IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4905-4908 OF 2011

IN THE MATTER OF:

NIRMOHI AKHARA AND ANR … APPELLANT

VERSUS

RAJENDRA SINGH AND ORS. … RESPONDENTS

COMPREHENSIVE WRITTEN SUBMISSIONS ON SUIT OOS NO. 3 OF 1989 AND OOS 5 OF 1989

ALONG WITH REJOINDER ARGUMENTS

ON BEHALF OF THE APPELLANT - NIRMOHI AKHARA
BY **SUSHIL KUMAR JAIN**, SR. ADVOCATE

ADVOCATE FOR THE APPELLANTS : PRATIBHA JAIN

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WRITTEN SUBMISSIONS

ON BEHALF OF THE APPELLANT - NIRMOHI AKHARA
BY SUSHIL KUMAR JAIN, SR. ADVOCATE

PLAINTIFF IN OOS NO. 3 OF 1989

A . PLEADINGS

The O.O.S. No.3 of 1989 (Regular Suit No.26 of 1959) was filed on 17.12.1959 by the Nirmohi Akhara (Plaintiff No. 1) and Its Mahant and Sabrakar Mahant Raghunath Das. It was filed against the following defendants:-

(1) **Defendant No. 1** - Babu Priya Datt Ram (Receiver appointed in the proceedings under section 145 Cr. P.C.). He was later replaced with Shri Jamuna Prasad in Oct. 1989.

(2) **Defendant No. 2-5** were State of U.P., Deputy Commissioner Faizabad, City Magistrate and S.P. Faizabad.

(3) **Defendant No. 6 to 8 and 11** - Individual Muslim Parties (Def 6-8 were impleaded in the suit in a representative Capacity for which permission was granted on 21.12.1959). Defendant No.11 Mohd. Farook was added vide order of Court dated 03.12.1991.

(4) **Defendant No.9** - U.P. Sunni Central Board of Waqfs Lucknow was added as a defendant vide order of Court dated 23.08.1989.

(5) **Defendant No. 10** - Umesh Chandra Pandey was impleaded as defendant No.10 on 28.01.1989 on his own application.

The case of plaintiff Nirmohi Akhara was that for a very long time in Ayodhya an ancient math and Akhara of Ramanandi Baragis called *"Nirmohi"* existed which was a religious establishment of a public character. It was further pleaded that Janma Asthan now commonly known as Janam Bhumi, the birth place of Lord Ram Chandra was belonging to and in possession of the Akhara which was also acting as its Manager through its Mahant and Sarbrahkar who had been managing and receiving offerings made there at in the form of money etc.

In the Map Attached to the suit, the temple of the Janma Bhumi was described by the letters E.F.G.K.P.N.M.L.E. And the Main temple was described by the letters E.F.G.H.I.J.K.L.E. Since the property attached in the S. 145 Proceedings related only to the main temple (also described generally as the "Inner Courtyard"), the suit was confined to the said inner courtyard and the constructed portion.

It is stated that so far as the "outer courtyard" is concerned, it has always been in possession of the

Nirmohi Akhara. **The said portion was not attached under the order dated 29.12.1959 and continued to be in possession of the Akhara**. **The suit of the plaintiff - Nirmohi Akhara is therefore confined to the Inner Courtyard only**. It is to be noted that till filing of suit No. OOS No. 4 of 1989 by the Sunni Central Board of Waqfs in the year 1961, there was no dispute by any party relating to the Outer Courtyard. In the Outer Courtyard, there were undisputed structures of the plaintiff including the Sita Rasoi, Bhandar Griha as well as the Chabutra. OOS No. 1 of 1989 filed by Gopal Singh Visharad was also concerned with the inner courtyard only.

Further the access of the Main Temple or the Inner Courtyard is through the Outer Courtyard only. There is no separate access to the Main Temple Area which is claimed by the Muslim Parties as the "Babri Masjid". It was specifically pleaded by the Plaintiffs (in Para 5) that no Mohammedan could or ever did enter the temple Building. It was specifically stated that no mohammedan has even attempted to enter it at least since 1934.

In Para-4 it was stated that Niromohi Akhara possessed the temple and none others but Hindus were allowed to enter and worship therein. After the demolition on 06.12.1992, plaint was amended and it was asserted that the "main temple" and other temples of Nirmohi Akharha were demolished by some miscreants, who had no religion, caste or creed. Submissions have been made by Dr. Dhawan in relation to the events which took place in 1992 resulting in the demolition of the "disputed structure" by the members of the VHP. It is submitted that the structure was a sacred "temple" which housed the deities of Bhagwan Sri Ram and hence it is obvious that the action on 6.12.1992 was an act of demolition of the Ram Temple which was wholly illegal and unwarranted.

In Para-7, it was stated that due to wrongful attachment, plaintiffs had wrongfully been deprived of "management and charge" of the temple. It was stated that the said proceedings were continuing and that the plaintiff had been waiting for dropping of the said proceedings under Section 145, Cr.P.C., hence initiation of a suit had become inevitable. It was stated that the Cause of action had arisen on 05.01.1950 when defendant No.4, City Magistrate,Faizabad illegally took over the management and charge of the temple along with the articles (which were taken into the custody at the time of attachment) and entrusted the same to the receiver defendant No.1.Takeover of charge of the temple by the Receiver, which was continuing and hence constitutes a continuing wrong which gives rise to a continuous cause of action. In the suit relief in the nature of Mandatory Injunction was prayed for removal of the defendant No.1 (receiver) from the management and charge of the said temple of Janma Bhoomi and delivering the same to the plaintiff through its Mahant.

REPLY TO DR. DHAWAN ON HIS SUBMISSIONS REGARDING
STRUCTURE OF THE SUIT OF THE PLAINTIFF NIRMOHI AKHARA
(REPLY TO SUBMISSION - **A-56**)

It has been submitted by Dr. Dhawan that claim of the Plaintiff Nirmohi Akhara was "against the state" i.e. in relation to the proceedings under section 145 Cr. P. C., and that the plaintiff was claiming "**only**" charge and management and "not possession". It is stated that the plaintiff was aggrieved by the unwarranted action by the state agencies resulting in unwarranted attachment under the order of the Magistrate which deprived the Akhara of "De-facto" possession under section 145. However his submission that (i) the suit was "ONLY" against the State Authorities or (ii) that the suit was only challenging "Section 145 Proceedings" or (iii) the plaintiff was not claiming "possession" is not correct on a plain reading of the plaint. It is stated that:-

(i) The Suit has neither been premised nor structured challenging "the order of attachment" passed by the Learned Magistrate nor it seeks setting aside of the "proceedings" under section 145. The relief sought is for "Restoration of Charge and Management" of the temple which is a suit for possession based its interest in the property - i.e. title as a Shebait.

(ii) The proceedings under section 145 are essentially exercise of emergency summary powers to prevent breach of peace. The issue of title is not decided in such proceedings however possession under the said section is to be restored to a person found to be in possession. The dispute of title and entitlement of a person to possess are issues which are required to be decided by a civil court and based on finding reached by it, the receiver would have to give possession to the person so held entitled.

(iii) The relief claimed by the plaintiff in OOS No. 3 of 1989 would require the court to rule on the issue of the place being a temple and the plaintiff being a Shebait of the said temple and thereby "entitled" for restoration of management and charge (i.e. possession) of the temple. Thus use of the words "***belongs***" or "***Belonging to***" and "***in possession***" in the plaint and written statements filed by Nirmohi Akhara are not superfluous as is being suggested. The suit is therefore in essence a suit 'for possession based on interest in immovable property" (*the title being claimed is based on possessory title under section 110 as well as a Shebait of the Temple*).

(iii) The relief of Restoration of Charge and Management includes a relief for possession as there cannot be a "Restoration of Charge and Management" without "Restoration of Possession".

(iv) For adjudication of the claim, the plaintiff Nirmohi Akhara had impleaded the (i) Receiver, (ii) The State Authorities and also (iii) the individual muslim parties who were impleaded in a representative capacity. If the relief claimed by the plaintiff Nirmohi Akhara was only against the State, it would not have impleaded individual muslim parties and that too in a representative capacity.

(v) The "nature of the suit" and the effect of the "reliefs" claimed by the plaintiff was clear and known to the U.P. Sunni Central Board of Waqfs and it is for this reason that the Board also became a party to suit OOS No. 3 of 1989 as a defendant. The nature of the suit was clear and understood by all the parties.

The suit OOS No. 3 was filed by the plaintiff Nirmohi Akhara in relation to the "Inner Courtyard" since it was only the Inner Courtyard which was attached by the Learned magistrate under section 145 Cr. P.C. The outer Courtyard continued to be in possession of the Plaintiff - Nirmohi Akhara and hence there was no occasion for the plaintiff to seek any relief for that area. It is stated that the Temple of Janmasthan comprises of both ***"INNER AS WELL AS THE OUTER COURTYARD"*** and ***"BOTH THE SAID AREAS WERE IN POSSESSION OF NIRMOHI AKHARA AS ON THE DATE OF ATTACHMENT"***. Possession of the Inner Courtyard was taken by the receiver from Nirmohi Akhara on 5.1.1950 while the Outer Courtyard continued in possession of Nirmohi Akhara even after the attachment in 1950. The outer courtyard was in possession of the plaintiff even on the date of filling of suit OOS No. 3.

It is the consistent case of all the parties, including the U.P. Sunni Central Board of Waqfs (in Suit OOS No. 4 of 1989 as well) that the building i.e. the inner and the outer courtyard is a unified whole i.e. a single building. The Nirmohi Akhara and the Hindu parties claim it to be a temple which the Muslim Parties claim it to be a Mosque. It is only due to the action of attachment, which was limited to the inner courtyard, that an "artificial distinction" is being made between the Inner Courtyard and the Outer Courtyard due to which the suit OOS 3 of 1989 was limited only to the Inner Courtyard. The distinction however made in the impugned judgment, which has been extensively relied upon by Dr. Dhawan, to discredit the evidence led by Nirmohi Akhara as "irrelevant" is unjustified. Thus the pleadings made and the evidence led to show possession of the plaintiff Nirmohi Akhara with reference to the "Outer Courtyard" is in fact evidence of possession inside the "BUILDING" i.e. inside the outer wall of the unified building and as such must be treated as evidence of the entire property.

The fact that only the "Inner Courtyard" was attached on an allegation that the deities were shifted inside shows that the initially in 1949 the claim of the Muslims was also limited "ONLY" to the Inner Courtyard. The scope of the claim was however enlarged in the suit filed by the U.P. Sunni Central Board of Waqfs in 1961.

The "Outer Courtyard" thus became subject to legal proceedings for the first time only in 1961 when Suit OOS No. 4 of 1989 was filed. In that suit Nirmohi Akhara is Defendant No. 3. The said defendant was undisputedly in possession of the said "Outer Courtyard" (Which position is now virtually admitted by Dr. Dhawan replying to the documents relied upon by Nirmohi Akhara). Thus unless the plaintiff U.P. Sunni Central Board of Waqfs is able to show better "title" than the defendant in possession, the defendant No. 3 is entitled to remain and continue in possession thereof - the outer courtyard.

The plaintiff Nirmohi Akhara was found to be in possession of the Outer Courtyard even at the time of attachment of the Inner Courtyard. Under section 110 Evidence Act, burden to prove better title and then to claim possession based on such title is on the U.P. Sunni Central Board of Waqfs. They have come with a specific case that the mosque was built by Mir Baqi at the instance of Badshah Babur in 1528 AD. The said burden has not been discharged by the U.P. Sunni Central Board of Waqfs. Since

the Muslim parties have failed to establish better title, the Defendant - Nirmohi Akhara is entitled to continue in possession of the outer courtyard.

Dr Dhawan has attributed (vide his submission No. 5) that from the “pleading” of Nirmohi Akhara the incident of 22nd - 23rd December, 1949 of shifting of the deities is made out. No para of the plaint of the Nirmohi Akhara has been pointed out and a reference has been made only to Para 1114, 2521 and 964 the impugned Judgment. It is the stated case of the Nirmoi Akhjara that no such incident took place and the action of attachment was an act of conspiracy between the state authorities and the some local muslim parties. The submission as a conclusion from the pleading of Nirmohi Akhara is therefore not correct.

It has further been submitted by Dr. Dhawan (Vide Point No. 12) that even though the suit of the Plaintiff Nirmohi Akhara was limited to the Inner Courtyard and despite the fact that it has been held that the Plaintiff Nirmohi Akhara was not entitled to any relief (as the suit filed by the Nirmohi Akhara had been dismissed on the ground of limitation) still it has been granted relief of “outer courtyard”. This is for the reason that in Suit No. 4 of 1989 or Suit No. 5 of 1989, in which the said outer courtyard was an issue, the defendant - Nirmohi Akhara has been found to be in possession and the plaintiffs have failed to show a better title than the said defendant. Thus the impugned Judgment of the high court (which is impugned and questioned even by Nirmohi Akhara on its conclusions on other issues) cannot however be criticised on this count.

It was also submitted during the course of argumemts that the Suit has not been filed by Nirmohi Akhara mentioning that the same was being filed on behalf of the deities. It was already submitted in the opening submissions that one the suit has been filed in the capacity as a Shebait and the Deities of which the plaintiff claims to be a Shebait have been mentioned in the plaint it is evident that the nature of right claimed is as a Shebait and hence the suit is for and on behalf of the deities. It is settled that a Deity is not a necessary party in all suits relating to the Debutter (See Para 6.23 B.K. Mukharjea, Hindu Law of Religious and Charitable Truusts, Tegore Law Lectures) and personality of the Idol is merged in that of the Shebait. (See Para 6.16 and 6.29(1) B.K. Mukharjea, Hindu Law of Religious and Charitable Truusts, Tegore Law Lectures). It is submitted that from the pleadings it is evident that the Nirmohi Akhara was suing in its capacity as a Shebait.

NOTE ON THE WRITTEN STATEMENT OF NIRMOHI AKHARA IN OOS NO. 5 OF 1989

The plaint (OOS No. 5) filed by the Plaintiff, a declaration has been sought that the properties identified in Annexures I, II and III be declared and to vest in the deities - Plaintiff No. 1 and 2. It is stated that the property indicated in the Annexure I, II, and III include interalia not only the Inner Courtyard, the Outer Courtyard but also properties around it including the properties identified as Sumitra Bhawan, Sita Koop etc. which the plaintiff No. 3 claims to be the “Janmabhumi of Lord Ram”.

In the written statement, the Defendant No. 3 - Nirmohi Akhara has inter-alia stated as under:-

(a) That the Ram Janmabhumi is not such a wide area but it is that on which the Temple Ram Janmabhumi is situated.

(b) That the defendant Nirmohi Akhara <u>is the Shebait and Manager</u> of the Deity - Bhagwan Ram and the Temple Ram Janmabhumi.

> “4 … The idol of Bhagwan Sri Ram is installed or is virajman not at Ram Janmabhumi Ayodhya but in the Temple known as Ram Janmabhumi temple Ayodhya for whose delivery of charge and management the answering defendant has filed a suit referred to above…” (Para 4)

"5 … and which is claimed by the answering defendant as being the Temple of Bhagwan Shri Ram under his charge and management, and whereon the Nirmohi Akhara is the Shebiat of Bhagwan Sri Ram…" (para 5)

"14 . … The Answering defendant is the Shebiat of Bhagwan Sri Ram installed in the temple in dispute, and he (the Nirmohi Akhara) alone has the right to control and supervise the repair or even reconstruct the temple if necessary" (para 14)

"18. Asthan Ram Janma Bhumi is not at all a Juridical person. The answering defendant has already filed Suit 26 of 1959 thirty years ago for the benefit of Bhagwan Shri Ram for a decree of delivery of charge and management of the temple to the Nirmohi Akhara"

"20. … the subject of dispute as the Ram Janmabhumi for whose delivery of charge and management the Nirmohi Akhara has filed the suit no. 26 of 1959…" (Para 20)

"25 … The temple in question along with the land and property appurtenant thereto is already waqf property whereof the Nirmohi Akhara is the shebait and manager…

Thus the stated case of the Defendant - Nirmohi Akhara is that is the Shebiat and manager of the temple - Ram Janmabhumi and the idol - Bhagwan Shri Ram.

(c) That the Plaintiff No. 2 - a Place is "not a Juristic Person". (See Para 2, 4, 18)

Note:- The statement made in Para 2 and 4 is a purely a legal question - "Whether a deity being a place is a Juristic person or not". It is a settled principle (***See "Law of Evidence" By, M.C. Sarkar Seventeenth Edition Page 542***). A stand taken on a point of law cannot be be an estoppel and in any case cannot amount to setting up of an title "adverse" to a deity.

(d) That the Temple - Ramjanmabhumi "Belongs to" Nirmohi Akhara.

"4. … when the temple **belong to** the defendant no. 3, the answering respondent"

30. … The temple **belongs to** Nirmohi Akhara. No body else has a right to construct a new temple in its place except the Nirmohi Akhara"

It is stated that the term "belong to" used by the defendant is in the context of a right of shebiati management for which specific plea has been taken even in the written statement. In any case, the said statement" it is not setting up of an adverse title (***See AIR 1965 SC 1923 Para 14, 15 and 16***)

REPLY TO DR. DHAWAN ON HIS SUBMISSIONS REGARDING MEANING OF "BELONGING TO" IN THE SUIT AND WRITTEN STATEMENT OF NIRMOHI AKHARA

(Submission A-64)

It is submitted by Dr. Dhawan that the assertions made by the Plaintiff - Nirmohi Akhara in Para 2 and 4 of the Plaint and Para 13(d), 17(j), 18(k), (m) of the submissions do not match with the reliefs claimed by the Plaintiff, is not correct. The plaintiff has claimed restoration of "charge and management" of the temple which had been taken away. The submission appears to be a follow up of Dr. Dhawan's submission and assertion that the suit filed by Nirmohi Akhara is should be read in a limited sense i.e. **"Only" "against the state" and "against section 145"**. It has already been submitted hereinbefore that the relief in the plaint cannot be read in a limited sense and hence the submissions on the plaintiff's assertion not matching with the relief is also incorrect .

It is stated that meaning of the word "belonging to" and "ownership" and "in possession" used in the plaint and written statement, as has already been explained to have to be understood in the context of and the plaintiff's assertion that it was a Shebait/Sabhrakar of the idols and the Temple of Ram

Janmabhumi. Possessory title claimed under section 110 of the Evidence Act is also based on "Possession" which possession of the plaintiff was as a Shebait". The assertion therefore does not derogate or belittle the plaintiff's claim to be limited to only "charge and management" as submitted by Dr. Dhawan but the claim for charge and management is based on "**entitlement**" as Shebait and hence the plaintiff seeks "**restoration**" of such charge and management. ***The suit is thus a suit for possession based on title (i.e. title as a Shebait)***.

Nirmohi Akhara had also relied upon the decision in the case of ***Raja Mohdmmad Vs Municipal Board Sitapur*** - ***AIR 1965 SC 1923 Para 14, 15 and 16 (or Para 24, 25 and 26 of the print given by Dr. Dhawan),*** for understanding the meaning of the word "***belonging to***" used in the its Plaint (OOS No. 3) and Written Statement (OOs No. 5) so that the said word is read in the context of the claim which was not "adverse" to the interest of the daily which was a submission made by the Plaintiffs of Suit OOS No. 5 of 1989.

Dr. Dhawan has also referred to a Judgment in ***Late Nawab Sir Mir Osman Ali Khan Vs Commissioner of Wealth Tax (1986) Supp SCC 700*** which also supports the submission of Nirmohi Akhara that the term "Belonging to" cannot be equated with "ownership" and in Para 13 of the said decision it has been held "*… Section 2(m) of the Act uses the expression "belonging to" and as such indicates something over which a person has dominion…*" therefore use of the word "belonging to" in pleadings or under a statute, has to be understood in the context as a person having "lawful dominion" or "possession".

DIFFERENCE BETWEEN A SHEBAIT AND AN TRUE OWNER

Salmond On Jurisprudence[1],, discusses the different ingredients of 'ownership'. 'Ownership', according to Salmond, denotes the relation between a person and an object forming the subject matter of his ownership. A relationship between the deity and shebait can never be one of ownership between a person and an object. The issue of ownership in the present case is only qua the Shebait and "property" which belongs to the deity.

Ownership consists of a complex of rights, all of which are rights *in rem*, being good against all the world and not merely against specific persons. It defines ownership to have the following characteristics:-

(a) Firstly, Salmond says, the owner will have a **right to possess the thing** which he owns. A shebait is a rightful possessor of the debuttar property.

(b) Secondly, the owner normally has the **right to use and enjoy the thing** owned i.e. **the right to manage it** i.e. the **right to decide how it shall be used**; and the **right to the income from it**. A shebait has a right to use and enjoy the debutter property, subject to the terms of grant/dedication, and also to decide the manner in which it should be managed.

(c) Thirdly, the owner has the **right to consume, destroy or alienate the same**. A right

of the shebait to alienate the property is not absolute and its right to alienate is circumscribed by the principles of “Necessity” i.e. for the need and benefit of the deity. In any case the office of shebait is not transferable.

(d) Fourthly, ownership has the characteristic of **being indeterminate in duration**. The position of an owner differs from that of a non-owner in possession in that the latter's interest is subject to be determined at some future time.

(e) Fifthly, ownership **has a residuary character**. i.e. all residual rights (eg. easements etc) in relation to the property owned also vests in the owner.

It is submitted that the right of the shebait cannot therefore be categorised as full “ownership” rights. He however undoubtedly has “substantial” rights in relation to debutter property and hence has been accepted and understood to be a blend of right in an office and the debuttar property.

The claim of the plaintiff - Nirmohi Akhara is therefore a right as a Shebait which is also a right claimed in property.

REPLY TO SUBMISSIONS BY SHRI K. PARASARAN
ON THE CHARACTER OF A SHEBAIT – A SEVAK

It was submitted by Shri Parasaran. That a shebait was merely a “sevak” and therefore no substantial rights in property can be claimed by him. It has also bene submitted that a Shebait is not at all necessary for the upkeep and management of the tmple.

See:-

(i) Para 5.1A - B.K. Mukharjea, Hindu Law of Religious and Charitable Truusts, Tegore Law Lectures

> ***5.1A. Shebait the human ministrant of the deity***.-In my last lecture, I have dealt with the general features of a religious endowment which is known as Debutter, and which arises on dedication or gift of property to an idol. It would now be necessary to enter into details and discuss how a Debutter is managed and administered. As has been said already, “it is in an ideal sense that the dedicated property vests in an idol," *and in the nature of things the possession and management of it **must be** entrusted to some person as Shebait or manager*.
>
> “I would seem to follow," the Judicial Committee observed in *Prasanna Kumari Debi v Gulab Chand Baboo* that the person so entrusted **must, of necessity, be empowered to do** whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of necessary funds to preserve and maintain them." This human ministrant of the deity, who is its manager and legal representative, is known by the name of Shebait in Bengal and North India. He is called the Dharmakarta in the Tamil and Telugu districts, Panchayatdar in places like Tanjore and Urallen in Malabar. He is the person entitled to speak on behalf of the deity on earth and is endowed with authority to deal with all its temporal affairs. As regards the temple property, the manager is in the position of a trustee but as regards the service of the temple and the duties that appertain to it he is rather in the position of the holder of an office of dignity. For convenience I will call the manager by the general name of Shebait, though I am aware that a distinction has been made in some cases between a Shebait and a Dharmakarta.”

(i) Para 6.2 - B.K. Mukharjea, Hindu Law of Religious and Charitable Truusts, Tegore Law Lectures

> **6.2. Duties of a Shebait.**-The duties of a Shebait **are both spiritual and temporal**. "Sheba" (Sanskrit word सेवा) is literally means service and whenever an image is set up, **a Shebait is necessary to render services to the deity**. It is the paramount duty of the Shebait to take the image into his charge or custody: he must see that the idol is given a bath and feed, clothed and tended properly and that due provision for its worship is made. When the Shebait is himself the Archaka, the pujas have also to be performed by him. Otherwise it is not necessary that the Shebait should conduct the worship himself; he can appoint a priest for the purpose; but the responsibility always is his to see that the religious ceremonies are properly performed. There are usage in certain religious establishments that the food (Bhog) that is offered to the deity must be cooked by persons belonging to particular families or by the head of the institution himself, and in some cases, particularly in public temples, none but persons affiliated to particular religious sects are entitled to touch, annoint or decorate the idol. When such usages exist, they would undoubtedly have to be observed scrupulously. It would appear that in the absence of such usages Shebaits are entitled to carry out their duties and manage the properties in such order as they think fit.

Thus the role, purpose and function of the Shebait cannot be slighted to a mere servant as suggested. The office of the Shebait is not a mere office but is a blend of rights in an office as well as an interest in the debutter property.

B. BROAD SUBMISSIONS

Thus the submissions of the Plaintiff's is therefore broadly being classified into the followings heads:-

A. The issue of **LIMITATION** of OOS No. 3 of 1989 and Suit No. OOS No. 4 of 1989

B. The issue of the place being **THE RAMJANMABHUMI TEMPLE** which was being worshipped by the Hindus since times immemorial. The property has been used and possessed exclusively by the Hindus - The building was **NEITHER A MOSQUE BUILT BY BABAR IN 1528 NOR BEING USED AS MOSQUE** and No namaz performed by the Muslims at the said site.

D. The issue of **SHEBAITI MANAGEMENT** - The Idol of Ram Lalla (and other idols) as well as the Asthal Janmabhumi (Inner & Outer Courtyard) was under Shebaiti Management of Nirmohi Akhara.

C. The issue of **POSSESSION** - The Possession of the Janmabhumi Temple (Inner and Outer Courtyard) was with the Nirmohi Akhara before the order of attachment. Due to the order of attachment dated 29.12.1949, charge and management of the inner courtyard as well as the *puja samgri* was taken by the Receiver on 5.1.1950 from the Mahants and priests of Nirmohi Akhara and in furtherance of the interim orders, the sadhus of the Nirmohi Akhara were performing and continuing the seva puja "as before".

D. The issue relating to the alleged **INCIDENT OF 22ND - 23RD DECEMBER 1949**. It is submitted that no incident took place on 22nd/23rd December, 1949. The entire premises was a Temple which was already in exclusive possession of Nirmohi Akhara and hence no incident which could give rise to any cause of apprehension of breach of peace took place.

D. The issue of **MAINTAINABILITY of Suit OOS No. 5 of 1989** by Plaintiff No. 3 as "next friend" ***using the name of*** (*and not* ***by***) the deities. Right to maintain a suit on behalf of the deities is only with the Shebait i.e. the Nirmohi Akhara. A Suit at the behest of Worshippers can be entertained only in exceptional circumstances i.e. when the Shebait refuses to act to protect the interest of the deity or when the she bait has a conflict of interest.

C. SUBMISSIONS IN DETAIL

I. LIMITATION (ISSUE NO. 9 O.O.S. 3 OF 1989)

The issue of limitation has been decided against the Plaintiff-Appellant Nirmohi Akhara by Majority.Justice Sudhir Agarwal (while deciding the issue under Head (**H**) **Page 1514-1516 Vol II**) and Justice D.V. Sharma (at page 3495, Volume III) have held that suit of the Nirmohi Akhara was barred by limitation applying Article 120, Justice S.U. Khan (**Page 71-70 Vol 1**) in his separate opinion has held the suit of the plaintiff to be within limitation.

The issue of limitation is required to be decided on the basis of the provisions of the Limitation Act, 1908 which was applicable at the time when the present suit was filed on 17.12.1959. Section 31(b) of the New Limitation Act, 1963 saves suits, appeals and applications filed and pending on the date of commencement of the Limitation Act, 1963 from the application of the said Act.

The following facts need to be taken into consideration for decision on the said issue:-

(a) That the property which is the subject matter of the suit was attached under section 145 Cr. P. C, by an order dated 29.12.1949 and the receiver took possession of the property by a "supurdaginama" on 5.1.1950. The property was therefore *custodia legis* awaiting final decision of the Magistrate under section 145(2) of the Code. On 30.7.1953, the learned Magistrate passed the following order:-

> "*the finding of the Civil Court will be binding on the Criminal Court it is no use starting proceedings in this case under Section 145 Cr.P.C. and recording evidence specially when a temporary injunction stands, as it can not be said that what may be the finding of this Court after recording the evidence of parties. From the administrative point of view the property is already under attachment and no breach of peace can occur.*
>
> *I, therefore, order that the file under Section 145 Cr.P.C. be consigned to records as it is and will be taken out for proceedings further when the temporary injunction is vacated*."

(b) The proceedings under section 145 Cr. P. C. Were pending even on the date when the suit was filed (i.e. on 15.12.1959) no final order had been passed holding one party or the other to be in possession of the property. Apart from the last portion of the aforesaid order, the fact that the proceedings under section 145 Cr. P. C remained pending is also evident from order dated 31.07.1954 passed on an application dated 22.07.1954 filed by Gopal Singh Visharad with a request that entire file of the case under Section 145 Cr.P.C. be preserved and not weeded out until such time as it was summoned by the Civil Court. The Magistrate passed the following order on 31.07.1954:

> "*This file can not be weeded as it is not a disposed of file….*".

Thus it is evident that the proceedings under section 145 remained pending and were not disposed off.

(c) In OOS No. 1 of 1989, an ad-Interim Order of attachment was passed on 16.1.1950 which was modified on 19.1.1950, continuing of the receiver appointed under S. 145 Cr. P. C

and also allowing continuation of Puja. The said order was confirmed after hearing the parties **3.3.1951** (**Page 3802 Vol III**). The order was challenged by filing first appeal and was confirmed by an order dated **26.04.1955 in FAFO no. 154 of 1951**. Thus the order of attachment and appointment of receiver (though as an interim measure) attained finality only on 24.5.1955. The order dated 3.3.1951 stood merged in the order dated 24.5.1955.

(d) The plaintiff - Nirmohi Akhara was not only claiming ownership and possession of the property i.e. the Main Temple or the Inner Courtyard but was also claiming to be the Manager (Shebiat) of "Janma Asthan" as well as the idols of Lord Ram Chandra, Laxmanji, Hanumanji and Saligramji. (See Para 2 and 3 of the Plaint)

(e) The cause of action pleaded in the plaint is 5.1.1950 when the plaintiff Nirmohi Akhara was deprived of possession "by order of the Court" under section 145 Cr. P. C. Possession was deprived not by a adversarial defendant but by an order of court. On the principle - act of court prejudices no one, it cannot be said that the limitation could commence from the said date.

SUBMISSION ON THE ISSUE OF LIMITATION
OOS 3 OF 1989 IS A "SUIT FOR POSSESSION"

Concept of "POSSESSION" - Possession is a variable term and has different meanings when used in different circumstances. An owner in actual physical possession of the property has both ***De-jure*** possession (i.e Legal Possession or Possession in law) as well as ***De-facto*** possession (i.e. actual physical possession). There may however be circumstances where a person may have either De-Jure possession but not de-facto possession (example can be of Mortgagor, licensor or a lessor who would have de-jure possession but de-facto possession would be that of a Mortgagee, licensee or the tenant, here the former would be deemed to be in possession or the possession of the latter is deemed to be possession of the former) or cases a person may have De-facto possession without legal possession, (Example trespasser).

See: ***AIR 1996 SC 780 - B. Gangadhar Vs B.G. Rajalingam (Para 4)***

> "… Halsbury's Law of England IVth Ed. Vol. 35 in Para 1214 at page 735, the word possession is used in various contexts and phrases, for example, in phrase 'actual possession' or 'to take possession' or 'interest in possession' or 'estate in possession' of 'entitled in possession'. In Para 1211 at page 732 legal possession has been stated that possession may mean that possession which is recognised and protected as such by law. *Legal possession is ordinarily associated with de-facto possession; but legal possession may exist without de-facto possession, and de-facto possession is not always regarded as legal possession. A person who, although having no de-facto possession, is deemed to have possession in law is sometime said to have constructive possession*. In Paragraph 1216 at p. 736 it is stated that *right to have legal and de-facto possession is a normal but nor a necessary incident of ownership. Such right may exist with or apart from de-facto or legal possession*, and different persons at the same time in virtue of different proprietary rights."

Thus one, who may have legal possession may sue for de-facto possession and hence a suit for possession based on title is nearly always for "de-facto" possession and such suits would be classified as *"suits for possession"*. In any suit for possession based on "admitted" title, possession of

the defendant is never adverse and there may be cases where there is a legal bar against the defendant setting up an adverse title (see Section 116[2] of the Evidence Act), and hence suits for *de-facto* possession based on title are classified as a suits for possession. Where the title of the plaintiff is "disputed" and a suit is filed for declaration of title and possession, the legal effect and character of the suit does not change and the suit would continue to remain a suit for possession. A decision on issue of title being inherent in a suit for possession.

Thus in a case where the property is in possession of a court receiver (i.e. the receiver has "de-facto" possession, though de-jure possession is with the real owner), the owner or possessor can file a suit for possession i.e. for De-facto possession which is with the court receiver, based on his title like any other suit based on title. Though the defendant (i.e. the receiver) is not holding possession as an adversarial party (which would also be the case where possession is with a tenant or a licensee who is legally barred from setting up an adverse title), the suit for de-facto possession would be maintainable.

The class of suits for possession of immovable property are covered by Articles 3, 11A, 47, 134, 134 B, 134C, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 146A, 148, 165 and 180 of the schedule to the Limitation Act, 1908. It is stated that while various articles concerning the genre of "suits for possession" cover specific situations mentioned therein, Article 144 acts as a "residuary clause" for suits for possession. Thus where a suit is a suit for possession and which is not covered by any article with reference to Column 1 of the schedule, it would then be governed by Article 144 of the Limitation Act. *It is submitted that so long as the suit is a suit for possession, Article 120 has no application whatsoever and if no specific article applies for a suit for possession, Article 144 would apply*.

It has been submitted that since the possession of the property is with a court receiver or that the property is *"custodia legis"* hence it is "not necessary" to seek a further relief of possession or in other words only a suit for declaration would be"*sufficient*". The fact that a suit of declaration may be sufficient would not mean that a suit for possession based on title cannot be filed at all. A person filing a suit for possession based on a claim of title pays a higher court fees and hence generally, where property is custodia legis, a suit for declaration is being filed and has been held to be sufficient), *however this does not either "bar" a suit for possession or to say that a suit for possession would be "not be maintainable" would be erroneous or if such a suit is to be filed, it would still be governed by Article 120*.

Reliance has been placed by the defendants on the decision of this court in ***Deo Kuer Vs Sheo Prasad (AIR 1966 SC 359)*** wherein it is held that:-

> *"(4) In our view, in a suit for declaration of title to property filed when it stands attached under S. 145 of the Code, it is not necessary to ask for a further relief of delivery of possession…"*
>
> *"(5) There is no doubt that property under attachment under S. 145 of the code is in custodia legis. The cases clearly establish that it was not necessary for the appellants*

to have asked for a possession"

A suit for possession "can" be filed where the property is put under attachment, and where such a suit for possession is filed wherein a relief is sought for possession, the suit would be governed by Article 142 or 144 (or Article 65 of the New Limitation Act).

See:

(1) (2018) 10 SCC 588 - Ghewarchand Vs Mahendra Singh (Para 5, 12-20)

> *"**19**. As per the allegations in the plaint, the defendants' possession, according to the plaintiffs, became adverse when the defendants in Section 145 CrPC proceedings asserted their right, title and interest over the suit property to the knowledge of the plaintiffs for the first time and which eventually culminated in passing of an attachment order by the City Magistrate on 23-12-1966. This action on the part of the defendants, according to the plaintiffs, cast cloud on the plaintiffs' right, title and interest over the suit property and thus furnished a cause of action for claiming declaration of their ownership over the suit property and other consequential reliefs against the defendants in relation to the suit property. (See Para 23 of the plaint.)*
>
> ***20**. In our opinion, the plaintiffs, therefore, rightly filed the civil suit on 19-12-1978 within 12 years from the date of attachment order dated 23-12-1966. The assertion of the right, title and interest over the suit property by the defendants having been noticed by the plaintiffs for the first time in proceedings of Section 145 CrPC before the City Magistrate, they were justified in filing a suit for **declaration and possession**. It was, therefore, rightly held to be within limitation by the trial court by applying Article 65 of the Limitation Act.*

It is therefore submitted that:-

Suit OOS 3 of 1989 is a suit for restoration of charge and management which is undoubtedly a *"suit for possession"* based on title covered by either article 47 or Article 142.

If both the article are held to not apply, the suit being a suit for possession would be covered by the residuary clause i.e. Article 144 of the schedule to the limitation Act. The starting point of limitation prescribed in column 3 - *"when possession of the defendant becomes adverse"* is not relevant for determination of the class of suit for applicability of the article, it is only to find out the end point "after" which a suit could not be filed.

In any case assertion of the defendants (i.e. the muslim parties) in the 145 proceedings that the property was a mosque and hence in their possession made their assertion of possession adverse to the interest of the plaintiff and as such a suit for possession based on title would governed by a longer limitation of 12 years under article 142 or 144 of the Limitation Act.

Attachment of inner courtyard and hence takeover of change and management of the temple gives rise to continuing cause of action which right continues until the attachment continues. Thus even if Article 120 applies, since attachment of the property gives rise to a continuous cause, suit for restoration of charge and management would be within limitation.

The order of appointment of receiver was confirmed after hearing the parties **3.3.1951** (**Page 3802**

Vol III). The order was challenged by filing first appeal and was confirmed by an order dated **26.04.1955 in FAFO no. 154 of 1951**. The order of appointment of receiver stood confirmed finally on 26.4.1955 and therefore applying the principle of merger, the limitation, if at all would commence only from 26.4.1955 and the suit OOS 3 of 1989 is within limitation even if Article 120 applies.

STRUCTURE AND SCHEME OF THE SCHEDULE OF LIMITATION ACT

During the course of hearing it was suggested that since no "final order" under section 145 has been passed as stated in column 3 of the schedule relating to Art. 47, no "cause of action" for the purposes of the said article has arisen. In other words it is suggested that Cause of action for the purposes of a suit must be governed by Column 1 and Column 3 of the schedule.

It is submitted that (i) for determination of nature of suit and ascertain the relevant Article of the Limitation Act which would govern a suit, reliefs claimed in the suit have to be considered with reference to the first column of the schedule and (ii) the "cause of action" for filing a suit of a nature covered by Column 1 and "the starting point" stated in Column 3 may not always synchronise.

See:-

(i) ***AIR 1957 Cal 153 - Indian Trades Corporation Vs Union of India***

> "10. The first point to be decided is which of the two articles of the Limitation Act, namely Art. 115 or Art. 120 would govern the case. Mr. Mitter appearing for the government suggested Art. 115 would be the proper article whereas Mr. Roy contended that Art. 115 is not at all applicable to this case and there being no other article the residuary article 120 would apply.
>
> "11. The first column of the schedule of the limitation Act states the class of cases to be governed by each article. The Second Column states the period and the third column states the starting point of limitation. ***For the purpose of finding out what article will apply in a suit or matter, the proper thing is to look to the first column of the article***. The first column of Article 115 reads as follows:
>
> > "For compensation for breach of any contract, express or implied, not in writing, registered and not herein specifically provided for."
>
> Clearly a suit for breach of contract ***comes within the language of first column of Article 115 of the Limitation Act*** *and the instant case must be governed by Article 115 of the said Act*. If Article 115 of the Limitation Act applies, there is no question that the case would (not) come under Article 120"

(ii) ***AIR 1926 Cal 65 - Smt. Sharat Kamini Dasi Vs Nagendra Nath Pal***

> "A Careful study of the third column of the schedule reveals an *outstanding fact which cannot be ignored, namely that the starting point does not always synchronise with the cause of action*, in many cases it does *but in others it dates from* ***some specified events*** *which are again either anterior* ***or posterior to the accrual of cause of action***…." (Page 67 Col. 1)

There are various articles in the schedule to the 1908 Act which also reveal that the staring point of limitation can be either "anterior" or "posterior" to the actual cause of action. Some of the articles which depict this facet are as under:-

INSTANCES WHERE STARTING POINT IS POSTERIOR TO THE CAUSE OF ACTION				
	Description of Suit	Period of Limitation	Time from which period begins to run	Remarks

1	To contest an award of the Board of Revenue under the Waste Lands (Claims) Act, 1863 (23 of 1863).	Thirty days	When notice of the award is delivered to the plaintiff.	Cause of action is making of the Award. Starting point of Limitation is the date of delivery of notice which would be posterior to cause of action. Right to sue would extinguish only 30 days "after" the delivery of notice.
12	To set aside any of the following sales:- (a) sale in execution of a decree of a Civil Court; (b) sale in pursuance of a decree or order of a Collector or other officer of revenue; (c) sale for arrears of Government revenue, or for any demand recoverable as such arrears; (d) sale of a patni taluq sold for current arrears of rent.	One Year	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.	Cause of action is the date of sale. Starting point of limitation is date of confirmation or if no confirmation is necessary the "end" of the period when the sale becomes final and conclusive. This would be posterior to the cause of action
17	Against Government for compensation for land acquired for public purposes.	One Year	The date of determining the amount of the compensation.	Cause of action is the date of acquisition or taking over of possession. Starting point of limitation is date of determination of the amount of compensation, which would be posterior to the cause of action.
18	Like suit for compensation when the acquisition is not completed.	One Year	The date of the refusal to complete.	Cause of action for compensation is is the date of take over of possession. Starting point is the date of refusal which would be posterior to the cause of action.
19	For compensation for false imprisonment.	One Year	When the imprisonment ends.	Cause of action is the date of Imprisonment Starting point would be the date when the imprisonment is declared illegal and thereafter the imprisonment ends. Both the dates would be posterior to cause of action.
23	For compensation for a malicious prosecution.	One Year	When the plaintiff is acquitted, or the prosecution is otherwise terminated.	Cause of action is the date when a person is falsely implicated Starting point for a suit would be the date acquittal or termination of prosecution. Both the dates would be posterior to the cause of action.

42	For compensation for injury caused by an injunction wrongfully obtained.	Three Years	When the injunction ceases.	Cause of action is when the injunction is wrongfully obtained. Starting point is when the injunction ceases would be posterior to the cause of action.
44	By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three Years	When the ward attains majority.	Cause of action is the date of transfer. Starting point is deferred till date of attaining of majority

INSTANCES WHERE STARTING POINT IS POSTERIOR TO THE CAUSE OF ACTIONS:

	Description of Suit	Period of Limitation	Time from which period begins to run	Remarks
33	Under the Legal Representatives' Suits Act, 1855 (12 of 1855), against an executor.	Two Years	When the wrong complained of is done.	Cause of action would be the date when the wrong complained of come into Knowledge. Starting point provided is the date when the wrong complained of is done. Thus the Starting point is Anterior to the cause of action.
34	Under the same Act against and administrator.			
35	Under the same Act against any other representative.			
36	For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for.	Two years	When the malfeasance, misfeasance or nonfeasance takes place.	Cause of action would be the date when the Malfeasance, misfeasance or nonfeasance come into Knowledge. Starting point provided is the date of occurrence. Thus the Starting point is Anterior to the cause of action.

Thus based on the reliefs claimed by Nirmohi Akhara, the suit - OOS No. 3 of 1989 is a suit for possession of immovable property which, would be covered by either Article 47 or 142 of Limitation Act and if the said articles are not applicable, Article 144 (residuary clause for a suit for possession) would apply.

ARTICLE 47

(a) The relief prayed for by the plaintiff is for “restoration” possession and charge of the Main temple or the Inner Courtyard which was placed under a receiver appointed by the Magistrate in exercise of powers under section 145 Cr. P. Code, 1898 and which is also the cause of action pleaded in the suit. The suit would therefore be governed by Article 47 of the Schedule to the Limitation Act, 1908. The said article provides thus:-

"Art. 47: (Incorporated in Art. 65 of Limitation Act, 1963)

	Description of Suit	Period of Limitation	Time from which period begins to run
47	By any person bound by **an order** respecting the possession of immovable property made under the Code of Criminal Procedure, 1898 or the Mamlatdar's Courts Act, 1906, or by any one claiming under such person, to recover the property comprised in such order.	Three years	The date of the **final order**

It is submitted that though the cause of action for the Plaintiff first arose on 5.1.1950 when the property of the Plaintiff was deprived of possession - "charge and management" of the *debutter property* and which was then placed in the hands of the receiver (defendant No. 1) appointed by the court, the limitation under the said article begins to run only from "**the date of final order**". It is undisputed that no final order was actually passed and the S. 145 proceedings, which remained pending and as such though cause of action has undoubtedly arisen, period of limitation has however not begun to run against the Plaintiff in terms of the Article. The suit, during the pendency of the proceedings would therefore be within limitation.

(b) ALTERNATE ANGLE - The Limitation Act creates a statutory bar on the right of a litigant of judicial redress "after" the period of limitation. The schedule to the limitation act has three columns. The first column "Description of suit" categorises the nature of suits, while a combination of the second and the third column determines the period "**after**" which a suit cannot be filed or if filed shall be dismissed. Thus a suit cannot be instituted "after the period prescribed". ***A suit, which can suitably be categorised in the language of the first column of an article of the schedule to the 1908 Act would continue to be governed by the said article alone and its categorisation would not be dependent on the words or phrases used in the third column***.

(b) A reference to Section 3 of the Limitation Act would be useful at this stage which provide thus:-

> **3. Dismissal of suits, etc., instituted, etc., after period of limitation**.- Subject to the provisions contained in Sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, **after the period of limitation prescribed therefor** by the first schedule shall be dismissed, although limitation has not been set up as a defence.
>
> *Explanation*.-A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

It is stated that a right to file a civil suit to remedy a civil wrong is governed by Section 9 of the Civil Procedure Code wherein any suit can be filed and considered by the courts "UNLESS BARRED".

> **9. Courts to try all civil suits unless barred**— The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> [Explanation I].—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
>
> [Explanation II]. For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.].

A suit can be said to be barred under section 3 of the Limitation Act or any other special law. The Limitation Act only bars suits filed "**AFTER**" the period prescribed but does not prevent suits from being instituted"BEFORE" the said period. *Suits filed "BEFORE' the last point prescribed would naturally be "within limitation"*.

See:- **(i) (2019) 10 SCALE 473 - Ravinder Kaur Grewal Vs Manjit Kaur (para 50)**

> "50. Law of adverse possession does not qualify only a defendant for the acquisition of title by way of adverse possession, it may be perfected by a person who is filing a suit. **It only restricts a right of the owner to recover possession before the period fixed for the extension of his right expires**. *Once the right is extinguished another person acquires prescriptive right which cannot be defeated by re-entry by the owner or subsequent acknowledgment of his rights*. In such a case a suit can be filed by a person whose right is sought to be defeated."

(c) The "description of suit" under article 47 refers to "**an order"** respecting possession of immovable property made under the Code of Criminal Procedure, 1898. The terms used in the Column No. 1is not "**Final Order**" which is mentioned in Column No. 3. Since the legislature has used two different phrases in the same article, they would have to be understood and given different meaning. Therefore the suit filed by the plaintiff Nirmohi Akhara for recovery of Management and Charge from the receiver appointed under under a "preliminary order" dated 29.12.1949 under section 145 of the Cr. P. C. 1908 would strictly fall under the "description of suit" mentioned in the First Column of Article 47. A proceedings under section 145 Cr. P. C. Is undoubtedly "respecting possession of immovable property" as it falls under Chapter XII which itself is concerning - "***Disputes as to immovable property***". Second and the Third Column only prescribe the time "***AFTER***" which such a suit cannot be filed, it can always be filed "BEFORE" that date once there is a cause of action. Thus only thing to be considered is that there should be a "Cause of Action". It cannot be denied or disputed that the interim order of attachment and appointment of receiver did give rise to a "cause of action" to the plaintiff.

Shri K. Parasaran has relied upon a decision in ***AIR 1942 PC 47 - Raja Raigan Maharaja Jagatjit Singh Vs Raja Pratab Bahadur Singh***. It is submitted that the said judgment is not an authority for a proposition of applicability of Article 47 since in the said case an order of attachment took place on 7.11.1931 (tehsildar took possession on 23.2.1932) and the suit, which was a suit for declaration, was fled on 26.1.1933 (Page 49). Thus either

under Article 47 or Article 120 the suit (being filed within two years) was within limitation. The question in the said suit was whether title by adverse possession or through compromise in earlier proceedings was perfected “prior” to the order of attachment. The observation therein that Article 47 did not apply as there was no order of possession by the Magistrate under 145 Cr. P. C is therefore clearly obiter.

ARTICLE 142

(d) Article 142 reads thus:-

Art. 142: (Correspondent to Art. 64 of Limitation Act, 1963)

For possession of immovable property when the plaintiff while in possession of the property has been dispossessed or had discontinued the possession.	Twelve years	The date of the property dispossession or discontinuance.

(f) It is submitted that the Suit of the plaintiff is for Restoration of Possession when the plaintiff while in possession has been “dispossessed”. It is stated that:-

(i.) Undisputedly the plaintiffs were in possession of the property and the receiver took possession of the property from the plaintiff - Nirmohi Akhara. The said fact has not been disputed by any one. The Muslim parties do not claim to be in possession of the property on the date of when the receiver took possession on 5.1.1950.

(ii.) When the receiver took possession, the plaintiff - Nirmohi Akhara lost de-facto possession. Therefore as a result of action by the state agencies the plaintiffs while in possession has been dispossessed. Further the Shebiati Rights of Control and Management that have been “impaired” due to the order of attachment and appointment of a receiver.

(iii.) Interest of a Shebiati in the Debuttar Property is an interest in immovable property and the Shebaiti Rights have been held to be a blend of a right in an office as well as proprietary right in the debuttar property.

See:-

(i) Angurbala Mullick Vs Debabrata Mullick, 1951 SCR 1125, 1132-1134

(ii) The Commissioner Hindu Religious Endowments Vs Shri Lakshmindra Thirtha Swamiar of Sri Sirur Mutt 1954 SCR 1005, 1018-1019.

(e) Thus all conditions of Column No. 1 of Article 142 stand satisfied. Even if loss of de-facto possession is taken from 5.1.1950 as pleaded, the suit filed in 1959 is within 12 years and hence the suit would be within limitation.

(f) It is submitted that despite the order of attachment under 145 Cr. P. C dated 29.12.1949, as well as the interim orders passed in the Civil Suit OOS No. 1 of 1989, Seva Puja and Darshan was allowed to continue as before. The said functions were however being performed as an agent of the receiver and not as an independent Shebait or Sabhrakar. Thus while possession of the property in its physical form became *custodia legis,* the right of management was not *custodia legis* *since the court expressly allowed it to continue as before*. When the management was taken over on 5.1.1950, the receiver was allowing only two or three pundits to go inside and perform religious ceremonies and the general public was permitted to have Darshan only from beyond the Grill-Brick Wall. It is submitted that appointment of receiver therefore resulted in "**impairment** "of the "absolute" right of the plaintiff to do seva puja which, it is submitted would be de-facto dispossession to that extent of the shebiati right for which a suit can be brought for restoration in the time prescribed under Article 142. A suit for restoration of shebiati rights would be a suit for recovery of possession of immovable property and would be governed by Article 142 of the Limitation Act, 1908.

(g) It is stated that since de-facto possession of the immovable property was taken along with impairment of shebaiti rights, due to the order of attachment, a suit could be filed for recovery of such possession and restoration of such rights. It is stated that the property was put under attachment hence, while it may not be said that the plaintiff is not dispossessed in law (or de-jure possession) as the property became *custodia legis*, it can still be said that as a result of the order of attachment, the plaintiff's management stood impaired and a suit for recovery of management filed on 17.12.1959 would be within 12 years prescribed therefore from the date of dispossession.

(h) In case the magistrate had passed a "Final Order" closing the proceedings under section 145 by deciding the case one way or the other and directing delivery of the property to anyone other than the plaintiff, it would result in "dispossession" and hence would give rise to a fresh cause of action under Article 142 and also under Article 47.

ARTICLE 144 - RESIDUARY ARTICLE FOR SUITS FOR POSSESSION

(i) It is submitted that once the suit is understood and accepted to be a suit for possession, if it is held that none of the proceedings articles i.e. article 47 or 142 apply, the residuary article for a suit for possession would be Article 144. The fact that entry 144 is a residuary article is clear and evident from a plain reading of said article:-

Art. 144: (Correspondent to Art. 65)

For possession of immovable property or any interest thereinnot hereby otherwise provided for.	Twelve years	The date of the property dispossession or discontinuance.

(l) Interest of the shebiat in a debuttar property is undoubtedly an interest in an immovable property hence a suit for possession or any interest in the property would be covered by Article 144.

SECTION 23 - CONTINUING WRONG

(j) OBSTRUCTION OF WORSHIP - CONTINUING WRONG - It is submitted that the petitioner was in possession of the property (inner courtyard) and upon attachment under section 145, possession was taken from the Plaintiff - Nirmohi Akhara. As a result of the order of attachment, the right of the plaintiff to manage and carry out seva puja has been impaired and which infringement of the right has been continuing every day since the date of attachment. The infringement therefore gives rise to a continuing wrong and hence gives rise to a continuing cause of action.

(k) Obstruction of prayer and worship has been held to be a continuing wrong (See ***Hukum Chand Vs. Maharaj Bahadur, AIR 1933 P.C. 193,197***) and hence obstruction of the Plaintiffs right to manage the Bhog and Prayers independently by appointment of a receiver has been denied which is a continuing wrong under section 23 of the Limitation act 1908 and hence every obstruction provides a fresh cause of action and fresh starting point for the limitation.

(l) ENTITLEMENT OF MESNE PROFITS - CONTINUING CAUSE OF ACTION - Since the property is under the control of the receiver. A suit for Mesne Profits for incomes derived by the receiver can still be filed by the true owner and in such a suit, for which cause of action arises any benefit accrues would thus give rise to a continuous cause of action. While determining the issue of entitlement of mesne profits, the question of title will have to be adjudicated and upon adjudication possession will have to be delivered by the Receiver to the True Owner.

(i) Ellappa Naicken vs. Lakshmana Naicken A.I.R. 1949 Madras 71

(ii) Rajah of Venkatagiri v. Isakapalli Subbiah, ILR 26 Madras 410.

ARTICLE 120

(m) The commencement of Cause of Action pleaded in suit OOS No. 3 of 1989 is 5.1.1950\ when de-facto possession of the main temple was taken over by the receiver under an order of attachment issued by the Magistrate under section 145 Cr. P. C. It is stated that stand of Plaintiffs of OOS No. 4 of 1989 and OOS No. 5 of 1989 is that as the property has been attached by the court, the plaintiff cannot claim to have been “dispossessed” and hence a suit for possession is “*not maintainable*” and only a suit for “declaration” can be maintained.

NOTE: Submission regarding maintainability of a suit for “possession”, where the property is custodia legis has already been elaborated and submitted in detail hereinbefore in Paras 15 to 22.

(n) It has been held by the majority judgment of the High Court that suit ought to have been filed within time prescribed under Article 120 of the Limitation Act, 1908. Article 120 is a residuary clause, as under the 1908 Act there was no separate specific articles governing Suits for Declarations, such suits would fall under under Article 120. The said article is reproduced below:-

Art. 120: (Correspondent to Art. 58 and 113 of Limitation Act, 1963)

Suits for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.

(r) Since the property upon attachment by the order of the Magistrate had become *custodia-legis* i.e. in possession of the court, it is claimed that no suit for possession could be filed and only a suit for declaration of title was sufficient.

It is stated that:-

(i) The said article being a residuary clause has no application where a suit is governed by another specific clause. Since the case would be governed by Article 47 and 142, therefore Article 120 would have no application.

(ii) Assuming Article 120 applies and a suit for declaration of title was required to be filed within the limitation prescribed under the said Article, since the order for appointment of receiver merged into the order of the civil court vide its interim order dated 19.1.1950 which was confirmed on 3.3.1951 and thereafter a final order in appeal against the order dated 3.3.1951 was passed on 24.5.1955, the period of 6 years ought to commence from the date of the order of the said appeal. The interim order of the Civil court “merged” in the order passed in the appeal and hence, suit filed by the Plaintiff on 15.12.1959 is within a period of 6 years from the order dated 24.5.1955 is within limitation.

On the merger and commencement of limitation:-

(i) S.S. Rathore Vs State of M.P. (1989) 4 SCC 582
(ii) Chandi Prasad Vs Jagdish Prasad (2004) 8 SCC 724
(iii) Union of India Vs West Coast Paper Mills Ltd (2004) 2 SCC 747
(iv) Shanthi Vs T.D. Vishwanathan (2018) SCC Online SC 2196
(v) Surinder Pal Soni Vs Sohan Lal (2019) SCC Online SC 900

(n) Since the property was attached and placed under a receiver, it is incumbent for the court to decide and adjudicate the issue of title and the suits cannot be dismissed as barred by Limitation. The property must revert to the rightful owner and cannot remain custodia legis for time *ad-infinitum*. Hence in a suit for restoration of possession from a receiver, the question of limitation can never arise and such suits cannot never become barred by limitation so long as such property continues to be under a receiver at least of a person from whom possession was taken.

Hypothetical situation

In a case where a property is attached by a preliminary order under section 145(1) and none of the parties approach a civil court for a period of 3 years (period of limitation for a declaratory suit now under Article 58 is 3 years). A party approaches the court after three years and therefore as a result of a party approaching a civil court, s. 145 proceedings are dropped since continuation thereof would be an abuse of process. If the Civil Suit is dismissed on the ground of limitation, it would create an anomalous situation where the receiver, appointed or continued under an interim order which stand revoked due to dismissal of the suit, would continue to be in possession.

(o) The Plaintiff Nirmohi Akhara is a party defendant in Suit OOS No. 1 of 1989 in which interim order was passed and confirmed on 3.3.1951. The suit is in any case within limitation and hence the question of title can be decided even in the said suit. The issue of Limitation raised in OOS No. 3 of 1989 was therefore entirely unnecessary.

(p) The plaintiff - Nirmohi Akhara was not only claiming ownership and possession of the property i.e. the Main Temple or the Inner Courtyard but was also claiming to be the Manager (Shebiat) of “Janma Asthan” as well as the idols of Lord Ram Chandra, Laxmanji, Hanumanji and Saligramji. (See Para 2 and 3 of the Plaint). It is stated for the reasons which found favour with the court to hold that the suit OOS No. 5 of 1989 is within limitation that the deity was a perpetual minor, the suit of the Plaintiff Nirmohi Akhara cannot also be held to be barred by limitation.

REPLY TO THE SUBMISSIONS BY DR. DHAWAN ON CONTINUING WRONG

(REPLY TO SUBMISSION - A-65)

Dr Dhawan has while answering the submission of “continuing wrong” by Nirmohi Akhara has stated that there no “pleading” of a continuing wrong in the plaint of the Plaintiff.

Further while replying to the issue of continuing wrong it was submitted by Dr. Dhawan that for giving rise to a continuous cause of action, there ought to be a continuing “wrong” which must be based on some illegal action. It has been submitted that since the property was under attachment under an order of the court, it cannot be deemed as an illegality to give rise to a continuous cause.

It is submitted that section 145(4) a magistrate is mandatorily bound to decide the proceedings “***as far as may be practicable***” within **two months**. Further under section 146, where the magistrate finds the none of the parties were in possession, he can order attachment and thereafter forward the record of the proceedings after drawing up a statement of facts of the case for decision by a Civil Court. U/s 146(1B), the Civil Court is required to decide “***as far as may be practicable***” within a period of **three months**.

> **SECTION 145 Cr. P. C. 1898**
> **145 Procedure where dispute concerning land, etc., is likely to cause breach of peace:**
>
> (4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the inquiry, **as far as may be practicable, within a period of two months** from the date of the appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject : Provided that the Magistrate may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained
>
> **SECTION 146 Cr. P. C. 1898:**
> **s. 146 Power to attach subject of dispute:**
>
> (1-B) The Civil Court shall, **as far as may be practicable**, within a period of **three months** from the date of the appearance of the parties before it, conclude the inquiry and transmit its finding together with the record of the proceeding to the Magistrate by whom the reference was made; and the Magistrate shall, on receipt thereof, proceed to dispose of the proceeding under Section 145 in conformity with the decision of the Civil Court.

Undisputedly the magistrate in the present case nether himself decided the issue “within two months” as mandated under section 145(4), nor referred the parties under section 146 to a civil court. The case kept lingering and prolonging. It is submitted that lingering and prolonging of the case beyond the statutorily prescribed period or a “reasonable period” after completion of the period of two months and “continuation” of attachment was contrary to the scheme of Section 145 and 146 Cr. P. C. and hence “illegal”. Continued attachment of the property contrary to the mandate of section 145 and 146 is a non-compliance of the mandate of the section and hence would constitute an illegal act which

gives rise to a continuing wrong after expiry of the statutory period or a “reasonable” period.

Continuation and pendency of proceedings for excessively long and unreasonable periods have been held to be fatal to such proceedings. **Thus inordinate delay in conclusion of proceedings itself gives rise to a cause to move an appropriate court for redress. Such delay can be administrative or judicial also and the principle is applied in both civil and criminal matters. For example:-**

(i) Delay in finalisation of transport schemes for inordinately long periods have been held to be fatal and hence quashed by the courts. **(See Onkar Singh Vs Regional Transport Authority Agra (1986) 3 SCC 259 following Yogeshwar Jaiswal Vs STAT (1985) 1 SCC 725, Phool Chand Gupta Vs RTA (1985) 4 SCC 190, Shri Chand Vs Govt of U.P. (1985) 4 SCC 169)**.

(ii) Delay in initiation or deciding Departmental Proceedings in service matters have been held to be fatal **(See State of M.P. Vs Bani Singh 1990 Supp SCC 738) Pavan Ved Vs Union of India, Copy attached herewith)**

(iii) Delay in execution of Death Sentence entitles the accused to move the court for commutation of sentence **(See Triveni Ben Vs State of Gujarat (1989) 1 SCC 678, Ajay Kumar Pal Vs Union of India (2015) 2 SCC 478).**

(iv) It has also been held that Protracted investigation or trial for inordinately long period infringes fundamental right of speedy trial guaranteed under article 14 and 21 and which could be fatal **(See Pankaj Kumar Vs State of Haryana (2008) 16 SCC 117, Srinivas Gopal Vs Union Territory of Arunachal Pradesh (1988) 4 SCC 36).**

The Plaintiff - Nirmohi Akhara has, in para 7 of the plaint (Page 51, Volume 72) , clearly mentioned that the plaintiff is aggrieved since it has wrongfully been deprived of Charge and Management ever since the attachment and that it was waiting for the dropping of the proceedings U/s 145 which have been unduly prolonged and lingered. It is stated that this lingering of the 145 proceedings during which the attachment continued and through which the plaintiff was being deprived continuously its right of management constitutes a “continuing” wrong which attracts the provisions of section 23 of the Act of 1908. It is submitted that factual foundation to constitute a continuing wrong has been specifically pleaded in the plaint and thereafter whether such a continuing deprivation of the plaintiff to manage the debuttar pleaded in the plaint constitutes a continuing wrong is a legal question.

REPLY TO THE SUBMISSIONS BY SHRI K. PARASARAN ON LIMITATION OF OOS 3 OF 1989

Shri K. Parasaran has submitted that upon attachment of the property under section 145, the "injury" was complete or that once an order has been made, causal sequence of the wrong "*Snaps*" and hence thereafter only a suit for declaration under article 120 could be filed within 6 years.

It has been submitted that since the cause of action pleaded by the plaintiff in the plaint is 5.1.1950, the injury according to the plaintiff was complete and hence limitation would start running from the said date. It has further been submitted that once the limitation starts running it would not stop.

It is submitted that the plaintiff - Nirmohi Akhara has claimed restoration of charge and management of the temple and is therefore seeking possession of the property. Submission by Shri Parasaran is self contradictory. If the suit is treated to be a suit for possession, with dispossession from 5.1.1950, the suit filed within 12 years from the date of "dispossession" would be within limitation. The submission by Shri Parasaran is that attachment by the court resulting in the property being *custodia legis* does not result in dispossession, therefore as a corollary 5.1.1950 could not in law be treated to be the date where the causal sequence "*snaps*" finally and which gives rise to a final cause of action. It is undisputed that no "final order" has been passed therefore the question of a concluded final "injury" giving rise to a crystallised final cause of action does not arise.

It has also been submitted by Shri Parasaran that since the suit of Nirmohi Akhara is barred by limitation (applying Article 120) therefore the "rights" of the Nirmohi Akhara stand "extinguished". Furthering his arguments it has therefore been stated that once the right is extinguished, Nirmohi Akhara cannot also get any relief as a defendant in other suits. Submission of Shri Parasaran is not supported by the plain language of section 28:-

> "**28. Extinguishment of right to property** - at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

It is undisputed that the time limit for the Nirmohi Akhara to file a suit for possession either under article 47 or article 142 or 144 of the limitation act did not expire in 1959 when the suit was filed and hence the question of extinguishment of the right under section does not arise. Surprisingly the case for debarring and extinguishment is based on Article 120 which governs a suit for declaration and not a suit for possession.

Further the Limitation Act bars only a "suit" and not a defence. Thus defence taken in the written statement either suit No. 5 or Suit No. 4 would not become barred as a result of application of a Limitation Act.

See:-

(i) ***Bajranglal Shivchandrai Ruia v. Shashikant N. Ruia, (2004) 5 SCC 272*** *at page 294*

> *71. In our view, this reasoning of the Division Bench is erroneous.* ***Although the period of limitation prescribed in the Limitation Act, 1963 precludes a plaintiff bringing a suit which is barred by limitation, as far as any defence is concerned, there is no such limitation****. In reply to the plaintiff's suit that she had derived title to*

*the suit property by virtue of the auction-sale and the certificate of sale issued by BMC, **it was perfectly open to the defendants, including Bajranglal, to contend to the contrary**. The burden of proving the facts alleged in the plaint was squarely upon the plaintiff. After recording evidence on both sides, if the evidence showed that the auction-sale held by BMC was contrary to the provisions of the BMC Act and the Regulations made thereunder, the defendants were entitled to urge upon the learned Single Judge to come to the conclusion recorded by the learned Single Judge."*

Thus as the property is custodia legis, even if the suit of Nirmohi Akhara, as plaintiff is dismissed as barred by limitation (or as premature to wait for a "final order" in the proceedings under section 145), the issue of entitlement can well be raised as a defence in the other suits including Suit No. 1, 4 and 5 and upon adjudication of the issue in those suits, Nirmohi Akhara is held to have a right, it would be entitled to be restord back nt possession from the receiver. The issue of limitation is thus a non-issue.

A further submission was made by Shri Parasaran by referring to Section 11 Explanation 5 CPC - that since the suit of the plaintiff is to be rejected on the ground of limitation, all reliefs claimed by the plaintiff therein ought to be deemed to have been refused and on that basis it has been submitted that no relief could be granted even in the other suits to the plaintiff - Nirmohi Akhara where it is a defendant. It is submitted that Section 11 (Res-Judicata) applies in relation to a matter directly and substantially in issue has been directly and substantially in issue in a "former suit" between the same parties. The meaning of the term "former suit" has been explained in "Explanation I" to denote a suit "which has been decided prior to the suit in question". Since in these cases all suits are being decided together, the question of application of section 11 does not arise at all.

Explanation V to section 11 CPC is an "explanation" to section 11 and is not a stand alone provision and therefore has to be read with and understood in the context of section 11. Thus there should be a "former suit" where a relief is deemed to be refused in view of Explanation V and which a matter "directly and substantially" in issue in a subsequent suit. Shri Parasaran has not explained which is the "former suit" and the "subsequent suit" in the present cases.

It appears that the argument of Shri Parasaran is in furtherance of his submission that dismissal of suit on the point of limitation would debar defences in other suits and for which it has already been submitted, relying upon **(2004) 5 SCC 272** at page 294 (supra), that limitation bars only suits and not defences.

REPLY TO THE SUBMISSIONS BY SHRI C.S. VADYANATHAN ON LIMITATION OF OOS 3 OF 1989

Shri Vadyanathan has relied upon (1959) Supp 2 SCR 476 - Balakrishna Savalram Pujari Waghmare Vs Shree Dhyaneshwar Maharaj Sansthan (**Para 8 page 128**) in support of his plea against applicability of Continuing wrong. It is stated that the said case is wholly inapplicable since in that case the there was a "decree" ousting the pujaris (Guravs) dated 4.11.1922 and which decree had also been executed and the plaintiffs had been completely ousted on 16.11.1922. Thus it was said that the "injury" was complete. The four suits of Guravs filed in 1933, 1935, 1936 and 1937 was therefore held to be barred by Limitation. In the present case there is no final ouster and the property was placed under attachment which impaired the rights of the Nirmohi Akhara and since the

attachment had continued for an unreasonably long period of time, the present is undoubtedly a case of Continuing Wrong.

II ANALYSIS OF THE ORAL EVIDENCE LED BY THE PLAINTIFF

43. Oral evidence as well as Documentary evidence has been led by the plaintiff. It is submitted that, the said evidence has to be considered from the perspective of the following issues:-

(i) That the Idol of Ram Lalla (and other idols) as well as the Asthal Janmabhumi (Inner & Outer Courtyard) was under Shebaiti Management of Nirmohi Akhara.

(ii) That Possession of the Janmabhumi Temple (Inner and Outer Courtyard) was with the Nirmohi Akhara

(iii) After the order of attachment, charge and possession of inner courtyard as well as the *puja samgri* was taken by the Receiver on 05.01.1950 from the Mahants and priests of Nirmohi Akhara and in furtherance of the interim orders, the sadhus of the Nirmohi Akhara were performing and continuing the seva puja “as before”,.

(iv) That the property has been used and possessed exclusively by the Hindus - No namaz performed at-least since 1934.

(v) That no incident took place on 22nd/23rd December, 1949. No shifting of the deities took place on the said date which were already in the Main Temple.

(Please See **Annexure A** - for specific issue wise depositions)

II. NIRMOHI AKHARA IS THE SHEBAIT - HAS A RIGHT OF POSSESSION

44. The said issue is covered by the following issues of Suit OOS No. 3 of 1989

Issue No. 2 : Does the property in suit belong to the plaintiff No.1?

Issue No. 4 : Are plaintiffs entitled to get management and charge of the said temple?

45. The conclusion of the issue will have impact on the findings in relation to issue no. 2 & 6 of OOS No. 5/89 relating to maintainability of the said Suit No. OOS 5 of 1989 on behalf of the Deities (plaintiff No. 1 and 2) Through Next Friend (Plaintiff No. 3) treating them to be "minors" under Order 32 Rule 1 CPC and the reasoning will also have relevance for the decision on the issue of limitation of OOS No. 5 of 1989 (i.e. Issue No. 13 in OOS No. 5).

Issue No. 2 : Whether the suit in the name of deities described in the plaint as plaintiffs 1 and 2 is not maintainable through plaintiff no.3 as next friend?

Issue No. 6 : Is the plaintiff No.3 not entitled to represent the plaintiffs 1 and 2 as their next friend and is the suit not competent on this account?

Issue No. 13 : Whether the suit is barred by Limitation

The issue of Shebait is also necessary to decide the issue of "relief" of restoration possession from the receiver. It is stated that if this court comes to a conclusion that the property vests in the deity as is being contended by the plaintiff of OOS No. No. 1, OOS No. 3 and OOS No. 5, possession of the property of the deity cannot be handed over to persons who are merely "worshippers" such as the plaintiff in OOS No. 1 or the Next Friend (or plaintiff No. 3 in OOS No. 5). Possession on behalf of the deities, will have to be given only to the Shebait. A worshipper or a next friend merely acts as a 'disinterested person' for and on behalf of the deity but cannot receive possession of the property belonging to the deity. It is stated that Plaintiff No. 3 of OOS No. 5 - Devki Nandan Agarwal (OPW-2, Volume 17) does not even claim in the plaint that he is a worshipper and in fact in the evidence has admitted that he does not believe in idol worship.

PLEADINGS

47. The Plaintiff - Nirmohi Akhara (OOS No. 3 of 1989) has claimed right as Shebiat/manager of the Ram Janma Asthan as well as the Idols of Lord Ram, Lakshman, Hanuman and Saligram installed in the Disputed Structure (See Para 2 and 3 of the Plaint *(**Page 49 Volume 72**)*) which is described as the "main temple" and generally also referred to as the Inner Courtyard.

48. Only written statement filed denying the claim of the plaintiff is by Defendant No. 10 - Umesh Chand Pandey (Page 63-68 Volume 72) dated 21.10.1991. The said Defendant No. 10 has not entered the witness box nor any other witnesses have been examined by him and therefore his pleading in the written statement has remained unsupported and adverse inference has to be drawn against him under section 114 evidence Act. See ***Iswar Bhai C. Patel v. Harihar Behera, (1999) 3 SCC 457 (para 19 to 29).***

49. In the pleadings of Plaint of OOS No. 5 of 1989 (***Page 234 Volume 72***) (See Para 6, 7, 11 and 12):-

It is not the case setup by the plaintiff that there is "no shebait" of the deities at all.

It is not the case setup that "working shebait is not looking after the deities faithfully"; or

It is also not the case that there is any person other than the Nirmohi Akhara, named either in the plaint or the written statements, who was the shebiat, managing the affairs of the deities.

Even independent of Suit No. OOS 5, no rival claimant has setup a claim to be shebait/manager of the two deities except Nirmohi Akhara.

50. So far as Plaintiff of OOS No. 4 - Sunni Central Board of Waqfs is concerned, in the statement by Shri J. Jilani (recorded on 22.4.2009) under Order X rule 2 CPC, it has been stated as under:-

> "***The existence of Nirmohi Akhara from the second half of nineteenth century onwards is also not disputed***. It is however denied and disputed that Nirmohi Akhara was in existence and special in Ayodhya in 16th Century AD or in 1528 AD and it is also denied that any idols were there in the building of the Babri Masjid upto 22nd December, 1949" (***Page 262 Para 262 Volume I - Judgment***)

51. The said statement has been made in light of the fact that cases had been filed by the muslim parties against the Mahants of Nirmohi Akhara and vice versa during the second half of the Nineteenth Century.

EVIDENCE - ORAL AND DOCUMENTARY

52. On the issue of Shebaiti Management of the deities as well as Janmasthan, the position is virtually admitted and the Oral Evidence led by the Plaintiff on this issue has remained unrebutted in cross-examination by the Hindu Parties and in fact the witnesses of the Plaintiff in OOS No. 5 have also admitted the said fact in evidence.

53. At no point of time any other rival claimant has emerged ever claiming shebiatship or a right of management of the Deities. From the Oral evidence led by the parties, (detailed hereinbefore in **Annexure A (I)**), there is complete absence of any cross - examination questioning or challenging the shebaiti rights of Nirmohi Akhara or setting up any rival claimant. Further there is nothing on record to even allege that the Nirmohi Akhara has acted against the interest of the deities. The said position is therefore admitted. Dr. Dhawan has in his submissions expressly admitted the claim of the Nirmohi Akhara as the Shebait.

54. The plaintiff has also filed documentary evidence of it was exercising shebiati/managerial rights and making arrangements for looking after the affairs of the deity:-

(i) Exhibit 8 (Suit-3) (Page 66-70 Nirmohi Akhara Volume-90) is a copy of the agreement dated 11.6.1900 permitting Jhingoo son of Gaya for providing drinking water to the pilgrimages visiting Ramjanambhumi site at Ayodhya. (This was for an area near - Sita Koop just outside the outer courtyard)

(ii) Exhibit 9 (Suit-3) (Page 71-74 Nirmohi Akhara Volume-90) is a copy of agreement of Theka Shop of Janambhumi Ramkot Ayodhya by Gopal son of Babu in favour of Narottamdas on 13.10.1942. (This was for an area - outside the Eastern Gate or Hanumat Dwar in the outer courtyard)

(iii) Exhibit 10 (Suit-3) (Page 75-78 Nirmohi Akhara Volume-90) is a copy of the agreement dated 29.10.1945 regarding Theka Shop in favour of Mata Prasad by Mahant Raghunath Das. (This was for an area - outside the Eastern Gate or Hanumat Dwar in the outer courtyard)

Note:- It has also come in evidence that in the year 1982 there was a dacoity at the Nirmohi Akhara in which the documents of the plaintiff were looted apart from other precious idols and articles. FIR and Chargesheet was filed against Dharam Das. (Page 12087 Vol 65). As a result other evidence in the shape of Original documents of shebaiti management and other agreements entered into by the plaintiff were lost. Further a suit came to be filed in 1982 (which is still pending) relating to the outer courtyard and in that proceedings the outer courtyard was attached and placed under the same receiver who was appointed in the present suits for the Inner courtyard.

FINDINGS OF THE HIGH COURT

55. With regard to the Shebaiti Rights of the Plaintiff No. 1 and 2 of OOS No. 5 of 1989, it has been noticed by Jus. Sudhir Agarwal as under:-

> "**2133**. Now, so far as the issue No.2 and 6 (Suit-5) are concerned, we really find it surprising that there is no averment at all in the entire plaint that plaintiff no. 3 is a worshipper of lord Ram and that of plaintiffs 1 and 2. **Besides it is also not the case that there is no Shebait at all or the Shebait, if any, is not managing the affairs properly**."

56. The Janma Asthan as well as the deities have been in existence from time immemorial and the High Court has also found that the plaintiff No. 1 - Nirmohi Akhara has been in existence atleast from 1734 AD (See Para 799 Page 751) . It is the case of the Muslim Parties as well as the Next Friend of Plaintiff No. 1 and 2 in OOS No. 5 of 1989 that the deities were shifted from the Chabutra in the outer courtyard to under central dome of the disputed structure of 22-23.12.1949. This case of the Plaintiffs in OOS No. 4 as well as OOS No. 5 show undisputedly that the Nirmohi Akhara was managing the affairs of the Idols when they were situate on the Chabutra (Para 2038), hence the inevitable conclusion has to be that the plaintiff was managing the affairs even when the deities were placed under the Central Dome, unless anything contrary could be shown by any of the parties. In Para 2138, the High Court has observed:-

> "**2038** … … It is not the case of any of the parties that there is or there was any shebait appointed or working to look after or managing the plaintiffs no. 1 and 2. **The idol while existing on Ram Chabutara, its worship etc. was being managed by the priest of Nirmohi Akhara as claimed by them and also not seriously disputed by other Hindu parties**but after its shifting in the disputed building under the central dome, there is nothing on record to show that any person as shebait of plaintiff no. 1 continued to look after.

It is stated that first part of the aforesaid extract is factually incorrect as it is the specific case of the Plaintiff Nirmohi Akhara that it was the Shebait/Manager of the Main temple (i.e. the Inner courtyard) (See Para 2 and 3 of the Plaint (***Page 49 Volume 72***) known as the Janmasthan.

The second part is recording of the undisputed position that the priest of the Nirmohi Akhara was managing the affairs on the Ram Chabutra. The observation thereafter, that there is no evidence that the plaintiff Nirmohi Akhara was managing the affairs of the deities after shifting is unjustified since:-

(i) After the alleged shifting, on 22-23.12.1949 as found by the High Court, a receiver was appointed by an order dated 29.12.1949 (7 days) who took possession on 5.1.1950 (i.e. 14 Days).

(ii) Oral Evidence has been led by the plaintiff - Nirmohi Akhara that the receiver had taken possession of the property from the plaintiff - Nirmohi Akhara. (**See Annexure A (III)**).

(iii) Though the Supurdagi Nama, by which the receiver took possession does not record from whom such possession was taken, but the said document clearly indicate the presence of the plaintiff Nirmohi Akhara in the outer courtyard.

(iv) As a result of the interim order passed in the S. 145 Proceedings as well as the interim orders passed by the Civil Court, whereby seva puja was required to be continued "as before", it was being carried out by the priests of the Nirmohi Akhara, as is evident from the Oral evidence of witnesses produced by the Plaintiff as Mentioned in **Annexure A(III)**.

(v) The witnesses of Plaintiff of Suit No. OOS 5 of 1989 have admitted the fact that the priests of Nirmohi Akhara were managing the affairs in Garbha Griha before and after attachment in their evidence.

See:

(i) OPW-1 - Sri Mahant Paramhans Ram C. Das (Volume 16 Page 58)

> "*… Before attachment, Hindus had been going to Garbha Griha without any restrictions for having Darshan. Idols of Lord Saligram, Hanumanji and Ramlalla were installed there. People Belonging to the Nirmohi Akhara never obstructed any Hindu from going to the Garbha Griha. Members of the Nirmohi Akhara used to manage Garbha Griha before attachment…*"

(ii) OPW-2 - Shri Devki Nandan Agarwal (Volume 17)

> *"… Bairagis of Nirmohi Akhara who used to worship at the Ram Chabutra did not allow muslims to enter inside. Therefore Namaz could never be performed in this place inspite of efforts made constantly" Page 363*
>
> *"… Worship of idols which existed earlier on Ram Chabutra and of the idol installed after 1949 was got done only by the people of the Nirmohi Akhara till a quarrel arose with Dharamdasji" Page 408*

(iii) OPW-5 - Shri Ram Nath Panda @ Bansari Panda (Volume 19 Page 861)

> *"11. In the Barred wall, there were two doors which used to remain locked and those doors were opened and closed by the Pujaris of the Nirmohi Akhara. The same very pujari used to offer prayers and perform Arti at Ram Chabutra and Sita Rasoi Etc. We used to arrange Darshan of the Garbh Griha for the pilgrims from the railing itself. A Donation box was also kept there. On the main gates were the shops of Batasha and flowed/garlands. One of those shops belong to Sehdev mali.*
>
> *"… The key of the lock used to be in the possession of the people of Nirmohi Akhara and whose pujari would open the lock, close the lock, and*

perform Arti puja and sounded bells and bugles…" ***Page 869***

"… from 1949 to 1970, I used to go to Ram Janm Bhumi Temple regularly. After the attachment of 1949, the receiver of Garbh Griha - Babu Priya Dutt Ram became the chairman of the Municipality Faizabad and at places like Ram Chabutra Temple, Chhati Puja Sthal, Bhandar Sthal and Shiv Darbar Puja continued to be performed in the same way as before and was performed by the same people who used to perform it before…." ***Page 873***

57. Thus it cannot be disputed that the Nirmohi Akhara has been managing the affairs of the deities - Idol of Ram Lalla and other deities as well as the Janmasthan. It is stated that apart from the other intrinsic material showing presence of the Nirmohi Akhara, it is the only institution in the immediately nearby vicinity in the outer courtyard itself which land-locks the Inner courtyard where there is presence of the Akhara and the Akhara alone. However it is also the stated case of the plaintiff - Nirmohi Akhara that it had never objected to or stopped any Hindu from visiting the said place and hence the fact that the property has been found to be used by other Hindus is really of no consequence.

58. Therefore, once the position regarding the shebiati rights of the Plaintiff have remained unrebutted and undisputed as noticed in Para 2138, there was no justification for the Court to observe in the same para that there was "no shebiat" of the deities "after" the alleged shifting especially when that was not even a case setup in the plaint as also rightly noticed in Para 2133 itself and in any case the conclusion is erroneous based on the evidence available.

59. Thus, Issue No. 2 and 4 of the OOS No. 3 are required to be decided in favour of the Appellant - Nirmohi Akhara.

RESPONSE TO THE SUBMISSIONS BY DR. DHAWAN
ON THE ISSUE OF SHEBAIT

60. It is stated that Dr. Dhawan has in his submissions categorically admitted and not disputed that Nirmohi Akhara is the Shebait of the deities, however his submission is that the idol as well as the Ram Janmasthan is limited to the Ram Chabutra.

61. It is stated that the Asthan Ram Janmabhumi comprises of the entire property i.e. the Inner Courtyard as well as the Outer Courtyard. Dr. Dhawan has admitted possession of the Nirmohi Akhara in the Outer Courtyard however he has submitted that that this was merely as a concession by way of an "easementary right". The submission regarding possession and easementary rights in the property would be dealt with separately.

RESPONSE TO THE SUBMISSIONS BY MR. C.S. VADYANATHAN
ON THE ISSUE OF THE CLAIM OF NIRMOHI AKHARA AS SHEBAIT
(SUBMISSION AT SR. NO. 9)

62. It is stated at the outset that the initial premise of the submission attributed to the Claim of the Nirmohi Akhara -

(i) That the claim is based on their having put up a Ram Chabutra in 1855 and
(ii) That they are the Mahants and Shebiat of the Idol put up in the Ram Chabutra.

Is not an accurate description of the claim/basis of claim of Nirmohi Akhara. It is submitted that in Para 1 of the Plaint it has been stated:-

> "*1. That there exists in Ayodhya, **since the days of yore** an Ancient Math or **Akhara of Ramanandi Vairagis called the Nirmohis** with its seat at Ramghat Known as the Nirmohi Akhara, the Plaintiff No. 1, which is a religious establishment of a public character, whereof the plaintiff No. 2 is the present head as its Mahant and Sabhrakar.*"

It is also stated that even the High Court has, while deciding Issue No. 17, in Suit No. 3 held (***See Para 799 Page 751 Vol. 1***) that the presence of Nirmohi Akhara at Ayodhya is related back to some time after 1734 AD:-

> *"**799**. We accordingly, in view of the above discussion, decide the issue No. 17 (Suit-3) in favour of the Plaintiffs by holding that Nirmohi Akhara, Plaintiff No. 1 is a panchayati Math of Ramanandi Sect of Vairagi and as such is a Religious Denomination following its religious faith and pursuit according to its own custom. **We however further hold that its continuance at Ayodhya finds sometimes after 1734 AD and not earlier thereto**".*

63. It is submitted that while the Nirmohi Akhara may have been established sometime in 1734 AD by Sri Balanandacharya, however "***the Ramanandis***" i.e. the followers of Sri Ramanandacharya is from a period much earlier and with passage of time, for protection of its temples, they first

created three Annis - Nirmohi, Nirvana and Digambar and therefrom seven Akharas - Nirmohi, Nirvana, Digambar, Santoshi, Khaki, Mahanirvani and Niralambi were established. The Akharas maintain their own customs and tenets and worship “Lord Rama” as God.

64. Thus to state that the claim of the Nirmohi Akhara is based on them having put up a Chabutra in 1855 AD is not correct. The Nirmohi Akhara and its Mahants and before them the Mahants of the Ramanadi Vairagis have been in control, possession and Management of the Temple of Ramjanmabhumi. The presence of the Bedi and Seetha Rasoi at the place is from much earlier and noticed even by Tiffenthaler whose work was published in 1770 AD which were being managed by the Ramanandis.

65. The submission that the Nirmohi Akhara claims that the Idol worshipped in Ram Chabutra in outer courtyard was shifted to the Central Dome in December 1949, is not correct. The Nirmohi Akhara has never claimed that there was any shifting of the Idol to the Central Dome in December 1949. It is the case of the Nirmohi Akhara that no such incident took place. However since it was the case of the Plaintiff in Suit 5, that such a shift took place from the Chabutra to the inner courtyard, the shebaiti of the same idol cannot change.

66. The submission (in Para 2) of Shri Vadyanathan seeking to differentiate the “Idol” of Ram Lalla and the Ram Janmabhumi, appears at best a reluctant attempt, to deny the claim of the Plaintiff Nirmohi Akhara as the Shebait, since it cannot be disputed that Nirmohi Akhara is the Shebait of the Idol. In this regard it is submitted:-

(a) In Para 2 of the Plaint of the Plaintiff - Nirmohi Akhara (which was filed it was specifically pleaded as under:-

> *“2. That **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*

Thus there is a specific case/claim of the plaintiff - Nirmohi Akhara that it is the Shebait of Ramjanm Asthan.

(b) The Janma Asthan, the Idol of Bhagwan Shri Ram or Ram Lalla in his Child form are both representative of the supreme one Devine God - Bhagwan Shri Ram and there cannot be a bifurcation of the two. The devotees worship the Janmasthan personified in the form of Deity i.e. the Idol of Lord Rama and hence one being a personification of the other, there is no difference between the two. No such distinction, as is sought to be made by Mr. Vadyanathan can be made. In fact in the Plaint of OOS No. 5 also it is stated as follows:-

> *“20. 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.* (also reproduced at page 1 of the submissions of Mr. Vadyanathan)

67. In the pleadings of Plaint of OOS No. 5 of 1989 (Page 234 Volume 72) (See Para 6, 7, 11 and 12), even though the pleading of OOS No. 3 of 1989 has been noticed, which includes a claim of Shebait of the Ram Janmasthan:-

i. It is not the case setup by the plaintiff that there is "no shebait" of the deities at all.

ii. It is not the case setup that there are separate shebaits of Ram Janmasthan and the Idol of Ram Lalla or that the Nirmohi Akhara is confined to the Ram Chabutra.

iii. It is not the case setup that "shebait is not looking after the deities faithfully" or that the claim of Nirmohi Akhara is "adverse" to the interest of the deities and for which it is required to be ousted; or

iv. It is also not the case that there is any person other than the Nirmohi Akhara, named either in the plaint or the written statements, who was the shebiat, managing the affairs of the deities.

(d) Even independent of Suit No. OOS 5, no rival claimant has setup a claim to be shebait/manager of the two deities except Nirmohi Akhara.

(e) On the issue of Shebaiti Management of the deities as well as Janmasthan, the position is virtually admitted and the Oral Evidence led by the Plaintiff on this issue has remained un-rebutted in cross-examination by the Hindu Parties. In fact there is complete absence of any cross - examination questioning or a challenge to the shebaiti rights of Nirmohi Akhara or setting up any rival claimant. Further there is nothing on record to even allege that the Nirmohi Akhara has acted against the interest of the deities. Further witnesses of the Plaintiff in OOS No. 5 have also admitted the said fact in evidence.

(i) OPW-1 - Sri Mahant Paramhans Ram C. Das (Volume 16 Page 58)

"*… Before attachment, Hindus had been going to Garbha Griha without any restrictions for having Darshan. Idols of Lord Saligram, Hanumanji and Ramlalla were installed there. People Belonging to the Nirmohi Akhara never obstructed any Hindu from going to the Garbha Griha. **Members of the Nirmohi Akhara used to manage Garbha Griha before attachment**…*"

(ii) OPW-2 - Shri Devki Nandan Agarwal (Volume 17)

"… Worship of idols which existed earlier on Ram Chabutra and of the idol installed after 1949 was got done only by the people of the Nirmohi Akhara till a quarrel arose with Dharamdasji" Page 408

(iii) OPW-5 - Shri Ram Nath Panda @ Bansari Panda (Volume 19 Page 861)

"11. In the Barred wall, there were two doors which used to remain

locked and those doors were opened and closed by the Pujaris of the Nirmohi Akhara. The same very pujari used to offer prayers and perform Arti at Ram Chabutra and Sita Rasoi Etc….

"… The key of the lock used to be in the possession of the people of Nirmohi Akhara and whose pujari would open the lock, close the lock, and perform Arti puja and sounded bells and bugles…" ***Page 869***

(f) At no point of time any other rival claimant has emerged ever claiming shebiatship or a right of management of the Deities (except now at the fag end of the arguments when Shri Dharam Das Defendant No. 13/1 (in Suit No. 4) and Defendant No. 14 (in Suit No. 5) is staking a claim as a Shebait). It is stated that his Guru Abhiram Das was appointed as a Pujari of the Ram Janmabhumi Temple and he cannot claim any right as a "Shebait".

(h) Dr. Dhawan has in his submissions expressly admitted the claim of the Nirmohi Akhara as the Shebait.

68. In Para 3 of the Submissions, it has been stated that the pleadings of Nirmohi Akhara are "hostile" the interest of the Plaintiffs in Suit No. 5. It is stated that detailed submissions had already been given with regard to the use of the word "belonging to" to which much emphasis has been laid. It is stated that there is no pleading by Nirmohi Akhara, which is contrary to the interest or hostile to the deities.

69. It is to be noted that the plaintiffs of OOS No. 5 have not replied to the specific submissions of the Nirmohi Akhara that the said suit (Suit 5) cannot be treated to be a suit under section 92 CPC wherein a prayer can be sought for removal of a Trustee or for framing of a scheme of Management.

70. Mr. Vadyanathan has also referred to Para 30 of the written statement (Volume 72 Page 266) and Para 53 (Volume 72 Page 271) in which the Nirmohi Akhara as a shebait has claimed "exclusive" right to take decision to construct the new temple. The said right is a right inherent in the Shebait and merely because the Shebait is asserting that right does not make its case hostile to the interest of the deity. In para 53, Nirmohi Akhara has denied the claim of the Nyas being espoused by the Plaintiff No. 3. There is nothing which can be said to be adverse to the interest of the deity. The judgments relied upon deal with situation where the Shebait is not acting or acting contrary to the interest of the deity. The said judgments have no application to the facts of the present case when the Plaintiff No. 3 of Suit 5 has neither "pleaded" nor "proved" the acts of the shebait which has forced it to approach the court to protect the interest of the deity.

71. In fact the submission by Mr. Vadyanathan to try to bifurcate the deities - Ram Lalla which is the presiding deity of the temple of Ram Janmabhumi and the Ram Janmabhumi to serve their self interest i.e. to support prayer (B) of their plaint. Further by submitting that the claim of the Nirmohi Akhara as Shebait to the Idol … "**wherever it is**" it appears to be a suggestion that this Hon'ble court may direct the Nirmohi Akhara to take the Idol of Ram Lalla and leave the Janmasthan to enable the plaintiff to construct the "*New Temple*" as stated in prayer B:-

"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 Shri Ram Janmabhumi Ayodhya, after demolishing and removing the existing buildings and structures etc. situate thereat, in so far as it is necessary or expedient to do so for the said purpose."

72. The plaintiff No. 3, as a disinterested next friend, who is representing Plaintiff No. 1 and 2 is seeking "perpetual injunction" against the defendants (which also includes the Nirmohi Akhara, its shebait) from interfering or objecting to the construction of a "new temple". Right to decide on behalf of the deity is of the Shebait. Just because a few people desire to construct a "big temple" in place of an old smaller temple, does not confer and clothe them of a "right" to demand and obtain a decree to that effect. The plaintiff No. 3 has to show a "legal right", which is absent since Plaintiff No. 3 neither is nor claims to be the Shebait. In all cases, a claim for a "new" or "a bigger temple" is not in the interest of the deity or the worshippers for emotional and spiritual attachment can be there with the Temple just as it is with the "deity" as well as the "Place". Final decision is to be taken by the Manager in the interest of the deity. The fact that he "decides" to act in a particular manner cannot mean that he is acting against the interest of the deity.

73. The aforesaid submission should however not be taken to mean that the Nirmohi Akhara is not in favour of construction of a New Temple at the place. It is submitted that a new temple needs to be constructed, after the demolition of the "OLD TEMPLE" in 1992 by some miscreants. The said task would be under taken, if so decreed, by the Nirmohi Akhara by taking help from all sections of the society.

74. Prayer B seeks a decree to construct a new temple "*after demolishing and removing the existing buildings and structures etc. situate thereat*". It is a co-incidence that the temples situated outside the present disputed building of 1460 Sq. Yards, were demolished by the then Government of Uttar Pradesh by issuing an notification for acquisition under the Land Acquisition Act, (before a stay could be obtained from the High Court) and which notification was quashed by judgment dated 11.12.1992 in MB No. 3541 of 1991 filed by Nirmohi Akhara. A few Days prior to pronouncement of the judgment in the land acquisition case, on 6.12.1992, some people in violation of the status-quo orders "executed" that part of the prayer and demolished the "Old Temple" that housed the deity of Ram Lalla.

III ISSUE OF MAINTAINABILITY OF SUIT OOS NO. 5 AT THE INSTANCE OF A"NEXT FRIEND"

ISSUE NO. 2 AND 6 OF OOS NO. 5

75. Issue no. 2 & Issue No. 6 of OOS No.5 is relating to maintainability of the said suit purportedly filed under Order 32 Rule 1 CPC through Plaintiff No. 3 - Devki Nandan Agarwal (the Next Friend).

- ***ISSUE NO.2 :Whether the suit in the name of deities described in the plaint as plaintiffs 1 and 2 is not maintainable through plaintiff no.3 as next friend?***

➢ ***ISSUE NO.6 : Is the plaintiff No.3 not entitled to represent the plaintiffs 1 and 2 as their next friend and is the suit not competent on this account?***

76. The argument of the plaintiff - Nirmohi Akhara against maintainability of Suit OOS No. 5 has been noticed in **Para 1705 (page 1114 Volume I)**. It was the specific case of the Plaintiff Nirmohi Akhara that the suit OOS No.5 of 1989 cannot be maintained on behalf of the deities by Plaintiff No.3 – Shri D.N. Agarwal as a '*next friend'* under Order XXXII, Rule 1, which was wholly inapplicable. Written objections were also filed against entertaining of the suit on their behalf.

> *"**1705**. Sri R.L.Verma, learned counsel appearing on behalf of Nirmohi Akhara defendant No.3 raised objection about the maintainability of suits through next friend and contended that there is no averment in the entire plaint (Suit-5) as to why the plaintiff no.3 be allowed to file suit on behalf of plaintiffs no. 1 and 2 as their next friend. He submits that neither there is any averment that the already working Shebait is not looking after the Deity faithfully and religiously nor there is any averment that there is no Shebait at all of the Deities, plaintiffs no.1 and 2, nor there is any averment that plaintiff no.3 himself is a worshipper of the Deities (plaintiffs no.1 and 2) and therefore, is interested in the welfare and proper management of the property and daily care of Deities themselves. Sri Verma submits that Order XXXII, Rule 1 in terms has no application to Suit-5. The suit, as framed, is not maintainable through the next friend, hence, is liable to be rejected on this ground alone."*

In order to answer the aforesaid objection the Hon'ble High Court framed points of determination in **Para 1710 and Para 1711 (Page 1124).**

> **"1710.** The pleadings, argument etc. over these issues require us to consider the matter from two different angles:
>
> The case of defendant no.3 (Suit-4), i.e., Nirmohi
>
> Whether plaintiff no.1 is a Deity in terms of Hindu Law. Its effect,
>
> Plaintiff no.2 is a place and therefore, first of all it has to be seen whether a place by itself can be a Deity and be conferred status of legal person in the light of principles of Hindu Law.
>
> **1711**. If both these aspects are decided in affirmance only then we will have to consider whether there was any Shebait of the said two plaintiffs and whether the plaintiff no.3 has rightly filed the suit in question as their next friend."

The questions framed in Para 1710 (Page 1124, Vol.1) have been answered in affirmative in Para 1918 (Page 1206, Vol.1) and it has been held that the Plaintiff No.1 & 2 are juridical persons for which the Plaintiff - Nirmohi Akhara raises no grievance.

77. A suit under Order XXXII, Rule 1 CPC is in respect of suits to be filed by a minor. Minor for the purposes of the said Order XXXII Rule 1 has been defined in the explanation appended to the said Rule 1 itself (inserted by Act No. 104 of 1976 and hence applicable to Suit OOS 5 of 1989 filed in 1989). Order XXXII Rule 1 has been reproduced hereunder:

> **"ORDER XXXII**
>
> **SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND**
>
> **1. Minor to sue by next friend**. – Every suit by a minor shall be instituted in his name by a person who in such suit be called the next friend of the minor.
>
> **Explanation** – In this Order, "minor" means a person who has not attained his majority within the meaning of section 3 of the Indian Majority Act, 1875 where suits relates to any of the matters mentioned in clauses (a) and (b) of the section 2 of that Act or any other matter."

78. As is evident, Order XXXII does not deal specifically with suits by or on behalf of idols/deities but only an "**inference**" is being drawn on a premise that deities are in the nature of "minor or infant" and therefore suits can be maintained on their behalf by their 'next friend'. It is submitted that minor for the purposes of Section 3 of the Indian Majority Act would apply only to 'natural persons' i.e., a person capable of attaining age of majority as specified and who has not yet attained the said age. An idol is incapable of attaining the age of majority and hence, not covered by definition of Section 3. In ***Doongarsee Shyamji vs. Tribhuvan Das, AIR 1947 All 375*** it was observed:-

> "… t*he analogy of a deity being treated as a minor is a very imperfect analogy and we cannot carry it far enough to make O. 32, Civil P.C. applicable*…".

79. **SUIT BY SHEBAIT**- Assuming such an inference can be drawn or on the principle of locus to maintain a suit on behalf of the deity, a suit for and on behalf of the deity can be filed only by the shebiat or the manager and no other. In ***1904 (31) IA 203, 210 - Maharaja Jaghdhindra Nath Roy Bahadur Vs Rani Hemlata Kumari Debi.,*** Privy Council has held that right to sue in respect of the property of the idol vests in the shebiat and not in the Idol. In ***Kalimata Debi v. Narendra Nath, 99 Ind Cas 917: (AIR 1927 Cal 244)***The Calcutta High Court was of the opinion that the Shebait alone can maintain a suit on behalf of an idol.

See also:-

- **AIR 1961 All 73, 77—Gyan Singh Vs Nagar Palika of the City of Agra (Para 13,14)**
- **AIR 1978 All 1 - Kishore Joo Vs Guman Bihari Joo** (Para 9)

80. **IDOL/DEITIES NOT NECESSARY PARTIES** - It is now a settled principle that deity is not a necessary party in all suits relating to Debuttar and the suit can be maintained by the Shebait in his own name. Under the Hindu law, the property vests in the deity only in the ideal sense and for all practical purposes it is the shebait, who looks after the deity and the deity's property. It is also accepted that in a shebait the office of a manager as well as property are blended together[3] and hence the Shebait can maintain a suit on behalf of the deity in his own name and need not implead the deity as a party in every case.

See:

- **Para 6.16, 6.28 - The Hindu Law of Religious and Charitable Trusts (Fifth Edition) (ANNEXURE B)**

WHO IS A SHEBAIT? - A HUMAN AGENCY TO REPRESENT A DEITY

81. The concept of Shebait was explained by the Privy Council in ***Pramatha Nath Mullick Vs Pradumna Kumar Mullick (1925) 52 IA 245 at p. 250-2***

> "… One of the questions emerging at this point, is as to the nature of such an idol, and the services due thereto. A Hindu Idol is, according to long established authority, founded upon religious customs of Hindus and the recognition thereof by courts of law

as "Juristic entity". It has a Juridical Status with the power of suing and be sued. *Its interests are attended to by the person* ***who has the deity in his charge and who is in law its manager*** *with all powers which would, in such circumstances,* ***on analogy****, be given to the Manager of the estate of an infant heir*. It is unnecessary to quote authorities, for this doctrine thus simply stated is firmly established.

"… ***The person founding a deity and becoming responsible for those duties is defacto and in common parlance called shebait.*** This responsibility is, of course, maintained by a pious Hindu either by personal performance of the religious rites or - as in case of sudras, …. By employment of brahmin priest to do so on his behalf…"

"… The position and rights of the deity must, in order to work this out both in regard to its preservation, *its maintenance and the services to be performed* ***be in charge of a Human Being****.* ***Accordingly he is the Shebiat Custodian of the Idol and manager of its estate***.

In ***Prafulla Chorone Requittee Vs Satya Chorone Requitte (1979) 3 SCC 409*** (page 417 Para 20):-

"20. Before dealing with these contention, it will be appropriate to have a clear idea of the concept, the legal character and the incident of shebiatship. Property Dedicated to an idol vests in it in an ideal sense only; ex necessitas, the possession and management has to be entrusted to some human agent. Such an agent of the idol is known as Shebait in Northern India. The legal character cannot be defined with precision and exactitude. *Broadly described, he is the human ministrant and custodian of the idol, its earthly spokesman, its authorised representative entitled to deal with all its temporal affairs and to manage its property. As regards administration of the debutter, his position is analogous to that of a trustee*; yet he is not precisely in the position of a trustee in an English sense, because under Hindu law, property absolutely dedicated to an idol, vests in the idol and not in the shebait. *Although the debutter never vests in the she bait, yet, peculiarly enough, almost in every case the shebait has a right to be part of the usufruct, the mode of enjoyment, and the amount of the usufruct depending again on usage and custom, if not devised by the founder*."

82. Thus "ordinarily" it is the shebait which is entitled to initiate action on behalf of the deities either in his own name or in the name of the deities. There is however a recognised exception to the rule as noticed in ***Bishwanath vs. Sri Thakur Radha Ballabhji AIR 1967 SC 1044 -*** when a "worshipper" can also be clothed with "***an adhoc power of representation to protect the interest of the deity***" when the person ordinarily representation him i.e. the shebait "***leaves it in the lurch***". The judgment does not deal with or hold that a deity is a "minor" for all purposes or that he is a "perpetual minor". The judgment only holds a deity to be a minor "under certain circumstances", the underlying principle being cases where the shebiat leaves the deity in lurch. Thus exceptions being:-

(ii) Where the shebait "refuses" to act to protect the interest of the deity, or

(iii) Where the shebait has a conflict of interest i.e., where the suit seeks to challenge the Act of the shebait himself.

See also:-

- ***AIR 1961 Allahabad 206*** - ***Sri Thakur Kirshna Chandramajju vs. Kanhayalal and others*** the Hon'ble High Court of Allahabad observed that where the acts of the alleged Shebait are being impugned, then the idol may sue through a next friend who has beneficial interest in the property.

- ***AIR 1941 Cal 272 - Sri Sri Sridhar Jew v. Manindra K. Mitter,*** the Hon'ble High Court observed that when the interests of the Shebait are adverse to that of the idol then the idol should be represented through a disinterested next friend.

83. Thus whether or not a suit can be maintained by a next friend *would depend of the nature of the suit and the nature of the reliefs claimed* and hence only in exceptional circumstances, a *de-facto* right can be vested in a "worshipper" or any person who is able to show some beneficial interest in the endowed property, to bring a suit in the name of the deities.

84. In the facts of the present case, the Plaintiff Nirmohi Akhara has been acting as the shebait of the deities and had already instituted a suit admittedly in 1959 i.e., 30 years prior to the institution of OOS No. 5 of 1989. Further the "reliefs" claimed in OOS No. 5 are not questioning any act of the Nirmohi Akhara or its Mahants and hence, in view of the nature of the relief claimed, it cannot be said that the Nirmohi Akhara has a conflict of interest with the two deities so as to enable a "next friend" to sue on their behalf.

85. **SH. DEVKI NANDAN AGARWAL, THE NEXT FRIEND, NOT A "WORSHIPPER"** - Even in terms of ***Bishwanath (Supra),*** the right to file a suit on behalf of the deity, under the aforesaid exceptional circumstances, has been reserved with the "worshipper" *who may have beneficial interest in the endowment or in the deity*. It is stated that in the Suit – OOS No.5, *there is no statement, as a matter of fact, to the effect that Shri DN Agarwal (Plaintiff No. 3) was a worshipper of the two deities*. Further in evidence, he has admitted that he does not believe in idols and he is the follower of 'Arvind Ashram' established by Maharishi Arvind who does not believe in idol worship. So far as worshipping Plaintiff No. 2, it has been admitted by him that he had only once visited the place. Thus, a suit instituted at the instance of Shri Devki Nandan Agarwal who was not even a worshipper of the two idols was not maintainable even otherwise.

See:-

(i) OPW-2 - Shri Devki Nandan Agarwal (Volume 17)

> *"During the period between 1940-1952, I did business of Brick Kiln and also worked as a Contractor. I did this work till 1954. During the period from 1940-1954, when I was doing business I had no time to take interest in religion.* ***I never did Idol worship****. Then volunteer : that his mother used to worship idols. My wife also used to do idol worship…" (****Page 371****)*
>
> *" … After 1955 and since 1960, I came under the influence of Shri Arvind Ji……. As I was living with them, I was influenced with the writing of Shri Arvind. …… Meetings used to be held in my house regarding the thoughts of Shri Arvind after 1965. After 1965 till 1971 meetings were being held held in my house, but it did not have any special impact on me. …. This has also been a main component of his philosophy that this world is not an illusion but an expression of divine. About Ishwar he said that bhagwan, Allah, god are all concept of non being i.e. concept of god without form and attributes and who is in the world in every form, which means that he exists in every living being, in every insect and in every thing. In other words we can say that god exists in each and every particle of the universe. It is cause of it and also the end of it. It has no particular form and it has innumerable forms." (****page 371-372****)*
>
> *"During the year 1965 - 66, Shri Maa had established a Centre of Shri Arvind Society in My House after seeing the photograph of my wife. At that time, Preeti Adawal was secretary and Shri Sumitra Nandan pant was president of the above centre. After the death of Shri Sumityra Nandan pant, I was appointed as the president of that centre." (****Page 373-374****)*
>
> *"After the establishment of the centre of Shri Arvind Society in my home in 1968, my faith in the society of Shri Arvind went on increasing. By 1974-75, I had complete faith in it. I still have complete faith in the philosophy of Shri Arvind." (****Page 375****)*

Regarding visit to the Ram Janma Bhumi it was stated by him that:-

> *"… I never visited Ayodhya from 1934 till 1955, but during the period from 1955 to 1977, I had been going to Faizabad but I do not remember whether I ever went to Ayodhya. Then he said that he remembered that he had once gone to Ayodhya; then I was the standing advocate. Either I went during 1977 to 1983, I do not remember. But once when I was going from Lucknow to Gorakhpur then on the way I had stopped at Ayodhya and took bath in the Saryu River. This visit took place between 1977 and 1983 but I do not remember the exact date. During that visit, I took bath in Saryu and perhaps went to hanuman Garhi* ***but did not go to Ram Janmabhumi****". (****page 382****)*

86. In Para 17 of the Plaint, it has however projected "***Shri Ram Janmabhumi Nyas***" as a person "interested" in the seva, puja and other affairs of the plaintiff deities. It is therefor evident that the Plaintiff No. 3 was merely a "proxy" on behalf of "Shri Ram Janma Bhumi Nyas" and hence cannot be said to be a "disinterested person" to qualify as a next friend.

87. Shri Ram Janma Bhumi Nyas was created in 1.5.1987 and hence cannot at all "claim" to be the shebait or Manager of the deities for which the Nirmohi Akhara has been fighting for more than 200 Years. In any case the an application filed by the Ram Janma Bhumi Nyas for transposition as a plaintiff was dismissed by High Court by an order dated 19.3.1996. No Appeal has been preferred by the Nyas before this Court.

88. In any case, the constitution of the Ram Janmabhumi Nyas is under challenge and is Pending consideration in Regular Suit No. 426/1989 filed by the Nirmohi Akhara (Ex C-5 (Suit-5) Volume 92).

CAN "POSSESSION" OF THE PROPERTY FOUND TO BE OF THE DEITY BE DELIVERED TO THE NEXT FRIEND?

89. It is stated that in a suit filed in the name of the deity by a next friend in his capacity as a worshipper, a decree for possession cannot be granted to it. ***In fact neither Plaintiff of OOS No. 1 - Sh Gopal Visharad nor Plaintiff No. 3 of OOS No. 5 have intact claimed a relief of possession***. The next friend necessarily is a person who does not seek relief for himself but only for the deities whom he represents. A decree for possession or recovery of possession cannot also be granted in favour of a worshipper. In ***Veruareddy Ramaraghava Reddy Vs Konduru Sheshu Reddy (1966) Supp SCR 270, 277*** it has been held:-

> *"… The legal position is also well established that the worshipper of a Hindu temple is entitled, in certain circumstances, to bring a suit for declaration that the alienation of the temple properties by the de jure Shebait is invalid and not binding upon the temple. If a Shebait has improperly alienated trust property a suit can be brought by any person interested for a declaration that such alienation is not binding upon the deity* ***but no decree for recovery of possession can be made in such a suit unless the plaintiff in the suit has the present right to the possession****. Worshippers of temples are in the position of cestui que trustent or beneficiaries in a spiritual sense (See Vidhyapurna Thirthaswami v. Vidhyanidhi Thirthaswami[ILR 27 Mad 435 at 351].* ***Since the worshippers do not exercise the deity's power of suing to protect its own interests, they are not entitled to recover possession of the property improperly alienated by the Shebait, but they can be granted a declaratory decree that the alienation is not binding on the deity*** *(See for example, Kalyana Venkataramana Ayyanagar v. Kasturiranga Ayyangar [ILR 40 Mad 212] and Chidambaranatha Thambiran v. Nallasiva Mudaliar [IRL 41 Mad 124] …"*

90. In ***Doongarsee Shyamji vs. Tribhuvan Das, AIR 1947 All 375 : 1946 SCC OnLine All 120 (Para 12)*** the legal position has been aptly stated as under:-

> *"12. In the case before us there are no allegations that it is in the interest of plaintiff 4, the deity, that the defendant should be removed and plaintiffs 1 to 3 put in charge of its property, nor are there allegations of any waste or mismanagement. There are no allegations in the plaint that defendant 1 is not a fit person to look after the deity or that he is not looking after the deity and its property properly. Neither the defendant nor plaintiffs 1 to 3 can claim to be the properly appointed sebaits of the deity and Saraswati Bai, who was the last sebait, was as great a well wisher of the deity as plaintiffs 1 to 3 and it cannot be said that when she selected defendant 1 and put him in charge, though strictly speaking she may not have had the legal authority, she did not act in the best interest of the deity. The result of accepting the argument of learned counsel would be that any person can constitute himself as the next friend of a deity and file a suit in the name of the deity for possession of the property by the dispossession of a de facta sebait who may be managing the property and looking after the deity to the satisfaction of everybody and get hold of the property in the name of the idol till such time as he is dispossessed again by somebody else.* ***We are not prepared to hold that such is the law that any third person can constitute himself as next friend and file a suit and claim an absolute right to possession of the property simply because he has filed the suit in the name of the deity****."*

See also:-

(i) AIR 1947 Nagpur 233 - Kisan Bhagwan Marathe Vs Shree Maroti Saunsthan (Para 3-10)

(ii) AIR 1956 ALL 207 - Shivaji Maharaj Vs Lala Barati Lal (Para 9,10, 14-16, 21)

91. It is stated that the factual situation noticed in Para 12 in ***Doongarsee Shyamji (supra)*** is identical to the facts of the present case. *The defendant Nirmohi Akhara has been made a defendant in the suit OOS No. 5 of 1989*. In the plaint of (OOS No. 5 - Filed by the deities), the litigation initiated by Nirmohi Akhara (i.e. OOS No. 3 of 1989) has been referred to and therefore it cannot be disputed that the plaintiff is fully aware about the claim of Nirmohi Akhara as the Shebiat of the deities. Despite this, the plaint is silent about the role of Defendant No. 3 and there is no challenge to the claim of Nirmohi Akhara to act as the shebiat of the deities. The Plaint is also silent on the aspect that Nirmohi Akhara is acting adversely to the interest of the deity. There is also no assertion that the Plaintiff No. 3 himself is the shebiat or any other person, impleaded in the plaint is the shebiat. **Thus even if title to the properties is held to vest in the deities - Plaintiff No. 1 and 2 of OOS No. 5, the possession thereof, even in Suit No. OOS No. 5 must be directed to be delivered only to Defendant No. 3 - Nirmohi Akhara**.

92. The relief granted to the Plaintiff No. 3 (by referring to the plaintiffs of Suit OOS No. 5 of 1989 by the word "*Plaintiff**s***") is therefore unjustified. Plaintiff No. 3 claims only as the "Next Friend" who cannot himself become a "Plaintiff" and claim a right of possession of the property on behalf of the Deities upon a declaration that the properties vest in the Deities.

93. It is also stated that grant of the said relief - enabling recovery of possession from the receiver to the Next Friend or any other worshipper, in fact runs counter to the conclusion reached by the High Court itself while deciding issue No. 20(b) of OOS No. 4 of 1989 filed by the Sunni Central Board of Waqfs. (See Page 2855 Para 4501-4505). In Para 4504 it has been held that "*… the management being the responsibility of a Muttawali, the possession of a waqf can also be*

claimed by him ***since a worshipper is not entitled for possession of a waqf property though he may be allowed to file a suit for protection of the property of waqf but possession of such waqf cannot be granted to such worshipper***.". It is submitted that a similar conclusion has however not been applied while granting relief in suit OOS No. 5 of 1989. The Judgment, to that extent is self contradictory.

SUIT OOS NO. 5 OF 1989 - NOT A SUIT UNDER SECTION 92 CPC

94. A suit under section 92 CPC, must satisfy the following essential ingredients as is aparent from the said section:-

1. Cause of action - (i) in case of any alleged breach of any express or implied trust created for public purpose or (ii) where the direction of the court is deemed necessary for the administration of such trust.
2. Party Plaintiffs - The Advocate General, or two or more persons having an interest in the trust.
3. Condition precedent - The plaintiffs need to obtain leave of the court
4. The reliefs - as stated in clause (a) to (h) of subsection (1).

95. It is stated that OOS No. 5 of 1989 does not satisfy any of the conditions. There is no allegation of any breach of a any express or implied trust and further in the reliefs no directions for "administration" of the trust has been sought for by the plaintiffs. No allegation has been made against the Nirmohi Akhara and no direction has been sought for removal of any trustee, for appointment of any new trustee or for settling a scheme as provided under clauses (a), (b) and (g) of sub-section (1). Even the suit has not been instituted by "two persons having an interest in the trust" and no leave has been obtained from the court as mandated. The present suit is by only one person and he also does not even claim to have any interest in the trust or to be a worshipper of the deities.

96. In ***Bishwanath (Supra)*** it has been observed:-

> "**…** It is settled law that to invoke Section 92 of the Code of Civil Procedure, 3 conditions have to be satisfied, namely, (*i*) the trust is created for public purposes of a charitable or religious nature; (*ii*) there was a breach of trust or a direction of court is necessary in the administration of such a trust; and (*iii*) the relief claimed is one or other of the reliefs enumerated therein. If any of the 3 conditions is not satisfied, the suit falls outside the scope of the said section. A suit by an idol for a declaration of its title to property and for possession of the same from the defendant, who is in possession thereof under a void alienation, is not one of the reliefs found in Section 92 of the Code of Civil Procedure. That a suit for declaration that a property belongs to a trust is held to fall outside the scope of Section 92 of the Code of Civil Procedure by the Privy Council in *Abdur Rahim* v. *Barkat Ali* [(1928) LP 55 IA 96] , and by this Court in *Mahant Pragdasji Guru Bhagwandasji* v. *Patel Ishwarlalbhai Narsi-bhai* [(1952) SCR 513] on the ground that a relief for declaration is not one of the reliefs enumerated in Section 92 of the Code of Civil Procedure. So too, for the same reason a suit for a declaration that certain properties belong to a trust and for possession thereof from the alienee has also been held to be not covered by the provisions of Section 92 of the Code of Civil Procedure: See *Mukhda Mannudas Bairagi* v. *Chagan Kisan Bhawasar* [ILR 1957 Bom, 809].

97. Thus, the plaintiffs for OOS No. 5 of 1989 cannot (and in fact have not) claimed any relief for removal of the Nirmohi Akhara as the shebait or for a direction to "frame a scheme" or appoint

any other person (such as the Ram Janmbhumi Nyas or any other person) as a trustee or a shebait. Thus no such direction can be issued in the said suit - OOS No. 5 of 1989.

ISSUE OF LIMITATION (ISSUE NO. 14) IN OOS NO. 5 OF 1989

98. Suit No. OOS 5 of 1989 has been held to be within limitation (See Page 1516 Para 2581 to 1565 Para 2738) by applying inter-alia the theory of perpetual minor (See Page 1522 Para 2599).

99. It is stated that the said reasoning of the High Court to decide the issue of limitation in favour of the plaintiffs of Suit No. OOS 5 cannot be sustained. It is submitted that the said suit - OOS No. 5 of 1989 can however be sustained on the point of limitation, for the reasons already set out in Part I of the submission on Limitation already made, but not on the ground that the deity is a "perpetual minor" and hence no period of limitation can run against it.

STATEMENT ON THE STAND OF THE NIRMOHI AKHARA ON THE MAINTAINABILITY OF SUIT OOS NO. 5 OF 1989

1. The Nirmohi Akhara would not press the issue of Maintainability of Suit No. OOS No. 5 of 1989 which has been filed on behalf of the deities Plaintiff No. 1 and 2 through Plaintiff No. 3 as their next friend under Order 32 Rule 1 CPC provided the other Hindu Parties i.e. Plaintiff of OOS No. 1 of 1989 and Plaintiff No. 3 of OOS No. 5 of 1989 do not press or question the Shebaiti right of Nirmohi Akhara in relation to the deities in question and the Maintainability of Suit OOS No. 3 of 1989 by the Plaintiff Nirmohi Akhara.

2. It is submitted that the plaintiff - Nirmohi Akhara can independently maintain the suit even in the absence of Deities as parties in Suit OOS No. 3 of 1989 as the identity of the deities is merged in the identity of the Shebait - Nirmohi Akhara. A suit filed by the Nirmohi Akhara "as a Shebait" is a suit filed by and on behalf of the deities.

3. It is stated that, the reliefs sought by the Nirmohi Akhara "For restoration of charge and management from the receiver" can be categorised as a reliefs "against" the interest of the deities for which it can be said that they should be represented as a defendant through a disinterested next friend.

RESPONSE TO THE SUBMISSIONS BY MR. C.S. VADYANATHAN
"OTHER MISCELLANEOUS OBJECTIONS"
(SUBMISSION AT SR. NO. 10)

100. Shri Vadyanathan has in his submissions (Other Miscellaneous Objections) has submitted, relying upon order dated 20.4.1992 that the objections against the appointment of next friend raised by Nirmohi Akhara and some Muslim Parties were "considered" by the Hon'ble High Court and "rejected". A bare reading of the order (at Page 133 @134 and 135 of his Submissions) shows that the said statement is not accurate. The High Court noticed that issues

had not been framed and whether the issues covered by the said application should be taken up for Preliminary hearing or decided along with the suit could be decided at an appropriate stage and hence at that stage, applications were rejected.

101. Subsequent order dated 25.4.2002 was on an order under order 32 Rule 10 CPC for replacement of the existing next friend who had died during the pendency of the suit. The court did not decided the issue of maintainability of the suit at the instance of next friend. It is to be noted that the application came to be filed after evidence in the cases had been led and statement of Sh. Devki Nandan Agarwal had been recorded. Shri T.P. Verma had merely "replaced" Shri D.N. Agarwal and the maintainability of the suit would have to be decided on the basis of eligibility of the original Plaintiff No. 3 - Shri D,N, Agarwal. None of the other Next Friends were examined to establish that they were worshippers or otherwise eligible to act as a Next Friend.

102. In any case the issue of Maintainability of the suit OOS 5 of 1989, when the suit filed by the Nirmohi Akhara as a Shebait was already pending was required to be decided. It is submitted that the High Court did decide the said issue on merits and not on the basis that the said issue stood concluded due to the orders dated 20.4.1992 or 25.4.2002.

IV. EXISTENCE OF RAM TEMPLE AT RAM JANMABHUMI WHICH WAS REVERED BY THE HINDUS SINCE TIME IMMEMORIAL AND PRESENCE OF NIRMOHI AKHARA

103. In order to trace the existence of the Ram Janmabhumi Temple and possession of the Nirmohi Akhara, historical facts chronologically are discernible as under:-

1528 AD — It is claimed by the Muslim Parties that Badshah Babar had come to India and at his instance his general (Mir Baqi) constructed a Mosque known as the "*Babri Masjid*". They have however not admitted the fact that the said mosque was constructed bye demolition of a Hindu Temple or that there was a Hindu Temple in existence prior to the construction of the Babri Mosque. It is however noteworthy that:-

(a) There is nothing in the Babar-Nama, which otherwise gives a detailed day-to-day account of the events of the period when Babar entered India in about 1524 AD, about the construction of Babri Mosque at Ayodhya. The pleaded case of the Muslims that the Babri Masjid was constructed by Badshah Babar is therefore not been established or proved by any material whatsoever.

(b) The fact that there was a massive Hindu Temple in existence upon which another building was constructed is now evident from the expert report of the ASI.

(c) The building that was constructed could not be described as a mosque. This issue has been dealt with in detail by Shri P.N. Mishra in his opening submissions.

See Mr. P.N. Mishra's submissions:-

(i) Part XVII - Ram Janmabhumi Temple and mosque could not co-exist. (***Pages 126-129***)

(ii) Part XVIII - Structure having images/idols cannot be a *Masjid (**Pages 130-131**)*

(iii) Part XIX - Mosque surrounded by graves/facing towards graves namaz could not be offered. (***Pages 132-133***)

(iv) Part XX - In the vicinity of a temple having bells, no mosque could exist. (***Page 134-136***)

(v) Part XXI - No provision of water for *wadu* in disputed structure - could not be a mosque. (***Pages 137-140***)

(vi) Part XXII - Waqif must by the owner of the property for creating a valid waqf. The owner must consent to and give voluntarily land for construction of a mosque (***Pages 141-146***)

Finding of the High Court

Para 3445 page 1975 Vol II (Jus Sudhir Agarwal)

At pages 2975, 2976, 3039, et. al. of Vol. III (Jus D.V. Sharma)

(d) A letter written by Babar to his son Humayun on the contrary reflects the

all encompassing and embracing virtue of Babar who wished his son to respect people of all religions. It is therefore strange that two years after this letter he would himself order his General to demolish one of the most revered places of Hindus and construct a Mosque in its place.

Thus the building constructed and which was found on the site as on the date of attachment in the year 1949 was a Hindu temple. The building re-constructed using the remains of the previous old temple (Kasauti Pillars, idols etc) was a temple and continued to be a temple. The building as well as the revered places within - Bedi, Seeta Rasoi which was worshipped by the Hindus was therefore always a temple.

1734 AD — The High Court has found the presence of Nirmohi Akhara at Ayodhya from 1734 AD after Mahant Govind Dasji came to Ayodhya from Jaipur. (*See Para 799 Page 751 - Jus. Sudhir Agarwal and Page 3496 - Jus. D.V Sharma*)

1770 AD — Joseph Tieffentheller - Historique Et Géographique De l Inde

> "… But a place **more particularly famous is that which is called the Sitha Rassoee, the table of Sitha (seeta), wife of Ram**; situated on an eminence to the south of the city. The emperor Aurangzeb, demolished the fortress called Ramcote, and erected on the site, a Mohammedan temple with a triple dome. According to others, it was erected by Babar. There are to be seen fourteen columns of black stone, five spans in height, which occupied the site of the fortress. Twelve of these columns support the interior arcades of the Mosque : the two other form part of the tomb of certain Moor. They tell us, or rather these remains of skilfully wrought columns, were brought from isle of Lanca or Selendip (Ceylon) by Hanuman, King of the monkeys. **On the left is seen a chest raised five inches from the ground covered with lime, about 5 ells in length and not more than four in breadth. The hindus call is Bedi, the cradle and the reason is that there formerly stood here the house in which Beshan (Vishnoo) was born in the form of Ram and were also, they say, his three brothers were born**. Afterwords, Aurangzeb, or, according to others Baber, caused the place to be destroyed, in order to deprive the heathen of the opportunity to practice their superstitions. Nevertheless, they still pay a superstitious reverence to both these places, namely to that on which the natal dwelling of Ram stood by going three times round it prostrate on the earth. The two places are surrounded with a Low wall adorned with battlements…" **(Ex. 133 (Suit 5)) (Quoted at Page 3089 Volume III - Judgment)**

From the aforesaid account the following facts emerge clearly:-

(a) That there was a place which continued to be identified as the Sita Rasoi. There was a "bedi" or cradle - raised five inches from the ground covered with lime, about 5 ells in length and not more than four in breadth.

(b) Both the said places were in existence in 1770 AD and which were revered to by the Hindus.

(c) The Building being referred to was a "triple dome structure" with 14 Kasauti Pillars which is therefore a clear reference to the building in question. The building is described by him to be a "Mohammedan Temple" probably due to the information given to him that it was constructed by Aurangzeb or Babar. The use of the building, he saw

was worship by Hindus. Strangely, no reference of any Muslims visiting the place despite it being a "Mohammedan Temple".

(d) The Hindus also used to do Parikrama. The entire structure was considered sacred and Parikrama was performed around the building.

(e) The two places (i.e, the Sita Rasoi and the Cradle/Bedi) are surrounded with a Low wall adorned with battlements (which is the outer wall of the disputed structure)

1828 AD "East India Gazeteer of Hindustan" by Walter Hamilton

> "… The modern town extends a considerable way along the banks of the Goggra, adjoining Fyzabad, and is tolerable well peopled but inland is a mass of rubbish and jungle among which are the reputed sites of temples dedicated to Rama, Seeta, his wife, Lakshman, his general, and Hunimaun (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 performed the customary ceremonies" **(Page 3091 Volume III - Judgment)**

(a) The Ramata Sect has been noticed and explained in the B.K. Mukharjea - Hindu Law and Religious and Charitable trusts (fifth edition) Para 1.28. as follows:-

> "**1.28. Ramananda**. - Ramananda, reputed, though not correctly, to be one of the followers of Ramanuja, founded a different school of Vaishnavism. His followers worshipped Ramchandra as an incarnation of Vishnu and are known by the name of Ramaths. They abound in the northern India and there are several Mutts of celebrity belonging to this order at Benaras" **(ANNEXURE B)**

1855 AD A fight took place between the Hindus and the Muslims, in which Muslims took over the Janmasthan and tried to capture Hanumangarhi also. The Hindus first repulsed an attempt by the Muslims to capture Hanumangarhi and thereafter recaptured Janmasthan. In this fight, 75 Muslims died and 11 Hindus also lost their lives. Thus after 1855 AD, the entire Janmasthan came back in possession of the Hindus.

—- Several attempts have been made thereafter to somehow take over the sites which was never allowed. Even the British Government also did not favourably decide in favour of the Muslims despite several complaints made in that regard.

1854 AD "The Gazetteer of the Territories under the Government of East India Company", by Edward Thornton

> "Here, in a large building a mile from the river, is an extensive establishment, called Hanumangurb, or Fort of Hanuman, in honour of the fabled monkey-god the auxillary of Rama. It has an annual revenue of 50,000 rupees, settled on it by Shuja-ud-daulah, formerly Nawaub Vizier. It is manage by a malik or abbot, the spiritual superior; and the revenues are dispensed to about 500 bairagis or religious ascetics, and other Hindoo mendicants of various descriptions. No Musalmans being allowed within

the walls…

… Close to the town on the East, and on the right bank of the Ghogra, are extensive ruins, said to be those of the forts of Rama, king of Oude, hero of the Ramayana, and otherwise highly celebrated in the mythological and romantic legends of India. Buchanan observes, "that the heaps of bricks, although much seems to have been carried away by the river, extend a great way; that is, more than a mile in length, and more than half a mile in width; and that, although vast quantities of materials have been removed to build the Mahomedan Ayodha or Fyzabad, yet, the ruins in many parts retain a very considerable elevation; nor is there any reason to doubt that **the structure to which they belonged has been very great, when we consider that it has been ruined for about 2000 years**." The ruins still bear the name of Ramgurh, "or of fort of Rama"…"

"… Not the smallest traces of these temples, however, now remain; and according to native tradition they were demolished by Aurangzebe, who built a mosque on part of the site, the falsehood of the tradition is however, proved by an inscription on the wall of the mosque, an attributing work to the conqueror Baber, from whom Aurangzebe was 5th in descent. The mosque is embellished with 14 columns of only 5 or 6 feet in height, but of very elaborate and tasteful workmanship, said to have been taken from the ruins of the Hindoo fanes, to which they had been given by the monkey general Hanuman, who had brought them from Lanka or Ceylon.

A quadrangular coffer of stone, whitewashed five ells long, 4 broad, and protruding 5 or 6 inches above ground, is pointed out as the cradle in which Rama was born as the 7th Avatar of Vishnoo; and is accordingly abundantly honoured by the pilgrimages and devotions of the Hindoos …" **(Ex. 5 (Suit-5) Volume 73 Page 33-37) (Page 3092 Volume III - Judgment)**

(a) The "cradle" noticed by Joseph Tieffentheller in 1770 was also noticed by Edward Thornton.

25.9.1866 **EX - A-13** (**Volume 3 Page 36**) (**Translation appears to be defective and correct translation is at Page 1396-97 Vol- II**) — A complaint was made by Meer Rajab Ali Khateeb regarding the "Kothri" constructed by Tulsidas etc. Bairagis. In the said complaint it has been stated:-

"… about a month back, **Tulsidas etc. Bairagis, Janmasthan**, with an intention of placing an idol etc. in it have constructed a kothari in an illegal manner within a few hours inside the compound of the mosque. The applicant informed the police vide Roznamcha Thana but till now no orders regarding demolition of the Kothri has been issued by the Government…"

"… Mr. Goldane Commissioner did not find even the chabutra built near the Kothri in the past. At the time of Gadar, within two days, Bairagian got the Chabutra Constructed overnight…."

Note:-

(a) The complaint was made against Tulsidas, who was a Mahant of the Nirmohi Akhara (*See Para 40 of Statement of DW-3/1 - Mahant Bhaskar Das (reproduced at Page 709) and Para 48 of the Statement of DW-3/20 - Mahant Raja Ramchandracharya (reproduced at Page 729)*)

(b) Possession by the Bairagis is admitted w.r.t. Chabutra as well as the Kothri.

(c) Chabutra was thus different from the "Bedi" noticed by Joseph Tieffentheller and Edward Thornton. The Chabutra was constructed, according to the complainant within two days during the 1857 riots.

(d) There is no reference of any bifurcation of the building into inner and the outer courtyard by the wall by the British Government. Had it been the case, the Muslims would not have complained about a construction made "Kothri" in the Outer Courtyard.

12.10.1866 **Ex 29 (Suit OOS-1) (Volume 87, Page 135)** - The aforesaid complaint was consigned to record. (thus no relief was granted to the Muslims).

1870 Historical Sketch of Faizabad, by P. Carnegi (**Page 4054 Vol. III - judgment, at 4062**) **(Ex. 49 (Suit-5) Volume 74 Page 469)**

"Hindu Muslim differences – The Janmasthan is within a few hundred paces of the Hanomangarhiin 1855, when a great rapture took place between the Hindus and the Muhammadans, the former occupied the Hanomangarhi in force, while the Musalmans took possession of the Janmasthan. The Mohammadans on that occasion actually charged up the steps of the Hanomangarhi, but were driven back with considerable loss. The Hindus then followed up this success, and at the third attempt took the Janmasthan at the gate of which 75 Muhammadan were buried in the 'martyr's grave' (ganj shahid). Several of the King's regiment were looking on all the time but their order were not to interfere. It is said that up to that time the Hindus and Mohammadans alike use to worship in the mosque-temple. Since British rule a railing has been put up to prevent the disputes within which, in the mosque, the Mohammadans pray; while outside the fence the Hindus have raised a platform on which they make their offerings.

(ANNEXURE C)

Note:- From the aforesaid historical sketch, it is evident that prior to 1855, the Janmasthan was in possession of the Hindus, which was only temporarily taken over by the Muslims but thereafter the Hindus re-gained it.

Note:- In para 2314 (page 1361 Vol II) of the judgment by Jus. Sudhir Agarwal, it has been noted as under:-

> "**2134** Be that as it may, even if for the purpose of the issues in question we assume that the building in question was so constructed in 1528AD, *there is no evidence whatsoever that after its construction, it was ever used as a mosque by muslims till at least 1856-57. Sri Jilani fairly admitted during the course of arguments that historical or other evidence is not available to show the position of possession or offering of namaz in the disputed building at least till 1855*. He has also disputed seriously the alleged riots of 1855. For the time being we do not intend to concentrate on this aspect whether this denial of Sri Jilani and Siddiqui and other Muslim Counsels about 1855 riot is correct or not and proceed to consider further material and other aspects."

13.4.1877 Permission was granted to Mahant Khem Das for construction of a New Gate on the Northern Side.

13.12.1877 **Ex 30 (OOS -1) (Volume 87 Page 136-144)** - Appeal filed against the order dated 13.4.1877 for construction of a new gate on the northern side by Mahant Khem Das. (**English Translation - Pg 143-144**) It was claimed that

the building was a Mosque and therefore permission for construction of a Gate in the wall of the Mosque could not be given to a Hindu Party (para 1). A reference is made to some order dated 7.11.1873 in - Mohd Asghar Vs Mahant Baldeo Das in which it is claimed that some order was passed for removal of "*Charan Paduka*". In Para 6 it is accepted that the order dated 7.11.1873 could not be served upon Baldeo Das and as such it is accepted that the Idols have not been removed. It is also accepted that a Chulha has been made, which was earlier a small Chula for for Puja.

Note:-

(a) The complaint was made against Khem Das, who was a Mahant of the Nirmohi Akhara. See Cause Title - " *Khemdas Mahant Janmasthan va Nirmohi Akhara*" (at page 140 - not appearing in Translation at Page 143).

(b) Mahant Baldeo Das is also a Mahant of Nirmohi Akhara (*See Para 40 of Statement of DW-3/1 - Mahant Bhaskar Das (reproduced at Page 709) and Para 48 of the Statement of DW-3/20 - Mahant Raja Ramchandracharya (reproduced at Page 729)*).

(c) Possession by Mahant Baldeo Das and Khem Das is admitted. It is also admitted that there are "*Charan Paduka*", Chulha and Puja was going on. Permission for construction of Gate to Mahant of Nirmohi Akhara is a recognition of possession of the petitioner.

—- **Ex 15 (OOS-1) (Volume 87 Page 61-65)**- Report made by the Dy Commissioner upon an order of the Commissioner in view of the appeal (Ex 30). The report was against the Muslims and it was stated that the appeal was made with a view to annoy the Hindus by making them dependent on the Mohammedans.

13.12.1877 **Ex 16 (OOS-1) (Volume 87 Page 66-68)**- Order of the Commissioner, by which the appeal (Ex 30) was dismissed.

1877-78 AD Gazetteer of the Province of Oudh (Vol I A-G

"**Nirmohi sect**. It is said that one Gobind das came from Jaipur some two hundred years ago, and having acquired a few bighas of revenue-free land, he built a shrine and settled himself at Ram Ghat. Mahant Tulsi Diis is the sixth in succession. There are now two branches of this order, one at Ram Ghat, and the other occupying the temples at Guptar Ghat. They have rent-free holdings in Basii, Mankapur, and Klmrdabad.

"Hindu and Musalman – The Janmasthan is within a few hundred paces of the Hanomangarhiin 1855, when a great rapture took place between the Hindus and the Muhammadans, the former occupied the Hanomangarhi in force, while the Musalmans took possession of the Janmasthan. The Mohammadans on that occasion actually charged up the steps of the Hanomangarhi, but were driven back with considerable loss. The Hindus then followed up this success, and at the third attempt took the Janmasthan

at the gate of which seventy-five Muhammadan were buried in the 'martyr's grave' (ganj-i-shahidan). Eleven Hindus were killed. Several of the King's regiment were looking on all the time but their order were not to interfere. ***It is said that*** up to that time the Hindus and Mohammadans alike use to worship in the mosque- temple. ***Since British rule a railing has been put up to prevent the disputes within which, in the mosque, the Mohammadans pray; while outside the fence the Hindus have raised a platform on which they make their offerings***. A second attempt was made shortly afterwards by Molvi Amir Ali of Amethi; the object was to seize the alleged site of an old mosque on the Hanoman Garhi". (Gazetteer of the Province of Oudh 1877-78 p.7) (**ANNEXURE D**)

Note:- Similar account is reflected in:-

(I) THE HISTORICAL SKETCH OF FAIZABAD BY P. CARNEGY (published in 1870)

(II) REPORT OF THE SETTLEMENT OF LAND REVENUE OF FAIZABAD DISTRICT BY A.F. MILLETT

Note:- As to what happened on the Second Attempt made by Molvi Amir Ali of Amethi is noticed in the Fyzabad Gazetteer, Volume XLIII of the District Gazetteers of the United provinces of Agra and Oudh by H.R. Nevill (Page 4070 Vol III - Judgment, at page 4072) and it is stated that he was stopped at the Barabanki District.

8.11.1882 **Ex 24 (OOS-1) (Volume 87 Page 110)** - A copy of the Plaint in a suit filed by the Syed Mohd. Asghar against "*Mahant Raghubar Das Chela and Nirmohi Akhara*" seeking rent of Rs 30/- for user of the Chabutra and half of the rent and profits of the in respect of the Fair conducted at the Janmasthan.

Note:-

(a) Mahant Raghubar Das was a Mahant of Nirmohi Akhara *(See Para 40 of Statement of DW-3/1 - Mahant Bhaskar Das (reproduced at Page 709) and Para 48 of the Statement of DW-3/20 - Mahant Raja Ramchandracharya (reproduced at Page 729)*)

18.6.1883 **Ex 17 (OOS-1) (Volume 87 Page 69-79)** - Order by Sub-judge, Faizabad in the suit Ex -24 filed by the Syed Mohd. Asghar against Mahant Raghubar Das. The suit of the plaintiff was dismissed with costs.

2.11.1883 **Ex 18 (OOS-1) (Volume 87 Page 82)** - Application filed by Syed Mohd Asghar against Mahant Raghubar Das claiming that he was the owner of the Masjid and that he was entitled to carry out the repair and whitewash of the Masjid. In the said suit it has been admitted to the extent that the Chabutra and the Seeta Rasoi belong to the defendant. It has been stated:-

"… The Birth Place Chabutra (platform) within wall of the Ahata of the Babri Masjid belongs to the Defendant…"

"… Defendant has no other place there except Chabutra (platform) and

Rashoi (Kitchen)…"

12.1.1884 **Ex 34 (OOS-1) (Volume 87 Page 162)** - The Deputy Commissioner, without deciding the rights of any of the parties directed Raghubar Das not to carry out repairs or whitewash and also directed Mohd Asghar not to put locks on the gates. (It is to be noted that the Deputy Commissioner also did not permit Mohd Asghar to carry out the repairs/whitewash as was requested by him).

22.1 1884 **Ex 27 (OOS-1) (Volume 87 Page 124-125)** - The Assistant Commissioner notices in his order the order dated 12.1.884 passed by the Deputy Commissioner. The parties were asked to comply with the old existing orders and there should not be any interference with it. The case was however consigned to record without deciding the rights.

27.6.1884 **Ex 28 (OOS-1) (Volume 87 Page 126 @130)** - Mahant Raghubar Das made a complaint to the Assistant Commissioner seeking a spot inspection since despite the orders passed, syed Mohd Asghar was carrying out white wash.

THE 1885 SUIT

19.1.1885 **Ex A-22 (OOS-1) (Volume 3 Page 51)** - Mahant Raghubar Das filed a suit seeking permission for construction of a temple on the Chabutra.

24.12.1885 **Ex A-26 (OOS-1) (Volume 3 Page 63)** - The Sub-judge, Faizabad found that the area occupied on the Chabutra was in possession of the plaintiff however permission of construction was refused on the basis that grant of such permission would not be in public interest as it would lay seeds of disputes between the Hindus and the Muslims.

18/26.3.1886 **Ex A-27 (OOS-1) (Volume 3 Page 71) (Also at Page 4200 Vol III - Judgment)** - An appeal was preferred against the order of the Sub-Judge before the District Judge, Faizabad by Mahant Raghubar Das. The said appeal was dismissed and while dismissing the appeal, the finding recorded regarding ownership was expunged as "Redundant" observing that "*The only question decided in this case is that the position of the parties will be maintained*"

Note:- The Respondent Sunni Central Waqf Board and the muslim parties have relied upon the said suit and the decision therein to to operate as "Res-Judicata". It is stated that there is no issue of "Res-judicata" framed in Suit OOS No. 3 of 1989.

Note:- The said suit of 1885 was filed by Mahant Raghubar das in his personal capacity without even mentioning the name of Nirmohi

Akhara and in any case the subject property in the said suit - (Chabutra in the Outer Courtyard) was different from the suit-property (Inner Courtyard) which is the subject matter of OOS No. 3. The issue of Res-judicata would be dealt with separately in Reply since the said issue has been decided in favour of Nirmohi Akhara.

Note:- The said suit is being relied upon to show presence of the Mahant of the Nirmohi Akhara at the Chabutra in the Outer Courtyard.

11.6.1900 **Ex 8 (OOS-3) (Volume 90 Page 66)** - Agreement permitting Jhingoo son of Gaya for providing Drinking water to the Pilgrims.

1903 A case was filed by Syed Mohd Rizvi against Mahant Narottamdas for removal of Stone name slate removed from the Janmasthan. The Photograph of Janmasthan Name Slate (*Photo No. 25 in Black & White Photo Album given by Mr. C. S Vadyanathan*). The said case was dismissed and it was recorded that such stones were being placed at 143 Hindu Places all around Ayodhya. The Janmasthan was inside the outer wall and it was being placed at the right place.

Note:-**The document is not on record of the file of the High Court.** The document a copy of a judicial order which is also more than 30 years old and hence admissible under section 90 Evidence Act.

1905 The Gazetteer of the United Provinces of Agra and Oudh. Volume XLII ***By H.R. Nevill***

> "… The Nirmohi sect claim spiritual descent from one Gobind Das of Jaipur. ***They formerly held the Janamasthan temple in Ramkot, the remains of which still belong to them***; but on its destruction by the Musalmans they moved to Ramghat. Subsequently a quarrel arose among them on a question of succession and a split occurred, a branch leaying Ramghat and settling at Guptarghat. The mahant of the Ramghat branch is the ninth in succession from the founder. The Nirmohis of Guptarghat have some revenue-free lands in Basti, Mankapur and Khurdabad, but the others are wholly dependent on the temple offerings…" (**ANNEXURE F**)

1934 The fact that another set of riots took place in 1934 is a historical fact which is not in dispute. In fact the Muslims parties have filed documents suggesting repairs etc. were carried out after damage was caused to the structure (Ex A-49 (Suit-1) etc.)

1931AD/26.2.41 **Ex 49 (OOS-4) (Volume 3 Page 71) (Also at Page 1435 Vol II - Judgment)** - It is Nakal Khasra of Arazi No. 583, Abadi, Kot Ram Chandra, Pargana Haveli Awadh, Tehsil and District Faizabad, of 1931 AD. (*Plot No. 583 is the plot where the mosque was situated is admitted in the statement of Shri J. Jilani Advocate under Order X rule 2 CPC dated 11.1.1996 Page 261 Volume I - Judgment*). In the said document it has been inter-alia stated:-

Name of building (1)	**: Masjid Ahad-e-Shahi**
Number Aarazi (2/1)	**: 583**
Raqba Aarazi (Area of Plot) (2/2)	: 305/9 B. 15 Biswansi 4
Kach. Number Sabiq (Old) (3/1)	: Abadi 444
Raqba Sabiq (Area old) 3/2)	: 7 B. 11 Biswansi 14 Kach.
Name Malik Aarazi (Owner) (4)	: Masjid Waqf Ahde Shahi

Name Matahaddar (Subordinate), if any (5):
Name Kabiz Haal (Presently occupied by) (6) : Masjid
Kism (Nature) (7) :
(9) Raqba (Area) : 9 B. 15 Biswansi 4 Kachh.
Baadaye Lagan : (2) Bila Lagan (Without Rent)
Kandhal (10) : Bajariye Missil Numbari 427 No. 6/47 Raiganj, Munfasla **26 February San 41** Indraz Raghunath Das Janambhumi Ke Mahant Mukarrar Kiye Gaye, Ke Bajaye Mahant Ram Sharan Das."

14.6.1941

Dastandazi (11)
(12)
Raqba (13)
Lagan (14)
Khet numbari (15) : No. of plot
Kaifiyat (Details) (16) : **Masjid Pokhta Waqf Ahde Shahiandar Sahan Masjid**Ek Chabutara Jo Janambhumi Ke naam Se Mashhoor Hai, Darakhtan Goolar Ek Imli Ek Mulsiri Ek, Pipal Ek, Bel Ek. Masjid Mausma Shah Babur Shar Marhoom.

Note:-
(a) The Revenue Record Ex 49 of Abadi land is a proof for possession.

(a) The Building is indicated and identified as a Masjid but is shown to be in possession of Mahant Raghunath Das, who is a Mahant of Nirmohi Akhara. It was previously entered in the Name of Mahant Ram Sharan Das (*See Para 40 of Statement of DW-3/1 - Mahant Bhaskar Das (reproduced at Page 709) and Para 48 of the Statement of DW-3/20 - Mahant Raja Ramchandracharya (reproduced at Page 729)*)

13.10.1942 **Exhibit 9 (Suit-3) (Page 71-74 Nirmohi Akhara Volume - 90)** is a copy of agreement of Theka Shop of Janambhumi Ramkot Ayodhya by Gopal son of Babu in favour of Narottamdas on 13.10.1942. (This was for an area - outside the Eastern Gate or Hanumat Dwar in the outer courtyard)

29.10.1945 **Exhibit 10 (Suit-3) (Page 75-78 Nirmohi Akhara Volume - 90)** - is a copy of the agreement dated 29.10.1945 regarding Theka Shop in favour of Mata Prasad by Mahant Raghunath Das. (This was for an area - outside the Eastern Gate or Hanumat Dwar in the outer courtyard)

10.12.1949 **Exhibit A-63 (Suit-1) (Page 1738 Volume II - Judgment)** - Report by Mohd. Ibrahim (Waqf Inspector) wherein it is admitted:-

> "… **On investigation in Faizabad City it was revealed that because of the fear of Hindus and Sikhs no one goes into the masjid to pray Namaz Isha".** If by chance any passenger stays in the Masjid he is being put in trouble by the Hindus. Out of the Sahan of Masjid there is a Temple where Many pandas reside and they harass the Muslims whoever visit inside the mosque…"

23.12.1949 **Exhibit A-64 (Suit-1) (Page 1742 Volume II - Judgment) -** Report by Mohd. Ibrahim (Waqf Inspector). The report would reveal the following:-

Note:-
(a) That he visited the Disputed place on 22.12.1949 and stayed at

Ayodhya overnight i.e. the intervening night between 22.12.1949 and 23.12.1949.

(b) He noticed that there were two tents outside the Disputed place, one of the tents were occupied by Police Personnel and in the other tent about 8 to 9 sepoy of battalion were living. Since there was already police deployment, it is unbelievable that any incident could take place in their presence.

(c) He accepts that no Namaz is held which he claims remains locked and the police does not allow them to open. It is however claimed that the locks are opened only on Friday for 3-4 hours.

(d) He mentions the name of Mahant Raghubar Das along with others who invited the Muslims for talks. Mahant Raghubar Das is the Mahant of Nirmohi Akhara.

(e) He claims to have come to the site in the morning of 23.12.1949 and states "*…I did stayed at Ayodhya in the night. In the morning I came to know that Bairagis are trying to take possession over the masjid forcefully. Today is Friday, I visited the spot when I saw that 10-15 Bairagis armed with Dandas and spears had assembled in front of the door of the mosque…*". He does not state that idols had been placed inside the structure in the intervening night.

5.1.1950 **Ex A-3 (Suit-4) (Volume 91 Page 9-10)** - The receiver took possession of the Inner Courtyard. The articles recovered and taken possession of as part of the inventory were Hindu articles of worship. Description of the property of which possession was taken indicates:-

North	:	**Hata Chatti Pujan and Nirmohi Akhara**
South	:	Land Parti and Parikrama
East:		**Chabutra Temple Ramji ka in possession of Nirmohi Akhara with Sahan of Temple**
West	:	Parikrama

EVENTS AFTER THE ATTACHMENT AND FIRST SUIT OOS 1 OF 1989

4.7.1950 ***Ex. C-2 (Suit-5 By Def. 3 Volume 92 Page 5-14 Translation 15-24)*** - Order of Additional Sessions Judge, Faizabad dated 3.8.1957 in Cr. Appeal No. 50 of 1951. Mahant Bhaskar Das of Nirmohi Akhara was accused for offence under section 294 of defacing the Muslim Graves by putting Hindu names on them on 4.7.1950. It was claimed by him that those were not muslim graves but samadhis of Hindu saints who were buried there. He was ultimately acquitted by the Additional Sessions Judge holding that the prosecution had failed to prove that the graves were muslim or Hindu Samadhis.

27.9.1950 **Ex No. 6 - (OOS-3) (Volume 90 Page 53-56)** - Objections were filed by Mahant Baldeo Das in the proceedings under section 145 Cr. P.C. In Para 1 and 6 thereof, it was specifically pleaded that the Nirmohi Akhara was the owner and in possession of the Janmabhumi Temple. In Para 7 it was also stated that the management of the deities was being performed by the Nirmohi Akhara.

1961 **Ex. 3, 4 (Suit-3) (Volume-90 - Page 47-48 and 49–50)** Permissions was sought and granted for construction to be made in the outer courtyard from the Nagar Palika.

6.2.1961 **Ex 5 (Suit-3) (Volume-90 - Page 51-52)** - Application to City Magistrate for clarification by Mahant Raja Ramchandracharya that despite permission for construction, the police was stopping carrying out of the construction.

9.2.1961 **Ex 2 (Suit-3) (Volume-90 - Page 47-48 and 49–50)** - Clarification issued by the City Magistrate :-

> "… There is no objection to the replacement of the Canvas or sirki cover by the sheets ***if it made on applicants own land which may not be under attachment***, and if the alteration is made according to municipal bylaws"

13.10.1973 **Ex C-8 (Suit -5) (Volume 92 Page 70-82)** - A suit was filed by Nirmohi Akhara for cancellation of license given to Ram Lakhan Saran Das for conducting the Akhand Kirtan at Kirtan Chabutra. Ex C-8 is the Report and Spot map was prepared by Pateshwari Dutt Pandey (Examined as DW 3/10) indicating possession of Nirmohi Akhara. (Since during the pendency of the said suit Ram Lakhan Saran died and hence the suit became infructuous)

18.2.1982 (**Page 12086-7 Volume 65** Statement DW3/20 - Mahant Raja Ramchandracharya) - A dacoity was committed at the Nirmohi Akhara by Dharam Das and Ram Balak Sharan some other persons. FIR was filed. Shri Dharam Das remained in Jail for a period of 2 months and thereafter based on a compromise, the case was quashed. However the documents destroyed by him could not be recovered.

ANALYSIS OF EVIDENCE ON THE ISSUE OF POSSESSION & CONCLUSION OF HIGH COURT OF "JOINT POSSESSION"

104. The Case of the Plaintiff - Nirmohi Akhara is that there is a "Temple of Janma Bhumi" marked by the letters E.F.G.K.P.N.M.L.E. within which there was a Main temple (or the "Inner Courtyard") denoted by the letters E.F.G.H.I.J.K.L.E. which has always been in possession of the Nirmohi Akhara of which the plaintiff claims to be the Shebait or Sabrahkar and none other than the Hindus have ever been allowed to enter or worship therein. It has also been pleaded that no Mohammedan could or ever did enter the temple building at least since 1934.

105. The said pleading has the following parts:-

(i) That there is a "temple of Janma Bhumi" (i.e. the inner and outer courtyard") of which the Main temple is the "Innter Courtyard". Thus the building was a temple and always used as a temple. It was never a mosque and no muslims were allowed to offer 'namaz' as alleged by the Muslims.

(ii) That the "temple of Janma Bhumi" is in possession of the Nirmohi Akhara.

(iii) That no muslim has been allowed or has ever entered the temple building at least some 1934.

106. The Muslim Parties have on the contrary alleged that the Disputed Building was a "Mosque" constructed by or under the Order of Shehanshah Babar in the year 1528AD. They have also claimed to be in exclusive continuous possession from the time the said "mosque" was built to the date when according to them the mosque was desecrated by placing of the idols on 22nd - 23rd December, 1949. They claim possession of the Inner as well as the Outer Courtyard.

107. "ACTUAL EXCLUSIVE USER" OF THE BUILDING BY THE HINDUS

(i) **Evidence of Prior Hindu Religious structure -(Page 2507 Para 4055-4056)** That prior to the construction of a disputed structure, there was a non-islamic religious building in which the materials like the stone, pillars, bricks etc. of the earlier structure was used. The court finds the same to be a Hindu temple based on the intrinsic evidence of the ASI Report as well as the Travellers Gazetteers Accounts.

(ii) **Continued user by Hindus despite construction of a Mosque** - **(Page 2508 Para 4058)** That the defacto position is that after demolition of a Hindu temple, a building was constructed in the shape of a "Mosque". However despite the construction of the building in the shape of a Mosque the defacto position was also that it was used and continued to be used and visited by Hindus for offering worship, puja and Darshan as per their beliefs.

(iii) **Nature of the property - (Para 4060-4063 Page 2508 Vol II and Para 4066-67 Page 2520)** - it is undisputed and has been found by all the three judges that the property in question (inner courtyard) was land locked while deciding **issue No. 19(b)** in OOS No. 4 of 1989.

(iv) The building though described as a "mosque" housed Hindu deities and hence was a "TEMPLE" for all practical purposes and was unnecessarily demolished on a

misconception of being a "Masjid" in 1992. The position of the user and possession during the various periods can be analysed as under:-

PRE - 1855 AD

(a) It has been admitted and accepted by the Muslim parties that there is no evidence of the building being used for offering Namaz for any time prior to 1855 (See Para 2314 Page 1361 - Vol. II of the Judgment), wherein it is noticed:-

> "**2314** Be that as it may, even if for the purpose of the issues in question we assume that the building in question was so constructed in 1528AD, *there is no evidence whatsoever that after its construction, it was ever used as a mosque by muslims till at least 1856-57. Sri Jilani fairly admitted during the course of arguments that historical or other evidence is not available to show the position of possession or offering of namaz in the disputed building at least till 1855*. He has also disputed seriously the alleged riots of 1855. For the time being we do not intend to concentrate on this aspect whether this denial of Sri Jilani and Siddiqui and other Muslim Counsels about 1855 riot is correct or not and proceed to consider further material and other aspects."

(b) The gazetteers accounts especially ***(i) Historique Et Géographique De I Inde*** by Father Joseph Tieffentheller (published in the year 1770 AD), ***East India Gazeteer of Hindustan*** by Walter Hamilton (published in 1828 AD) as well as the ***Gazetteer of the Territories under the Government of East India Company***, by Edward Thornton (published in 1858 AD) notice that the building, though recognised as a Mosque was being used as pilgrimage by the Hindus. While Tieffentheller describes the practice as "*… Nevertheless, they still pay a superstitious reverence to both these places, namely to that on which the natal dwelling of Ram stood by going three times round it prostrate on the earth*…", Walter Hamilton recognises it by observing "…*The religious mendicants, who perform the pilgrimage to Oude are chiefly of the Ramata sect*…" and Edward Thornton notices that the place was "… *abundantly honoured by the pilgrimages and devotions of the Hindoos*…". Thus while there is no evidence from the Muslim parties of "USER" of the place for offering Namaz or being used as a Mosque, there is ample intrinsic evidence of the place being a place of pilgrimage and reverence by the Hindus.

FROM 1855 to 1885

(a) It is undisputed that there was an outbreak of Hindu Muslim riots in the year 1855. The events of the said riot at Ayodhya has been noticed in ***Historical Sketch of Faizabad***, by **P. Carnegi**, ***Gazetteer of the Province of Oudh (Vol I A-G)***, ***Report of the Settlement of Land Revenue of Faizabad District*** by A.F. Millett. As well as ***Fyzabad Gazetteer, Volume XLIII of the District Gazetteers of the United provinces of Agra and Oudh*** by H.R. Nevill (Page 4070 Vol III - Judgment, at page 4072). It is however important to note that in all these accounts it is clearly stated that for a brief period the Muslims took over the Janmasthan however the Hindus re-captured it to great loss to the Muslims. It is noted "… *The Hindus then followed up this success, and at the third attempt took the Janmasthan at the gate of which seventy-five Muhammadan were buried in the 'martyr's grave' (ganj-i-shahidan).*

Eleven Hindus were killed…**".** Thus there is nothing to show that the Hindus at any time thereafter gave it up. As there is no evidence of the Muslims using the premises "Pre-1855" it would be strange that even after winning over and re-capturing the Janmasthan in which 75 Muslims and 11 hindus were killed, the Hindus would allow the Muslims to offer Namaz at the place which they did not allow Pre-1855.

(b) Apart from the Gazetteers, the following documentary material also show presence and continuous user of the Ram Janma Bhumi Temple by the Nirmohi Akhara after 1855.

(i) **EX - A-13** (**Volume 3 Page 36**) (**Translation appears to be defective and correct translation is at Page 1396-97 Vol- II**) — which was a A complaint dated 25.9.1866 made by Meer Rajab Ali Khateeb regarding the "Kothri" constructed by Tulsidas etc. Bairagis**. The complaint was not entertained and was consigned to record wide Ex 29 (Suit OOS-1) (Volume 87, Page 135).**

(ii) **Ex 30 (OOS -1) (Volume 87 Page 136-144) is an appeal filed against grant of permission** to challenge the permission granted to Mahant Khem Das for construction of a New Gate on the Northern Side (Singh Dwar). The permission was granted to meet the extensive crowd of persons who used to visit the place during festivals. The said appeal was also dismissed vide **Ex 16 (OOS-1) (Volume 87 Page 66-68).**

(iii) **Ex 24 (OOS-1) (Volume 87 Page 110)** is a a suit filed by the Syed Mohd. Asghar against "*Mahant Raghubar Das Chela and Nirmohi Akhara*" seeking rent of Rs 30/- for user of the Chabutra and half of the rent and profits of the in respect of the Fair conducted at the Janmasthan. The document also shows actual user by the Nirmohi Akhara and the Hindus of the property in question. The said suit was dismissed by **Ex 17 (OOS-1) (Volume 87 Page 69-79)**.

(iv) **Ex 18 (OOS-1) (Volume 87 Page 82)** - is Application filed by Syed Mohd Asghar dated 2.11.1883 against Mahant Raghubar Das claiming that he was the owner of the Masjid and that he was entitled to carry out the repair and whitewash of the Masjid. No such permission was granted and the parties were directed to maintain status quo. In the said proceedings no rights were decided however no relief was granted to the Muslim Parties to enter and offer namaz.

(c) The Muslim Parties have relied upon the following documents:-

(i) **Ex A-10 (Suit-1), Ex A-3 (Suit-1)**, relatable to the Year 1860 by which Cash Grant of Rs 302-3-6 appears to have been sanctioned by the British Government in favour of Rajab Ali and Mohd Asghar. It is stated in Ex A-10 that the Grant was given at the time of Construction of the Mosque to Syed

Baqi to work as a Moazzin. He was followed by his son Ali, then Syed Hussain Ali. It is claimed the Syed Rajab Ali was the son in law of Syed Hussain Ali and Mohd Asghar was the son of the daughter (Navasa/grandson) of Syed Hussain Ali (i.e. only four generations from 1528 i.e. in 350 years). The High Court has found (**Page 1380 Para 2336 Vol - II - Judgment**) that the documents are not reliable and do not show USER of building by muslims for Namaz. Documents **A-14, A-16, A-17, A-18 and A-19** are essentially for allotting land in lieu of Cash Grant of Rs 302-6-3.

(ii) **Ex A-8** are alleged details of the expenses incurred by the Muttawalis which was produced in the inter-se suit between the Shia and Sunni Muslim waqf Boards (i.e. Suit No. 29 of 1945). A certified copy of the document has been produced, the author of the documents have not been examined to prove the contents of the same. The originals have also not been summoned to give rise to presumption under section 90 Evidence Act. (**Considered by the High Court in para 2355 - 2358 Page 1411 to 1412 Vol II - Judgment**)

(iii) The muslims also rely upon certain observations made in The Gazetteer of the United Provinces of Agra and Oudh. Volume XLII ***By H.R. Nevill***, wherein it is observed (at Page 174 of the report) that it is said that upto 1855 both parties used to worship together but after the mutiny a dividing wall has been put up such that the Hindus worship outside and are not allowed inside. It is stated that:-

(1.) Use of the words "**it is said that…**" in the beginning of the observation of Nevill shows that the said observation were mere hearsay and not based on any personal observation of the author.

(2.) Even the said observations do not state that muslims used to go and worship inside in the inner courtyard said to have been constructed by the British through the dividing wall.

(3.) There is no empirical record of the British to have constructed the wall.

(4.) Other material - ***Historical Sketch of Faizabad***, by **P. Carnegi**, ***Gazetteer of the Province of Oudh (Vol I A-G)***, ***Report of the Settlement of Land Revenue of Faizabad District*** by A.F. Millett. Do not record of any such construction having been done by the British. In any case, the observation regarding joint user to offer prayers by both Hindus and Muslims prior to 1855 is also not supported by any previous record and the conditions prevalent post 1855 when the Janmasthan was re-captured by the Hindus militates against the theory of joint user either before or after 1855.

THE SUIT OF 1885

(a) **The 1885 SUIT** - In view of the orders passed in 1883 and 1884 directing the parties to maintain status quo, since for the protection and benefit of the pilgrims a pucca ceiling was required, Mahant Raghubar Das, in his personal capacity filed a suit seeking permission for construction of a temple on the Ram Chabutra. The muslims rely upon (i) the Plaint map filed along with the said suit (Vol. 72 Page 95) wherein the inner courtyard is described as a Masjid and (ii) the fact that the said suit was finally dismissed, though without deciding the intense rights of the parties, to contend that the decision of the case operates as Res-judicata against the Hindus in

General.

(b) It is submitted that the building was being described as a "Masjid" since long, even Tieffentheller described the building as a "Mohammedan temple" however the building was "USED" only as a Hindu temple as noticed by him as he did not find any Joint user by the Muslims also.

(c) Thus describing the building as a "Masjid" in the Suit Map is only for the identification and location of the suit property which was not the Masjid but the Chabutra in the Outer Courtyard. Issue of Res-Judicata has been decided against the Muslims by the High Court.

(d) The document however shows possession and presence of Mahant Raghubar Das at the disputed site who was continuing to worship the deities at the said site and for protection of whom, permission for construction was sought and which was denied in public interest to avoid possibility of a dispute between the Hindus and the Muslims.

FROM 1885 TO 1934

(a) Apart from one agreement dated 11.6.1900 **Ex 8 (OOS-3) (Volume 90 Page 66)** - Agreement permitting Jhingoo son of Gaya for providing Drinking water to the Pilgrims showing user of the premises by the Hindus. The revenue record for the year 1931 **Ex 49 (OOS-4) (Volume 3 Page 71) (Also at Page 1435 Vol II - Judgment)** of Arazi No. 583, Abadi, Kot Ram Chandra, Pargana Haveli Awadh, Tehsil and District Faizabad. The property is recorded in the name of Mahant Ram Sharan Das who is the Mahant of Nirmohi Akhara and as a consequence of the order dated 26.2.1941, the name of Mahant Raghunath Das was inserted in place of Mahant Ramsharan Das. The building though "described" as a "masjid" but shown to be in Possession of Mahant Ramsharan Das who was replaced with Mahant Raghunath Das. The description property in possession includes "**Sahan Masjid" as well as "**one Chabutara which is famous by the name of Janambhumi". It is stated that the revenue entry therefore records the entire property, including the masjid, to be in possession of Mahant Raghunath Das.

(b) Ex 49 is a revenue record of 1931 AD and change of name has taken place from Mahant Ram Sharan Das to Raghunath Das in 1941. Both the said Mahants are Mahants of Nirmohi Akhara. It is stated that since the name of the Mahant of Nirmohi Akhara is present in the revenue records at least for 10 years, presumption of continuity of possession with "before" and "after" the said date can also be taken. See:-

(i) Gurunath Manohar Pavaskar Vs Nagesh Siddappa Navalgund (2007) 13 SCC 565, (Page 568 Para 12)

> *"12 A revenue record is not a document of title. It merely raises a presumption of possession and/or continuity thereof both forward and*

backward can also be raised under section 110 of the evidence Act."

(ii) State of A.P. Vs Star Bone Mill & Fertilizer Co. (2013) 9 SCC 319, 327 (Para 21, 24)

"21 … Even a revenue record is not a document of title. It merely raises a presumption of possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under section 110 of the evidence Act."

PERIOD AFTER 1934

(a) That there was another communal riot in the year 1934 is not in dispute. The muslim parties have relied upon documents ***Ex A-49, A-43, A-51, A-45, A-44 A-48, A-46, A-47, A-52, A-50 and A-53 (Of Suit-1)*** which are documents relating to appointment of contractor by the PWD for the repair of the building that was damaged during the 1934 Riots. It is submitted the fact that a Mohammedan contractor was appointed for the Repairs of the building who was also appointed to carry out the repairs of houses of other muslim locals is of no significance. The religious faith of the contractor cannot be a basis to come to a conclusion that the possession of the building was "restored" to the muslims when in fact, from a period prior to 1855 apart from a brief period during the 1855 riots, there is no evidence to show presence of muslims at the disputed site.

(b) The documents need to be considered in light of the revenue record (***Ex 49***), also maintained by the government which show continuous possession of the Hindu Mahant on the entire building including the so called Masjid from 1931 till after 1941, which includes the period of 1934-35 when the repairs in terms of the documents ***Ex A-49, A-43, A-51, A-45, A-44 A-48, A-46, A-47, A-52, A-50 and A-53 (Of Suit-1),*** were carried out.

(c) Thereafter there are two documents relied upon ***Ex.A-63 (suit-1) (Page 1738 Volume II - Judgment) dated 10.12.1949*** and ***Ex A-64 (Suit -1) (Page 1740 Volume II - Judgment) dated 23.12.1949***. It is submitted that the said documents are in fact internal communications by the Waqf Inspector addressed to the Secretary, Sunni Central Waqf Board and cannot be relied upon against the defendant Hindu Parties. Since the documents have been produced by the Muslims Parties, the contents thereof can however be relied upon "against them". It is submitted that:-

(i) Ex A-63 (Suit 1) (Pg. 1738 - Vol II) Report by Mohd. Ibrahim (Waqf Inspector). The waqf inspector accepts:-

"*… on investigation in Faizabad city it was revealed that <u>because of fear of hindus and Sikhs no one goes into the masjid to pray namaz Isha</u>. <u>If by any chance any passenger stays in the masjid, he is being put into trouble by the Hindus</u>. Out of the Sahan of Masjid there is a temple where many pandas reside and they harass the muslims who so ever visit inside the mosque. I went at the spot and from inquiries it was revealed that the said allegations are correct….*"

(ii) Ex A-64 (Suit 1) (Pg. 1740 - Vol II) - Report by Mohd. Ibrahim (Waqf Inspector). In the said report it has been stated:-

> *"… The keys of the Masjid are with the muslims, but the police does not allow to open the lock which is opened only on Friday for 3-4 hours. During this period cleaning of the place is done and then namaz is held. After this is over the masjid is again locked. During Friday prayers the bairagis make hue and cry and when the Namazi pass through the stairs, shoes and rubbish is thrown on them by the adjoining houses…."*

The report appears to be the only document, relied upon to show Friday namaz and on which basis in Para 3110 (Page 1746 Volume II) the High Court records a finding of "Joint Possession". It is submitted that document would however reveal the following:-

(a) That he visited the Disputed place on 22.12.1949 and stayed at Ayodhya overnight i.e. the intervening night between 22.12.1949 and 23.12.1949 which is the alleged date of incident. 22.12.1949 was a Thursday and therefore he is not witness to any of the alleged acts stated above in his report regarding Friday Namaz. The statement recorded, apart from being an internal self created document is only hearsay and cannot be relied upon.

(b) He noticed that there were two tents outside the Disputed place, one of the tents were occupied by Police Personnel and in the other tent about 8 to 9 sepoy of battalion were living. Since there was already police deployment, it is unbelievable that any incident could take place in their presence.

(c) He accepts that the mosque is not available for Namaz regularly since he claims that the mosque remains locked and the police does not allow them to open. It is however claimed that the locks are opened only on Friday for 3-4 hours.

(d) He mentions the name of Mahant Raghubar Das along with others who invited the Muslims for talks. Mahant Raghubar Das is the Mahant of Nirmohi Akhara.

(e) He claims to have come to the site in the morning of 23.12.1949 and states "*…I did stayed at Ayodhya in the night. In the morning I came to know that Bairagis are trying to take possession over the masjid forcefully. Today is Friday, I visited the spot when I saw that 10-15 Bairagis armed with Dandas and spears had assembled in front of the door of the mosque…*".

It is most important to state that he visited the place before and after the alleged time of incident. Both on 22.12.1949 and also on 23.12.1949. <u>But it is noteworthy that the most important event i.e. "shifting of the idol" finds no mention in his report. He does not state that idols had been placed inside the structure in the intervening night</u>.

108. From the aforesaid analysis of the documentary material, it is evident that the plaintiff Nirmohi Akhara is in "Settled Possession" of the disputed site i.e. the inner as well as the outer courtyard. The site was in possession of prior to 1855. The possession was lost only for a brief period during the 1855 riots however the Janmasthan was regained and re-possessed immediately. The Akhara has been in possession of the site ever since and continued to be in possession.

109. Assuming that the muslims were allowed to and hence went to the site to offer namaz on Fridays, as is depicted from the documents filed by them, Firstly it would militate against their claim of "exclusive possession", Secondly it the said fact also does not shows that their rights to be in exclusive possession and to offer Namaz unhindered and without interference by any person had already been impaired and hence as soon such a right was impaired, it gave rise to a cause of action for them to institute a legal proceeding for enforcement and protection of their rights. It is stated that:-

(a) The first cause of action for them was in 1855 when as per gazetteer records, Hindus took possession of the Janmasthan.
(b) The second cause of action was when, after the riots, a Chabutra was constructed inside the building which is being claimed by the Muslims to be a Mosque since 1528 AD.
(c) The third cause of action when after the 1934 riots, they were allowed to have only Friday namaz.

110. It is submitted that a suit ought to have been filed at least after 1934, which the muslims failed to institute and hence no right survived after the period of limitation. Even Assuming period of limitation to be 12 years, cause of action would at least be from 1934 and the suit filed by the Sunni Central Waqf Board in 1961 is hopelessly barred by limitation.

111. So far as the hindus are concerned, even if it is assumed that Friday namaz was being held due to the interference by the administration for 3-4 hours as suggested, after the event possession of the Hindus was restored and hence such intermittent (even if recurring) interference in possession of the Hindus would not affect their "settled possession".

See:-

(i) Poona Ram Vs Moti Ram (D) Th. Lrs (Civil Appeal No. 4527 of 2009 decided on 29.1.2019)

(ii) Rame Gowda (D) th. Lrs Vs M. Varadappa Naidu (2004) 1 SCC 769 (Page 775 Para 8, 9)

(iii) Munshi Ram Vs Delhi Administration (1968) 2 SCR 455, 462 (D)

REPLY TO SUBMISSIONS BY DR. DHAWAN ON
(A-58 - NOTE ON EXHIBITS AND DOCUMENTS BY NIRMOHI AKHARA)
(A-59 - SHORT NOTE ON EXHIBITS OF NIRMOHI AKHARA)
(A-60 - RESPONSE TO EXHIBITS RELIED UPON BY NIRMOHI AKHARA)
(A-61 - RESPONSE TO SUBMISSIONS MADE BY NIRMOHI AKHARA)

In Submissions A-58 of Dr. Dhawan he has referred to the various exhibits filed by Nirmohi Akhara in three volumes I.e. (Volume No. 90, 91, and 92). The documents have been deemed "***irrelevant***" or "***pertaining to outer courtyard does not help Nirmohi***" or "***pertains to land outside disputed premises - does not help Nirmohi***" etc.

It is stated that the documents filed by Nirmohi Akhara was to establish various facets. This included:-

(i) Panchayati Math Character of the Akhara and its historical background (Exhibit 1 Suit -3) for which a specific issue was framed (***Issue No. 17 Suit - 3***) and decided by the High Court in favour of Nirmohi Akhara (***See Para 781, 789 Page 745,747-48 Vol. 1***). Since the said issue has been decided in favour of the Akhara and no challenge has been made by any party to the present set of appeals regarding the said character, no reference has been made by the Akhara in the present set of appeals.

(ii) Documents relating to possession of the temple property as well as the deities by the Mahant of the Nirmohi Akhara. Dr. Dhawan in his submissions has deemed such documents as those "***pertaining to outer courtyard***" and therefore irrelevant since the suit of Nirmohi Akhara was relating to the Inner Courtyard only. It is submitted that:-

(a) ***The distinction between "Outer Courtyard" and the "Inner Courtyard" is an "artificial" distinction***. The said distinction has arisen possibly for the reason that the attachment was limited to the "inner courtyard" only. It is submitted that the building i.e. the "Outer Courtyard" and the "Inner Courtyard" **IS A UNIFIED WHOLE** and also the portion of the property described as the "inner courtyard" is **LANDLOCKED** by the outer courtyard and the access of the inner courtyard is through the Outer Courtyard only. THUS ***evidence of possession of "outer courtyard" is a proof of possession of the "INSIDE OF THE DISPUTED BUILDING"***.

(b) The consistent case of all parties to the suit including suit of the U.P. Sunni Central Board of Waqfs (i.e. suit No. 4) is for the entire property - inner and outer courtyard (*subject however to the submission in respect of the suit and the map which is blatantly vague which would be dealt with while responding to suit OOS 4/89*). While OOS No. 3 was limited to the inner courtyard since the outer courtyard was in any case was in possession of the Nirmohi Akhara (and which position is now virtually admitted), OOS No. 4 of 1989 was seeking declaration that the "Inner as well as the Outer courtyard" was a MOSQUE. Thus the suit of the Sunni Board is also premised on the basis that the "entire" building was a ***single unified whole*** and not two separate properties.

(c) Since the property was landlocked and access of the "inner courtyard" was only through the Outer Courtyard which was in possession of Nirmohi Akhara, possession of the "inner courtyard" must be "deemed" to be in possession of Nirmohi Akhara unless, it is specifically shown by cogent material that "possession" of the inner courtyard was with any of the plaintiffs of Suit OOS 4 of 1989.

(d) In fact there is evidence on record especially by the Muslim Parties that the inner courtyard was never locked.

See:-

(1) PW-1 - Mohd Hashim

"*On the 22nd of November 1949, Jahoor Ahmed had put a lock. He had put a lock at the behest of the police. The police had apprehension of danger*" (See Vol. II Para 2479 Page 1474)

"… One more wall was there inside the masjid, and the main gate of was locked. The lock was put there when the Masjid was attached." (Page 7212 Volume 45)

(2) PW-3 - Farooq Ahmed son of Zahoor Ahamed and he claims that Thanedar Ramdeo had come to his father upon which he had gone to the site to put the locks. He claims to put the lock at the instance of the SHO.

""I had gone with him with a lock and on return after putting the lock, he went back after giving me in the custody of my father. . . . . .. The inspector had instructed me to put the lock.

Question:- When the inspector asked to put the lock, does it mean that prior to it the disputed property was not locked?

Answer:- It was not locked."

"Locks ***were not put at the mosque prior to that day.*** *When I put the locks, the Muazzim was inside the mosque. He was in the courtyard gate and not in the inner part. He was in the outer courtyard.* ***When I went to put the locks, the Muazzim was sleeping under the thatched roof. I did not wake him up. I returned home after putting the lock and the Muazzim kept sleeping peacefully."***

(3) PW 9 - Saiyyad Akhalak [Para 4063 (ix)]:

"… I never saw any locks put on these doors. . ."

(e) In view of the aforesaid evidence of the witnesses of the Muslim Parties, the High Court recorded the following finding:-

1903. …… After about hundred years by which time the premises in dispute was divided by an iron grilled wall with an indication that the muslims may worship in the inner courtyard and the Hindus may continue to worship in the outer courtyard, in actuality the Hindus continue with their practice of entering the inner courtyard and worshipping thereat in one or the other manner. This is evident from some documents which we are discussing hereinbelow. There is no evidence on record to show that from 1856 to 1949, at any point of time there was a restriction effected in such a manner that only the people of one faith would enter the inner courtyard and not all. ***It is the admitted case of muslims and their several witnesses had also admitted that till 22nd December, 1949 the doors of the iron grilled dividing wall were never locked***. …"

"**3071**. …… ***We have considered witnesses of Muslim parties i.e. PW 1 to 9 and few others. Many of them have categorically stated that in the entrance gate of dividing wall, no lock ever put till 22nd December 1949***……."

3089. …… *There was no restriction in the entry inside the inner courtyard in any manner. The entrance door in the dividing grilled wall was never locked……"*

(f) Thus a combined effect of the fact that the inner courtyard was landlocked by the outer courtyard, which was in possession of the Nirmohi Akhara and that the Grill Wall of the inner Courtyard was never locked can lead to only one conclusion that the Nirmohi Akhara was in possession of both the inner as well as the outer Courtyard.

(g) It is submitted that the suit OOs 4 of 1989 as well as Suit OOS 5 of 1989 relate to and are concerned with the Outer Courtyard as well and hence the documents relating to the outer Courtyard are therefore in any case "relevant".

(h) There is no plaintiff in OOS No. 4 of 1989 who can claim to be in possession of the property or who can claim that "**HE**" was in possession of the property which is described as a Mosque and that "**HE**" had been dispossessed by the alleged events of 22nd and 23rd December 1949. It is stated that while the plaintiff Nirmohi Akhara has placed material to show possession of ***"INSIDE OF THE DISPUTED BUILDING", there is no evidence forthcoming from any of the Muslim parties showing possession of any of the plaintiffs.***

During arguments, a submission was made by Dr. Dhawan that none of the documents relied upon by Nirmohi Akhara were on record. It is submitted and re-iterated that the documents relied upon by Nirmohi Akhara of which reference has been given in the list of dates submitted are on record, referred to in the impugned judgment and their specific exhibit numbers have also been given along with the opening submissions. The sweeping statement of Dr. Dhawan that none of the documents of the plaintiff - Nirmohi Akhara are on record is therefore not accurate.

Dr. Dhawan in his Submission A-59 referred to the documents produced by Nirmohi Akhara, it is stated that most of the said documents pertain for a period after the filing of the suit or Ex 1 which was relatable to issue No. 17 of Suit OOS 3 and for which a submission has already been made above, and hence was not considered necessary. Ex C-5, C-6 and C-10 relate to the suit of the Nirmohi Akhara challenging the constitution of the Ram Janma Bhumi Nyas. The said Nyas was a defendant in Suit OOS No. 5 of 1989. The said Defendant had filed an application for transposition as a Plaintiff in the said suit, which application was rejected by an order dated 19.03.1996. No further challenge has been made by the Nyas to the said order. Hence the said documents have not been referred to by Nirmohi Akhara in the present proceedings.

In Submission A-60, submissions have been made referring to the "Exhibits" relied upon by Nirmohi Akhara. Further in the opening submissions a detailed analysis of the documentary exhibits was given relating to the Pre 1855 period, The period between 1855-1934, The period between 1934 to 1949 and the period thereafter. Submission of Dr. Dhawan (A-61) is a response to the said submissions. It is stated that:-

I. LANDLOCKED PROPERTY - Dr. Dhawan has not disputed that the property was "landlocked". He has however relied upon the observations of the High Court in Para 4066-67 by Jus Sudhir Agarwal concerning the "effect" of the property being landlocked. It is submitted that the conclusions drawn by Agarwal J. Which thereafter becomes a basis for a conclusion of "joint possession" is therefore erroneous. Thereafter reference has been made to 1885 suit, the suit Map and the Map by Shri Gopal Sahai Amin (Ex A-25) submitted in the said suit, in which it is claimed that there was a reference to the inner courtyard as the mosque. *It may be noted that in the Map Ex A-25, the inner courtyard is not described as a mosque*. The report of Shri Gopal Sahai Amin (Ex A-24) clearly notices that the emphasis was on the measurement of the Chabutra and not the "inner courtyard". Thus no conclusions can be drawn on the basis of the said document regarding the "inner courtyard" that it was a mosque. The document in any case shows possession of Nirmohi Akhara on the Chabutra.

II. PRE-1855 -

(i) There is no dispute of the fact that a categorical statement was made By Shri Jilani as noticed in the order that there is no evidence of Namaz at the disputed site prior to 1855.

(ii) The Documents show presence of at least two hindu places of worship inside the building - The Cradle or Bedi and the Seeta Rasoi.

(iii) It is to be noted that there was no "grill wall" prior to 1855 which according to the muslim parties was constructed by the British after 1855 who came to the area only after 1855. Thus presence of Hindu sites "inside" the disputed building shows their presence in the entire property.

(iv) The description of the property as a mosque does not mean it was used as a mosque. Due to the presence of the Hindu places of worship inside the building, the building could not be used as a mosque at all. The High Court has also recorded in the order as under:-

> "**1989.** ***So far as the existence of Sita Rasoi which was on the north west side in the outer courtyard is concerned, nothing has come on record to show as to when it was actually constructed. On the contrary, the record shows that it existed prior to 1885***. Its actual time and period when it was constructed is unascertainable. ***It is beyond comprehension that Mir Baqi or anyone else, while constructing a mosque at the disputed place could have spared some Hindu structure(s) to continue, may be smaller in size, in the precinct of mosque*** so as to be worshipped by Hindus inside the premises of mosque. ***We put this question to Sri Jilani also and he frankly stated that no Muslim would allow idol worship in the precinct of a mosque.*** "

III 1855-1885

(i) The Historical Sketch by P. Carnegi, Report of settlement by A.F. Millet and Faizabad Gazetteer by Nevil have been relied upon to establish a historical fact of a riot that took place in 1855 wherein muslims took possession of the Janmasthan for

a brief period. The Janmasthan was "**RE-CAPTURED**" by the Hindus in the third attempt, thus restoring the status quo which existed before. The Hindus were therefore in possession prior to 1855 and apart from a brief period, possession was re-acquired by them. Some statements mentioned in the said documents have been relied upon, in that regard it is submitted:-

(1) Reference in the documents relating to construction of the "Grill Wall" by the British. However as submitted hereinbefore, there was no lock on the grill wall and was open to access by the Hindus. Thus it is a misnomer to state and suggest that the grill wall created any "exclusive" possession of the Muslim parties on the inner courtyard. The possession was of the Nirmohi Akhara which continued unobstructed and the property was used by the Hindus without any hinderance.

(2) It has been submitted that till 1855 Hindus and Mohammedans used to worship alike. This is contrary to the specific concession given by Shri Jilani recorded in ***Para 2314 @ Page 1361 Vol II***.

(3) No reliance can be placed on the alleged "inscriptions" which were not found to be reliable by the High Court (See ***Para 1636, 1647, 1650, 1653 and 1679-80 (Vol I) and Para 2953 Page 1650-51 Vol II***)

(4) The presence of Kasauti Pillars and their use in the construction of the Building intact militates against the theory that the building was constructed as a Mosque. Presence of these pillars with Hindu motifs shows that the building was always a temple.

(5) The fact of Badshah Babar coming to Ayodhya as noticed in the said gazetteers has not been established with reference to the Babar Nama and other material See ***Para 1534 page 1025 Vol I***). Observations made in the said documents in that regard therefore appear to be mere "impressions" of the author. Thus Babar never visited Ayodhya and the said pleading of the Muslim Parties (as also plaintiff No. 3 in Suit No. 5) is not established.

(ii) **Ex A-13 (Suit 1) and Ex 29 (Suit 1)** relates to the complaint made by Meer Rajab Ali Khateeb, claiming to be a Muttawali against construction of a Kothri near the Chabutra by the Bairagis. It is not disputed that the complaint was consigned to record and no cognisance was taken since the property was in possession of the Hindus. The document therefore shows presence and possession of Nirmohi Akhara.

(v) **Ex 30 (OOS -1) and Ex 16 (OOS 1)** is an appeal to challenge the permission granted to Mahant Khem Das for construction of a New Gate on the Northern Side (Singh Dwar). The permission was granted to meet the extensive crowd of persons who used to visit the place during festivals. The said appeal was also dismissed.

The document shows possession of Nirmohi Akhara as well as the fact that the claim of the Muslims to construct the gate was rejected. The document also shows that numerous devotees came to the site in question and for whose benefit a second gate was deemed necessary.

(vi) **Ex 24 (OOS-1) Ex 17 (OOS-1)** is a a suit filed by the Syed Mohd. Asghar against "*Mahant Raghubar Das Chela and Nirmohi Akhara*" seeking rent of Rs 30/- for user of the Chabutra and half of the rent and profits of the in respect of the Fair conducted at the Janmasthan. It is claimed that the Nirmohi Akhara had "disowned" Mahant Raghubar Das. It is stated that Nirmohi Akhara has accepted that Mahant Raghubar Das was a Mahant of Nirmohi Akhara which is accepted by Syed Mohd. Asghar also. The claim for rent and part of the profits was claimed based on an assumed title by the Muslims which was rejected. This document which is an appeal by the muslims does not "establish" existence of "Babri Masjid" was was merely a "claim" made by them but was never accepted due to the rejection of the suit.

(vii) **Ex 18 (OOS-1)** - is Application filed by Syed Mohd Asghar dated 2.11.1883 against Mahant Raghubar Das claiming that he was the owner of the Masjid and that he was entitled to carry out the repair and whitewash of the Masjid. No such permission was granted and the parties were directed to maintain status quo. In the said proceedings no rights were decided however no relief was granted to the Muslim Parties to enter and offer namaz.

IV THE 1885 SUIT - The proceedings in the said suit is relied upon to show possession of Nirmohi Akhara on the "Ram Chabutra" in the outer courtyard. The prayer in the said suit was disallowed ultimately upon consideration of avoiding disputes between the two communities. The issue in the said case was a permission for construction on the Ram Chabutra. The question of consideration of title was not necessary or germane for decision in the said suit. The fact of possession of Nirmohi Akhara is not been disputed in the orders passed.

V FROM 1885 - 1934

(i) The plaintiff Nirmohi Akhara has relied upon Ex 49 which is a revenue record for the year 1931 ***Ex 49 (OOS-4) (Volume 3 Page 71) (Also at Page 1435 Vol II - Judgment)*** of Arazi No. 583, Abadi, Kot Ram Chandra, Pargana Haveli Awadh, Tehsil and District Faizabad. The property is recorded in the "name" of Mahant Ram Sharan Das who is the Mahant of Nirmohi Akhara. Byan order dated 26.2.1941, the name of Mahant Raghunath Das was inserted in place of Mahant Ramsharan Das. Thus for the period from 1931 onwards possession of the Mahant of Nirmohi Akhara is indicated.

(viii) The building though "described" as a "masjid" but shown to be in Possession of Mahant Ramsharan Das whose was replaced with Mahant Raghunath Das.

(ix) The description property in possession includes "**Sahan Masjid" as well as "one Chabutara which is famous by the name of Janambhumi**". Thus the revenue entry records the "entire property", INCLUDING THE MASJID, is in possession of Mahant Raghunath Das.

(x) It is stated that since the name of the Mahant of Nirmohi Akhara is present in the revenue records at least for 10 years, presumption of continuity of possession with "before" and "after" the said date can also be taken.

See:-

(i) Gurunath Manohar Pavaskar Vs Nagesh Siddappa Navalgund (2007) 13 SCC 565, (Page 568 Para 12)

> *"12 A revenue record is not a document of title. It merely raises a presumption of possession and/or continuity thereof both forward and backward can also be raised under section 110 of the evidence Act."*

(ii) State of A.P. Vs Star Bone Mill & Fertilizer Co. (2013) 9 SCC 319, 327 (Para 21, 24)

> *"21 … Even a revenue record is not a document of title. It merely raises a presumption of possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under section 110 of the evidence Act."*

VI PERIOD AFTER 1934 - Amendment in Ex 49 - Revenue Records has been effected on 26.2.1941 and thus it is clear and evident that possession of the Mahant of the Nirmohi Akhara continued. If the building was a mosque or used as a mosque, it would have been shown to be in possession of some Mutawali. From the documents produced by the Muslim parties, though it is accepted that there was some Mutawali, however no Mutawali has been indicated to be in possession in the revenue records. No Mutawali has chosen to become a plaintiff in the suit.

Thus the documents on record relied upon by the Nirmohi Akhara establish that the building was a temple and was in settled possession of the Hindus, except for a brief period during 1855 Riots. The possession was re-taken and has since never been lost.

The original case setup by the U.P. Sunni Central Board of Waqfs that the Babri Mosque was constructed in the year 1528 AD by Babar or his General Mir Baqi and that they were in possession of the property ever since. No evidence is forthcoming to prove the same and in fact Shri Gilani had expressly admitted, fairly, that no evidence is available regarding possession or holding of Namaz prior to 1855 (Para 2134 Vol. II). A new case is now being projected that the British, divided the property by the "Grill wall" whereafter the "inner courtyard" was made over to the Muslims as a Masjid and the outer courtyard for the Hindus. It is stated that:-

(i) There is no pleading of such a case in either the Plaint (OOS No. 4 of 1989) or in the written statements filed in the other suits.

(ii) In fact in the plaint (OOS No. 4 of 1989), entire property including the Outer Courtyard has been claimed as a Mosque. If the case was of British dividing the property and

creating a mosque restricted to the inner courtyard, the suit ought to have been restricted to the "inner courtyard" only.

Dr. Dhawan had during arguments set up another new case and suggested that the Nirmohi Akhara and the Hindus could at best claim a right of "Easement" to go to the specific sites in the outer courtyard. It is submitted that the said submissions is clearly unsustainable:-

(i) It is the case of the Muslims that the entire property, making no distinction for the Ram Chabutra, the Seeta Rasoi or the Bhandara, belongs to the them. No property has been recognised and admitted by the Muslims in their suit or the written statement to belong to or possessed by the Hindus. A right of easement is a right of way for use of a "Dominant Estate" through a "Subservient Estate" therefore the dominant estate must belong to or possessed by the one party and the subservient estate must belong to another. A concession of right of "easement" is in fact an admission by Waqf Board that the Nirmohi Akhara has possession and title of the Outer Courtyard or at-least the hindu sites located in the outer Courtyard.

(ii) The Muslims parties have to show and establish "title" to the property before suggesting only a right easement to the Nirmohi Akhara or the Hindus to "access" their religious structures, which they have failed to establish. Their "specific" case in the plaint as well as the written statement is that Babar or his general Mir Baqi constructed the Babri mosque, for which no evidence has been led. The High Court (***Para 1682 Page 1100 Vol I***) has held as under:-

> **1682**. *It is a matter of further probe by Historians and others to find out other details after making an honest and independent inquiry into the matter. The three issues, therefore, are answered as under:*
>
> ***(A) Issue no.6 (Suit-1) and Issue No.5 (Suit-3) are answered in negative.*** *The defendants have failed to prove that the property in dispute was constructed by Shanshah/Emperor Babar in 1528 AD. Accordingly, the question as to whether Babar constructed the property in dispute as a 'mosque' does not arise and needs no answer.*
>
> ***(B) Issue No.1(a) (Suit-4) is answered in negative.*** *The plaintiffs have failed to prove that the building in dispute was built by Babar. Similarly defendant no.13 has also failed to prove that the same was built by Mir Baqi. The further question as to when it was built and by whom cannot be replied with certainty since neither there is anypleading nor any evidence has been led nor any material has been placed before us to arrive at a concrete finding on this aspect. However, applying the principle of informed guess, we are of the view that the building in dispute may have been constructed, probably, between 1659 to 1707 AD i.e. during the regime of Aurangzeb.*

(iii) The muslims claim is restricted to a claim by them of a once in a week namaz on Fridays (which claim is in any case denied). The property was otherwise unlocked and open for access by the Hindus. Thus there is no need for the Hindus to claim any right in the nature of easement. Infact the Nirmohi Akhara is in long "**settled possession"** and therefore unless the Muslims parties are able to establish better title, the Nirmohi Akhara is entitled to be in possession and hence entitled to be put back in possession of the temple which was taken from it.

The claim of the Muslim parties is of a weekly Friday Namaz which they claim to come and observe in the disputed property. It is the case of Nirmohi Akhara that no such Namaz was ever held for which evidence has been led. Assuming the muslim parties are able to establish that they were carrying out weekly Friday namaz, it would at best be a case of “intermittent encroachment” and restoration of possession of the Hindus. Since possession of the Muslims was not continuous, even as claimed by them, no adverse interest could be created in them. No right accrues on the basis of such “intermittent encroachment” which is required to be “Continuous” and “unobstructed”. Admittedly from the documents of Ex A-63 and A-64 it is evident that their claim for possession is a mere periodical encroachment without crystallising any right in their favour.

THE ALLEGED INCIDENT OF 22ND - 23RD DECEMBER 1949
REPLY TO SUBMISSION OF DR DHAWAN (A-53) "NOTE ON PLANNED DESECRATION OF MOSQUE - REPLY TO NO DESECRATION ON DECEMBER 22-23,1949"

1. Dr. Dhawan has relied upon various documents to buttress his submissions that the alleged desecration of mosque was a pre planned act in which idols were placed inside the inner courtyard as part of a malicious act to infringe the rights of muslims too use the building as a mosque. It is stated at the outset that out of the seven documents relied upon , only three are exhibited documents; namely

    1. Document at S. no. 1) dated 09.03.1949 which is Exhibit No.1 (suit-3),
    2. Document at S no. 4) dated 10.12.1949 which is Exhibit A-63 (suit -1)
    3. Document at S no. 6) dated 23.12.1949 which is Exhibit A-64 (suit -1)

2. It is submitted that the other documents have been only been "placed on record" in view of the order dated 29.5.2009 passed by the High Court however the said documents have not been "proved on record" as none of the witness of the State Government have been examined in the present case. The documents have also not been put to the witnesses who deposed in the present case to elicit any explanation from them. The authenticity and veracity of the contents have not been tested by cross examination and hence facts stated therein cannot be taken as undisputed statements of fact which could be relied upon without further proof.

3. The documents are essentially in the nature of inter-departmental communications (i) between the S.P. Faizabad to the Deputy Commissioner (document dated 29.11.1949), (ii) between the Deputy Commissioner to the Home Secretary, Government of Uttar Pradesh (Document dated 16.12.1949) and a noting in the diary /report of 09:30 (document dated 27.12.1949). It is submitted that such inter departmental communication/file noting are even otherwise inadmissible and do not create any rights in favour of any party. These can at best be personal unauthenticated "impressions" of the concerned officers which without proper investigation cannot be regarded as a true statement of fact.

4. See:-

    1. *Union of India v. Vartak Labour Union (2)*, (2011) 4 SCC 200

        15. It is trite that inter-departmental communications and notings in departmental files do not have the sanction of law, creating a legally enforceable right. In *Sethi Auto Service Station* v. *DDA* [(2009) 1 SCC 180], a Division Bench of this Court, in which one of us (D.K. Jain, J.) was a member has observed thus: (SCC pp. 185-86, para 14)

            "*14*. … Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is *communicated* to the person concerned." (emphasis in original)

        16. Similar views are echoed in *Jasbir Singh Chhabra* v. *State of Punjab* [(2010) 4 SCC 192] . This Court has observed that: (SCC p. 209, para 35)

            "*35*. It must always be remembered that in a democratic polity like ours, the functions of the Government are carried out by different individuals at different levels. The issues and policy matters which are required to be decided by the

> Government are dealt with by several functionaries some of whom may record notings on the files favouring a particular person or group of persons. Someone may suggest a particular line of action, which may not be conducive to public interest and others may suggest adoption of a different mode in larger public interest. However, the final decision is required to be taken by the designated authority keeping in view the larger public interest."

5. Documents at Sl. No. 4) and 6) are self serving internal report/communication by the officers of the U.P. Sunni Central Board of Waqfs and hence cannot even otherwise be relied upon. The documents relied upon are merely self serving internal communications, no conclusion can be derived from such material.