IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL. No. 6965 / 2011

IN THE MATTER OF:

CONVENOR OF AKHIL BHARATIYA SRIRAM JANAM BHOOMI PUNARUDDHAR SAMITY ...... APPELLANT

-VERSUS-

SRI RAJENDRA SINGH & ORS. .... RESPONDENTS

[**Appellant in the instant Appeal** headed by His Divine Majesty Jagadguru Shankaracharya of Sharadamath-Dwarka & Jyotirmath- Badarikashram Mahaswami Swaroopanand Saraswati Ji Maharaj is Defendant No.20 in O.S. No.4 of 1989 being Regular Suit No. 12 of 1969 **AND Respondent No.16 in Civil Appeal. No. 10866-10867 / 2010 M. Siddiq (D) Thr. Lrs. -Versus- Mahant Suresh Das And Ors. before this Hon'ble Court**]

NOTES OF ARGUMENT PART –II

Compiled By-
Mr. Parmeshwar Nath Mishra, Advocate, Lead Counsel
With
Ms. Ranjana Agnihotri, Advocate, Assisting Counsel

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NOTES OF ARGUMENT PART - II

PART 1

1. If Owner suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession:

1.1. In 11M.I.A. 345 : Gunga Govind Mundul and Ors. Vs. The Collector of the Twenty-Four Pergunnahs and Ors.; the Privy Council has laid down law that the title to sue for dispossession of the lands belongs, to the owner whose property is encroached upon ; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; relevant extracts from said Judgment reads as follows:

"In the Collector's suit alone is there any appeal. That suit, though it asks " a declaration overruling the plea of a rent-free tenure," which is not properly the subject of that jurisdiction, is properly treated in the Civil Court as an ejectment suit, and it was admitted by Mr. Forsyth, who appears for the Collector, to be a suit in the nature of an ejectment suit. For such a suit, which supposes that the Plaintiff was put out of possession, it is necessary for him to allege and prove his title to the possession.

The Collector sues for the Government, being entitled to sue to enforce their claim to the possession. It appears, however, in this suit, that both the Prince Gholam and the first and second Munduls claim derivatively from the same person, Johnson; the judgment of the High Court finds, as a fact, that " the property was originally the property of Johnson. "By this word " property " here, is evidently meant absolute ownership; though it may be by a grant from the East India Company, as the Zemindars of the Twenty-four Pergunnahs. The well-known cases of Gardiner v. Fell, and Freeman v. Fairlie (1 Moore's Ind. App. Cases, pp. 299 and 305), and the observations of Lord Lyndhurst in the latter case on the subject of Pottahs, exclude any supposition that such absolute ownership of lands by private persons could not exist at that time in that part of India, as against any claim of the Government to possession of the lands. In the latter case, his Lordship terms "the rent" " a jumma or tribute," and says " the Pottah, therefore, proves no part of the title, it is the conveyance that gives parties a right to claim the Pottah." The Pottah is evidence of title. If there were anything in the nature of the title of the Government to lands in the Twenty-four Pergunnahs, or any usage or custom in force there, which gave a less permanent interest to the possessors of proprietary right, some authority for, or some evidence of such a variation from, and limitation of the general law, should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take

these titles out of the operation of the principles established by the cases above referred to; consequently, upon the evidence in this suit, it appears that the Government had not, at the time of Johnson's possession of block No. 1, any title to the possession of these lands. If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply to the rent, the nature of which was that of a jumma or tribute ; and if the holders of these lands asserted then, or subsequently, a groundless claim to hold them free of rent, as La-khiraj, that claim would not destroy their proprietary right in the lands themselves, but simply subject their owners to liability to be sued in a resumption suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure, involving the measurement and assessment of the lands, and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed. If, at any period during Johnson's possession of these lands, or subsequently, a title to the possession of the lands themselves had accrued to the Government, by any act or omission on the part of the owners of the lands working a forfeiture, that title should have been alleged and proved. But so far from this being attempted to be established, the Collector treated the lands as belonging, by title, to the holding of the Prince, and the Prince as fulfilling the ordinary obligations of the owner of the land, to pay the rent or jumma of them. The title of Richard Johnson existed in 1783, and from that time downwards there is no proof of any act entitling the Government to take possession of the lands; there is no evidence, on which any reliance can be placed, that the title of the Munduls, be it what it may, commenced by violence ; but assuming that such proof existed, in what way can a dispute between two private owners, whether as to boundaries or lands, divest the title of either to possession in favour of the Government, if the latter have merely a rent or jumma ? **The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon ; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see Sel. Rep., vol. vi., p. 139, cited in Macpherson, Civil Procedure, p. 81 (3rd ed.). Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred ; and the effect of that bar must operate in favour of the party in possession.**

"The title, then, of the Prince to recover these lands as against the Munduls is extinguished; then how can the extinction of the proprietary owner's right in favour of the party in possession, confer any right to possession simply on another person not having a title in remainder, if he had not a title to possession whilst the right and remedy remained ? Supposing that, on the extinction of the title of a

person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to that. The interest of the person in possession is not a limited but an absolute interest; the title to the lands is one inheritance, the title to the khiraj or rent is another. Though these lands are treated as part of the khas mehals, yet there is no proof in this case of any relation of landlord and tenant ever existing between Johnson and the Government; Johnson appears to have been the absolute owner, and no reversion to have existed in the Government. It is not the case of a lease at all, still less of a lease of temporary duration ; it is the case of an absolute ownership of the lands ; and the title of the Government rather resembles a seignory than that of a lessor with a reversion."

(ibid page 360-362)

1.2. AIR 1942 Privy Council 64 "Hem Chand v. Pearey Lal" the Privy Council has held that if the owner whose property is encroached upon suffers his right to be barred by the law of limitation the practical effect is the extinction of his title in favour of the party in possession. Consequently where the executor holds the property adversely to the heir for upwards of 12 years on behalf of the charity for which it was dedicated, the title to it, acquired by prescription, becomes vested in the charity and that of the heir if he had any, becomes extinguished by operation of S.28, Limitation Act (9 of 1908), relevant paragraph of the said Judgment reads as follows:

"The law is well settled that in an action for ejectment the plaintiff can recover only by the strength of his own title, and not by the weakness of that of the defendant. Mr. Parikh, appearing for the respondents, admitted at the outset that the provision of the will relating to charity is vague, and is therefore inoperative to create a charitable trust; but he did not admit that the result of the failure of the trust is, as was held by the Subordinate Judge, that the executor must be considered as holding the undisposed of residue as trustee for the benefit of the author of the trust or his legal representative, his position being, that the resulting trust which arises when the trust fails or is void on account of vagueness or uncertainty is a trust against the deed and the property if retained by the executor is prima facie held by the executor adversely to the heir-at-law; and if, as in the present case, he dedicates the property to charity, the trust so created, after the expiry of 12 years' adverse possession would acquire a statutory title to it.

xxxxxx

Both Courts have found that the property was dedicated a "Dharmasala." There is ample evidence to show that it was treate as dedicated property and used as such for charitable and religiou purposes till the year 1931, when the defendant came in possession. The evidence shows further, that the defendant wa aware that the property was purchased with the money allotted t Babu Sri Ram for charitable purposes, that he was present whe the sale was registered, that he supervised the construction of th building, and that to his knowledge the building bore the incriptio "Dharmasala Babu Ram." The inference from the evidence as whole is irresistible that it was with his knowledge and implie consent that the building was consecrated as a Dharmasala an used as such for charitable and religious purposes, and that Lal Janaki Das, and after him Ramchand, was in possession of th property till 1931. As forcibly pointed out by the High Court i considering the merits of the case, "during the course of more tha 20 years that this building remained in the charge of Janaki Das and on his death in that of his son, Ramchand, the defendant ha never once claimed the property as his own or objected to its bein treated as dedicated property." This Board held in 11 MIA 345 1a p. 361, that if the owner whose property is encroached upon suffer his right to be barred by the law of limitation the practical effect i the extinction of his title in favour of the party in possession. Section 28, Limitation Act, says :

"At the determination of the period hereby limited to any person fo instituting a suit for possession of any property his right to such property shall be extinguished." Lala Janaki Das and Ramchand having held the property adversely for upwards of 12 years on behalf of the charity for which it was dedicated, it follows that the title to it, acquired by prescription, has become vested in the charity and that of the defendant, if he had any, has become extinguished by operation of S. 28, Limitation Act. Their Lordships have no doubt that the Subordinate Judge would also have come to the conclusion that the title of the defendant has become barred by limitation, had he not been of the view that Lala Janaki Das retained possession of the suit property as trustee for the benefit of the author of the trust and his legal representatives, and that presumably S. 10, Limitation Act, would apply to the case, though he does not specifically refer to the section. For the above reasons, their Lordships hold that the plaintiffs have established their title to the suit property by adverse possession for upwards of 12 years before the defendant obtained possession of it; and since the suit was brought in January, 1933,

within so short a time as two years of dispossession, the plaintiffs are entitled to recover it from the defendant, whose title to hold it if he had any has become extinct by limitation, in whichever manner he may have obtained possession permissively or by trespass.

1. ('66) 11 MIA 345 : 7 WR 21 : 1 Suther, 676: 2 Sar. 284 (PC), Gunga Gobindas Mundal v. The Collector of the Twenty Four Pergunnahs."

1.3. In (1878)ILR 3Cal 224 Gossain Dass Chunder vs. Issur Chunder Nath Calcutta High Court has held that the construction which this Court has given to the law thus laid down by the Privy Council, is not only that a twelve years' possession by a wrong-doer extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer. Relevant paragraphsfrom the said judgment read as follows:

"6. We have, therefore, a possession by the plaintiff established for upwards of twelve years before the defendant's dispossession, and **there is ample authority that such continuous possession for upwards of twelve years not only in the language of the Privy Council in the case of Gunga Gobind Mundul v. Collector of the 24-Pergunnahs 11 Moore's I.A. 345 bars the remedy, but practically extinguishes the title of the true owner in favour of the possessor.**

7. The construction which this Court has given to the law thus laid down by the Privy Council, is not only that a twelve years' possession by a wrong-doer extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer--see Amirunnissa Begum v. Umar Khan 8 B.L.R. 540 S.C. :17 W.R. 119 and Ram Lochun Chuckerbutty v. Ram Soonder Chuckerbutty 20 W.R. 104; and this Court has gone still further, because it has held, that the title of the wrong-doer can be transferred to a third person whilst it is in course of acquisition, and before it has been perfected by a twelve years' possession--see Brindabun Chunder Roy v. Tarachand Bandopadhya 11 B.L.R. 237; 20 W.R. 114. Whether the law as laid down by the Privy Council was meant to have this extended operation, may perhaps be doubted, but such a construction of it tends to convenience in this country, and we are certainly not disposed to question its correctness as applied to the present case.

8. It was strongly contended by the appellant that the plaintiff's suit ought not to have been decreed, because he did not establish his right in the precise way in which it was claimed, and the cases of Bijoya Debia v. Bydonath Deb 24 W.R. 444 and Bamcoomar Shome v. Gunga Pershad Sein 14 W.R. 109 were relied upon in

support of that contention. But these cases were very different from the present. They were cases in which the plaintiffs prayed for a declaration by the Court that they held their land upon a particular title, and as they had failed to establish that particular title, it was impossible of course that the Court could say that they were entitled to it.

9. Here the plaintiff asks for no declaration of title. He seeks to recover possession of property of which he has been dispossessed by the defendant, upon the strength, no doubt, of a purchase made by him, which he has not proved, but also upon the strength of a twelve years' possessory title, which he has p such a construction of it tends to convenience in this country, and we are certainly not disposed to question its correctness as applied to the present case.

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9. Here the plaintiff asks for no declaration of title. He seeks to recover possession of property of which he has been dispossessed by the defendant, upon the strength, no doubt, of a purchase made by him, which he has not proved, but also upon the strength of a twelve years' possessory title, which he has proved, and upon which, for the reasons that we have already given, he is entitled to succeed."

PART-2

2. All mosques of the world are not essential and integral part of practices of Islam.

From the authoritative texts / scriptures of the Religion of Islam reproduced in the following sub paragraphs it will become crystal clear that: whole Earth is Mosque (place of worship / prayer) for the Muslims and Mosques are not essential and integral part for practicing Islam save and except three Mosques of particular significances. The Al-Masjid Al- Haram i.e. Ka 'ba in Mecca is a mosque of particular significance for the reasons that there is Quranic command to offer prayers facing towards Ka 'ba and to perform Haj as well as Umra in Ka 'ba without which right to practise the religion of Islam is not conceivable. Two other Mosques namely, Al-Masjid Al-Aqsa i.e. Baitul Muqaddas in Jerusalem and Al-Masjid of Nabi at Madina also have particular significances for the reason that besides Ka 'ba, pilgrimage to these two mosques have also been commanded by the sacred Hadiths.

2.1. **Whole earth is mosque for Muslims:** In Sahih Muslim: Hadith 521, the Apostle of Allah (PBUH) has commanded that whenever the time comes for prayer, pray wherever you are, for whole earth is a Mosque and pure. Said sacred Hadith reads as follows:

> "521. Jabir b. Abdullah Al- Ansari reported: The Prophet (may peace be upon him) said: I have been conferred upon five (things) which were not granted to anyone before me (and these are): every apostle was sent particularly to his own people, whereas I have been sent to all the red and the black, the spoils of war have been made lawful for me, and these were never made lawful to anyone before me, and **the earth has been made sacred and pure and Mosque for me, so whenever the time of prayer comes for anyone of you he should pray wherever he is**, and I have been supported by awe (by which the enemy is overwhelmed) from the distance (which one takes) one month to cover and I have been granted intercession."
>
> Translator's Explanatory Foot Note 3:

This is a matter of great significance. Before Islam it was thought that the material world is profane and has nothing to do with the spiritual life of man. One who is interested in spirituality should look down upon this world as something impure. But with the advent of the Holy Prophet it was made clear that the material world is neither profane nor impure and it is a sacred as the spiritual and the moral world. **The whole earth has been made a fit place of worship for you. This signifies that there is no impurity attached to it and a prayer house is not necessary for prayer.**

[**Sahih Muslim:Hadith 521.** English Translation by Abdul Hamid Siddiqi; Published by Islamic Book Service, New Delhi]

2.2. All of the Earth is a Masjid and purifier except for the graveyard and the washroom: In Hadith 317: Jami At Tirmidhi, the Holy Prophet has said that all of the Earth is a Masjid and purifier for him except for the graveyard and the washroom. Said Hadith reads as follows:

"Abu Sa 'eed Al- Khudri narrated that Allah's Messenger said: "all of the earth is a Masjid except for the graveyard and the washroom." (Sahih)
[Abu Eisa said:] There are narrations on this topic from Ali Abdulla bin Amr, Abu Huraira, Jabir, Ibn Abbas, Hudhaifah, Anas, Abu Umamah, and Abu Dharr. They say that the Prophet said: "the earth has been made a Masjid for me and a purifier."

[**Jami At Tirmidhi: Hadith 317.** English Translation by Abu Khaliyal; Published by Darussalam, Riyadh, Saudi Arabia]

2.3. The whole earth is a place of prayer except public baths and graveyards: In Hadith 489 and 492 Sunan Abu Dawud reports that the Holy Prophet said that whole Earth is mosque and place of prayer except public baths and graveyards. Said Hadiths read as follows:

"489. Abu Dharr reported the Apostle of Allah (may peace be upon him) as saying: The earth has been made for me purifying and as a Mosque (place for prayer)."

Explanatory Note of the Transalator:
"It means that one can perform *tayammum* anywhere with pure earth. Likewise one can offer once prayer at any place provided it is pure. **The building of a Mosque is not essential for the validity of pure.**"

"492. Sa'id reported the Apostle of Allah (may peace be upon him) as saying and the narrator Musa said: As far as 'Amr thinks, the Prophet (may peace be upon him) said: **The whole earth is a place of prayer except public baths and graveyards.**"

[**Sunan Abu Dawud: Hadith 489 and 492**: English translation by Ahmad Hasan; Published by Kitab Bhavan, New Delhi]

2.4. The earth has been made a Mosque (a place for praying) for Muslims therefore anyone of Muslims can pray wherever the time of a prayer is due: In Hadith 739 Sunan Nasai the Holy Prophet has said that the earth has been made for me and for my followers a Mosque and purifier, therefore anyone of my followers can pray wherever the time of a prayer is due. Said Hadith reads as follows:

"Jabir bin 'Abdullah (Allah be pleased with him) reported that the Messenger of Allah (peace and blessings of Allah be upon him) said: **The earth has been 'made for me (and for my followers) a Mosque (a place for praying).** The earth has been made for me (and my followers) a purifier to perform Tayammum, **therefore anyone of my followers can pray wherever the time of a prayer is due.**"

[**Sunan Nasai: Hadith 739.** English translation by Muhammad Iqbal Siddiqi; Published by Kitab Bhavan, New Delhi]

2.5. The whole earth is a Mosque (a place of worship) except the dunghill and the bathroom for Muslims. So, wherever the prayer becomes due for Muslims, Muslims should observe the prayer: In Hadith 567 Sunan Ibn Majah the Holy Prophet has said that "the land has been made for me a Mosque and a purifier. In Hadith 745 he said that "the whole earth is a Mosque except the dunghill and the bathroom". In Hadith 753 he said "the Earth is a place of worship for you. So, wherever the prayer becomes due for you, you should observe the prayer." Said Hadiths read as follows:

"567. Abu Huraria (Allah be pleased with him) is reported to have said that Allah's Messenger (peace and blessings of Allah be upon him) said "The land has been made for me a Mosque (a place of worship) and a (means of) purifier."

"745.Abu Sa'id Khudri (Allah be pleased with him) reported that Allah's Messenger (peace and blessings of Allah be upon him) said, **"The whole earth is a Mosque (a place of worship) except the dung-hill and the bathroom."**

"753. Abu Dharr al- Ghifari (Allah be pleased with him) is reported to have said, "I said: Allah's Messenger, what Mosque was built first? He replied, "(it was) al-Masjid ul-Haram (Sacred Mosque i.e. Ka'bah)." I again said, "Then which mosque (was built)?" He replied, "Then al-Aqsa mosque." I said, "How much (space of time) was between the two." He remarked, "(The space spread over) forty years. Then **the (whole) earth is a place of worship for you. So, wherever the prayer becomes due for you, you should observe the prayer.**"

[**Sunan Ibn Majah: Hadiths 567,745,753**. English translation by Muhammad Taufil Ansari; Published by Kitab Bhavan, New Delhi]

2.6. The whole earth is mosque except the graveyard and the bath: In Hadith 737 Mishkat –Ul-Masabih the Holy Prophet has stated that "The whole earth is a Mosque except the graveyard and the bath.

" 737. Abu Sa 'id reported Allah's Messenger (peace and blessings of Allah be upon him) as saying: The whole earth is mosque except the graveyard and the bath."

Annotation of the translator: "The words that the 'whole world' is a mosque implies that prayer can be offered at any places where there is no visible filth. But the Muslims have been warned not to observe prayer in the two places: in the graveyard and the bath. They have been prohibited observing of the prayer in the graveyard at it leads to the worship of the graves of saints-a practice that runs counter to the spirit of Islam. The atmosphere of the baths is also not congenial to the observations of prayer there, as there is filth in them, and the people entering in them generally find themselves in non-serious moods."

2.7. Holy Prophet (PBUH) offered his prayer in the folds of the sheep and goats: Hadith 453 Sunan Abu Dawud reports that the Holy Prophet offered prayers in the folds of the sheep and goat. Relevant extracts from Said Hadith read as follows:

" 453. Anas b. Malik reported: .... **The Apostle of Allah** (may peace be upon him) would say his prayer wherever the time came and **offer his prayer in the folds of the sheep and goats.** ..."

2.8. Command of the Holy Prophet (PBUH) to offer Salat (Prayer) *in* homes: In Hadith 451: Jami At Tirmidhi the Holy Prophet (PBUH) has commanded Muslims to offer Salat (prayer) in their homes. The said Hadith reads as follows:

"451. Ibn 'Umar narrated that the **Prophet said: "Offer *Salat* in your homes**, and do not turn them into graves." (Sahih)
Abu 'Eisa said: This Hadith is Hasan Sahih.

Comments: This Hadith proves that offering *Salat* in the cemetery is not allowed and digging graves in homes is not right; however offering voluntary prayer in the home is more virtuous.

[Jami At Tirmidhi: Hadith 451. English Translation by Abu Khaliyal; Published by Darussalam, Riyadh, Saudi Arabia]

2.9. Prayer in a congregation is 25 or 27 parts more excellent than prayer said by a single man: In Hadith Nos. 649 and 650 of Sahih Muslim it has been stated that the Holy Prophet said that the prayer in a congregation is 25 or 27 parts more excellent than prayer said by a single man. Said Hadiths read as follows:

"649. Abu Huraria reported Allah's Messenger (may peace be upon him) saying: Prayer said in a congregation is twenty-five portions more excellent than prayer said by anyone alone."

"650. Ibn Umar reported Allah's Messenger (may peace be upon him) had said: Prayer said in a congregation is twenty-seven degrees more excellent than prayer said by a single person."

2.10. Prayer in jungle is more meritorious than prayer in congregation: In Hadith 560 Sunan Abu Dawud the Holy Prophet has said that one prayer in congregation is equivalent to 25

prayers and, prayer of a single person in a jungle is more excellent by multiplied degrees than prayer said in congregation. Said Hadith read as follows:

> "560. Abu Sa 'id al-Khudri reported that the Apostle of Allah (may peace be upon him) as saying: Prayer in congregation is equivalent to twenty-five prayers (offered alone). **If he prays in a jungle, and performs its bowing and prostrations perfectly, it becomes equivalent to fifty prayers (in respect of reward).**
>
> Abu Dawud said: 'Abd al-Wahid b. Ziyad narrated in his version of this tradition: **"prayer said by a single person in a jungle is more excellent by multiplied degrees than prayer said in congregation."**
>
> **Explanatory Note of the Translator:** "The reason is that one offers prayer in a jungle where no one sees him except Allah. Moreover, when he prays, the angels pray along with him. But it is necessary that such a person should pronounce the *adhan* and *iqamah*."

2.11. The Holy Prophet (PUBH) offered prayer in congregation in a House along with two male and one female: In Hadith Nos. 658 and 659 of Sahih Muslim reports that in the house of grandmother of Anas the Holy Prophet offered prayer in congregation along with Anas, an orphan and the old woman. The said Hadith reads as follows:

> "658. **Anas B. Malik reported that his grandmother, Mulaika, invited the Messenger of Allah (may peace be upon him) with dinner which she had prepared. He (the Holy Prophet) ate out of that and then said: stand-up so that I should observe prayer (in order to bless) you.** Anas b. Malik said: I stood up on him at (belonging to us) which had turned dark on account of its long use. I sprinkled water over it (in order to soft then it), and the Messenger of Allah (may peace be upon him) stood upon it, I and an orphan formed a row behind him (the Holy Prophet) and the old woman was behind us, and the Messenger of Allah (may peace be upon him) led us in two prostrations prayer and then went back."
>
> "659. Anas B. Malik reported that the Messenger of Allah (may peace be upon him) was the best among people in character. **On occasions, the time of prayer would come while he was in our house. He would then order to spread the mat lying under him, that would be dusted and then water is sprinkled over it. The Messenger of Allah (may peace be upon him) then led the prayer and we stood behind,** and that mat was made of the leaves of date-palm."

2.12. The Holy Prophet (PBUH) on different occasions with 1, 2 and 3 persons other than Him respectively constituted congregations and offered congregational prayers with them: In Hadith Nos. 610, 609 and 608 of Sunan Abu Dawud it have been reported that the Holy Prophet on different occasions with 1, 2 and 3 persons other than Him respectively constituted congregations and offered congregational prayers with them. Said Hadiths read as follows:

> "610. 'Abd Allah b. 'Abbas said: When I was spending in night in the house of my maternal aunt Maimunah, **the Apostle of Allah** (may peace be upon him) got up at night, opened the mouth of the water skin and performed ablution. He then closed the mouth of the water-skin and **stood for prayer.** Then I got up and performed ablution as he did; **then I came and stood on his left side. He took my hand, turned me around from behind his back and set me on his right side; and I prayed along with him."**
>
> "609. Anas said: **The Apostle of Allah (may peace be upon him) led him and one of their women in prayer.** He (the Prophet) put him on his right side and the woman behind him (Anas)."
>
> "608. Anas said: **The Apostle of Allah (may peace be upon him) entered upon Umm Haram. The people (in her house)** brought some cooking oil and dates to him. He said: Put it (dates) back in its container and return it (cooking oil) to its bag, because I am keeping fast. **He then is stood and led us in prayer two *rak 'ahs* supererogatory prayer. Then Umm Sulaim and Umm Haram stood behind us (i.e. the men).** Thabit (the narrator) said: I understand that Anas said: He (the Prophet) made me stand on his right side."

2.13. Fiqh us –Sunnah says that one person with the Imam would constitute a congregation even if the other person is child or a woman; an owner of a house has more right than others to be the Imam. If there are three people then one of them should be Imam. Relevant extracts from the said book read as follows:

"One person with the Imam would constitute a congregation even if the other person is a child or a woman. (*ibid Pg.53* 1st paragraph under caption Constitution of Congregation)

.....

Sa'id and Abu Huraria both report that the Prophet, peace be upon him, said: "If a man gets up during the night and wakes up his spouse and they pray two *rak 'ah* together, they both will be regarded among those (men and women) who remember Allah much." This is related by Abu Daw'ud. **Abu Sa'id narrates that a man entered the Mosque, and the Prophet and his companions had already prayed. The Prophet, peace be upon him, said: "Who will give charity to him by praying with him?" So, a man from the people stood and prayed with him.** This is related by Ahmad, Abu Daw'ud, and Tirmidhi who calls it *hasan.* (*ibid Pg.53*, 3rd paragraph under caption Constitution of Congregation)

.....

Abu Sa'id narrates that the Prophet said: "**If you are two in number, then one of you should be the Imam.** (*ibid Pg.56,* 1st paragraph)

.....

Sa'id Ibn Mansur says: **"A person should not be an Imam of another where the other is in authority, except with his permission." The meaning of this is that the one in authority, an owner of a house, a leader of a meeting, and so on, has more right than others to be the Imam if he has not granted the permission to any of the others.** Abu Hurariah reports that the Prophet, peace be upon him, said: "It is not allowed for a man who believes in Allah and the last day to be an imam for a people, except with their permission, nor may he specifically make supplications for himself without including them. If he does so, he is disloyal to them." This is related by Abu Daw'ud. (*ibid Pg.56, 3rd* paragraph)

2.14. The dung heap, the slaughtering area, the graveyard, the commonly used road, the wash-area, in the area that camels rest at and above the House of Allah (Ka 'ba) are seven prohibited places for offering prayers: In Hadith 346 of Jami At Tirmidhi it has been reported that the Holy Prophet prohibited prayers in seven places: the dung heap, the slaughtering area, the graveyard, the commonly used road, the wash-area, in the area that camels rest at and above the House of Allah (Ka 'ba). From this hadith it becomes crystal clear that the House of Allah is Al-Masjid Al-Haram and other Mosques are not House of Allah but those are places of prayer only. Said Hadith reads as follows:

"346. Ibn Umar narrated: "The Prophet prohibited *Salat* from being performed in seven places: The dung heap, the slaughtering area, the graveyard, the commonly used the road, the wash area, in the area that camels rest at, and above the House of Allah (Ka 'ba). "

2.15. Destruction of a Mosque under the command of Holy Prophet Mohammed (PUBH) and His instruction to use the site as a rubbish dump: From Sura 9 At- Tawbah 107-108 of the Holy Quran universally accepted commentaries thereon by the Sunnis namely Tafsir Ibn Kathir, Commentry of Mufti Muhammad Ashiq, Tafsir Ushmani, Commentry of Maulana Muhammad Ali and commentary of Usuf Ali it becomes crystal clear that a Mosque known as Masjid Ad- Dirar was burnt and brought down under the command of Holy Prophet Mohammed by his commanders. On being asked what should be done of the land of the said demolished mosque the Nabi instructed the Muslims to use the site as a rubbish dump.

Quran.Surah 9 At-Tawbah. Ayats 107-108 and relevant extracts from the Tafsir Ibn Kathir are reproduced as followed:

"107. And for those who put up a Masjid by way of harm and disbelief and to disunite the believers and as an outpost for those who warred against Allah and His Messenger aforetime, they will indeed wear that their intention is nothing but good. Allah bears witness that they are certainly liars."

"108. Never you stand therein. Verily, the Masjid whose foundation was laid from the first day on Taqwa is more worthy that you stand therein(to pray). In it are men who love to clean and purify themselves. And Allah loves those who makes themselves clean and pure."

[Quran. Surah 9 at-Tawbah. Ayats 107-108 from the translation and Commentary Tafsir Ibn Kathir]

Relevant extracts from the aforesaid commentary thereon reads as follows:

> "These hypocrites built a Masjid next to the Masjid in Quba, and they finished building it before the Messenger went to Tabuk. They went to the Messenger inviting to pray in their masjid so that it would be proof that the Messenger approved of their Masjid. They told him that they built the Masjid for the weak and ill persons on rainy nights. However Allah prevented His Messenger from praying in that Masjid. He said to them, "If we come back from our travel, Allah willing." When the Messenger of Allah came back from Tabuk and was approximately one or two days away from Al-Madinah, Jibril came down to him with the news about Masjid Ad-Dirar and the disbelief and division between the believers, who were in Masjid Quba (which was built on piety from the first day), that Masjid Ad-Dirar was meant to achieve. Therefore, **the Messenger of Allah sent some people to bring it down before he reached Madina.**

Transalation and relevant extracts from the Illuminating Discourses on the Noble Quran (Anwaar-ul- Bayaan) Surah 9 At-Tawbah. Ayats 109-110 are reproduced as followed:

> "109. Is he better who established his foundation on taqwa for Allah and His pleasure, or he who established his foundation upon the collapsing brink of a precipice, so he tumbles with it in to the fire of Jahannuam? Allah does not guide the oppressive nation."
>
> "110. The foundation that they established will always be a source of doubt in their hearts, except if their hearts are split into pieces. Allah is all knowing. The wise."

Relevant extracts from the aforesaid commentary thereon reads as follows:

> "Rasulullah (sallallaahu-alayhi-wa-sallam) was returning from Tabook and was less than a day's journey away from Madina when Hadharat Jibreel (A.S.) came to him. He informed Rasulullah (sallallaahu-alayhi-wa-sallam) that the Masjid was built " to harm, for disbelief, to create division between the believers, and in anticipation for him (viz. Abu Aamir) who fought against Allah and His Messenger before."
>
> Rasulullah (sallallaahu-alayhi-wa-sallam) then sent Hadharat Maaalik bin Dukhshum (R.A.) and Hadhrat Ma'n bin Adi (R.A.) to burn Masjid. According to other narrations, the brother of Hadharat Ma'n (R.A.) by the name of Hadharat Aamir bin Adi (R.A.) was sent with them. **The Nabi (sallallaahu-alayhi-wa-sallam) instructed the Muslims to use the site as a rubbish dump."**

Relevant extracts from the commentary Tafseer –E-Usmani on the Noble Quran Surah 9 (Tauba) Ayat 107 reads as follows:

> " The Holy Prophet ordered Malik bin Khasham and Ma'an bin Udi to raze that building, which was named Mosque out of mischief and deception, to the ground.

> They at once obeyed and burnt down that fictitious and fraudulent Mosque. .... So the roots of the unjust and wrong-doers were cut down and all praises are unto god, the Lord-Cherisher of the Universe."

Relevant extracts from the commentary Tafseer –E-Usmani on the Noble Quran.Surah 9 (Tauba)

Ayat 109 reads as follows:

> "The work , whose basis is piety, belief, sincerity and the good pleasure of God, is very strong and stable. On the contrary the work based on doubt, hypocrisy, fraud and deception is always weak, unstable and bad in its result and is like a weak building standing on a crumbling bank of a pit which falls down by a simple movement of the earth or an ordinary stroke of water or wind, and finally goes down into the fire of Hell with its dwellers. Such Hypocrites do not succeed though they may do some good work (as the building of a Holy house) in the outward sense, because their hypocrisy and fraud internally spoils their works and they do not receive any divine help or guidance from above."

Relevant extracts from the commentary of Maulana Muhammad Ali on the Holy Quran Surah 9 (Tauba) Ayat 107 reads as follows:

> "According to l'Ab and other commentators, twelve men from among the hypocrites of the tribe of Bani Ghanam built a mosque at the instigation of Abu Amir in the neighbourhood of the mosque of Quba, with the object of causing harm to that mosque. Abu Amir who after fighting against the Holy Prophet for a long time, had fled to Syria after the battle of Hunain, had written to his friends at Madinah that he was coming with a formidable army to crush the Prophet, and they should build a mosque for him. But Abu Amir died in Syria, and the founders desired the Holy Prophet to give it a blessing by his presence, which he was forbidden to do by Divine revelation, and the mosque was demolished (AH)."

PART-3

3. Al-Masjid Al- Haram i.e. Ka 'ba (in Makkah) is only mosque of particular significance without which right to practise the religion of Islam is not conceivable because it forms an essential and integral part of the practice of Islam.

3.1. **Command to face the Masjid al- Haram (in Makkah) during every prayer:** Noble Quran vide Surah al-Baqarah 2 :144 has directed that one must face the Masjid al-Haram (in Makkah) during every prayer. This command makes said sacred Mosque essential or integral part of religion of Islam. English translation of the said sacred *Ayat* reads as follows:

> "Noble Quran.2 :144 Verily We see you [Oh Muhammad (sallallahu-alaihi-wa sallam)] frequently lifting your gaze towards the heavens. We will most assuredly turn you towards a Qibla pleasing to you. So turn your face towards the sacred Masjid and wherever you may be, turn your face to its direction. Most certainly those who have been given the book know well that this order is from their Rabb. And Allah is not unmindful of what you do"

3.2. **Command to complete the Hajj, obligatory pilgrimage to Al-Masjid al- Haram at Mecca i.e. *Ka 'ba* and; the Umrah , optional visit to *Ka 'ba*:** In the Holy Quran's sacred Ayat nos. 196 of Surah 2: Al-Baqurah there is direction to complete the Hajj *(obligatory pilgrimage to Mecca)* and the Umrah *(optional visit to Mecca)* for the sake of Allah which direction gives Al-Masjid al-Haram at Mecca a status of particular significant religious place and makes it essential or integral part of the religion of Islam . No other Mosque can acquire such position. English translation of the said sacred Ayat by Mohammad Ashfaq Ahmad from the Book 'Noble Qur'an' Tafseer- E-Usmani of Allama Shabbir Ahmad Usmani Published by Darul-Isha'at reads as follows:

"Q.2:196. And complete the Hajj and Umrah for Allah. But if you are prevented then on you rest what you can afford of sacrifice; and do not shave your heads until the sacrifices reaches its place of sacrifice. Then if any of you is ill or has an injury or has an ailment in his head, he should fast or give alms or offer sacrifice as redemption; And when you are peaceful and secure so whosoever gets the benefit of Umrah with the Hajj, then on him lies a sacrifice which he can afford. But if whosoever cannot afford the sacrifice , he should keep three fasts during the Hajj and seven fasts when you return, these are ten fasts in all. This injunction is imposed upon him whose family does not live near the Sacred Mosque. And fear God, and know that chastisement of God is really very severe."

PART-4

4. Lesser than the Mosque of Al-Haram i.e. Ka 'ba in merit and significance there are other two Mosques of particular significance which may form an essential and integral part of the practice of Islam for the reasons that pilgrimage to those two mosques have also been mandated:

4.1. The Holy Prophet (PBUH) commanded to undertake pilgrimage to only three mosques: From Hadith 1397 Sahih Muslim it becomes crystal clear that in Islam only three Mosques namely the Mosque of the Holy Prophet (PBUH) in Madina, , the Mosque of Al-Haram in Mecca i.e. Ka 'ba and the Mosque of Al-Aqsa (Bait Al Maqdis) in Jerusalem have particular significances. English Translation of the said Hadith reads as follows:

> "[1397] Abu Huraria (Allah be pleased with him) **reported it directly from Allah's Apostle (SAW) that he said: Do not undertake the journey but to three mosques: this Mosque of mine, the Mosque of Al-Haram and the Mosque of Aqsa (Bait Al Maqdis).**"

4.2. A mount is not saddled for a pilgrimage except to three Masjids: In Hadith 326 Jami At Tirmidhi the Holy Prophet (PBUH) has commanded to go on pilgrimage to only three Masjids. English Translation of the said Hadith reads as follows:

> 326. Abu Sa 'eed Al- Khuri narrated that Allah's Messenger said: " **A mount is not saddled (for a journey) except to three Masjid: Al-Masjid : Al-Haram, this Masjid of mine, and Masjid Al-Aqsa.**"

4.3. The Holy Prophet commanded not to travel for pilgrimage except for three Mosques: In Hadith 288 (4) Sahih Bukhari the Holy Prophet has commanded not to travel (for visiting) except

for three Mosques i.e. Al-Masjid-Al-Haram, the Mosque of Aqsa (Jerusalem) and the Holy Prophet's Mosque (at Medina). English Translation of the said Hadith reads as follows:

> "288.Narrated Qaza Maula (freed slaves of) Ziad: I heard Abu Sa 'id Al-Khudri narrating four things from the Prophet and appreciated them very much. He said, conveying the words of the Prophet
> (1) xx
> (2) xx
> (3) xx
> **(4) Not to travel (for visiting) except for three Mosques i.e. Al-Masjid-Al-Haram, the Mosque of Aqsa (Jerusalem) and my Mosque (at Medina)."**

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PART-5

5. Ayats and Hadiths generally referred to show that mosques are essential or integral practices of Islam, do not support said claim:

In paragraph 2.16 (a) of his written notes of argument Dr Rajeev Dhavan Ld. Senior Advocate for the appellants had made reference of four sacred Ayats of the Holy Quran stating that those texts propound the importance of prayer in Mosque and also that the Mosque is the house of Allah. Said references are out of context. In fact in - Chapter 2 :Surah Al Baqrah :Ayat 114; Chapter 9: Surah Al Taubah: Ayat 18; and Chapter 72: Surah Al Jinn: Ayat 18, the words " Allah's Mosque" have been used for the Al-Masjid Al- Haram i.e. Ka 'ba in Mecca; and Al-Masjid Al-Aqsa i.e. Baitul Muqaddas in Jerusalem. In Chapter 62: Surah Al Jummah: Ayat 9 there is no whisper about Mosque but only Friday prayer, which will appear from the translation and renowned commentary "Illuminating Discourses On the Noble Quraan" by Mufti Muhammad Aashiq Illahi Muhajir Madani (Rahmatullahi Alyah) transalated into English by Mufti Afzal Hoosen Elias published by Zam Zam Publishers Karachi Pakistan. English translation and relevant extracts from the aforesaid commentary of those 4 *Ayats* are reproduced in following sub paragraphs.

5.1. In 'Illuminating Discourses on the Noble Quran': Chapter 2 :Surah Al Baqrah :Ayat 114, Al-Masjid Al-Haram, Mecca and Al-Masjid Al-Aqsa, Jerusalem have been referred. Whatever the specific reference of the verse the wording of the verse is general. The verse makes it clear that preventing Allah's name being taken in the masaajid is an act of great injustice. It will be permissible to prevent such people from the Masjid who have left the fold of Islam. From this verse it does not appear that Mosques are essential for practising Islam. English translation and relevant extracts from the aforesaid commentary of the Said verse is reproduced as follows:

"Q 2:114: who can be more unjust than the one who prevents the name o Allah of being taken in the Masaajid and exerts himself for its ruination. Thes people may only enter therein in fear. Theirs shall be humiliation in this worl and terrible punishment in the Hereafter."

.....

Masaajid (plural of Masjid) are constructed for salah, recited some of the Qur'aa dhikr,etc. Tawaaf also takes place in the Masjidul Haraam. Preventing people fro these acts will result in the ruination of a Masjid. While the Mushrikeen thought tha they were maintaining the Masjidul Haraam as its custodians, they were actuall contributing to its ruination by placing their orders in the Kaa'ba and preventing th Muslims from performing their salah therein. This was one of the reasons that fc the Muslims to migrate to Madinah.

.....

other commentators have mentioned that the verse refers to the Jews and th Christians, who violated the sanctity of Baitul Muqaddas. Hadhrat Mujahid (A.R. Says that the verse refers specifically to the Christians, who used to throw harmfu things into the Baitul Muqaddas and prevented people from performing salaat there.

Hadhrat Qatadah (A.R.) Says that the verse refers to the Romans who, because o their enmity for the Jews, assisted the fire worshipping Bukht Nasr to destroy Baitul Muqaddas. Hadharat Ka'b Ahbaar (A.R.) Says that the Christians burnt Baitul Muqaddas after seizing control. Now, any Christian entering there will do so in fear. [Durrul Manthoor, Vol.1 Pg.108]

Whatever the specific reference of the verse the wording of the verse is general. The verse makes it clear that preventing Allah's name being taken in the maasajid is an act of great injustice. It will be permissible to prevent such people from the Masjid who have left the fold of Islam. ...

5.2. 'Illuminating Discourses on the Noble Quran': Chapter 9: Surah Al Taubah: Ayat 18, it does not appear that Mosques are essential for practising Islam. In the said verse it has been told that the Masjid should be controlled and managed by only Muslims. English translation and relevant extracts from the aforesaid commentary of the Said verse is reproduced as follows:

" Q.9:18: Only those should tend Allah's places of worship who believe in Allah, and the Last Day, establish salaah, pay Zakaah and fear Allah only. It is hoped that these people will be of those who were rightly guided."

"Ma'aalimut Tanzeel" (Vol.2 Pg.273) narrates from Hadharat Abdullah bin Abbas (R.A.) that when Hadharat Abbas (R.A.) was brought as prisoners to Madinah, the Muslims taunted him by saying that he was still a kaafir and that he did not maintain his family ties (by compelling his nephew, Rasulullaah (sallallaahu-a'ayhi-wa-sallam), and others to leave Makkah. Hadhrat Ali (R.A.) also added some strong words.

There upon Hadharat Abbas (R.A.) asked them why were they not mentioning all his good attributes instead of only the negative ones. Hadhrat Ali (R.A.) asked the in surprise, "do you have any good to your credit?" Hadhrat Abbas (R.A.) replied, "yes! We tend the Masidul Haraam and/or the custodians of the Kaa'ba. We also give water to the Hajjis (pilgrims)." It was then that Allah revealed the ever verses.

Allah says, *"it is not befitting of the Mushrikeen that they tend Allah's places are worship while their test to their own disbelief."* The Kaa'ba was built by the enemy of shirk viz Hadharat Ibraheem (A.S.). The Masaajid (plural of Masjid) have been established so that Tauheed is expressed, so these can never be tended by those who attribute partners to Allah. It is therefore meaningless that they tend to upkeep of the Masjidul Haraam when all they do is whistle and clap hands (as mentioned in verse 35 of Surah Anfaal).

5.3. From 'Illuminating Discourses on the Noble Quran': Chapter 72: Surah Al Jinn: Ayat 18, it does not appear that Mosques are essential for practising Islam. In this verse word "Masaajid" (plural of Masjid) means "places of prostration". English translation and relevant extracts from the aforesaid commentary of the Said verse is reproduced as follows:

"Q.72:18. Indeed, prostration is only for Allah, so do not supplicate to anyone else with Allah."

.....

Allah asserts *"Indeed, prostration is only for Allah, so do not supplicate to anyone else with Allah."* This means that worship is reserved exclusively for Allah. The verse makes it clear that it is not permissible to prostrate to any being besides Allah even though the prostration is carried out for respect and not for worship. It was common in the past for people to prostrate before their kings and even two-day many so-called saints have their devotees prostrate to them when arriving or when leaving. Such practices are totally Haraam and are tantamount to shirk.

Some commentators have translated the word "masaajid" (translated above as "prostration") as "places of prostration" (i.e. the Liberal of Masjid). This translation will have the same meaning as the above interpretation i.e.

prostration (for which these places were built) should be for Allah only. If one is travelling and installs for salaah somewhere, the place will also be regarded as a "place of prostration" and the salaah should be for Allah only.

5.4. From 'Illuminating Discourses on the Noble Quran': Chapter 62: Surah Al Jumuah. Ayat 9, it does not appear that Mosques are essential for practising Islam. In this verse even the word 'Masjid' has not been used. This verse commands Muslims not to delay in presenting themselves for the Jumu'ah salaah once the Adhaan has been called. English translation and relevant extracts from the aforesaid commentary of the Said verse is reproduced as follows:

> **" Q.62:9. O you believe ! When the Adhaan is called out for salaah on the day of jumu'ah, then hasten towards Allah's remembrance and leave trading. This is best for you if you but new."**
>
> These verses express the obligatory (Fardh) nature of the Jumu'ah (Friday) salaah. Allah Ta'aala says, *"O you believe ! When the Adhaan is called out for salaah on the day of jumu'ah, then hasten towards Allah's remembrance and leave trading."* The first Khutbah (sermon) is referred to as *"Allah's remembrance."* This verse commands Muslims not to delay in presenting themselves for the Jumu'ah salaah once the Adhaan has been called.

5.5. Few Hadiths are referred inter alia stating that those Hadiths say that a Mosque is essential for practicing Islam, do not support said claim..

5.6. The sacred Hadith 260 of Sahih Bukhari reads as follows:

> "260. Narrated Maimuna : The Prophet took the bath of Janaba (sexual relation or wet dream). Used to take three handfuls of water, pour them on his head and then pour more water over his body. Al-Hasan said to me,' I am a hairy man.' I replied,' the Prophet had more hair than you'."

From the aforesaid sacred Hadith it is very much apparent that the said Hadith directs to take bath after sexual intercourse or wet dream. From the said Hadith it cannot be inferred that a Mosque is essential to practise Islam.

5.7. The sacred Hadith 618 of Sahih Bukhari reads as follows:

> "Narrated Abdulla bin Umar: Allah's Messenger said, "The prayer in congregation is twenty-seven times superior to the prayer offered by a person alone"

The said Hadith tells that prayer in congregation is 27 fold meritorious than the prayer offered by a person alone. As congregational prayer can be performed in a house or in an open space by only two or three persons from the said Hadith it cannot be inferred that a Mosque is essential to Islam.

5.8. The sacred Hadith 626 of Sahih Bukhari reads as follows:

> "Narrated for area: The Prophet said, "no prayer is more heavy (harder) for the hypocrites than the Fajr and the 'Isha' prayers and if they knew the reward for these prayers at their respective times, they would certainly present themselves (mosque) even if they had to crawl." The Profit added, "Certainly I decided to order the Mu'addhin (Call-maker) to pronounce it, and order a man to lead the prayer and then take a fire flame to burn all those (men) who had not left their houses so for the prayer along with their houses.

Be it mentioned herein that in the said sacred Hadith in original text Mosque does not find place that is why the translator has put the word "Mosque" in bracket.

5.9. In sacred Hadith 629 of Sahih Bukhari it has been inter alia stated that Allah will give shade, to seven persons, on the Day when there will be no shade and amongst the seven persons a man whose heart is attached to Mosque has also been enumerated. But in this sacred Hadith it has not been said that the Mosque is essential to practice Islam.

5.10. In sacred Hadith 653 of Sahih Muslim on being sought permission, the Holy Prophet granted permission to a blind person to say prayer in his house instead of a mosque. In Hadith 654 it has been stated that only seriously ill and hypocrite will remain away from the congregational prayer. In Hadith 664, 665 of Sahih Muslim certain Muslims whose houses were

away from the mosques and wanted to sift near a certain mosque, the Holy Prophet advised them to remain in their houses. In Hadith 549 of Sahih Muslim it has been reported that the Holy spittle is sticking to the wall towards Qibla. In these sacred Hadith it has not been said that a Mosque is essential practice of Islam.

5.11. In sacred Hadith 735 of Sunan Ibn Majah it is reported that during the days of the Holy Prophet whenever his companions used to pass through a mosque they prayed there. In Hadith 736 thereof it has been stated that the Angels invoke blessings on everyone so long he is in place of worship. In Hadith 737 thereof it has been stated that anyone who sat in a place of worship waiting for the prayer is in prayer. In Hadith 758 and 759 thereof it have been stated that no one should move / pass in front of a man who is praying .In these four Hadiths the word 'Mosque' has not been used. **In Hadith 789 thereof it has been stated that the Holy Prophet led the prayer and in Hadith 791 thereof it has been reported that Itban bin Malik who was unable to go to Mosque invited the Holy Prophet to come to his house and to pray in the place of worship in his house which was done by the Prophet. From this Hadith it is crystal clear that prayer can be offered by making a place of worship in one's house and the mosque is not essential to practice Islam.**

5.12. In sacred Hadith 564 of Sunan Abu Dawud the Holy Prophet has said that who goes to Mosque performing ablution and finds that the prayer has been finished he will get reward like one who prayed in congregation. In Hadith 1067of Sunan Abu Dawud it has been reported tha when two festivals (Id and Friday) synchronised on the same day, the Holy Prophet combinec them and offered two rak'ahs in the morning and did not add anything to them until he offered th afternoon prayer. In Hadith 2473 of Sunan Abu Dawud it has been reported that the Holy Prophe said that: 'Migration will not end until repentance ends, and repentance will not end until the su

rises in the West.' Out of aforesaid three Hadiths, in only one the word 'Mosque' has been used so also not in the context that the mosque is essential to practice Islam.

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PART-6

6. According to an authoritative work Durr -Ul-Mukhtar when two authentic opinions exist on any proposition, a Jurist and a Kazi may adopt either of the two views:

6.1. The authoritative work Durr-Ul-Mukhtar says that if the precincts of a Mosque disappear and it become useless, it's Al is still remain a Mosque, according to Abu Hanifa and Abu Yusuf, forever, as long as time lasts; that has been held by the Havi-ul- Kudsi, and it will revert to the owner i.e. to the founder or his heirs according to Mohammad. Abu Yusuf has held that it will made over to the another Mosque with sanction of the Kazi.

6.2. The Durr-Ul-Mukhtar further says that the principle is that when two authentic opinions exist on any proposition, a Jurist and a Kazi may adopt either of the two views. From the aforesaid view it also appears that the view of the Imam Mohammad that once Mosque is not Mosque for ever was adopted by the Mogul emperor as also by the courts of law.

6.3. The great jurist, scholar, author and eminent Judge of the Privy Council (a Member of its Judicial Committee) Sayed Ameer Ali in his book 'Mahommedan Law' compiled from authorities in the original Arabic has reproduced authoritative texts to the effect that colleges, high schools, hospitals, dispensaries, & etc., Stand on the same footing as mosques and other religious institutions and; a Mosque which has become ruined and part of it has come down, the Kazi (judge) has the power of authorising the application of the proceeds arising from the sale of the materials to another Mosque. The relevant extracts from the said book read as follows:

> "Colleges, high schools, hospitals, dispensaries, etc., Stand on the same footing as mosques and other religious institutions. From an English point of view, they would be regarded, generally speaking, as secular endowments. But, in the Mussulmar

Law there is no distinction between purely religious institutions and others. All are treated on the same footing."

xxx

"In the *Kinia* it is laid down that when a reservoir or a mosque has become ruined, and people have abandoned it, the Kazi has the power of authorising the application of the proceeds arising from the sale of the materials two and the reservoir or mosque. And it is also stated there, that when there are two ruined masques, and nobody knows who weathered indicators of the two, the Kazi has the power of directing the application of the one to the other for the purpose of reconstruction. If the consecrators are known and have left their heirs they might give the sanction themselves."

xxx

"According to Abu Hanifa and Abu Yusuf, the land which has once been dedicated to a Mosque continues wakf even though it has become waste and the building has fallen into ruin; and the Fatwa is according to their opinion. And Abu Yusuf further reports that, with the permission of the Kazi, the ruined or waste portion may be sold and applied towards the construction or maintenance of any other mosque nearest to the disused mosque. "And the same principle is applicable to every other religious or charitable institution."According to the Surrat-ul-Fatwa, the Fatwa is according to Abu Yusuf."

" According to the Sharh-Multeka, when the purpose of a trust fails, it is laughable to apply the income of the trust-property to an object in nearest in its nature to the original purpose, jins-i-karib. For example, if the object of a wakif is a reservoir, the income may be applied to a tank or canal; if it is a mosque, the income is to be applied to another mosque, or to fasting, prayers,etc."

"Shams ul-Aimma al-Halwani has declared that when a hauz (reservoir) or mosque becomes ruined, and nobody uses cover, Pinatubo the portable offender other available on the available guy school student pilot the Jaffna with the, the Kazi can direct the application of its materials to another hauz, or mosque. "In these times says the author of the Radd, "it is essentially necessary to adopt the views of Imam al-Halwani, who authorises the Kazi to give permission to apply the materials to a mosque, which has fallen into ruin to another which is in use.""

In his book "The Spirit of Islam" Sayed Ameer Ali has drawn true picture of Islamic Law.

6.4. The Durr-ul- Mukhtar says also prescribe for sale or exchange of endowed land.Relevant extract thereof reads as follows:

"It is valid to provide for exchange of the endowed property with another land, or its sale and purchase of another land with the sale consideration when the trust

deem it fit to do so. When the trustee does so, the second property becomes subject to all the condition attached to the first even if it is not so provided by the wakif. The second property should not however be exchanged." ...

"As for exchange without being provided for, even if it is for the benefit of the poor, cannot be made except by Kazi- the Durar. In the Bahrur-Ratik, the conditions under which exchange of endowed property without being provided for is allowed are:- (a) the endowed property become devoid of all income, (b) the property to be received in exchange being land and (c) the person sanctioning exchange being a heavenly kazi, in other words a Kazi of vast learning and good behaviour."

" In the Nahrul-faik it is said that when the exchanger is heavenly (virtuous) Kazi and one feels satisfied with him and fears no misappropriation, exchange with money can also be done."

PART-7

7. According to Islamic law Judge and Jurist acquire merits by giving Judgments.

7.1. In Hadith 1326 and 1327Jami At Tirmidhi the Holy Prophet has a stated that when the judge passes a correct judgement then he receives two rewards and when he judges and is mistaken then he receives one reward. He said that a judge should judge according to Quran and hadith and in case no provision is found therein he should give his own view. Relevant portions of the said Hadiths read as follows:

> "1326. Abu Hurairah narrated that the Messenger of Allah said: "When the judge passes a judgment in which he is strived and was correct, then he receives two rewards. And when he judges and is mistaken, then he receives one reward." "...
>
> "1327. Some men who were companion of Mu 'adh narrated from Mu 'adh that the Messenger of Allah sent Mu 'adh to Yemen, so he said: "How you will judge?" He said " I will judge according to what is in Allah's Book." He said: "If it is not in Allah's Book?" He said: " Then with the *Sunnah* of the Messenger of Allah." He said : " If it is not in the *Sunnah* of the Messenger of Allah?" He said: " I will give my view." He said; " all praise is due to Allah, the one Who made the messenger of the Messenger of Allah suitable."

7.2. In Hadith 2681, 2682 and 2685 Jami At Tirmidhi the Holy Prophet has said that a Jurist is more superior than thousand worshippers. Indeed the scholars are the heirs of the Prophet. Relevant portions of the said Hadiths read as follows:

> "2681. Ibn 'Abbas narrated that the Messenger of Allah said: " The *Faqih* is harder on *Ash-Shaitan* than a thousand worshippers." ..
> Comments:
> A dedicated worshipper who does not have firm knowledge, the benefit of his worship is restricted to his own self, and also it is easy for the Saton to misguide him; while a learned jurist does not only correct himself and is safe from the illusion of the Satan, but also he protects others against the plots, conspiracy and errors o the devil, and he guides them correctly by teaching the issues of religion.
>
> "2682. ..... " And superiority of the scholar over the worshipper is like the superiorit of the moon over the rest of the celestial bodies. Indeed the scholars are the heir of the Prophets, and the Prophets do not leave behind Dinar or Dirham. The onl legacy of the scholars is knowledge, so whoever takes from it, then he has indee taken the most able share." ...

"2685. Abu Umamah Al- Bahili narrated: "Two men were mentioned before the Messenger of Allah. One of them a worshipper, and the other a scholar. So the Messenger of Allah said: 'The superiority of the scholar over the worshipper is like my superiority over the list of you.' Then the the Messenger of Allah said: 'Indeed Allah, His Angels, the inhabitants of the heavens and the earths-even the anti-in his hole, even the fish-say *Salat* upon the one who teaches the people to do good.'" ..

PART-8

8. Mosque can be adversaly possessed.

8.1. That a 5 Judges Bench of the Privy Council in AIR 1940 PC 116 Mosque known as Masjid Shahid Ganj and others, Appellants v. Shiromani Gurdwara Parbandhak Committee, Amritsar and another has laid down a proposition of law that a Mosque can be adversaly possessed. Relevant extracts from the said judgment read as follows:

> "The rule of Hanafi law that wakf property is taken to have ceased to be held in human ownership is applied to all such property even if the wakf be a wakf-alal-uilad or wakf for the benefit of descendants. The result of the rule is not that the property cannot in any circumstances be alienated but that it can only be alienated for proper purposes and save as provided by the terms of the endowment with the leave of the Court. In some circumstances it can even be taken in execution. In the particular case of a mosque, like that of a graveyard, the wakf property is intended to be used in specie for a certain purpose-not to be let or cultivated so that the income may be applied to the purposes of the wakf. This and other facts make some case for a contention that such property cannot be alienated on any conditions or with any sanction, though their Lordships are by no means satisfied to affirm so wide a proposition. But the Limitation Act is not dealing with the competence of alienations at Mahomedan law. It provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. **It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of a mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as "mosque" or unless the building is razed to the ground or loses the appearance which reveals its original purpose.**
>
> The argument that the land and buildings of a mosque are not property at all because they are a "juristic person" involves a number of misconceptions. It is wholly inconsistent with many decisions whereby a worshipper or the mutwalli has been permitted to maintain a suit to recover the land and buildings for the purposes of the wakf by ejectment of a trespasser. Such suits had previously been entertained by Indian Courts in the case of this very building. The learned District Judge in the course of his able and careful judgment noted that the defendants

were not pressing any objection to the constitution of the suit on the ground that the mosque could not sue by a next friend. He went on to say:
It is proved beyond doubt that mosques can and do hold property. There is ample authority for the proposition that a Hindu idol is a juristic person and it seems proper to hold that on the same principle a mosque as an institution should be considered as a juristic person. It was actually so held in 59 PR 1914, p. 200 5and later in AIR 1926 Lah 372.6

5. Jindu Ram v. Hussain Bakhsh, (1914) 1 AIR Lah 444=24 IC 100=59 PR 1914=147 PLR 1914.
6. Haula Bux v. Hanzuddin, (1926) 13 AIR Lah 872=94 IC 7=27 PLR 256.

That there should be any supposed analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships. The question whether a British Indian Court will recognize a mosque as *(Ibid at page 121)*

having a locus standi in judicio is a question of procedure. In British India the Courts do not follow the Mahomedan law in matters of procedure (cf. 7 All 822 7at pp. 841.2, per Mahmood J.) any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence. **At the same time the procedure of the Courts in applying Hindu or Mahomedan law has to be appropriate to the laws which they apply. Thus the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognizes certain doctrines of Hindu law as essential thereto, e. g. that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait:** 31 IA 203. 8

7. Jafri Begum v. Amir Muhammad Khan, (1885) 7 All 822=1885 AWN 248 (FB).
8. Jagadindranath v. Hemanta Kumari, (1905) 32 Cal 129=31 IA 203=8 CWN 809=8 Sar 698 (PC).

Very considerable difficulties attend these doctrines-in particular as regards the distinction, if any, proper to be made between the deity and the image : cf. 37 Cal 128 9at p. 153, Golap Chandra Sarkar Sastri's Hindu Law, Edn. 7, pp. 865 et seq. But there has never been any doubt that the property of a Hindu religious endowment -including a thakurbari-is subject to the law of limitation: 37 IA 147; 1064 IA 203. 11 **From these considerations special to Hindu law no general licence can be derived for the invention of fictitious persons.** It is as true in law as in other spheres "entia non sunt multiplicanda praeter necessitatem." The decisions recognizing a mosque as a "juristic person" appear to be confined to the Punjab : 153 PR 1884 ; 1259 PR 1914; 5AIR 1926 Lab 372. 6In none of these

cases was a mosque party to the suit, and in none except perhaps the last is the fictitious personality attributed to the mosque as a matter of decision. **But so far as they go these cases support the recognition as a fictitious person of a mosque as an institution - apparently hypostatizing an abstraction. This, as the learned Chief Justice in the present case has pointed out, is very different from conferring personality upon a building so as to deprive it of its character as immovable property.**

9. Bhupati Nath v. Kara Lal, (1910) 37 Cal 128=3 IC 642=14 CWN 18=10 CLJ 355.
10. Damodar Das v. Lakhan Das, (1910) 37 Cal 885=7 IC 240=37 IA 147=14 WN 889=12 CLJ 110 (PC).
11. Iswari Bhubaneshwari Thakurani v. Brojo Nath Dey, (1937) 24 AIR PC 185=168 IC 766=64 IA 203= ILR (1937) 2 Cal 447=31 SLR 538 (PC).
12. Shankar Das v. Said Ahmad, (1884) 153 PR 1884.

xxxx

.... Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions' generally or to mosques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case and hold that suits cannot competently be brought by or against such (*Ibid at page 122)*

institutions as artificial persons in the British Indian Courts.

The property now in question having been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than 12 years, the right of the mutawali to possession for the purposes of the waqf came to an end under Art. 144, Limitation Act, and the title derived under the dedication from the settlor or wakif became extinct under S. 28. The property was no longer for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to his creatures." The main contention on the part of the appellants is that the right of any Moslem to use a mosque for purposes of devotion is an individual right like the right to use a private road, 7 All 178, 13that the infant plaintiffs, though born a hundred years after the building had been possessed by Sikhs, had a right to resort to it for purposes of prayer; that they were not really obstructed in the exercise of their rights till 1935 when the building was demolished; and that in any case in view of their infancy the Limitation Act does not prevent their suing to enforce their individual right to go upon the property. This argument must be rejected. The right of a Muslim worshipper may be regarded as an individual right, but what is the nature of the right? It is not a sort of easement in gross, but an element in the general right of a beneficiary to have the wakf property recovered by its proper custodians and applied to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and have the property delivered into the

possession of the mutawali or of some other person for the purposes of the wakf. As a beneficiary of the religious endowment such a plaintiff can enforce its conditions and obtain the benefits thereunder to which he may be entitled. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a parson possessing adversely to the wakf and every interest thereunder the rights of all beneficiaries have gone: the land cannot be recovered by or for the mutawali and the terms of the endowment can no longer be enforced: cf. 41 Mad 124 14at p. 135. The individual character of the right to go to a mosque for worship matters nothing when the land is no longer wakf and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication.

13. Jawahra v. Akbar Husain, (1884) 7 All 178=1884 AWN 324 (FB).
14. Chidambaranatha Thambiran v. Nallasiva Mudaliar, (1918) 5 AIR Mad 461=42 IC 866=41 Mad 124=38 MLJ 357.

This seems to their Lordships a sufficient answer to the argument that the only Article of the Limitation Act which affects the right of the plaintiffs (other than plaintiff 1) is Art. 120. Under that Article any plaintiff who had been of age for more than six years before the date of the suit would be barred as he has clearly been excluded from resort to the building for purposes of prayer. But the true answer to these plaintiffs and to the minor plaintiffs is that **the rights of the worshippers stand or fall with the wakf character of the property and do not continue apart from their right to have the property recovered for the wakf and applied to its purposes. As the law stands, notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the wakf.** Were the law otherwise the effect of limitation upon charitable endowments would be either negligible or absurd. The plaintiffs may, if they choose, refrain from asking that the land be recovered for the wakf but they do not alter the character of their right by deserting the logic of their case." (*Ibid at* page-PC123)

8.2. There are Decisions of the Sadar Diwani Adalat of the North Western Provinces of the years 1851 AD and 1853 AD respectively wherein the view of some Islamic jurists to the effect that once mosque is forever Mosque have been negated and law of Limitation has been applied. W.H. Macnaghten's 'Principles and Precedents of the Moohummudan Law' 3rd. Edn.1825 was again published by William Sloan in 1864 with additional notes and Appendix inter alia containing Digests of the decisions on the law and customs relating to moohummudans, by the Privy Council and Supreme and Sudder Courts of Madras, Calcutta, Bombay and North Western

Provinces, from 1793 to 1859 selected from the published reports. Sir William Hay Macnaghte 1st Baronet was a British Civil Servant. He was son of Sir Francis Macnaghten, Bart., Judge the Supreme Court of madras and Calcutta. For sometimes he was Registrar of Sadar Diwa Adalat, Calcutta. Gist of the relevant decisions published on page 421 and 422 of the said Boo read as follows:

> "45. In a suit brought for recovery of mosque which had been converted into a private residence thirty-eight years previous to date of action, Sudder Diwani Audalat North West Provinces vide its judgment dated 1st April 1851 held that the claim was barred by the law of limitation which decision has been reported in Dec. S.D.A.N.W.P. VI:95." (*Ibid page 421*)

> " 50.In another Suit before the Sudder Diwani Audalat North West Provinces it was contended in the suit by the Plaintiffs on behalf of the Mahomedan of Dehlie that certain ground taken position of by Government, had been occupied by a mosque (which had disappeared), and that as the erection of a mosque upon a piece of ground constitutes that ground wuqf or endowed property, the endowment remains, whether public worship continue to be performed in the buildings or not, and that the land can never be resumed or appropriated to any other than religious purposes. Vide its judgment dated 27th September 1853 in accordance with a decision passed on the 14th of February 1850, it was held that as every trace of the building appeared to have been obliterated by time and neglect; and the ground was waste and had not been made use of by the Mahomedan population for religious purposes within the period of twelve years preceding the institution of the action; the ground must be considered to have escheated to Government whose Agent, under the authority of Sec.4 Reg.XIX of 1810 was fully competent to take possession of it; which decision has been reported in Dec. S.D.A.N.W.P. VIII:679."(*Ibid page 422*)

CHAPTER-9

9. What constitutes the essential part of a religion is primarily to be ascertained witl reference to the doctrines of that religion itself.

9.1. In judgment of a Constitution Bench of 7 Judges of the Hon'ble Supreme Court of Indi reported in AIR 1954 S.C. 282 The Commr., Hindu Religious Endowments, Madras - versus- Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (hereinafter referred to as the Shirur Mutt Case) it has been laid down that 'Art. 25 secures to every person, subject tc public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery or in a temple or parlour meeting. Under Art.26 the administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no Legislature can take away, where as the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which cl. (b) of the Article applies. A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conductive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. **What constitutes the essential part of a religion is primarily to be ascertained with**

reference to the doctrines of that religion itself. Under Art. 26(b), therefore a religiou denomination or organization enjoys complete autonomy in the matter of deciding as t what rites and ceremonies are essential according to the tenets of the religion they hol and no outside authority has any jurisdiction to interfere with their decision in such matters.

Relevant extracts from paragraph nos. 14, 16,17,18,19 and 22 thereof read as follows:

> **"14.** We now come to Art. 25 which, as its language indicates, secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. .....
>
> .... Institutions, as such cannot practise of propagate religion; it can be done only by individual person and whether these persons propagate their personal views or the tenents for which the institution stands is really immaterial for purposes of Art. 25. **It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery or in a temple or parlour meeting.**
>
> XXXXXX
>
> **16. The other thing that remains to be considered in regard to Art. 26 is, what, is the scope of clause (b) of the Article which speaks of management 'of its own affairs in matters of religion?"** The language undoubtedly suggests that there could be other affairs of a religious denomination or a Section thereof which are not matter of religion and to which the guarantee given by this clause would not apply. **The question is, where is the line to be drawn between what are matters of religion and what are not?**
>
> **17.** It will be seen that besides the right to manage its own affairs in matters of religion which is given by cl. (b), the next two clauses of Art. 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. **The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no Legislature can take away, where as the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties**

belonging to a religious group or institution are not matters of religion to which cl. (b) of the Article applies.

.....

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in ay Intelligent First Cause. A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conductive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. **A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.**

18. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion' in Art. 25....
.... Restrictions by the State upon free exercise of religion are permitted both under Arts. 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Art. 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-cl. (b).under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. **The learned Attorney-General lays stress upon cl (2) (a) of the Article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.**

19. The contention formulated in such broad terms cannot, we think be supported, in the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices **and should be regarded as matters of religion within the meaning of Art. 26(b).**

What Art. 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and normality but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. .....

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22. .....

Our Constitution-makers, however, have embodie the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Arts. 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only, it extends to religious practices as well subject to the restrictions which the Constitution itself had laid down. **Under Art. 26(b), therefore a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.**

Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature, for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under Art. 26 (d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law, and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose.

A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art 26."

9.2. In paragraph 22 of the Shirur Mutt Case it was laid down that under Art. 26(b), a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. From the

said judgment it is crystal clear that the words "outside authority" was used for the Commissioner Hindu Religious Endowments, Madras in particular and State / Statutory authorities discharging administrative or quashi judicial functions in general, not the Court. In paragraph 19 of the Shirur Mutt Case it was held that what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself **but in the said case it was not expressly told that who will ascertain it, this gray-area was filled up by a 5 Judges Constitution Benches of the Hon'ble Supreme Court of India in AIR 1962 SC. 853 Sardar Syedna Taher Saifuddin Saheb v. State of Bombay and AIR 1963 S.C.1638 Tilkayat Shri Govindlalji Maharaj etc -versus- State of Rajasthan and others (hereinbefore and hereinafter referred to as the Nathdwara Temple Case).**

9.3. In AIR 1962 SUPREME COURT 853 Sardar Syedna Taher Saifuddin Saheb v. State of Bombay , a Constitution Bench of 5 Judges held that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion. Relevant paragraph 34 of the said Judgment reads as follows:

> **34.** The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in 1954 SCR 1005 : (AIR 1954 S.C. 282), Ramanuj Das v. State of Orissa 1954 SCR 1046 : (AIR 1954 SC 400), 1958 SCR 895 : (AIR 1958 S.C. 255); (Civil Appeal No. 272 of 1960 D/- 17-3-1961 : (AIR 1961 SC 1402), and several **other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy.** The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. **The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.**

9.4. In AIR 1963 S.C.1638 Tilkayat Shri Govindlalji Maharaj etc Appellants –versus- State of Rajasthan and others Respondents, a Constiution Bench of 5 Judges of the Hon'ble Supreme

Court went into the question as to whether the tenets of the Vallabh denomination and its religious practices require that the worship by the devotees should be performed at the private temples and, therefore, the existence of public temples was inconsistent with the said tenets and practices, and on an examination of this question, negatived the plea. In said case it was laid down that in deciding the question as to whether a given religious practice is an integral part of the religion or not the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. Relevant paragraph nos. 56, 57, 58, 59 and 60 thereof read as follows:

> "**56.** Articles 25 and 26 constitute the fundamenta1 rights to freedom of religion guaranteed to the citizens of this country. Article 25(1) protects the citizen's fundamental right to freedom of conscience and his right freely to profess, practice and propagate religion. **The protection given to this right is, however, not absolute. It is subject to public order, morality and health as Art. 25(1) itself denotes. It is also subject to the laws existing or future which are specified in Art. 25(2).** Article 26 guarantees freedom of the denominations or sections thereof to manage their religious affairs and their properties. Article 26(b) provides that subject to public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion; and Art. 26(d) lays down a similar right to administer the property of the denomination in accordance with law. Article 26(c) refers to the right of the denomination to own and acquire movable and immovable property and it is in respect of such property that clause (d) makes the provision which we have just quoted. The scope and effect of these articles has been considered by this Court on several occasions. The word "religion" used in Art. 25(1), observed Mukherjea, J." speaking for the Court in the case of the Commissioner, Hindu Religious Endowments, Madras, 1954 SCR 1005: (AIR 1954 SC 282)

"is a matter of faith with individuals and communities and it is not necessarily theistic. It undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribed rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress."

57. In 1958 SCR 895 at p. 909: (AIR 1958 SC 255 at p. 264) Venkatarama Aiyar J. observed

"that the matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion."

It would thus be clear that religious practice to which Art. 25(1) refers and affairs in matters of religion to which Art. 26(b) refers, include practices which are an integral part of the religion itself and the protection guaranteed by Article 25(1) and Art. 26 (b) extends to such practices.

58. In deciding the question as to whether a given religious practice is an integral part of the religion or not the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. **This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.** It is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of Durgah Committee Ajmer v. Syed Hussain Ali, 1962-1 SCR 383 at p. 411: (AIR 1961 SC 1402 at p. 1415) and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even

purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26.

59. In this connection, it cannot be ignored that what is protected under Arts. 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affairs which is controlled by the statute is essentially and absolutely secular in character it cannot be urged that Art. 25(1) or Art. 26(b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practice religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matter of religion, then, of course, the right guaranteed by Art. 25(1) and Article 26(b) cannot be contravened.

60. It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. **As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though and the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Ars. 25(1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf of the Court must be satisfied that the practice is religious and the affairs is in regard to a matter of religion.** In dealing with this problem under Articles 25(1) and 26(b) Latham C.J.'s observation in Adelaide Co. of Jehovah's witnesses v. Commonwealth, 1943-67 Com- WLR 116 at p. 123 that "what is religion to one is superstition to another", on which Mr. Pathak relies, is of no relevance. If an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Art. 25(1) and Art. 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a

citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have on the rejected not he ground that it is based on irrational considerations and cannot attract the provisions of Art. 25(1) and Art. 26(b). This aspect of the matter must be borne in mind in dealing with true scope and effect of Art. 25 (1) and Art. 26 (b)."

9.5. In AIR 1958 S.C.731 Mohd. Hanif Quareshi and others v. State of Bihar Respondents, the Hon'ble a 5 judges Constitution Bench decided that the sacrifice of a cow on Bakr Id day is not an obligatory overt act for a Mussalman to exhibit his religious belief and idea in other words sacrificing cows on Bakrid day is not essential or integral part of practice of Islam. The said Constitution Bench further concluded that the very fact of an option seems to run counter to the notion of an obligatory duty. Relevant paragraph 13 of the said Judgment reads as follows:

"13. Coming now to the arguments as to the violation of the petitioners' fundamental rights, it will be convenient to take up first the complaint founded on Art. 25 (1). That article runs as follows :

"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the rights freely to profess, practise and propagate religion."

After referring to the provisions of cl. (2) which lays down certain exceptions which are not material for our present purpose this Court has, in Ratilal Panachand Gandhi v. State of Bombay, 1954 SC R 1055 at pp. 1062-1063 : (A I R 1954 S C 388 at p. 391) (B), explained the meaning and scope of this article thus:

"Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people."

What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meager and it is surprising that of matter of this description the allegations in the petition should be so vague. In the Bihar Petition No. 58 of 1956 are set out the following bald allegations:

"That the petitioners further respectfully submit that the said impugned section also violates the fundamental rights of the petitioners guaranteed under Art. 25 of the Constitution inasmuch as on the occasion of their Bakr Id Day, it is the religious practice of the petitioners' community to sacrifice a cow on the said occasion, the poor members of the community usually sacrifice one cow for every 7 members whereas suit would require one sheep or one goat for each member which would entail considerably more expense. As a result of the total ban imposed by the impugned section the petitioners would not even be allowed to make the said sacrifice which is a practice and custom in their religion, enjoined upon them by the Holy Quran, and practiced by all Muslims from time immemorial and recognised as such in India."

The allegations in the other petitions are similar. These are met by an equally bald denial in paragraph 21 of the affidavit in opposition. No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Suarah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We h
affidavit before us by any Maulana explaining the implications of those v
throwing any light on this problem. We, however, find it laid down in H
translation of Hedaya Book XLIII at p. 592 that it is the duty of
Mussalman, arrived at the age of maturity, to offer a sacrifice on the
festival of the sacrifice, provided he be then possessed of Nisab
traveler, the sacrifice established for one person is a goat and that
or a camel. It is therefore, optional for a Muslim to sacrifice a goa
a cow or a camel for seven persons. It does not appear to
person must sacrifice a cow. **The very fact of an option se
the notion of an obligatory duty.** It is, however, pointed
other members of his family may afford to sacrifice a c
afford to sacrifice seven goates. So there may be an e
there is no religious compulsion, It is also pointed o
Indian Musslamans have been sacrificing cows
certainly sanctioned by their religion and it
protected by Art. 25. While the petitioners
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emphasized by the respondents, c
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of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad shah, it is said, prohibited cow slaughter,. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cow, We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day in an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners."

9.6. In AIR 1995 S.C.464 State of W.B., etc. etc Appellants v. Ashutosh Lahiri and others Respondents, a 3 Judges Bench of the Hon'ble Supreme Court decided that that slaughtering of healthy cows on Bakri Idd is not essential or required for religious purpose of Muslims or in other words it is not a part of religious requirement for a Muslim that a cow must be necessarily scarified for earning religious merit on Bakri Idd. Relevant paragraph 9 of the said judgment reads as follows:

"**9.** In view of this settled legal position it becomes obvious that if there is no fundamental right of a Muslim to insist on slaughter of healthy cow on Bakri Idd day, it cannot be a valid ground for exemption by the State under S. 12 which would in turn enable slaughtering of such cows on Makri Idd. The contention of learned counsel for the appellant that Art. 25(1) of the Consitution deals with essential religious practices while S. 12 of the Act may cover even optional religious practices is not acceptable. No such meaning can be assigned to such an exemption clause which seeks to whittle down and dilute the main provision of the Act, namely S.4 which is the very heart of the Act. If the appellants' contention is accepted then the State can exempt from the operation of the Act, the slaughter of healthy cows even for non-essential religious, medicinal or research purpose, as we have to give the same meaning to the three purposes, namely, religious, medicinal or research purpose, as envisaged by. Sec 12. It becomes obvious that if for fructifying any medicinal or research purpose it is not necessary or essential to permit slaughter of healthy cow, then there would be no occasion for the State to invoke exemption power under S.12 of the Act for such a purpose. Similarly it has to be held that if it is not necessary or essential to permit slaughter of a healthy cow for any religious purpose it would be equally not open to the State to invoke its exemption power under S.12 for such a religious purpose. We, therefore, entirely concur with the view

of the High Court that slaughtering of healthy cows on Bakri Idd is not essential
required for religious purpose of Muslims or in other words it is not a part of religiou
requirement for a Muslim that a cow must be necessarily scarified for earnin
religious merit on Bakri Idd."

PART-10

10. Single individual may be treated as a class by himself.

10.1. In AIR 1958 S.C. 538 Shri Ram Krishna Dalmia Appellant v. Shri Justice S. R. Tendolkar and Others the Hon'ble Court held that there is no warrant for the proposition that a definite matter of public importance must necessarily mean only some matter involving the public benefit or advantage in the abstract, e. g., public health, sanitation or like or some public evil or prejudice, e. g., floods, famine or pestilence or the like. Quite conceivably the conduct of an individual person or company or a group of individual persons or companies may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well-being as to make such conduct a definite matter of public importance. that a law may be constitutional even though it relates to a single individuals if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself; hat it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ; that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

> "5. It will be convenient to advert to a few minor objections urged before us on behalf of the petitioners in support of their appeals before we come to deal with their principal and major contentions. The first objection is that the notification has gone beyond the Act. It is pointed out that the Act, by S. 3, empowers the appropriate Government in certain eventualities to appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and for no other purpose. **The contention is that the conduct of an individual persons or company cannot possibly be a matter of public importance and far less a**

definite matter of that kind. We are unable to accept this argument as correct. Widespread floods, famine and pestilence may quite easily be a definite matter of public importance urgently calling for an inquiry so as to enable the Government to take appropriate steps to prevent their recurrence in future. The conduct of villagers in cutting the bunds for taking water to their fields during the dry season may cause floods during the rainy season and we can see no reason why such unsocial conduct of villagers of certain villages thus causing floods should not be regarded as a definite matter of public importance. The failure of a big bank resulting in the loss of the life savings of a multitude of men of moderate means is certainly a definite matter of public importance but the conduct of the persons in charge and management of such a bank which brought about its collapse is equally a definite matter of public importance. Widespread dacoities in particular parts of the country is no doubt, a definite matter of public importance but we see no reason why the conduct, activities and modus operandi of particular dacoits and thugs notorious for their cruel depredations should not be regarded as definite matters of public importance urgently requiring a sifting inquiry. It is needless to multiply instances. In each case the question is : is there a definite matter of public importance which calls for an inquiry ? **We see no warrant for the proposition that a definite matter of public importance must necessarily mean only some matter involving the public benefit or advantage in the abstract, e. g., public health, sanitation or like or some public evil or prejudice, e. g., floods, famine or pestilence or the like. Quite conceivably the conduct of an individual person or company or a group of individual persons or companies may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well-being as to make such conduct a definite matter of public importance** urgently calling for a full inquiry. Besides, S. 3 itself authorises the appropriate Government to appoint a Commission of Inquiry not only for the purpose of making an inquiry into a definite matter of public importance but also for the purpose of performing such functions as may be specified in the notification. Therefore, the notification is well within the powers conferred on the appropriate Government by S. 3 of the Act and it cannot be questioned on the ground of its going beyond the provisions of the Act.

11. The principal ground urged in support of the contention as to the invalidity of the Act and/or the notification is founded on Art. 14 of the Constitution. In Budhan Choudhry v. The State of Bihar, 1955-1 S C R 1045 : ((S) A I R 1955 S C 191) (A) **a Constitution Bench of seven Judges of this Court at pages 1048-49 (of S C R) : (at p. 193 of A I R) explained the true meaning and scope of Art. 14 as follows :**

"The provisions of Art. 14 of the Constitution have come up for decision before this Court in a number of cases, namely, Chiranjit Lal v. Union of India, 1950 S C R 869 : (A I R 1951 S C 41) (B), State of Bombay v. F. N. Balsara, 1951 S C R 682 : (A I

R 1951 S C 318) (C), State of West Bengal v. Anwar Ali Sarkar, 1952 S C R 284 : (A I R 1952 S C 75) (D), Kathi Raning Rawat v. State of Saurashtra, 1952 S C R 435 : (AIR 1952 S C 123) (E), Lachmandas Kewalram v. State of Bombay, 1952 S C R 710 : (A I R 1952 S C 235) (F), Qasim Razvi v. State of Hyderabad, 1953 S C R 589 : (AIR 1953 S C 156) (G) and Habeeb Mohammad v. State of Hyderabad, 1953, S C R 661 : AIR 1953 S C 287) (H). It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. **It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be funded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.** It is also well established by the decisions of this Court that Art. 14 condemns discrimination not only by a substantive law but by a law of procedure."

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish -

(a) that a law may be constitutional even though it relates to a single individuals if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself ;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common

R 1951 S C 318) (C), State of West Bengal v. Anwar Ali Sarkar, 1952 S C R 284 : (A I R 1952 S C 75) (D), Kathi Raning Rawat v. State of Saurashtra, 1952 S C R 435 : (AIR 1952 S C 123) (E), Lachmandas Kewalram v. State of Bombay, 1952 S C R 710 : (A I R 1952 S C 235) (F), Qasim Razvi v. State of Hyderabad, 1953 S C R 589 : (AIR 1953 S C 156) (G) and Habeeb Mohammad v. State of Hyderabad, 1953, S C R 661 : AIR 1953 S C 287) (H). It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. **It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be funded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.** It is also well established by the decisions of this Court that Art. 14 condemns discrimination not only by a substantive law but by a law of procedure."

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish -

(a) that a law may be constitutional even though it relates to a single individuals if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself ;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common

report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation ; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon, to adjudge the constitutionality of any particular law attacked **as discriminatory and violative of the equal protection of the laws.**

PART-11

11. Where there is a clash of two Fundamental Rights, the Right which would advance the public morality or public interest would alone be in force to the process of Court.

11.1. In 1999 SC 495 *'X' Appellant v. Hospital 'Z' Respondent,* the Hon'ble Supreme Court held that where there is a clash of two Fundamental Rights, the Right which would advance the public morality or public interest would alone be in force to the process of Court. In other words the superior Fundamental Right would prevail. Relying on said judgment it is submitted that the pilgrimage, service and worship as well as performance of customary rituals at Sri Ramjanamsthan which has been described as Babri Mosque in the plaint is integral part of Hinduism as it has been commanded by the Holy Divine Scripture Sri Atharv Ved, the Holy Sacred Scripture Sri Skand Puran & Sri Narsimh Puran, Sri Valmiki Ramayana, The Sacred Religious Book Sri Ramacharitamanasa that the persons must visit the birth place of the Lord of Universe Sri Ram and by doing so they will acquire merit of visiting all the sacred places, performing of all yajnas (sacrifice) and gifting of thousands of cows etc. as also they will get salvation. But in no sacred Holy books of Islam it has been mentioned that offering prayer at the birth place of Sri Ram which has been described as Babri Mosque in the plaint is integral part of Islam. As such the Hindus have superior Fundamental Right to enforce through this Hon'ble Court and the instant suit is liable to be dismissed as *Sthandil* of Sri Ram which is a deity cannot be declared as mosque otherwise it will infringe Fundamental Rights of the Hindus guaranteed under Article 25 and 26 of the Constitution of India. Relevant paragraph nos.44 and 45 of the said judgment read as follows:

> **43.** Ms. 'Y', with whom the marriage of the appellant was settled, was saved in time by the disclosure of the vital information that the appellant was HIV(+). The disease which is communicable would have been positively communicated to her immediately on the consummation of marriage. As a human being, Ms. 'Y' must also

enjoy, as she, obviously, is entitled to, all the Human Rights available to any other human being. This is apart from, and, in addition to, the Fundamental Rights available to her under Article 21, which, as we have seen, guarantees "Right to Life" to every citizen of this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since "Right to Life" includes right to lead a healthy life so as to enjoy all faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and Ms. 'Y's' right to lead a healthy life which is her Fundamental Right under Article 21, the RIGHT which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay, in the Hall, known as Court Room, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day." (See: Legal Duties : Allen)

44. "AIDS" is the product of indisciplined sexual impulse. This impulse, being the notorious human failing if not disciplined, can afflict and overtake anyone how high soever or, for that matter, how low he may be in the social strata. The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respects as human beings. Their society cannot, and should not be avoided, which otherwise, would have bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. (See : School Board of Nassau Country, Florida v. Airline (1987) 107 S.Ct. 1123; Chalk v. USDC CD of Cal. (9th Circuit 1988) 840 2 F. 2d 701; Shuttleworth v. Broward Cty., (SDA Fla. 1986) 639 F. Supp. 654; Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne (1989) 261 Cal. Reporter 197). But, "sex" with them or possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object.

Overruling observation of the court made in paragraph nos. 37 to 40 of the said judgment REPORTED IN air 1999 SC 495, the ratio of law as laid down in the aforesaid paragraph nos. 43 and 44 were upheld by the Bench of three Judges of the Hon'ble Supreme Court of India in Mr. *'X' Appellant v. Hospital 'Z' Respondent* reported in AIR 2003 SC 664.

11.2. In AIR 1969 S.C. 966 Railway Board, New Delhi and another v. Niranjan Singh , a Bench of 3 Judges of the Hon'ble Supreme Court of India has laid down that 'the fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes.' In the light of said judgment the Hindus who were admittedly worshiping at Sri Ramjanmbhoomi for a period more than a decade prior to filing of OOS No.4, unless right of the Hindus are negated Muslims have no right to pray at that Sacred Place The relevant paragraph no.13 of the said Judgment reads as follows:

> 13. It is rule that the freedoms guaranteed under our Constitution are very valuable freedoms and this Court would resist abridging the ambit of these freedoms except to the extent permitted by the Constitution. The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes. Such a limitation is inherent in the exercise of those rights. The validity of that limitation is not to be judged by the tests prescribed by sub Articles (2) and (3) of Article 19. In other words the contents of the freedoms guaranteed under Clauses (a), (b) and (c), the only freedoms with which we are concerned in this appeal, do not include the right to exercise them in the properties belonging to others. If Mr. Garg is right in his contentions then a citizen of this country in the exercise of his right under Clauses (d) and (e) of Article 19 (1) could move about freely in a public office or even reside there unless there exists some law imposing reasonable restrictions on the exercise of those rights.

11.3. Fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people:

In AIR 1998 S.C. 184 Communist Party of India (M) Appellant v. Bharat Kumar and others Respondents, a Bench of 3 judges of the Hon'ble Supreme Court of India confirming the judgment reported in AIR 1997 Kerala 291 Bharat Kumar K. Palicha and another Petitioners v. Communist Party of India (M) Respondents compared the fundamental rights as follows:

"3. On a perusal of the impugned judgment of the High Court, referring to which learned counsel for the appellant pointed out certain portions, particularly in paras 13 and 18 including the operative part in support of their submissions, we find that the judgment does not call for any interference. We are satisfied that the distinction drawn by the High Court between a "Bandh" and a call for general strike or "Hartal" is well made out with reference to the effect of a "Bandh" on the fundamental rights of other citizens. There cannot be any doubt that **the fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people.** It is on the basis of this distinction that the High Court has rightly concluded that there cannot be any right to call or enforce a "Bandh" which interferes with the exercise of the fundamental freedoms of other citizens, in addition to causing national loss in many ways. We may also add that the reasoning given by the High Court, particularly those in paragraphs 12, 13 and 17 for the ultimate conclusion and directions in paragraph 18 is correct with which we are in agreement. We may also observe that the High Court has drawn a very appropriate distinction between a "Bandh" on the one hand and a call for general strike or "Hartal" on the other. We are in agreement with the view taken by the High Court."

PART-12

12. Comparision of Religious Places,

12.1. Comparisons of mosques made by the Holy Prophet (PBUH): In Hadith 752 Mishkat –Ul-Masabih the Holy Prophet has said that prying in the three sacred Mosques i.e. Al-Masjid Al-Haram (Ka 'ba) at Mecca, Al- Masjid Al-Aqsa (Bait-ul-Muqadis) at Jerusalem and Al-masjid Al-nabavi at Medina yields merit one lakh, fifty thousand and twenty-five thousand times respectively which facts shows that those three mosques are significant for religion of Islam and Muslims. English translation of said sacred Hadith reads as follows:

> "752. Anas b. Malik reported that Allah's messenger (peace and blessing of allah be upon him) said: The prayer of a person in his house is one single prayer, and his prayer in the Mosque of his tribe has the reward of 25 prayers, and his prayers in the Mosque in which the Friday prayer is observed has the reward of five hundred, and his prayer in the Mosque of Aqsa (i.e. Bait-ul- Muqdis) has a reward of fifty thousand prayers, and his prayer in my Mosque (Prophet's Mosque at Medina) has a reward of fifty thousand prayers, and the prayer in the sacred Mosque (Ka 'ba) at Mecca has a reward of one lakh prayers."
>
> (*Ibn Majah*).

12.2. Significance of Sri Ramjanmbhoomi: Al-Masjid Al-Haram (*Ka 'ba*) in the Holy Quran has been said "House of Allah" and Muslims have been directed to go to *Ka 'ba* for Haj and Umara and, in a Hadith merit of offering prayer in *Ka 'ba* has been told; similarly in Atharvaveda and Skandapurana Sri Ramjanmbhoomi has been said "House of Brahm" and in Narsimhapurana it has been stated that Lord Vishnu i.e. Lord Rama is worshipped inter alia in altar and idol. Skandapurana giving location of Sri Ramjanmbhoomi commands for having its *Darshan* by enumerating merits emanating there- from wherefrom it becomes crystal clear that Sri Ramjanmabhoomi is as significant place of worship for Hindus as *Ka 'ba* is for the Muslims, any other mosque cannot be compared with Sri Ramjanmabhoomi as such in Dr. Ismail Faruqui Case it has been rightly indicated that Sri Ramjanmabhoomi is significant place and alleged

Babari Masjid is non-significant for practicing Islam. Relevant portion of aforesaid scriptures with English Translation have been recorded in Paragraph Nos. 4090, 4299 to 4303 of the majority Judgement of the Hon'ble Justice Sudhir Agarwal. English Translation of the above mentioned Holy and sacred scriptures of the Hindus as recorded in the aforesaid paragraphs of the Majority Judgment read as follows:

> **"4090.** On behalf of the defendant no. 20 (Suit-4), Sri P.N.Misra and Km. Ranjana Agnihotri, advocates, made their submissions at length placing certain extracts from **"Rigveda Samhita", "Taittiriya Sanhita", "Yajurveda Samhita", "Atherva-Veda ka Subodh Bhasya", "Atharva-Veda Samhita", "Skanda-Purana", "Shri Narsinghpuranam", "Sri Ramacaritamanasa", "History of Dharmashastra"** by P.V. Kane. It is contended that Ayodya, Lord Rama and their relationship is duly recognised since ancient time which shows that the Lord Rama was born at the place in dispute and there cannot be any reasonable doubt in this regard which is in the memory, faith and belief of Hindu people since several centuries handed down to them from generations to generations.
>
> **4299.** "**Atherva-Veda ka Subodh Bhasya**", Tritiya Bhag (Kanda 7-10), translated by Dr. Sripad Damodar Satvalekar published in 1985, at 2. 31, 32 says:
> xxxxxx
> "The self knowing Yaksha (demi God), who exists in that Tejaswi Kosh surrounded on three sides with three focal points, is definitely believed so by Brahma Ji." (E.T.C.)
>
> **4300.** "**Atharva-Veda Samhita**", Books VIII to XIX, translated by William Dwigth Whitney (Revised and edited by Charles Rockwell Lanman) first published in Cambridge in 1905 and re-printed in 2001 by Motilal Banarsidass, at X. 31and 32 says:
> "31. Eight-wheeled, nine-doored, is the impregnable stronghold of the gods; in that is a golden vessel, heaven going (svarga), covered with light.
> 32. In that golden vessel, three-spoked, having three supports—what sou-possessing monster (yaksa) there is in it, that verily the knowers of the brahman know."
>
> **4301.** "**Skanda-Purana**", translated and annotated by Dr.G.V. Tagare, Part-VII, first published in Delhi in 1995 by Motilal Banarasidas at page 142 verses 25, 26-28, 29, 30-31. It says:
> "25. Orh, obeisance to that Holy lord Vyass of unmeasured splendour, with whose favour I know this glory of Ayodhya.

26-28. May all sages with their disciples hear with attention. I shall recount the splendid glory of the city of Ayodhya. It was heard by Skanda from Narada. Then it was narrated to Agastya. Formerly it was recounted to Krsna Dvaipayana by Agastya.O ascetics, it was obtained from Krsna Dvaipayana by me. With great respect I shall recount it to you all who are desirous of hearing.

29. I bow down to the immutable Rama, the Supreme Brahman whose eyes resemble lotus, who is as dark-blue as a flower of flax (in complexion) and who killed Ravana.

30. Great and Holy is the city of Ayodhya which is inaccessible to perpetrators of evil deeds. Who would not like to visit Ayodhya wherein Lord Hari himself resided?

31. This divine and extremely splendid city is on the banks of the river Saray. It is on a par with Amaravati (the capital of Indra) and is resorted to by many ascetics."

4302. Page 216 to 219 Chapter-IX verse 54-58, Chapter X 4753 verses, 1-2, 3-6, 7, 8-12, 13-16a, 16b-17, 18-19, 20, 21, 22, 23- 25, 28, 32, 33, 35 and 36 of **Skanda-Purana (supra)** says as under:

"54-58. Gold and cooked rice should be given in accordance with the injunctions to Brahmanas. This must be performed with great faith by piously disposed men. To the west of it is the excellent Jatakunda where Rama and others dropped and removed their matted hairs. Thus Jatakunda is well-known as the most excellent of all excellent Tirthas. By taking the Holy bath here and by making charitable gifts, one attains all desires. In the previous (?eastern) Kundas Bharata should be worshipped along with Sri. In the Jatakunda Rama and Laksmana should be worshipped along with Sita. The annual festival shall be on the fourteenth day in the dark half of Caitra. Thus in accordance with the great injunctions one shall worship Rama and Sita (first), then in Bharatakunda one shall worship Laksmana. The couple should take the Holy plunge in the Amrtakunda duly. Thereby the devotee dwells in the world of Visnu as an embodiment of meritorious deeds."

"1-2. The devotee should worship Ajita (Visnu) by abstaining from food or taking in only milk. Siddhi (spiritual achievement) comes within his hands (power). The great festival should be celebrated with vocal and instrumental music. An intelligent devotee who does

like this and performs the rites in this manner, shall attain all desires."

"3-6. To the north of this is the auspicious Tirtha of Vira, the great elephant in rut. O sage regularly performing Holy rites.After taking the Holy bath, the devotee should stay there in front of it determinedly. He attains the complete Siddhi on realising which he does not bemoan or regret.Vira (Hero, the elephant deity here) is the defender of Ayodhya and bestower of all desired objects. The annual festival shall be celebrated on the Pancami (fifth) day during Navaratris (Festival on nine days in Asvina). The deity should be worshipped carefully by means of scents,incense, flowers etc. and food offerings in accordance with the injunctions. The deity shall be the bestower of all desired objects. Whatever he may desire, he shall attain."

"7. The the south of this is the demoness names Surasa. O Brahmana, she is a perpetual devotee of Visnu.She is a bestower of Siddhis."

"8-12. By devoutly worshipping her one shall realise all desires. She was brought from her abode in Lanka by Rama of Magnificent activities. She was installed in Ayodhya for the sake of its defence. People must observe vows and restraints, worship her duly and visit her with great respect. The festival for the sake of realising all desired objects, bestows auspiciousness. It should be celebrated with great effort by means of vocal and instrumental music.The annual festival shall be celebrated on Trtiya (third day) during the Navaratris. It is conducive to the attainment of happiness and progeny. It bestows great objects. It shall be made pleasant by means of songs, musical instruments and dances. If everything is done thus,one shall be well-protected always. There is no doubt about this."

"13-16a. In the western direction to this is installed a very great warrior of excellent heroism called Pindaraka. He is to be worshipped with great effort by means of scents,flowers, raw ricegrains etc. As a result of this worship Siddhis shall be within the reach of men. The worship of that deity should be performed by men in accordance with the injunction of worship. The devotee shall take his Holy bath in the waters of Sarayu and then worship Pindaraka who deludes sinners and bestows good intellect on men of good deeds always.The (annual) festival should be celebrated during Navaratris with great luxury."

"16b-17. To the west of it, the devotee should worship Vighnesvara by seeking whom not even the least obstacle remains (in the affairs) of men. Hence Vighnesvara, the bestower of all desired benefits, should be worshipped."

"18-19. To the north-east of that spot is the place of the birth of Rama. This Holy spot of the birth is, it is said,the means of achieving salvation etc. It is said that the place of birth is situated to the east of Vighnesvara, to the north of Vasistha and to the west of Laumasa."

"20. Only by visiting it a man can get rid of staying (frequently) in a womb (i.e. rebirth). There is no necessity for making charitable gifts, performing a penance or sacrifices or undertaking pilgrimages to Holy spots."

"21. On the Navami day the man should observe the Holy vow. By the power of the Holy bath and charitable gifts, he is liberated from the bondage of births."

"22. By visiting the place of birth one attains that benefit which is obtained by one who gives thousands of tawny-coloured cows everyday."

"23-25. By seeing the place of birth one attains the merit of ascetics performing penance in hermitage, of thousands of Rajasuya sacrifices and Agnihotra sacrifices performed every year. By seeing a man observing the Holy rite particularly in the place of birth he obtains the merit of the Holy men endowed with devotion to mother and father as well as preceptors."

"28. By (visiting) the city of the Son of Dasarath (i.e.Rama) in Kali Yuga, it is said, one gets that merit which is obtained by persons who perform Gayasraddha and then visit Purusottama (Jagannathapuri)."

"32. By visiting the city of Dasarath's Son in Kaliyuga (even) for half a moment one obtains the merit of taking a Holy plunge in Ganga for sixty thousand years."

"33. If living beings contemplate on Rama for a moment or half a moment, it becomes the destroyer of ignorance which is the cause of the worldly existence."

"35. Sarayu is Brahman itself in the form of water. It always bestows salvation. There is no question of experiencing the effects of Karma here. The man assumes the form of Rama."
"36. Beasts, birds, and animals and all those living beings of inferior species, become liberated and they go to heaven in accordance with the words of Śrirama."

4303. "Shri Narsinghpuranam", Samvat 2056, published by Geeta Press Gorakhpur, Chapter 62 verse 4, 5 and 6 says:
"Sri Markandey Ji said- Well, I am telling the method of worshipping extremely luminous Lord Vishnu by virtue of which all the sages have attained 'Param Nirvan' (liberation). For those offering 'Hawan' in fire, 'Bhagwan' (God) is present in fire. For the wise and the Yogis, God exists only in their respective hearts, and for those having a little intellect, God exists in statues. That's why, the sages have prescribed for due worship of God in fire, the Sun,heart, altar and idol. The God is omnipresent. So the worship of God is good in altars and idols as well."
(E.T.C.)

12.3. Comparative Significance of Srinathji Temple, Nathdwara: In AIR 1963 S.C.1638 Tilkayat Shri Govindlalji Maharaj etc –versus- State of Rajasthan and others , the Hon'ble Supreme Court of India in deciding the 'question which we have to decide is whether there is anything in the philosophical doctrines or tenets or religious practices which are the special features of the Vallabha school, which prohibits the existence of public temples or worship in them'(*ibid para21)* considered the Significance of the Temple of Shrinathji at Nathdwara Nathdwara and made it epicentre. Relevant paragraph 5, 8, 54 of the said judgment reads as follows:

"5. **Before dealing with the merits of the present dispute, it is necessary to set out briefly the historical background of the temple of Shrinathji at Nathdwara and the incidents in relation to the management of its properties which ultimately led to the Act. The Temple of Shrinathii at Nathdwara hold a very high place among the Hindu Temples in this country and is looked upon with great reverence by the Hindus in general and the Vaishnav followers of Vallabha in particular. As in the case of other ancient revered Hindu temples, so in the case of the Shrinathji Temple at Nathdwara, mythology has woven an attractive web about the genesis of its contruction at Nathdwara. Part of it may be history and part may be fiction, but the story is handed down from generation to generation of devotees and is believed by all of them to be true.**

This temple is visited by thousands of Hindu devotees in general and by the followers of the Pushtimargiya Vaishnava Sampradaya in particular. The followers of Vallabha who constitute a denomination was founded by Vallabha (1479-1531 A.D.)1. He was the son of a Tailanga Brahmin named Lakshmana Bhatt. On one occasion, Lakshmana Bhatt had gone on pilgrimage to Banaras with his wife Elamagara. On the way, she gave birth to a son in 1479 A. D. That son was known as Vallabha. It is said that God Gopala Krishna manifested himself to Vallabha on the Govardhana Hill by the name of Devadamana, also known as Srinathji. Vallabha saw the vision in his dream and he was comnanded by God Gopala Krishna to erect a shrine for Him and to propagate amongst his followers the cult of worshipping Him in order to obtain salvation.2

Valabha then went to the hill and he found the image corresponding to the vision which he had seen in this dream. Soon thereafter, he got a small temple built at Giriraj and installed the image in the said temple. It is believed that this happened in 1500 A.D.A devotee named Ramdas Chowdhri was entrusted with the task of serving in the temple. Later on a rich merchant named Pooranmall was asked by Goverdhannathji to build a big temple for him. The building of the temple took as many as 20 years and when it was completed, the Image was installed there by Vallabha himself and he engaged Bengali Brahmins as priests in the said temple.3

1. Some scholars think that Vallabha was born in 1473 A. D., vide. The Cultural Heritage of India Vol. III at p. 347.

2. Bhandarkar on "Vaishnavism, S' alvism and Minor religious Systems at p. 77.

13. Bhai Manilal C. Parekh's 'A religion of Grace'.

8. When Aurangzeb came on the throne, the genial atmosphere of tolerance disappeared and the Hindu temples were exposed to risk and danger of Auranzeb's intolerant and bigoted activities. Col. Tod in the first Volume of his 'Annals of Rajasthan' at p. 451 says that.

"When Aurangzeb prescribed Kanaya and rendered his shrines impure throughout Vrij, Rana Raj Singh offered the heads of one hundred thousand Rajpoots for his service, and the god was conducted by the route of Kotah and Rampoora to Mewar. An omen decided the spot of his future residence. As he journeyed to gain the capital of the Session, the chariot-wheel sunk deep into the earth and defied extrication; upon which the Sookuni (augur) interpreted the pleasure of the deity that he desired to dwell there. This circumstance occurred at an inconsiderable village called Siarh, in the chief of Dailwara, one of the sixteen nobles of Mewar. Rejoiced at this decided manifestation of favour, the chief hastened to make a perpetual gift of the village and its land which was speedily confirmed by the patent of the Rana. Nathji (the god) was removed from his car. and in due time a temple was erected for

his reception, when the hamlet of Siarh became the town of Nathdwara. This happened about 1671 A. D."

This according to the tradition, is the genesis of the construction of the temple at Nathdwara. Since then, the religious reputation of the temple has grown by leaps and bounds and today it can legitimately claim to be one of the few leading religious temples of the Hindus. Several grants were made and thousands of devotees visiting the temple in reverence made offerings to the temple almost everyday throughout the year. No wonder that the temple has now become one of the richest religious institutions in the country.

54. **That takes us to the argument that the Act is invalid because it contravenes Article 14.** In our opinion, there is no substance in this argument. We have referred to the historical background of the present legislation. At the rime when ordinance No. II of 1959 was issued, it had come to the knowledge of the Government of Rajasthan that valuables such as jewelleries, ornaments, gold and silver ware and cash had been removed by the Tilkayat in the month of December, 1957, and as the successor of the State of Mewar, the State of Rajasthan had to exercise its rights of supervising the due administration of the properties of the temple. **There is no doubt that the shrine at Nathdwara holds a unique position amongst the Hindu shrines in the State of Rajasthan and no temple can be regarded as comparable with it.** Besides, the Tilkayat himself had entered into negotiations for the purpose of obtaining a proper scheme for the administration of the temple properties and for that purpose, a suit under Sections 92 of the Code had in fact been filed. A Commission of Enquiry had to be appointed to investigate into the removal of the valuables. If the temple is a public temple and the legislature thought that it was essential to safeguard the interests of the temple by talking adequate legislative action in that behalf, it is difficult to appreciate how the Tilkayat can seriously contend that in passing the Act, the legislature has been guilty of unconstitutional discrimination: **As has been held by this Court in the case of Shri Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 at p. 297: (AIR 1958 SC 538 at pp. 547-548) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to other, that single individual may be treated as a class by himself. Therefore the plea raised under Article 14 fails."**

PARET-13

13. Comparative importance or value of the social interest.

13.1. In Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of U.P., (1997) 4 SCC 606, a Bench of three Judges of the Hon'ble Supreme Court of India held as follows:

> **28.** The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his Cosmos/Creator and realise his spiritual self. Sometimes, practices religious or secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because under the provisions of the ancient Smriti, human actions from birth to death and most of the individual actions from day-to-day are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One hinges upon constitutional religious model and another diametrically more on traditional point of view. The legitimacy of the true categories is required to be adjudged strictly within the parameters of the right of the individual and **the legitimacy of the State for social progress, well-being and reforms, social intensification and national unity.** Law is a tool of social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo has put it in his *Judicial Process*, **life is not logic but experience. History and customs, utility and the accepted standards of right conduct are the forms which singly or in combination all be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be, thereby, impaired.** There shall be symmetrical development with history or custom when history or custom has been the motive force or the chief one in giving shape to the existing rules and with logic or philosophy when the motive power has been theirs. One must get the knowledge just as the legislature gets it from experience and study and reflection in proof from life itself. **All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc.** The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. **It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it.** Though the

performance of certain duties is part of religion and the person performing the duties is also part of the religion or religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is a matter of religion or a secular management by the State. Whether the traditional practices are matters of religion or integral and essential part of the religion and religious practice protected by Articles 25 and 26 is the question. And whether hereditary archaka is an essential and integral part of the Hindu religion is the crucial question.