, 1861 by Mohd. Asghar, Mir Razab Ali and Mohd. Afzal as Khateeb/Moazzin, Masjid Babri situated Janam Asthan Oudh (Exhibit 54 Suit-4) stating that some Imkani Singh has made a Chabutara near Masjid Babri at Janam Asthan Oudh and despite of order to remove, has not complied the same. There is nothing to show that there was any compliance even thereafter and at any point of time later.

11. Alexander Cunningham conducted Archaeological survey during the period, 1862 – 1865 and found temples about Ayodhya. They are all modern date and without any architectural pretentions. But there can be no doubt that most of them occupy the sites of more ancient temples that were destroyed by Mussalmans. Thus Ramkot or Hanumangarhi on the east side of the city. The name Ramkot is certainly old. In the very heart of the city stands the Janamasthan or birthplace temple of Ram. (Ex. 6 – Suit No. 5)

12. Application dated 25.09.1866 by Mohd. Afzal Mutwalli Masjid Babri Exhibit A-13 (Suit-1) complaining about a Kothari constructed by some Bairagis and that they are also trying to built a temple near mosque.

13. Appeal no. 56 Exhibit 30 (Suit 1) filed against the order dated 3rd April 1877 of Deputy Commissioner Faizabad whereby he had granted permission to Hindus to open a new door in the northern outer wall of the disputed building.

14. Report submitted by the Deputy Commissioner on the appeal of Mohd. Asgar permitting opening of a door on the northern outer wall of the disputed building. He treated outer compound i.e. the outer courtyard as Janam Asthan and the disputed building inside the grilled partition wall as mosque and said that for the convenience of visitors to Janam Asthan and rush on fair days, the said opening was allowed in public interest. Exhibit 15 (Suit 1)

15. Exhibit 24 (Suit 1) is suit no.374/943 filed by Mohd. Asgar claiming rent against user of Chabutara and

Takhat near the door of Babari Masjid for organizing Kartik Mela at the occasion of Ram Navmi regarding 1288-1289 Fasli. It shows worship at the disputed site by Hindus as Janmasthan and it was admitted by him that since ancient times, Mela Kartiki and Ram Navmi was being organized there.

16. Application dated 2nd November, 1883, Exhibit 18 (Suit 1) by Mohd. Asgar claiming that he is entitled to get the wall of mosque whitewashed but is being obstructed by Raghubar Das though he has right only to the extent of Chabutara and Rasoi.

17. P. Carnegy in his book "Historical Sketch" 1870 (Exhibit-49 Suit-5) under the heading "Hindu Muslim Differences", he has said:

"..... It is said that up to that time the Hindus and Mahomedans alike used to worship in the mosquetemple. Since British rule a railing has been put up to prevent disputes, within which, in the mosque, the Mahomedans pray; while outside the fence the Hindus have raised a platform on which they make their offerings..."

18. Gazetteer of Province of Oud, by W. C. Benett, 1877 (Exhibit-7 Suit-5), clearly mentions the Janmasthan temple on which Babur built the mosque, i.e., at the Janmasthan. It also mentions about the continuous struggle of Hindus to reclaims it.

19. Report of the Settlement of Land Revenue in the Faizabad District by A.F. Millett, Officiating Settlement Officer, 1880 (Exhibit-7 Suit-5): At Page 234, the report mentions about the Janmasthan temple wherein Emperor Babur built the mosque.

20. Order dated 18/26.3.1886 passed by F.E.A. Chamier, District Judge, Faizabad (Ex. A-27, Suit-1) expressed his anguish that it is most unfortunate that a Masjid should have been built on land especially held sacred by Hindus.

21. Archaeological Survey of NW Provinces and Oudh 1889 (Exhibit 92 (Suit-5), "The old temple of Ramachandra at Janmasthanam must have been a very fine one, for many of its columns have been used by the Musalmans in the construction of Babar's masjid."

22. Monumental Antiquities and Inscriptions in NWP & Oudh by A. Fuhrer 1891 " (Exhibit-9 Suit-5)

> *"...It is locally affirmed that at the Musalman conquest there were three important Hindu temples at Ayodhya: these were the Janmasthanam, the Svargadvaram, and the Treta-Ke-Thakur. On the first of these Mir Khan built a masjid, in A.H. 930 during the reign of Babar, which still bears his name..."*

23. Barabanki Gazetteer by H.R. Nevill (1903) reiterated that there was continuous struggle of Hindus to reclaim the ground on which formerly stood the Janmasthan temple.

24. Fyzabad A Gazetteer by H.R. Nevill (1905) mentions that in 1528 Babar built the mosque at Ayodhya on the traditional spot where Lord Rama was borne and specifically mentioned that the janmsthan was in Ramkot, the birthplace of Rama and Babar in 1528 destroyed the ancient temple and on its site built a mosque known as Babur's mosque.

25. The Imperial Gazetter of India, Provincial Series, 1905, "The present town stretched is land from a high bluff overlooking the Ghaghra. At one corner of the vast

mound is the holy spot where Rama was born where Babur built a mosque.

26. Imperial Gazetteer of India (1908) (Exhibit-10 Suit-5) "...At one corner of a vast mound known as Ramkot, or the fort of Rama, is the holy spot where the hero was born.

27. Nevill's Gazetteer of Fyzabad (1928) "...He destroyed the ancient temple and on its site built a mosque, still known as Babar's mosque."

28. Imperial United Provinces of Agra and Oudh", Vol. II, published in 1934 "...At one corner of a vast mound known as Ramkot, or the fort of Rama, is the holy spot where the hero was born. Most of the enclosure is occupied by a mosque built by Babar from the remains of an old temple, and in the outer portion a small platform and shrine mark the birthplace.... Besides the mosque..."

ORAL EVIDENCE

SR. NO.	NAME OF THE WITNESS	DEPOSITION
1.	**OPW 1 SRI MAHANT PARAMHANS RAM C. DAS** (Vol-16,17)	OPW-1 made statements with regard to his visit at Ayodhya, the faith of worshippers that Ayodhya is sacred as birthplace of Lord Ram, continuous worship of the place as deity, parikrama of the disputed building, worship through Grilled wall and belief that portion under the central dome has been considered as garbhgrah by the devotees. He maintained his statement during cross-examination and therefore can be held to have proved the continuous worship and existence of faith of devotees that they consider the place as deity. Some portions of his statements are given hereunder: *"...Since the time I came to Ayodhya, I have a1ways seen people going for 'Darshan' (Glimpse) at seven places at Ram Janam Bhoomi, Hanumangarhi, Nageshwarnath, Saryu, Chhoti Devkali; Badi Devkali, Laxman Ghat, Sapt Sagar, situated near Chhoti Devkali, and Kanak Bhawan temple. These seven places are unchangeable and their location cannot be changed, which means that one place cannot be built at the place of other one. Mani Parvat is a famous place, but is different from these seven places. There was an idol of Lord Ram at Ram Janam Bhoomi. There was Sita's kitchen also. As per customs there was a special hall by*

		the name of Ram Janam Bhoomi and on all the pillars and statues of many Gods and Goddesses here engraved there on. Apart from statues. That place was also worshipped, which was said to be the birthplace of Lord Ram and where the Lord Ram has appeared. (Page 9) *The activities of worship took on at this place regularly at that time. After the above development and after the installation of the idol in the Garbh Grih the performance of worship going on regularly. (Page 11)* *The basis of this belief is that Hindus have been having 'darshan' of this place as Janambhoomi since centuries.* (Page125) *The idol of Bhagwan Shri Ram Lalla was installed on Ram Chabootra and worship of Bhagwan Ram Lalla is being continuously done there. And devotees go there for having 'darshan' and doing worship Lakhs of people go there. (Page-166)* *I also remember that a picture of Bhagwan Shri Ram Lalla was also lying inside the disputed structure and priests used to take flower garlands from the people and offer them to Bhagwan from a distance. There were two pillars of touchstone at the gate of the disputed structure', which were used for its construction after demolishing the temple which earlier existed there. There were two similar pillars also inside the structure which could be seen from a distance. But two locks were affixed on the gate of the*

		inner premises of the. disputed structure and because of them, the police did not allow anybody to enter inside and worship etc. of Bhagwan Shri Ram Lalla, who was Virajman inside, was done from outside the gate and non-stop recitation and chanting of name of Lord was being continuously done in the outer premises. ***(Page 169)*** *I had darshan of the idol from outside the grills.* ***(Page 216)*** *By the word barrier, which occurs in the ninth line of para 12 of my plaint, I mean the wall of bars at the disputed place. It has been stated in para 12 of my plaint that the service and worship of plaintiff deities was regularly being performed but 'darshan' was done from outside the wall of bars.* (Page 252, Para 2, first five lines) *Thereafter, he said that thousands of visitors used to come every month for worship and 'darshan'. Visitors used to come in above number and they used to make some offerings. (Page* 288)
2.	**OPW 2 SHRI DEVAKI NANDAN AGARWAL** (VOLUME 17)	The deposition of Sh. Deoki Nandan Agarwal could not be completed due to his demise before the completion of his cross-examination and therefore his statement is not relied herein.
3.	**OPW 4 SHRI HARIHAR PRASAD TIWARI** (VOLUME 19)	OPW4 also proved the continuing faith and belief of the devotees. Some portions of his testimonies are mentioned hereunder: *"...The building having domes was the holy sanctum sanctorum, where, it is believed that Bhagwan Shri Ram had*

		taken birth. ***(Pg. 811)*** *"...It is right that in my above statement I had stated that the disputed site is the Janam Bhoomi of Ram. This faith of mine is not by reading any religious book but is based on what I have heard from old and aged persons. I am having this faith well before I came to Ayodhya. That is to say when I gained consciousness I have such faith and this was o by hearing from the people. In between 1934 to 38 when I was at Ayodhya , possibly I would have gone to the Janam Bhoomi i.e. the disputed site thousands of times.* **(Page 824)** *"...Pillars of black touch stone (Kali Kasauti) were there in the building having Sanctum- Sanctorum in the Shri Ram Janam Bhoomi premise wherein pictures of fruits, leaves and Gods and Goddesses were there. The building having domes was the holy sanctum sanctorum, where, it is believed that Bhagwan Shri Ram had taken birth. Hindu pilgrims and Darshanarthies (viewers) used to offer fruits, flowers and money there also, owing to their faith.* ***(Page 811)*** "...While living at Ayodhya I used to visit daily to Shri Ram Janam Bhoomi, Kanak Bhawan, Hanuman Garhi etc. temples for Darshan (viewing). Besides me a large number of Hindus used to visit these temples daily for Darshan. **(Page 809)** ***"...****It is incorrect to say that the disputed Building was a Mosque from the beginning. In fact it was a Temple from the beginning to last till it was*

		demolished. **(Page 840)** *"...Owing to this trust and faith people used to visit for Darshan and Parikrama (taking round) of Shri Ram Janam Bhoomi.* ***(Page 80)*** *"...On the occasion of Chaitra Ramnavami, Sawan Jhoola, Parikrama Mela.and Ram Vivah, Hindu Pilgrims comes to Ayodhya from the nook and corner of the country and have darshan in Temples after taking bath in river Saryu. All the pilgrims invariably used to go to see the Ram Janam Bhoomi and according to their veneration they offered fruits-flowers-money etc. Outside the premise of Shri Ram Janam Bhoomi, Parikrama Path was there. Pilgrims, viewers (people who came for Darshan) used to perform Parikrama (taking religious round) of the whole premise. Hundreds of devotees had been performing Parikrama daily.* ***(Page 811)*** *"...I had religious round (Parikrama) around all four sides of the building.* ***(Page 834)*** *"...Outside the west side wall of the Disputed Building there was a Parikrama Marg (route) close to the wall and walking on this route I used to perform Parikrama (religious round). This route was made walk able and some old bricks were laid on it. There was no lime plaster on that route.* ***(Page 848)*** *"...People used to perform Parikrama through that way. While performing Parikrama people passed through the side of the wall to the north side of the*

		Disputed Building. ***(Page 848)***
4.	***OPW 5 SHRI RAM NATH MISHRA ALIAS BANARSI PANDA*** (VOLUME 19)	OPW-5 also proved the tradition of worshippers to visit the place believing it as the birthplace of Lord Ram. *"...According to elderly people, it was central dome the Lord Rama was born as the son of king Dashrath. It was on the basis of this faith and belief that I and all the Hindu devotees of Lord Rama used to have the 'darshan' of Sri ·. Ramajnam Bhoomi. It was considered to be a sacrosanct place and a place worth worshipping. (Page 859)* *"...Towards its south was the 'Garbhgrah' of Sri Ram which was covered by the domes which was a very holy and sacred place of the Hindus. All the Hindus have this old traditional belief that Lord Vishnu was born as the son of king Dashrath at this place only and that is why this place is so sacred and worthy of worship. (Page 859)* *"...All the Hindus have this old traditional belief that Lord Vishnu was born as the son of king Dashrath at this place only and that is why this place is so sacred and worthy of worship. It is on the basis of this faith and belief that lakhs of pilgrims have been coming to Ayodhya for the 'darshan' and 'parikrama' of Lord Rama's birth place and continue to do it till date.* ***(Page-860)*** *"...It is wrong to say that this place is not the birth place of Lord Rama.* ***(Page 933)***

5.	**OPW 6 SHRI HOUSILA PRASAD TRIPATHI** (VOLUME 19-20)	OPW-6 also proved continuous faith of worshippers through ages that the disputed site is the birthplace of Lord Ram which is worshipped as such through ages. The worship was going on continuously also through the grilled wall. *"...I, alongwith my father and grand-mother also had Parikrama of the entire Shri Ram Janam Bhoomi premises after darshans. (Page 950)* *"...We have this faith and belief that Lord Shri ram was born at Ayodhya and that place is famous as Shri Ram Janarn Bhoomi where people in lakhs come from every nook and corner of the country and after having darshan of Shri Ram Janam Bhoomi do its Parikrama.It is on the basis of this faith and belief that we also come to Shri Ram Janam Bhoomi three to four times a year and make it a point to have the darshan of ShriRam Janam Bhoomi and then have its Parikrama. (Pg. 951)* *"...There was a building of three shikhars to the west of the wall with iron-bars in which the place of the central shikhar portion is Shri Ram Janam Bhoomi which is called Sanctum-Sanctorum, according to Hindu tradition, faith and belief. On the basis of this faith and belief, I also used to go for the darshan and Parikrama of the Shri Ram JanamBhoomi. (Pg. 952)* *"...All the pilgrims - darshanarthees would enter the Sri Ram Janam Bhoomi premises from the entry gate to the east and have darshans of the idols placed*

		at Ram Chabootra, of the idols placed under the neem and peepal tree located to its south-east corner and Sita Rasoi and the foot prints etc., there and also have darshan of the sacrosanct Sri Ram Janam Bhoomi located inside the barred wall which is considered to be the Sanctum-Sanctorum. The pilgrims and those coming for darshans and we used to make offerings like fruit and cash according to our shardha. At the Sanctum-Sanctorum also, the pilgrims and we after the darshan of this used to make offerings through the barred wall as per our belief. Pg. 953 Volume-19 *"...In the Sanctum-Sanctorum located in Sri Ram Janam Bhoomi, there were black pillars of touchstone onwhich drawn the pictures of flower-leaves and Gods and Goddesses. The temple with shikhars is the sacred Sanctum-Sanctorum where as per the ancient belief, Lord Ram was born. There are several temples around the Sri Ram Janam Bhoomi premises. The touchstone (black stone) pillars were fixed at the doors of the Grabh Griha. The Hindu pilgrims also used to have the darshans of theido!s drawn on those pillars. All round the Sri Ram Janam Bhoomi temple, there is Hindu population and temples in large numbers in which darshan-pooja goes on regularly and bells etc. keep ringing. There has never been any mosque on Janam Bhoomi nor has any Muslim ever read the Namaz in that buildinq, Ram Janam Bhoomi has always been under the possession of the devotees of*

		Lord Ram. *Pg. 954 Volume-19* *"...Between 1935 and 1945, whenever I went to the Ram Janam Bhoomi temple, I had the darshans of Lord Ram at all the religious places there like Ram Chabootra, Chhati Poojan, Sita Rasoi and the main Sanctum-Sanctorum. At Ram Chabootra, Shiv Darbar and Sita Rasoi, I used to receive the prasad and offered Prasad also and at Sanctum-Sanctoru m, I used to have the darshan of the Lord from outside the iron bars and would place the Prasad near the iron bar.* *Pg. 959 Volume-19* *"...However, the public opinion is that the birth place of Ramji is the same i.e. Ram Janam Bhoomi about which a dispute is going on. It is wrong to say that this public opinion is of the twentieth century. As a matter of fact, it has been there since long as per tradition.(Pg. 1047)*
6.	**OPW 7 SHRI RAM SURAT TEWARI** (VOLUME 20)	OPW-7 also proved his visit, his faith and faith of devotees that the site in question is considered through ages as the Birthplace of Lord Ram and is held sacred by them. *"...After that I continued going to Ayodhya for four-five times in a year and after having bath in Saryu I used to have the darshan of the main temples like Kanak Bhawan, Hanumangarhi, Shri Ram Janam Bhoomi etc. I used to go to Ayodhya usually on the occasion of Chaitra Ram Navmi, SawanJhula, Kartik Purnima,*

		Parikrama Mela, Ram vivah and also during my vacation and as per my convenience. I took bath in Saryu and have darshan of temples, which continues even today. *... My elder brother and myself after having darshan of Ram Janam Bhoomi performed parikrama of Ram Janam Bhoomi and somany people were also doing the 'Parikrama' of Ram Janam Bhoomi.* ***(Page 1106)*** *"...In side the lattice wail, there was a room having three domes. My elder brother told me that this was the birth place of Lord Rama (this is Ram Janam Bhoomi) and from the very ancient times Hindus have trust, confidence and a popular faith that Lord Vishnu had incarnated in the name of Shri Ram son of Raja Dashrath below the middle dome and this is why it has been called 'Garbh Griha'. After having the d ar shan of Ram Chabootra, the pilgrims and visitors used to go through doors of lattice wall to the three domed building and from there they got the darshan of 'Garbh Griha' and they offered flowers, prasad and coins towards the 'Garbh Griha'* Pg. 1108 Volume-20 *"...I have never had the darshan of 'Garbh Griha' inside the disputed building between the year 1942 to 15 December 1949. None of the idols were there in the 'Garbh Griha' inside disputed building. I had been offering flowers, prasad and coins from the outside of Iattice wall.* *Pg. 1114 Volume-20*

		"...This is why my elder brother considered that place to be the birth place of Shri Ram and this is also my sincere and pure trust and confidence that the land below the middle dome is the birth place of Shri Ram and with this trust and confidence all the Hindu pilgrims had been doing Darshan, Puja n and Parikrama I too had been doing Darshan, Pujan and Parikrama. (Pg. 1108) *"...The idol of Lord Varah was installed on the southern wall of the main entrance gate, which was called Hanumat Dwar. A Parikrama Road was constructed all around the Ram Janam Bhoomi which was 5 to 6 feet wide through which I used to do Parikrama and all the visitors and pilgrims too did Parikrama by thisParikrama Marg.* ***(Page* 1109)** *"...So far as the three-domed building is concerned, I had a faith which I maintain even today that it was the Janam Bhoomi of Ram Ji.(Pg. 1153)* *"... Before reaching the eastern gate, my brother from outside the wall fitted with iron bars offered flowers at the building with three domes and gave it to me also which I also offered. I offered the flowers through the iron bars from outside only. At the time when I offered, flowers, prasad and money offered by others were also lying there. I prostrated myself on the ground below the dome from outside only. I had asked my brother why was he offering flowers at that place, on which, he told that Lord Rama was born at the place under the middle*

		dome of this building. The place which I had visited was the one below the middle dome. ***(Page 1167)*** ***"...I have mentioned about 'Garbh-Griha' in para 7 of my sworn statement and from this word, I mean the birth place of Lord Rama. 'Garbh-Griha' is situated only in such temples where. God has taken a birth.(Pg. 1199, last four lines)*** ***"...It is my faith and belief that Ramlalla had emerged in the disputed building and it is on the basis of this faith that this building is called Ram Janam Bhoomi Mandir and even prior to it, it was called Janam Sthan Mandir because it was the birth place of Lord Rama. Birth place and native land have different connotations. This is, wrong to say that a place will be called birth place if one had taken his birth there, rather the term 'birth place' covers the entire area. Native land means the place where Lord Rama had taken birth. As per my belief, Lord Rama had taken birth below the middle dome in the three-domed disputed building and it was exactly at that point where Ramlalla had, emerged in 1949.(Pg. 1210)*** ***"...From the word 'Ram Janam Bhoomi premises' I mean the entire area and from the words 'Ram Janam Bhoomi I mean place where Lord Rama was born, i.e. 10 X 10 feet area of the middle dome. (Pg. 1218)***
7.	**OPW 12 SRI KAUSHAL KISHORE**	*"...When I started to go to Ram Janam Bhoomi with my grandfather and father, I noticed that the pilgrims,*

	MISHRA (VOLUME 24)	*devotees etc, who came to Ayodhya, used to visit Shri Ram Janam Bhoomi without fail. During the main festivals the gathering was very high, say more than lakhs and they used to worship and visit Ram Chabootra, Sita Rasoi, Shiv Chabootra and Sanctum-Sanctorum (where Lord Ram was born) below the middle dome of three domed building and make round of the premises Parikrama) outside the walls only.* ***(Page 2212)*** *"...I had been told by my grandfather and father that according to the faith and belief bf Hindus since time immemorial, Lord Ram was born as a son of King Dashrath in Treta Era in this Sanctum – Sanctorum situated under the building having three domes. This is the traditional belief and firm faith which makes the people of this country and the numerous pilgrims from outside to visit this birth place of Lord Shri Ram to pray and do parikrama of this place.* *Pg. 2213 Volume 24* *"... On the basis of this long traditional belief and faith, I also visit and worship and do parikrama of this holy shrine of Ram Janam Bhoomi and in the tradition of family priest, perform worship , rituals, yagya, benedictory functions etc. in Ram Janam Bhoomi and other temples and get dakshina also.(Page 2214, para 13)* *"...I had been told by my grandfather and father that according to the faith and belief bf Hindus since time immemorial, Lord Ram was born as a*

		son of King Dashrath in Treta Era in this Sanctum - Sanctorum situated under the building having three domes. This is the traditional belief and firm faith which makes the people of this country and the numerous pilgrims from outside to visit this birth place of Lord Shri Ram to pray and do parikrama of this place. (Page 2213) *"...It is my belief that he got his birth at the place where Babri Masjid was established. (Page 2248)* *"...I have seen 100-200 temples in Ayodhya, Hanumangarhi and Kanak Bhawan seen by me are temples. Both temples have the arrangements of Parikrama from inside and outside. (Page 2291)* *"...It is true that temples have the same structure and I know that structure. Temples have Parikrama, pillar, pictures of gods and goddesses, land of the temple. Sanctum-Sanctorum is also necessary for temple. Parikrama (to go around the idol of deity) is done round the sanctum-sanctorum outside the temple. It means the round of the entire temple from outside. (Page 2291)* *"...There is a very low land in the west of the disputed building: For the safety of the Western wall of the disputed building an embankment was constructed and beyond that the path of Parikrama was 3-4 feet wide with lime flooring. (Page 2302)* *"...Towards the north and the east, bricks were laid in the parikrama path and towards the south there was lime*

		plastering on the path. (Page 2302)
8.	**OPW 13 SRI NARAD SARAN** (VOLUME 25)	*"...When entering through the eastern gate there was a building with three domes west, just below the middle dome, there was sanctum-sanctorum which was worshipped. My preceptor had told me about this place that it was always the most worshipped as the birth place of Lord Ram since time immemorial. I have also worshipped this place and found that it was thronged by thousands of pilgrims who paid their obeisance to this holy shrine. They also visited and worshipped Sita Kitchen, Ram Chabutara etc., and made a full round of the entire premises after coming out of Hanumatdwar.* ***(Page 2307).*** *"...Before 23rd December, 1949 devotees in large numbers used to assemble in the field in front of Ram Janam Bhoomi temple for continuous recitation of Ramayan and devotional songs.* ***(Page 2312).*** *"...I have never seen the Namaz being offered in the disputed building. Non-Hindus did not used to go inside the building.* ***(Page 2315)*** *"...I have gone to the disputed site many times since 1946. From 1946 to 23rd' December, 1949, I went to the disputed site three or four times. I visited both the places; viz; Ram Chabutara and Sita Kitchen at that time in the morning and evening also. I visited these places and their paid my obeisance at the disputed place.* ***(Page 2318)***

		"...Ayodhya is the Janam Bhoomi of Lord Ram and we take the place below middle dome of the disputed structure as his Janamsthan. Janamsthan and Janam Bhoomi have the same meaning. (Page 2328). *"...That there was the Sanctum-Sanctorum below the middle dome. cannot tell how long this belief was in vogue but traditionally it was a common belief.* ***(Page 2366)*** *"...This belief is in vogue since my birth and it was much before I have been told. For the first time when I came to Ayodhya I saw it and before it also I was told in the village that fair and worships are organized in Ram Janam Bhoomi at Ayodhya. The devotees take part in the fair and shops also arranged. During the time of Sawan Jhoola when people visit there to have the glimpses of the display. The scholars deliver lectures at many places. The people who come Ayodhya for the first time visit all the place's.* ***(Page 2367).*** *"...It beinq the birth place of Shri Ramchandra, King Vikramaditya rehabilitated Ayodhya as a place of pilgrimage. (Page 2370).*
9.	**DW 3/14** **JAGAD GURU RAMANANDAC HARYA SWAMI HARYACHARYA** Volume-57	*"... I used to go to three domes Bhawan for darshan, earlier. I have also taken the darshan of Shri Ramjalla. I took darshan because I believe that one could get salvation by doing the darshan.* **Pg. 10204**

10.	**DW3/1 MAHANT BHASKAR DAS** Volume-51	*"...During my tenure from 1946 to 1949 till the date of attachment no Muslim ever visited the disputed site to offer Namaz and no Namaz was recited there. Hindu devotees used to offer money, sweets, fruits and other items to the deities seated within and out of the disputed site which were received by the Nirmohi Akhara through the priest.* **Pg. 8703 Volumen-51**
11.	**DW 3/3 SRI SATYA NARAIN TRIPATHI** Volume-52	*"... While going through the East gate, the courtyard (Sahan) was about 28-30 feet followed by a wall of bar and towards the west of the wall of bars, at a little distance from the courtyard could be seen the Garbhgraha, whose Darshan, Poojan, Prasad and Charanamrit was obtained by me from 1941 to December 1949 after doing the Darshan from a very close distance.* **Pg. 9097 Volume-52**
12.	**DW3/14 MAHANT SHIV SARAN DAS** Volume-52	*"I had been going for 'darshans' to Shri Ram Janam Bhoomi since 1933. Right from the very beginning, I have been seeing Shri Ram Janam Bhoomi temple site in two -par The first part is the interior 'Garbha Graha'. There are three pillars over it. Next i.e. to the east, there is a wall of bars. In that wall there was an iron gate to the east in front of the main 'Garbha Graha; There was another iron bar gate in the same wall about 18 or 20 feet away to the north of this gate. That is, there were two iron-bar gates in that wall of bars* **Pg. 9184 Volume-52** *"...I have been having 'darshan' of Bhagwan Ramlala inside the inner*

		Garha Graha until the attachment in December 1949. **Pg. 9185 Volume-52**
13.	**D.W. 1/2 SHRI KRISHNA CHANDRA SINGH** Volume-47	*"...By standing at the wall having railing and regarding in person the presence of Lord Ram under the middle dome, we used to offer flowers and do Dandwat Pranam (salute lying prostrate).* **Pg. 7851 Volume-47**
14.	**DW 2/1/3 MAHANT RAMVILAS DAS VEDANTI:** Volume-50	*"...Baba Abhiram Das used to tell me that during the period of Britishers and Government's thereafter had prohibited the darshan of Ramlalla inside the disputed Bhawan, some saints of Ayodhya had installed the idol of Ramchanderji at RamChabutra as a symbolic to Rama for worship, darshan and Parikarma."* **Vol. 50 @pg. 8639**
15.	**PW-1 MOHD. HASHIM** Volume-45	An admission is the best piece of evidence. Even Muslim witnesses including co-plaintiffs of Suit-4 admit the continuous faith of devotees. *"...The place which was attached on 22nd 123rd December, 1949 is called Ram Janam Bhoomi by Hindus and Babri Masjid by Muslims. In the suit of Gopal Singh visharad also it has been called Ram Janam Bhoomi by Hindus and Babri Masjid by Muslims. Pg. 7241* *"...As Mecca is important for Muslims so is Ayodhya for Hindus due to Lord Ram. Pg. 7244-7245* *"...After seeing the photo he replied "there is a human figure in the photo". (Photo Paper No.54 A 2/41 was shown to him). He said "These figures are of*

		Hindu Gods". Having seen the Paper No.54 A 2/43 he replied- " These are also the photos of Hindu Gods..." Pg. 7255 *"...The people from outside India also came to visit Ayodhya..." Pg. 7265* *"...Question: Where there is a picture of god, goddess, or a pitcher with flowers is placed, or there is a picture of any bird or animal, no Muslim would go to offer Namaz?* *Answer: Namaz will not be offered there because it is prohibited to do so in front of such a place.* *Question: Will any Muslim go to read Namaz at such a place as stated above?* *Answer: No Mulsim will read Namaz before a picture..." Pg. 7268* *"...Question:- The place where the idols of Hindu gods exist, where worship etc., is performed is considered an unholy place by the followers of Islam and Namaz cannot be offered there. Pg. 7298* *Answer:- If any idol is kept in any building or temple and worshipping is going there, Namaz cannot be read. Mosque can not be built in the graveyard..." Pg. 7299*
16.	**PW-2 HAJI MEHBOOB AHMED** Volume-31	*"...The grilled wall adjoined the wall of the mosque to the south. We call it a Masjid and the other party calls it a Mandir. The height of the entire boundary was the same. This was a fully constructed building to the west*

		of the courtyard. This was a mosque to which others called a Mandir..." Pg. 3777 ***"...Ayodhya is a place of pilgrimage for the Hindus. So is it for the Muslims. We call it 'Khurd Mecca'..."*** *Pg. 3805*
17.	**PW-4 MOHD. YASEEN** Volume-31	*"...I live in Ayodhya, so I often meet some Hindus and Priests also. We also meet them in marriage ceremonies. They believe that this is the birth place of lord Rama. (Then said they have their own faith). Hindus consider it a sacred place and worship here...." Pg. 3980* *"...After demolishing a temple, Mosque cannot be built at that place. Mosque cannot be built on a forcibly occupied place. If any person could prove that a temple was built there and after demolishing it a mosque has been made, We would not treat it as Mosque..." Pg. 3973*
18.	**PW-7 HASMAT ULLAH ANSARI** Volume-32	*"...It is true that the place I call Babri Masjid, is called Janambhoomi by the Hindus. It is true that lakhs of people who gather here have the delight of having a glimpse of all the four places. Pg. 5903* *"...It is correct to say that as per my memory I have been witnessing all the above said three festivals. It is true to state that lakhs of devotees come to participate in all these three festivals, some people come by train, some by bus and some in their own vehicles. Earlier, some people used to come on. bullock-carts, there were bullock carts*

		all around Dorahi Kuan. Rather the bullock-carts were stopped near my house. It is also correct to say that 10-20 thousand people come to Ayodhya daily. In the days of our childhood, the people used to come, but not in such large number'. It is true that the Hindus are claiming their own right to the disputed site by calling it Janam Bhoomi..." Pg. 5905 *"...Ayodhya is considered to be a holy place both for the Hindus and the Muslims it is true that Ayodhya is considered to be the place of pilgrimage of the Hindus..." Pg. 5907* *"...It is correct to say that the Hindus believe that Lord Ram was born in Ayodhya. It is also correct to say that there are many Kunds and places in Ayodhya which are related to Lord Ram. Pg. 5907*

RESPONSE TO SUBMISSIONS OF NIRMOHI AKHARA'S CLAIM AS SHEBAIT

1. Nirmohi Akhara's claim is based on their having put up a Ram Chabutra in 1855 and that they are the Mahant and Shebait of the Idol put up in Ram Chabutra. Admittedly this was in the outer courtyard. They claimed that the Idol worshipped in Ram Chabutra in the outer courtyard was shifted to the central dome in December, 1949 and it is based on that they claim to be Shebait of the Idol.

2. That worship was offered by Hindus devotees and pilgrims to Ramjanma Bhoomi even before Ram Chabutra was put up in 1855 is the evidence based on Ayodhya Mahatmaya, travelogues and gazetteers. Nirmohi Akhara was not the Shebait during those time, even as per their own pleading. Obviously therefore they cannot claim to be Shebait of Ramjanma Bhoomi. Their claim is as Shebait to the Idol which they had put up, wherever it is. Plaintiff No.2 in Suit 5 is Janma Bhoomi which claims to be an independent juristic entity and Nirmohi Akhara is not the Shebait of that entity.

3. Furthermore the pleadings of Nirmohi Akhara in the written statement filed in Suit No.5 are hostile the interest of the plaintiffs in Suit No.5 and dis-entitle them from claiming any right as Shebait of plaintiff 1 and 2 in Suit 5. Their claim of ownership is adverse to the interest of the plaintiffs in Suit 5. Nothing more is needed to conclude that they are not entitled to represent plaintiff 1 and 2 in Suit 5. Far from espousing and advancing the cause of plaintiffs 1 and 2 in Suit 5, they claim independent rights adverse to the deity and the High

Court has erred in accepting their claims and decreeing possession and title of one third of the Suit property.

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30. That the contents of para-30 of the plaint are denied. There is no movement of any construction of a new temple in place of the present temple. The temple belongs to Nirmohi Akhara. No body else has a right to construct a new temple in its place except the Nirmohi Akhara.

33. That the contents of para – 33 of the plaint are denied. The entire premises belong to the Nirmohi Akhara the answering defendant. There is n question of any mosque as Bari Masjid or any Qabristan.

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39. That the plaintiffs are not entitled to any relief at all. The premises mentioned by the plaintiffs belong to the Nirmohi Akhara and the Plaintiffs of this suit have no right of declaration against the right and titles of the Nirmohi Akhara. Nor are the plaintiffs entitled to any injunction as sought.

II Additional Written Statement of Nirmohi Akhara in Suit No. 5 at Page 271 (Pleadings Volume 72)

Para 52: That disputed temple belongs to Nirmohi Akhara from before the time of Hanuman *(sic Human)* memory and mostly all the property in suit vests to be religious denomination of Panch Rama Nandi Nirmhi Akhara and thus there could be no divesting of the religious institution to any other endowment or Nya. Defendant No. 3 has not joined information of any such Nayas nor could it do legally.

Para 53: That said Nayas is also becomes illegal as non – constituent body being devoid of any title to disputed property.

It is further stated in paragraphs 2 and 4B of their Plaint in Suit No.3 at page 50- 51 of Volume 72 (Pleadings)

> "2. That the Janma Asthan now commonly known as Janma Bhumi, the birth place of Lord Ram Chandra, situate in Ayodhya belongs and has always belonged to the Plaintiff No. 1 who through its reigning Mahant and Sarbrahkar has ever since been managing it and receiving offerings made there at in form of money, sweets, flowers and fruits and other articles and things"
>
> "4B. That plaintiff Nirmohi Akhara owns several temples in it and manages all of such temples through Panches and Mahant's of Akhara i.e. Plaintiff. The Plaintiff being a Panchayati Math acts on democratic pattern. The management and right to management of all temples of Akhara vest absolutely with Panches of Akhara and Mahant being formal head of Institution is to act on majority opinion of Panches"

4. As held by this Hon'ble Court in ***Biswanath v. Sri Thakur Radha Ballabhji 1967 2 SCR 218***

10. The question is, can such a person represent the idol when the Shebait acts adversely to its interest and fails to take action to safeguard its interest. On principle we do not see any justification for denying such a right to the worshipper. An idol is in the position of a minor when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an *ad hoc* power of representation to protect its interest. It is a pragmatic, yet a legal solution to a difficult situation. Should it be held that a Shebait, who transferred the property, can only bring a suit for recovery, in most of the cases it will be an indirect approval of the dereliction of the Shebait's duty, for more often than not he will not admit his default and take steps to recover the property, apart from other technical

pleas that may be open to the transferee in a suit. Should it be held that a worshipper can file only a suit for the removal of a Shebait and for the appointment of another in order to enable him to take steps to recover the property, such a procedure will be rather a prolonged and a complicated one and the interest of the idol may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol. It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment; see *Radhabai Kom Chimnaji Sali* v. *Chimnaji Bin Ramji* [(1878) ILR 3 Bom 27] , *Zafaryab Ali* v. *Bakhtawar Singh* [(1883) ILR 5 All 497] , *Chidambaranatha Thambiran Alias Sivagnana Desika Gnanasambanda Pandara Sannadhi* v. *P.S. Nallasiva* [(1917) 6 Law Weekly 666] *Mudaliar, Dasondhav* v. *Muhammad Abu Nasar* [(1911) ILR 33 All 660, 664] , *Kalayana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* [AIR 1917 Mad 112] , *Shri Radha Kirshnaji* v. *Rameshwar Prashad Singh* [AIR 1924 Pat 584] , *Manmohan Haldar* v. *Dibbenda Prosad Roy Choudhury* [AIR 1948 Cal 199] .

5. **B.K. Mukherjea in the 4th Edition of the Hindu Law of Religious and Charitable Trust (ed. Justice P.B. Gajendragadkar, at pages 257 – 258) notes that:**

But though a suit would lie at the instance of the Shebait, it does not mean that the idol as a juristic person is deprived of its right of suit altogether. The exact scope of the doctrine laid down in Jagadindra's case is certainly not free from doubt. Right to sue is a

necessary adjunct of the proprietary right, and if the property vests in the deity the right of suit cannot obviously be divorced from it. The view underlying the decision in *Jagadindra's* case seems to be that as an idol suffers from perpetual incapacity to engage itself in juridical acts, the natural personality of the Shebait supplies this legal deficiency in the idol. For all juridical purposes, it is the Shebait and Shebait alone that has the right to represent the idol and this creates what may be said to be a personal right in the Shebait to institute a suit in respect of the idol's property.

...**This position, therefore, seems to be that when a shebait is in existence and functions normally, the deity's rights lie dormant. But as soon as the Shebait ceases to act properly in the interest of the deity or asserts a claim adversely to the idol, the deity's rights can certainly be exercised independently of the Shebait and even against the Shebait himself.**

6. It was recognized in ***Ishwar Sridhar Jew vs. Sushila Bala Dasi and Ors*** (1954) SCR 407 that a suit would lie at the instance of the idol where the assertion of the ***shebait*** is contrary to the idol. In this case, the Shebait asserted a claim of adverse possession against the idol. **Therefore the suit was held to be maintainable at the** instance of the idol.

The shebait for the time being is the only person competent to safeguard the interests of the idol, his possession of the dedicated property is the possession of the idol whose Shebait he is and **no dealing of his with the property dedicated to the idol could afford the**

basis of a claim by him for adverse possession of the property against the idol.

7. It is unnecessary to go into the question of whether Nirmohi Akhara can claim to be the Shebait of Plaintiff No. 1 in Suit No. 5 in the event of the suit being decreed since the suit of Nirmohi Akhara being Suit No. 3 has been held to be time barred. The said decision is correct and should be upheld since the suit has been filed 6 years beyond the cause of action arising.

8. The decision applicable will be the Judgment of this Court in *1959 Supp 2 SCR 476* **[A65 Tab 8]** where it was held in ***Balakrishna Savalram Pujari Waghmare & Ors v. Shree Dhyaneshwar Maharaj Sanasthan & Ors, AIR 1959 SC 798***

"31... Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guras as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued. Can it be said that, after the appellants were evicted from the temple in execution of the said decree, the continuance of their dispossession was due to a recurring act of tort committed by the trustees from moment to moment? As soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely injured, and though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants a cause of action de die in diem. *We think there can be n doubt that where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application of section 23 in such a case"*

OTHER MISCELLANEOUS OBJECTIONS

1. Suit-5 was filed 1.7.1989 by the Plaintiff deities with an application by Plaintiff No.3 as Next Friend.

The said application was allowed on the same day subject to the objections by Ld. Civil Judge. The copy of the order is annexed herewith (Annexure A-4).

Later the objections on the appointment of Next Friend raised by Nirmohi Akhara and some Muslim parties were considered by Hon'ble High Court (upon Transfer of Suit) and vide order dated 20.4.1992 the same were rejected. (Annexure A-5)

Upon the death of Sh. Devki Nandan Agarwal, Hon'ble High Court vide order dated 25.4.2002 appointed Sh. T. P. Verma as next friend and was substituted as plaintiff no. 3. (Annexure A-6)

Thereafter, Sh. T. P. Verma desired to retire as next friend owing to his ill health however, since Hon'ble High Court refused the application the matter came to this Hon'ble Court and Sh. Triloki Nath Pandey was appointed as next friend by this Hon'ble Court vide order dated 3.2.2010. It is relevant to note here that this Hon'ble Court has noted that opposite parties have no objection with regard to the appointment of Sh. Triloki Nath Pandey. (Annexure A-7).

2. The objections of the defendants (Wakf Board and Nirmohi Akhara) are therefore ill founded in view of the orders made by Hon'ble Courts.

Another objection raised is with regard to the next friend being a Trustee of the Ram Janma Bhumi Nyas.

In this regard it is stated that Sh. Deoki Nandan Agarwal before filing the Suit had resigned from the said Nyas and was not a Trustee as alleged by the counsels. Moreover, neither Sh. T. P. Verma nor Sh. Triloki Nath Verma who is presently acting as Next Friend has ever been the Trustee of Ram Janma Bhumi Nyas.

3. It is further stated that some allegations have been made about Ram Janma Bhumi Nyas and Next Friend being central character and in the scheme evolved by filing a separate suit in 1989 on behalf of Ram Janma Bhumi. It is submitted that after the enactment of The Acquisition Of Certain Area At Ayodhya Act, 1993 by Parliament and pursuant to the judgment of this Hon'ble Court in M. Ismail Faruqui (Dr) v. Union of India, (1994) 6 SCC 360 the allegations vilifying the Ram Janma Bhumi Nyas and Next Friend are totally unwarranted and uncalled for.

4. It was argued before this Hon'ble Court by the Wakf Board that picture/sketch of Sh. K. K. Nayar was placed inside the Disputed Structure as a mark of respect to him since he helped the Hindus in placing the idol. It is submitted that the sketch at Photo No. 128 are those of Bhagat Singh and Chandra Shekhar Azad. The sketches/photos of various freedom fighters are usually seen in temples of Ayodhya as mark of respect to them. OPW 8 Ashok Chandra Chaterjee in his statement at Volume 21 Page 1323 has identified the photos as that of Bhagat Singh and Azad. He says that "...On having a look at photograph Nos.128 and 129, the witness stated, "*this photograph is of "Thakur Gurudutt Singh' and is fixed on the southern wall below the southern dome of the disputed building". The witness himself stated that the photographs of Chandra Shekhar Azad and Bhagat Singh were*

hanging side by side the photograph No.128. of Thakur Gurudutt Singh. I had seen this photograph on the site also..."

The difference may be marked out from the original picture of K. K. Nayar and Bhagat Singh and Chandrashekhar Azad which are also annexed herewith (Annexure A-8).

5. Another submission was made on behalf of the Wakf Board that this place is not a 'pilgrimage' and if decree is passed in Suit-5, this Court will be creating a new 'Pilgrimage'. It is highly objectionable. Ayodhya is described as first amongst the '*Saptpuris*' and in fact the witnesses produced on behalf of the Muslim parties have themselves admitted that it as important to Hindus as *Mecca* to Muslims.

PW-1, Mohd. Hashim has said *"...As Mecca holds importance for Muslims, similarly Ayodhya holds importance for Hindus because of Lord Rama..."* "...It is true that Ayodhya is a place of pilgrimage for Hindus..."

PW-2, Haji Mahboob Ahmad *"It is true that Ram Chandra's birthplace is Ayodhya. From when this turmoil has erupted, the Hindus from nooks and corners of the country call and worship the disputed premises as his Janam Bhumi..."*

PW-4, Mohd. Yaseen *"...The Hindus revere this place as sacred and pious..."*

PW-8, Abdul Ajij *"..It is true that Ayodhya is a pilgrimage of Hindus. Hindus come here from far off places."*

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Annexure A-4

IN THE COURT OF CIVIL JUDGE FAIZABAD
Regular Suit No. 236 of 1989
Bhagwan Sri Ram Virajman, etc. v/s Rajendra Singh & Others

01.7.1989

This plaint was presented today by Sri Deoki Nandan Agarwal, Plaintiff No. 3 for himself and for and on behalf of Plaintiffs No. 1 & 2 along with Application paper 5c with Affidavit 6c due to lack of time Notice u/s 80(1) CPC could not be served on Defendant Nos. 7, 8, 9 and 10. As such, the Plaintiffs be permitted to file the suit without serving notice on defendants as required under law. In addition to above Plaintiff No. 3 also moved application No. 7c supported with affidavit 8c and prayed that declaration and injunction to the effect that the disputed property belongs to Sri Ram Janma Bhumi Ayodhya and the idol and the defendants be restrained accordingly. According to Plaintiff No. 3, the suit is filed by Plaintiff No. 1 Bhagwan Sri Ramji seated at Ayodhya at Ram Janma Bhumi styled as Bhagwan Sri Ram Lala Virajman and Plaintiff No. 2 Asthan Sri Ram Janma Bhumi Ayodhya. The suit is filed by the Plaintiff No. 3 as Next Friend and the Plaintiff No. 3 be permitted to file the suit as Next Friend and be appointed Next Friend of Plaintiff No. 1 and 2 if some reasonable man is not available for being appointed as Next Friend. Plaintoiff No. 3 also moved an Application 9c and prayed that the suit is filed by the plaintiffs but defendants are not ready to take duplicates and summon, notice is yet not ready. As such, one week's time be given for submitting duplicated summon, notices, etc.

Application 7c by the plaintiff No. 3 is allowed subject to the objections, if any, being filed by the defendants and plaintiff No. 3 is appointed Next Friend of Plaintiff No. 1 & 2.

Application No. 5c which is supported with Affidavit 6c filed by the plaintiff is allowed and plaintiff is permitted to file the suit against defendant no. 7, 8, 9 and 10 without serving notice u/s 80(1)CPC.

Plaintiff's suit be registered.

On the application 9c moved by the plaintiff considering the contents thereof the plaintiff is granted one week's time. Plaintiff No. 3 is permitted to file summon, notice and duplicate of plaints, etc., by 08.7.1989 and thereafter summon be issued fixing 07.8.89 for filing of Written Statement and 14.8.89 for framing of issues.

Sd./-
(R.S. GUPTA)
CIVIL JUDGE FAIZABAD

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Annexure A-5

ORDER dated 20.4.1992 rejecting
Application/Objection of Sunni Waqf Board and Nirmohi Akhara regarding appointment of Next Friend Justice Deoki Nandan Agarwal

RESERVED

CIVIL MISC. APPLICATION No. 10 (0) of 1989
Md. Hashim .....
Defendant/Applicant
And
CIVIL Misc. Application No. 27-A2
Nirmohi Akhara, Mohalla Ram Ghat, Ayodhya ..... Defendant No. 3/Applicant

In Re
Other original suit No. 5 of 1989
Bhagwan Sri Ram Virajman at Sri Ram Janma Bhumi Ayodhya and others

Plaintiff

Versus

Sri Rajendra Singh & others.....
Defendants

Hon'ble S.C. Mathur J.
Hon'ble Brajesh Kumar J.
Hon'ble S.H.A Raza J.

These two applications are directed against the order dated 1st July, 1989 passed by the Ld. Civil Judge, Faizabad before whom the present suit was filed, permitting Sri Deoki Nandan Agarwal, Plaintiff No. 3 to sue as Next Friend of Plaintiff No. 1, namely Bhagwan Sri Ram Virajman at Sri Ram Janam Bhumi Ayodhya.

In the aforesaid suit, there are three plaintiffs. Plaintiff No. 1 is Bhagwan Ram Virajman at Sri Ram Janma Bhumi Ayodhya and Plaintiff No, 2 is Asthan Sri Ram Janam Bhumi Ayodhya. The Plaintiff No. 3 is Sri Deojki Nandan Agarwal. Plaintiffs 1 and 2 have filed the suit through Sri Deoki Nandan Agarwal. In the description of Plaintiffs 1 and 2 it has been stated "Represented by Next Friend Sri Deoki Nandan Agarwal, Senior Advocate and Retired Judge, High Court, 54, Dilkusha, Katra, Allahabad". In the affidavit filed in support of this application, Sri Md. Hashim has stated that Plaintiffs 1 and 2 are not legal persons, and therefore, no suit can be filed by them or on their behalf. On this basis, it is asserted that there is no question of appointing a Next Friend for Plaintiffs 1 & 2. It is also asserted that the application does not disclose the provision of law under which it has been filed. It is also the plea of Sri Md. Hashim that there is no assertion in the application that Sri

Deoki Nandan Agarwal does not have any interest adverse to the interest of the person who he desires to represent. The sum and substance of Md. Hashim's objection is that there is no legally installed deity in the building claimed by the plaintiffs and, therefore, there is no question of such a deity either filing the suit or to be represented by the Next Friend. In the objection filed by Nirmohi Akhara, the existence of deity is not disputed. All that is asserted is that the temple known as "Ram Janam Bhumi Temple" along with its surrounding land and building is the property of Nirmohi Akhara. Nirmohi Akhara has claimed to be the Sebayat of the deity installed in the temple. The property attached to the temple is claimed to be under the management and charge of Nirmohi Akhara. Ld. Counsel for Nirmohi Akhara, at the time of hearing, submitted that only a Shebayat or Sarvarahkar is entitled to file suit on behalf of deity. Regarding Sri Deoki Nandan Agarwal, it was pointed out that he does not claim to be either Shebayat or Sarvarahkar and, therefore, he has no right to represent the deity. The plaint was alleged to be liable to be rejected on account of the fact that it had not been properly instituted. Plaintiff No. 2 was alleged to be not a legal person. The suit was also claimed to be hit by the doctrine of Lis pendence as Nirmohi Akhara's suit was already pending. In support of his submissions, Sri R.L. Verma, Ld. Counsel for Nirmohi Akjara has cited:-

1. AIR 1962 Bombay (FB Farhundali Nannhay vs. V.B. Potdar & Ors.)
2. 1967 A.L.J. 602 Smt. Prem Devi vs. Gurdwara Budaun and
3. 1978 A.W.C.1 Khazan Singh vs. Subdivisional Officer Aligarh

We have heard Sri Abdul Mannan representing certain defendants including Sunni Central Board of Waqf and Sri R.L. Verma, Ld. Counsel for Nirmohi Akhara, and also Sri Deoki Nandan Agarwal who had moved application 7GA before Ld. Civil Judge Faizabad purporting to be under Order 32 and Section 151 of the Code of Civil Procedure 1908.

The entitlement of the plaintiffs to maintain suit and of Sri Deoki Nandan Agarwal to act as Next Friend is also assailed in the Written Statements filed on behalf of the defendants. Issues have not yet been framed in this suit. After issues have been framed, whether the issues covered by the present pleas should be taken up for preliminary hearing or the said issues should be decided along with the suit. In our opinion, the pleas raised by Sri Abdul Mannan and Sri R.L. Verma are not required to be considered at this state. For this reason, the authorities cited by Sri Verma also do not call for examination at this stage. In view of the above, the applications are rejected.

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April 20 1992

Sd. S.C.M. J.
Sd. B.K. J.
Sd. S.H.A.R. J.

ANNEXURE 'D'

Copy of the Order pronounced the same day, on 20.4.1992 on Nirmohi Akhara's Application No. 53 (0) of 1992, moved that very day, praying that the suit (OOS No. 5 of 1989) be rejected under Order 7, rule II, CPC.

In this application, the applicant who is opposite party No. 3 in the suit prays that the plaint of the suit be rejected under order 7, rule II of the Code of Civil Procedure. It is submitted by the Ld. Counsel that the plaint does disclose any cause of action and the suit is palpably barred by the law of limitation. In C.M.A. No. 27 (O) of 1989 filed by the applicant which we have rejected by today also it was pleaded that the plaint be rejected as the person through whom the suit has been filed was not competent to represent plaintiff No. 1 and 2. In the order pronounced today we have rejected the application observing that after issues have been framed we will consider whether any of the issue is required to be decided as preliminary issue. For reasons recorded in the order we reject this application also.

Sd. S.C. Mathur J.
Sd. B.K. J.
Sd. S.H.A.R. J.

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Annexure A-6

Court No.17.

ORDER

ON

C.M. Application No.19 (O) of 2002

(Under Order 32 Rule 3 read with Chapter IX Rule 19 of Rules of Court read with Sec.151 C.P.C.)

OF

Dr. Thakur Prasad Verma, son of Late Sri Jagannath Lal, resident of 397-A Bhagwanpur, Ganga Pradushan Niyantran Board Marg, Varanasi City.

IN

O.O.S. No.5 of 1989

Bhagwan Sri Rama Virajman at Sri Rama Janmabhumi, Ayodhya and others

Versus

Sri Rajendra Singh and others.

Hon'ble Sudhir Narain, J.
Hon'ble S.Rafat Alam, J.
Hon'ble Bhanwar Singh, J.

This is an application filed by Dr. Thakur Prasad Verma to appoint him as next friend of, Plaintiff nos.1 and 2 in O.O.S No.5 of 1989. As recited in the plaint, Bhagwan Sri Ram is the presiding Deity with other Idols at the place called Sri Ram Janma Bhumi. The parties were granted time to file objections. One objection has been filed on behalf of Nirmohi Akhara, defendant no.3, second objection has been filed by defendant no.4 and third objection has been filed by defendant No.5.

We have heard Sri Ved Prakash, learned counsel for the applicant, Sri R.L. Verma learned counsel appearing for defendant no.3, Sri M.A. Siddiqui, Advocate appearing on behalf of defendant no.5, Sri Zafaryab Jilani, Advocate for defendant no.4 and also Sri Vireshwar Dwivedi, Advocate who was earlier appearing for the plaintiffs in the suit.

The suit was filed by the deities, plaintiff nos.1 and 2 and Sri Deoki Nandan Agarwal himself as plaintiff no.3. In the relief clause plaintiff no.3 did not seek any personal relief. The following reliefs have been claimed in the plaint:-

> "(A) A declaration that the entire premises of Sri Rama Janma Bhumi at Ayodhya, as described and delineated in Annexures I, II, and III, belong to the Plaintiff Deities.
>
> (B) A perpetual injunction against the Defendants prohibiting them from interfering with, or raising any objection to, or placing any obstruction in the construction of the new Temple building at Sri Rama Janma Bhumi, Ayodhya.
>
> (C) Costs of the suit against such of the Defendants as object to the grant of relief to the Plaintiffs.
>
> Any other relief or reliefs to which the Plaintiffs may be found entitled."

Sri Deoki Nandan Agarwal had filed the suit as next friend of plaintiff nos.1 and 2. He expired on 8th April 2002. The applicant has applied for his appointment as next friend of plaintiff nos.1 and 2 after his death. He has come with the version that he belongs to Vaishnawite family believing in and worshipping Bhagwan Sri Rama, the incarnation of Lord Vishnu. He has no adverse interest to the Deities. He has retired from service, and will be able to devote his time, ability and energy in pursuing the matter for the

cause of plaintiffs-1 and 2. He retired as Reader in the Department of Ancient History, Culture and Archaeology of Benaras Hindu University and has written a book based on research on Ayodhya along with Dr. S.K. Gupta regarding the controversy involved in the suit.

Learned counsel for the defendant no.5, Sri R.L. Verma, raised objection that there is no specific provision in the Code of Civil Procedure for appointment of next friend. He has referred to Order 32 Rules 10 and 11 CPC which reads as under:-

> "10. Stay of proceedings on removal, etc., of next friend. – (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.
>
> (2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.
>
> **11. Retirement, removal or death of guardian for the suit.** – (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.
>
> (2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place."

Sub-rule (2) of Rule 11 of Order 32 provides that where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place. Sub-rule (1) of Rule 10 contemplates that on the retirement, removal or death of the next friend of a minor further proceedings shall be stayed until the appointment of next friend in his place. Sub-rule (2) thereof provides that where the pleader of such minor omits within a reasonable time to take steps to get a next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for appointment of one and the Court may appoint such person as it thinks fit. Sub-rule (2) must be read in the context of sub rule (1). When the plaintiff is represented by a next friend, on the retirement, removal or death, any person can apply to the Court for his appointment as next friend of the plaintiff and the Court may appoint such person as next friend of the plaintiff if the Court finds that such person is interested in the minor. If the suit has been filed by the minor represented by a guardian, the Court will appoint guardian on the death, retirement or removal of the guardian under sub-rule (2) of Rule 11 of Order 32 but when the plaintiff is represented by a next friend, the Court will appoint next friend under sub-rule (2) of Rule 10 of C.P.C. As Sri Deoki Nandan Agarwala had filed the suit as next friend of the plaintiffs 1 and 2, on his death, the Court may appoint a person as next friend of the plaintiffs 1 and 2. The application filed by the applicant for his appointment as next friend, in the facts and circumstances of the case, is maintainable.

The next submission of Mr. Verma is that as the applicant has not stated that he is worshipper of the plaintiff-deity, he is not to be appointed as next friend. The applicant in para 5 of the application clearly stated that he belongs to vaishnawite family believing in and worshipping Bhagwan Shri Ram. He is interested in the cause of the plaintiffs. There is no averment

contradicting the facts stated by him in the application. It has not been shown that the applicant has any adverse interest to plaintiff nos.1 and 2.

The next submission of Mr. Verma is that the application has not been properly framed in accordance with Order 4 Rule 1 C.P.C. and Chapter III of Rule 20 of the General Rules (Civil). We do find that there is any infirmity in the application. The application is supported with an affidavit.

Sri M.A. Sidciqui, learned counsel for defendant no.5, has raised three objections. The first objection is that Sri Deoki Nandan Agarwala was appearing as next friend for plaintiffs 1 and 2 but he was also arrayed as plaintiff no.3 and the applicant should not be impleaded as plaintiff no.3 in his place.

Shri Deoki Nandan Agarwala as plaintiff no.3 had not asked for any personal relief. He had claimed relief for plaintiffs 1 and 2. In these circumstances the applicant is appointed as next friend of plaintiff nos.1 and 2. His name shall be recorded as plaintiff no.3 but he shall be recorded as next friend of plaintiff nos.1 and 2 and in that capacity he may be treated as plaintiff no.3.

Another objection is that the applicant has written a book "Ayodhya Ka Itihas Evam Puratatva" and certain facts stated in that book are at variance with the averments in the pleading. He has pointed out that in the plaint Sri Deoki Nandan Agarwala stated that the temple was constructed by Vikramaditya but the applicant in his book has written that the temple was constructed by some Kings of Garhwal. It is not necessary to decide this question which is in controversy. The basic question is that the plaintiffs had sought a relief that the temple should be reconstructed. His averment was that the temple was demolished and a mosque was constructed thereafter. For this reason it cannot be said that the applicant has any adverse interest to the cause of plaintiffs 1 and 2.

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His third objection is that the applicant should furnish security as provided under Order 32 Rule 2-A of Code of Civil Procedure. His objection seems to be justified in that respect. Sub-rule (1) of Rule 2-A of Order 32 provides that where a suit has been instituted on behalf of a minor by his next friend, the Court may, at any stage of the suit, either on its own motion or on the application of any defendant, and for reasons to be recorded, order the next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant.

The applicant shall give undertaking on affidavit before this Court within a week that he will pay all the costs incurred or likely to be incurred by the defendants as and when the Court directs him to pay.

An objection/counter-affidavit has been filed on behalf of defendant No.4. The objections are almost the same as that of filed on behalf of defendant Nos. 3 and 5. We have already considered the objections and it is not necessary to reiterate the same.

Sri Vireshwar Dwivedi, learned counsel was representing late Sri Deoki Nandan Agarwal. He stated that he has no objection to the application filed by Dr. Thakur Prasad Verma for his appointment as next friend of the plaintiffs. He further made a statement that the son of late Sri Deoki Nandan Agarwal does not wish to be appointed as next friend of the plaintiffs.

The application is allowed on the conditions mentioned above.

The applicant/newly added next friend of the plaintiffs to incorporate the amendment within a week.

Dt: 25.4.2002.

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Annexure A-7

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

411017

CIVIL APPEAL No. 1643 OF 2010
(Arising out of SLP(C) No. 22416 of 2007)

BHAGWAN SHRI RAM LALA VIRAJMAN & ORS. ... Appellant(s)

Versus

RAJENDRA SINGH & ORS. Respondent(s)

Certified to be true copy
Assistant Registrar (Judl.)
Supreme Court of India

O R D E R

1. Leave granted.

2. This matter pertains to the continuation or otherwise of the next friend. Presently, Dr. Thakur Prasad Verma is acting as a next friend of appellant-plaintiff Nos. 1 and 2. Dr. Verma wants to retire as he is unable to effectively discharge his duties due to ailments and, therefore, the High Court was approached by way of filing C.M. Application No. 17(O) of 2007 in O.O.S. No. 5 of 1989. The High Court vide its order dated 26.10.2007 did not permit Dr. Verma to retire and rejected the application. Challenging the said order dated 26.10.2007, the matter has now come up before this Court.

3. Mr. K.N. Bhat, learned senior counsel appearing on behalf of the appellants very earnestly argues that instead of Dr. Thakur Prsad Verma, Mr. Triloki Nath Pande be

COMMISSIONER FOR OATH
High Court, ALLAHABAD
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appointed as a next friend of appellant-plaintiff Nos. 1 & 2 under the provisions of Order XXXII Rule 8 of Code of Civil Procedure since Dr. Verma has serious health problems. He further points out that insofar as the costs already incurred are concerned, the present next friend Dr. Verma shall give an undertaking to the High Court indicating therein that he would be responsible for the costs already incurred.

4. The other side has no objection for this arrangement. In that view, it is not necessary for us to examine the correctness or otherwise of the impugned order passed by the High Court. If the aforesaid undertaking is given and the willingness of Mr. Triloki Nath Pande is indicated to the High Court, in that case, Mr. Triloki Nath Pande shall act as a next friend of appellant-plaintiff Nos. 1 and 2 subject to the undertaking given by Dr. Verma.

5. The appeal stands disposed of accordingly.

.....J.
(V.S.SIRPURKAR)

.....J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
February 8, 2010.

COMMISSIONER FOR OATH
High Court, ALLAHABAD

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Annexure A8

SHRI K.K. NAYAR

M.A., LL.B., I.C.S. (Retd.); J.S., (Uttar Pradesh-Bahraich-1967):

Son of of Shri Shankar Nair;

Born at Alleppey, Kerala, September 11, 1907;

Source:http://loksabhaph.nic.in

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