IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

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MISCELLANEOUS COMPILATION IN RESPONSE TO SUBMISSIONS MADE BY MR. P.N. MISHRA, ADVOCATE AND MR. H.S. JAIN, ADVOCATE

BY

DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

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THE COMPLETE PLAYS OF BERNARD SHAW

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PAUL HAMLYN . LONDON
1965

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like that, Eugene?

MARCHBANKS [*with the ring of a man's voice—no longer a boy's—in the words*] I know the hour when it strikes. I am impatient to do what must be done.

MORELL [*who has also risen*] Candida: dont let him do anything rash.

CANDIDA [*confident, smiling at Eugene*] Oh, there is no fear. He has learnt to live without happiness.

MARCHBANKS. I no longer desire happiness: life is nobler than that. Parson James: I give you my happiness with both hands: I love you because you have filled the heart of the woman I loved. Goodbye. [*He goes towards the door*].

CANDIDA. One last word. [*He stops, but without turning to her. She goes to him*]. How old are you, Eugene?

MARCHBANKS. As old as the world now. This morning I was eighteen.

CANDIDA. Eighteen! Will you, for my sake, make a little poem out of the two sentences I am going to say to you? And will you promise to repeat it to yourself whenever you think of me?

MARCHBANKS [*without moving*] Say the sentences.

CANDIDA. When I am thirty, she will be forty-five. When I am sixty, she will be seventy-five.

MARCHBANKS [*turning to her*] In a hundred years, we shall be the same age. But I have a better secret than that in my heart. Let me go now. The night outside grows impatient.

CANDIDA. Goodbye. [*She takes his face in her hands; and as he divines her intention and falls on his knees, she kisses his forehead. Then he flies out into the night. She turns to Morell, holding out her arms to him*]. Ah, James!

They embrace. But they do not know the secret in the poet's heart.

THE END

VI

THE MAN OF DESTINY

1896

BEING THE THIRD OF FOUR PLEASANT PLAYS

The twelfth of May, 1796, in north Italy, at Tavazzano, on the road from Lodi to Milan. The afternoon sun is blazing serenely over the plains of Lombardy, treating the Alps with respect and the anthills with indulgence, neither disgusted by the basking of the swine in the villages nor hurt by its cool reception in the churches, but ruthlessly disdainful of two hordes of mischievous insects which are the French and Austrian armies. Two days before, at Lodi, the Austrians tried to prevent the French from crossing the river by the narrow bridge there; but the French, commanded by a general aged 27, Napoleon Bonaparte, who does not respect the rules of war, rushed the fireswept bridge, supported by a tremendous cannonade in which the young general assisted with his own hands. Cannonading is his technical speciality: he has been trained in the artillery under the old régime, and made perfect in the military arts of shirking his duties, swindling the paymaster over travelling expenses, and dignifying war with the noise and smoke of cannon, as depicted in all military portraits. He is, however, an original observer, and has perceived, for the first time since the invention of gunpowder, that a cannon ball, if it strikes a man, will kill him. To a thorough grasp of this remarkable discovery he adds a highly evolved faculty for physical geography and for the calculation of times and distances. He has prodigious powers of work, and a clear realistic knowledge of human nature in public affairs, having seen it exhaustively tested in that department during the French Revolution. He is imaginative without illusions, and creative without religion, loyalty, patriotism or any of the common ideals. Not that he is incapable of these ideals: on the contrary, he has swallowed them all in his boyhood, and now, having a keen dramatic faculty, is extremely clever at playing upon them by the arts of the actor and stage manager. Withal, he is no spoiled child. Poverty, ill-luck, the shifts of impecunious shabby-gentility, repeated failure as a would-be author, humiliation as a rebuffed time server, reproof and punishment as an incompetent and dishonest

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not English.

NAPOLEON. Yes you are: English to the backbone. Listen to me: I will explain the English to you.

LADY [*eagerly*] Do. [*With a lively air of anticipating an intellectual treat, she sits down on the couch and composes herself to listen to him. Secure of his audience, he at once nerves himself for a performance. He considers a little before he begins; so as to fix her attention by a moment of suspense. His style is at first modelled on Talma's in Corneille's Cinna; but it is somewhat lost in the darkness, and Talma presently gives way to Napoleon, the voice coming through the gloom with startling intensity*].

NAPOLEON. There are three sorts of people in the world: the low people, the middle people, and the high people. The low people and the high people are alike in one thing: they have no scruples, no morality. The low are beneath morality, the high above it. I am not afraid of either of them; for the low are unscrupulous without knowledge, so that they make an idol of me; whilst the high are unscrupulous without purpose, so that they go down before my will. Look you: I shall go over all the mobs and all the courts of Europe as a plough goes over a field. It is the middle people who are dangerous: they have both knowledge and purpose. But they, too, have their weak point. They are full of scruples: chained hand and foot by their morality and respectability.

LADY. Then you will beat the English; for all shopkeepers are middle people.

NAPOLEON. No, because the English are a race apart. No Englishman is too low to have scruples: no Englishman is high enough to be free from their tyranny. But every Englishman is born with a certain miraculous power that makes him master of the world. When he wants a thing, he never tells himself that he wants it. He waits patiently until there comes into his mind, no one knows how, a burning conviction that it is his moral and religious duty to conquer those who possess the thing he wants. Then he becomes irresistible. Like the aristocrat, he does what pleases him and grabs what he covets: like the shopkeeper, he pursues his purpose with the industry and steadfastness that come from strong religious conviction and deep sense of moral responsibility. He is never at a loss for an effective moral attitude. As the great champion of freedom and national independence, he conquers and annexes half the world, and calls it Colonization. When he wants a new market for his adulterated Manchester goods, he sends a missionary to teach the natives the Gospel of Peace. The natives kill the missionary: he flies to arms in defence of Christianity; fights for it; conquers for it; and takes the market as a reward from heaven. In defence of his island shores, he puts a chaplain on board his ship; nails a flag with a cross on it to his top-gallant mast; and sails to the ends of the earth, sinking, burning, and destroying all who dispute the empire of the seas with him. He boasts that a slave is free the moment his foot touches British soil; and he sells the children of his poor at six years of age to work under the lash in his factories for sixteen hours a day. He makes two revolutions, and then declares war on our one in the name of law and order. There is nothing so bad or so good that you will not find Englishmen doing it; but you will never find an Englishman in the wrong. He does everything on principle. He fights you on patriotic principles; he robs you on business principles; he enslaves you on imperial principles; he bullies you on manly principles; he supports his king on loyal principles and cuts off his king's head on republican principles. His watchword is always Duty; and he never forgets that the nation which lets its duty get on the opposite side to its interest is lost. He—

LADY. W-w-w-w-w-wh! Do stop a moment. I want to know how you make me out to be English at this rate.

NAPOLEON [*dropping his rhetorical style*] It's plain enough. You wanted some letters that belonged to me. You have spent the morning in stealing them: yes, stealing them, by highway robbery. And you have spent the afternoon in putting me in the wrong about them: in assuming that it was *I* who wanted to steal y o u r letters: in explaining that it all came about through my meanness and selfishness, and your goodness, your devotion, your self-sacrifice. Thats English.

LADY. Nonsense! I am sure I am not a bit English. The English are a very stupid people.

NAPOLEON. Yes, too stupid sometimes to know when theyre beaten. But I grant that your brains are not English. You see, though your grandfather was an Englishman, your grandmother was—what? A Frenchwoman?

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TO

THE CONSTITUENT ASSEMBLY DEBATES

Official Report

Volume X, 1949

6th to 17th October 1949



PRINTED IN INDIA BY THE MANAGER GOVT. OF INDIA PRESS, NEW DELHI
AND PUBLISHED BY THE MANAGER OF PUBLICATIONS, DELHI, 1951

Price As. 12 or 1s.

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[Maulana Hasrat Mohani]

here? You said that we have got the word Republic. You have dropped the word Federation. You will also say that of course Pandit Jawaharlal Nehru has agreed to remain in the British Commonwealth because they accept we are independent. But, what sort of independence? It will be a republican dominion. Because if it is a real republic and not a republican dominion, you should have nothing to do with any King or Emperor directly or indirectly in any manner. When once Pandit Jawaharlal Nehru has agreed to remain in the British Commonwealth, I think he has forfeited his right to call India as a Republic. It is not a republic. If it is a republic, it is a republican dominion, as I said just now.

So, my alternative proposal is this. Either introduce the word 'Federal' instead of the word "Democratic". It will make something clear. If you do not want to introduce this word 'federation', if you are afraid of it, I will grant a concession to Dr. Ambedkar and you stick to the original wording of the Objectives Resolution which is given here. It will be 'Independent Sovereign Republic.'' I say, drop this word 'democratic' and keep to the actual words used in the Objectives Resolution. If you use the words "Independent Republic" my object will be served. I come forward and say that whatever has been done by Pandit Jawaharlal Nehru is absolutely a false policy.

Mr. President: Does any one else wish to say anything about this amendment? I will put it to the vote. First alternative.

The question is:

"That in the Preamble, for the words, 'We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the following be substituted :—

'We, the people of India, having solemnly resolved to constitute India into a Sovereign Federal Republic.'"

The amendment was negatived.

Mr. President: I shall put the second alternative.

The question is:

"That in the Preamble, for the words, 'We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the following be substituted :—

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Independent Republic.' "

The amendment was negatived.

Mr. President: We shall take up the other things when we meet at six o'clock.

The Assembly then adjourned for Lunch till Six P.M.

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The Assembly re-assembled after Lunch at 6 P.M., Mr. President, (The Honourable Dr. Rajendra Prasad) in the Chair.

Mr. President: We have to take up the other amendment now. There is one in the name of Maulana Hasrat Mohani, No. 9.

Maulana Hasrat Mohani: Mr. President, I move:

"That in the Preamble, for the words 'We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the words 'We, The People of India, having solemnly resolved to constitute India into a Union of Indian Socialistic Republics to be called U.I.S.R. on the lines of USSR' be substituted."

Shri Deshbandhu Gupta: May I now raise the point of order again and submit that it is out of order because it goes counter to the Constitution we have passed?

Mr. President: A point of order has been raised that the whole Constitution that has been framed and accepted by this House is inconsistent with this amendment of the Preamble and therefore it should be ruled out of order.

Maulana Hasrat Mohani: It was for this very point I requested you to save me from this sort of manœuvring. I am not going to repeat the same things. The other day I proposed this very thing in connection with article 1. What I am going to propose today is on a different basis. If you find me repeating the same argument, you can declare me out of order but if I say something quite new which has nothing to do with my amendment to the First article of the Constitution, I think I am entitled to some indulgence on your part. As I showed in my statement earlier, you gave a sort of promise that you will not rule me out abruptly or without any consideration. Of course if you still think that I have nothing new to say and you find me repeating, you can rule me out; but if it is something quite different from what I said in connection with article 1, then of course I do not see any reason why my amendment should be ruled out of order.

Dr. B. Pattabhi Sitaramayya: May I know whether the vote that was taken this morning was a vote to reject Maulana's amendment? There was no positive vote on the wording of the Preamble?

Mr. President: I did not take any.

Dr. B. Pattabhi Sitaramayya: Therefore all that was done was to reject this amendment to substitute 'independent' or 'Federal' for the word 'Democratic'.

Mr. President: Maulana, what I have to decide is not whether you are going to repeat or not. The point is whether this is in order or not. The objection is that it is inconsistent with the whole Constitution we have passed. What have you to say about that?

Maulana Hasrat Mohani: I do not know how it is inconsistent. Because the words in the Preamble are 'Sovereign Democratic Republic'. I say that instead of these you can say 'Union of independent Republics'. Where is the inconsistency? I do not find any inconsistency in that.

Mr. President: Do you really suggest that the Constitution we have passed is on the lines of U.S.S.R.?

Maulana Hasrat Mohani: I am not going to say anything of the kind. I do not say we should go and merge in the U.S.S.R. or that you should adopt the same Constitution; but what I want to say is that we should work out our Constitution along the lines and on the pattern of Soviet Russia. It is a special pattern and also republican pattern and also it is of a centrifugal pattern.

Shri Jainarain Vyas (Bajasthan): May I enquire if the honourable Member is making a speech or replying to the point of order?

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Mr. President: He is replying to the point of order.

Maulana Hasrat Mohani: When I propose this that we are not going to merge ourselves with Russia or we are not going to adopt the Constitution of U.S.S.R., I am only suggesting that the Constitution and the Preamble we are adopting here in this Second reading must be on the same lines, of the same pattern as the U.S.S.R. plan and I do not think there is any thing inconsistent in that. What are those considerations? What are the Fundamental principles of the U.S.S.R.? They are three. First that it will be federal constitution. Secondly that it will be a centrifugal federation, and at the same time, the Centre, after getting some central powers, it again delegated those powers to their constituent units, declaring that they.....

Mr. President: I think it will save time if I allowed Maulana Sahib to move his amendment, without giving any ruling. So you had better finish your speech.

Maulana Hasrat Mohani: Some of my friends here, whenever they hear the word "Soviet", say, "He is an agent of the Soviet Government, and he is in the pay of the Soviet Government." I do not think anybody in this world can accuse me of that kind of thing.

Mr. President: Nobody has said that in this House.

Maulana Hasrat Mohani: They are the henchmen of the Soviet, they carry out the orders they receive from the Soviet Government. I have no connection with them. I have got no connection with the Communist Party of India even, because I refused to join them on the ground that once they made the mistake of saying that we have got a common ground with England because we are both fighting Nazism. I said then, and I say it now, "Anybody who helps any foreign Government, especially the British Government, under any terms or for any motive, I say that he is wrong."

Mr. President: Maulana Sahib, let me remind you that we are not concerned with biographical details. You will please speak on your amendment.

Maulana Hasrat Mohani: I am not going to say anything to which anyone can take objection. I have nothing to do with the Soviet Government or the Soviet Constitution. I want only our Constitution and our Preamble to follow the lines adopted by the Soviet Government, and those are the three lines which I have mentioned. That is to say, our Constitution must be federal, and also along with being federal, it must be centrifugal, that the constituent States or Republics should willingly hand over certain central powers to the Centre. And after that, to obtain the goodwill of the constituent units, they again, I mean the Soviet Government again, gave freedom to their constituent units or republics. They said, "If you find at any time that the Centre is deciding something against your interest, you are at liberty to differ from the Centre." And therefore, they gave them the simultaneous right, and if they found anything going wrong, any proposal of the Centre, they could at once go out and they said that even when the war was raging. They said to all those Muslim republics of the U.S.S.R., "If you like, you can go and fight on whichever side you want. If you do not like to fight for us, we do not press you." What was the result? The U.S.S.R. took them into its confidence and the result was not a single Muslim went against the Soviet Republic. Everyone fought, whole heartedly with the Soviet Government. What was the reason for this? They did so, because they found they had been taken into the confidence of the U.S.S.R. They were not made to leave the Soviet group. Why should they

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leave them? They were also cautious. They would never propose anything which might obviously go against the interest of their Constituent units.

So by adopting this conciliatory attitude they have attained that kind of freedom and that kind of success that has never been known in the world before. I say, Sir, that we should also follow the same policy, and we should also adopt the same attitude. We should also take our minorities into our confidence. Instead of doing that, you are going to outcaste them altogther. You are passing anything you like, without the slightest consideration for the interests of even your political minorities. You do not care a fig about us. You see, your Bengal Government and your Madras Government have declared the Communist Party to be unlawful, on the ground that the Communists have adopted some unlawful means, that they are fighting, killing, murdering and looting. Well, I say that the same thing can be said by the Communists. They can say, "You do not allow us any scope, you do not allow us to take an independent and constitutional attitude, and you.....

Mr. President: May I remind you, that we are not in the Legislative Assembly, but we are here in the Constituent Assembly, and we are not concerned with what is happening in the country at the present moment.

Maulana Hasrat Mohani: Very well, Sir. I have only a few sentences more to speak in this connection and I am not going to take very long over them.

Supposing you say that the Communists can fight a free election in the next election, with joint electorates and all that, and without any restriction. But how are they going to do that? Supposing the Communist Party wants to adopt this constitutional means, will you allow them to issue their manifesto, which must certainly be against your principles? Will you allow them to have their agents for the elections? Will you allow them to have their own workers who will approach every voter? You will not do anything of that kind. Once they issue their manifesto, you will at once send them to the prison. So it is a question of whether the hen came first or the egg came first. You imprison them because they adopt violent means, and they say, "We are forced to resort to violent means because you do not leave us any scope for constitutional means."

Mr. President: Maulana Sahib, you are not speaking on your amendment.

Maulana Hasrat Mohani: Very well. I have only to request Dr. Ambedkar and this House to adopt the same conciliatory attitude to all political minorities, and to adopt the same principles as have been adopted by the Soviet Union. I am not going to ask you to join the Soviet Union or to adopt their Constitution. With these few words, I propose my amendment and request Dr. Ambedkar to accept it.

Mr. President: Does anyone wish to say anything about this amendment?

Honourable Members: No.

Mr. President: Then I will put it to vote.

The question is:

"That in the Preamble, for the words 'We, the People of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the words 'We, The People of India, having solemnly resolved to constitute India into a Union of Indian Socialistic Republics to be called U.I.S.R. on the lines of U.S.S.R.' be substituted."

The amendment was negatived.

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Mr President: Now we have got a large number of amendments of which notice is given by other Members. Some of these amendments relate to two things. In some of them the name of God is brought in in some form or other in this Preamble. In some others, the name of Mahatma Gandhi is brought in in some form or other. Then there are some in which some amendments are suggested to the wording. But those are rather minor things, and the main amendments are really those in which the name of God is brought in, or the name of Mahatma Gandhi is brought in, or both together. Now, I would like to know from Members if they insist upon these amendments being moved, because I cannot prevent them from moving them; but I would suggest that neither God nor Mahatma Gandhi admits of a discussion in this House. (*Hear, hear*).

Shri H. V. Kamath: Mr. President, may I move my amendment No. 430?

Mr. President: If it is moved it may have to be voted upon.

Shri Deshbandhu Gupta: Sir, before Mr. Kamath moves his amendment, may I draw the attention of the House to the fact that when the Assembly passed the Objectives Resolution solemnly, all Members standing, the Prime Minister at that time had made an appeal in these words:

> "It is a Resolution and it is something much more than a Resolution. It is a declaration. It is a firm resolve. It is a pledge and an undertaking and it is for all of us I hope a dedication.....And I wish this House, if I may say so respectfully, should consider this Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution."

yet,

The Preamble is no less important and the Prime Minister's remarks are equally applicable to same. I therefore appeal to Mr. Kamath that this may be borne in mind.

Mr. President: May I just point out to Mr. Kamath one thing? In the Schedule III which we have passed an oath or affirmation is prescribed for Ministers and others who have to take office. We have put the thing in the alternative form, such as 'Swear in the name of God' or, 'Solemnly affirm' so as to give freedom of choice to the believers and the non-believers to take the oath or the affirmation. Now here, would you like this thing also to be in the alternative form?

Shri H. V. Kamath: Here we are not individuals. Here we are all the people of India. There is much difference between the two.

Mr. President: The people of India includes individuals. If you insist upon moving your amendment I cannot prevent you. But I would suggest to you not to insist upon it.

Shri H. V. Kamath: Mr. President, I move.....

Shrimati Purnima Banerji (United Provinces: General). Mr. President, I would beg of you to see that the matter of God is not made the subject of discussion between a majority and a minority. It is most embarrassing. To most of us, believers and non-believers, it will be difficult to affirm or deny God. Let us not try to invoke His name in vain. It should not be brought up in this God is invoked by every nation upon earth and God is an Impartial Entity and form and the Members compelled to vote one way or the other. The name of He should be allowed to remain so. With these words, I appeal to Mr. Kamath not to put us to the embarrassment of having to vote upon God.

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Shri H. V. Kamath: I regret I cannot accept the appeal. I shall move amendment No. 430 standing in my name. Sir, I move:

"That in amendment No. 2 of the List of Amendments (Volume I), the following be substituted for the proposed preamble :—

'In the name of God,

We, the people of India,

having solemnly resolved to constitute India into a Sovereign democratic republic, and to secure to all her citizens

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity; and to promote among them all;

Fraternity, assuring the dignity of the individual and the unity of the nation;

in our Constituent Assembly do hereby adopt, enact and give to ourselves this Constitution."

Dr. B. Pattabhi Sitaramayya: The amendment is only in the first line, you see, Sir?

Mr. President: It is exactly the same as the Preamble except that it begins with 'In the name of God.'

Honourable Members: No speech, please.

The Honourable Shri K. Santhanam: I rise to a point of order. The amendment moved must have a meaning.

Mr. President: It is not a point of order really.

Shri H. V. Kamath: I can reply to Mr. Santhanam. My amendment means, in the name of God we do this and that. No long speech is needed to commend this motion. Besides invoking the name of God, I have taken a little liberty with only one word, and that is, I have changed the word 'its' citizens to 'her' citizens.

Shri A. Thanu Pillai (Travancore and Cochin State): May I rise to a point of order, Sir? If Mr. Kamath's amendment is accepted, — of course I am a believer in God—would not that amount to compulsion in the matter of faith? Is it not out of order to move a motion like that? It affects the fundamental right of freedom of faith. A man has a right to believe in God or not, according to the Constitution. In that view this amendment should be ruled out, though I am myself a staunch believer in God.

Shri H. V. Kamath: My reply to Mr. Thanu Pillai is that we are passing this in the name and on behalf of the people of India. All that we have done here in this Assembly has been in the name and on behalf of the people of India.

Shri Rohini Kumar Chaudhuri (Assam: General): May I move an amendment to that of Shri Kamath that, instead of 'In the name of God', would he be pleased to accept 'In the name of Goddess'? (*laughter*).

Shri H. V. Kamath: Mr. President, all that we have done in this House has been done on behalf of and for the people of India, and all decisions have been taken here by the vote of the House. Whether this becomes a matter for the vote of the House or not, I am sure in their heart of hearts the people of India for whom we have been working and toiling here for the last three years would endorse this amendment *in toto*. That is so far as the point raised by Mr. Pillai is concerned.

I have taken only a slight liberty with the text of the Preamble. As I have pointed out, I am sticking to the wording of the Objectives Resolution moved

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[Shri H. V. Kamath]

by Pandit Jawaharlal Nehru in December 1946. In the first part of it, the future with reference to the goverance of the country the words used are "*her* future governance", *her* being apt for the motherland. That being so, we should say 'her' and not 'its' citizens in the Preamble. I would leave this however to the Drafting Committee.

As regards the substance of the motion I do not propose to make a long speech. In this august House, the first Constituent Assembly of India, of our Bharata Varsha, in this land, ancient but ever young, which has through the ages renewed itself at the Divine Fountain, let us consecrate this Constitution by a Solemn dedication to God in the spirit of the Gita.

Yatkaroshi yadashnasi

Yajjuhoshi dadasi yat

Yattapasyasi Kaunteya

Tatkurushwa madarpanam.

Whatever our shortcomings, whatever the defects and errors of this Constitution let us pray that God will give us strength, courage and wisdom to transmute our baser metal into gold, through hard work, suffering and sacrifice for India and for her people. This has been the voice of our ancient civilisation, has been the voice through all these centuries, a voice distinctive, vital and creative, and if we, the people of India, heed that voice, all will be well with us.

Shri V. I. Muniswamy Pillay (Madras: General): I strongly support the motion moved by Mr. Kamath.

(Prof. Shibban Lal Saksena rose to speak.)

Mr. President: Do you want to move any amendment?

Prof. Shibban Lal Saksena: Yes, Sir; No. 3.

Mr. President: Does anyone wish to speak on this amendment which has been moved by Mr. Kamath?

Shri M. Thirumala Rao (Madras: General): Are you allowing Mr. Saksena to move his amendment? I want to speak a few words on Mr. Kamath's amendment.

Mr. President: We are now on Mr. Kamath's amendment.

Shri Mahavir Tyagi: May I remind Dr. Ambedkar of the promise he made to me on another occasion. May I read a few lines. Sir? Sir, on the 15th November 1948 when the question was discussed, Dr. Ambedkar had asked me to remind him about this question of sovereignty. I said—

"I hope.....that his draft means that it (sovereignty) vests with the people, and his explanation may well go down into the records for future reference."

He replied—

"Beyond doubt it vests with the people. I might also tell my friend that I shall not have the least objection if this matter was raised again when we are discussing the Preamble."

Mr. President: That is not the point. At the present moment we are on Mr. Kamath's amendment, not on that. We are not dealing with that question now.

Shri M. Thirumala Rao: It is unfortunate that Mr. Kamath has not seen his way not to press his amendment to a vote. This is a thing of such vital

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importance and affects the life of the whole nation, that it should not be subjected to the vote of a House of three hundred people whether India wants God or not. We have accepted that God should be there in the Oath, but for those who do not believe in God, there is an alternative there, but there is no possibility of a compromise which can provide for both the things in the Preamble. Therefore, I think it would be better that Mr. Kamath withdraws his amendment and does not subject God about Whom he spoke in such reverent terms to the vote of the House, and if it comes to the vote, it will not be fair to ourselves and to the nation

Dr. B. Pattabhi Sitaramayya: May I request that that amendment may be disposed of first before we take up anything eles?

Pandit Hirday Nath Kunzru: It is a matter of the deepest regret that a matter that concerns our innermost and most sacred feelings should have been brought into the arena of discussion. It would have been far more consistent with our belief in the highest truths and our determination to adhere firmly to them that we should not seek to impose our own belief on others. I recognise the sincerity of Mr. Kamath and of those who agree with him, but I do not see why in a matter that vitally concerns every man individually, the collective view should be forced on anybody. Such a course of action is inconsistent with the Preamble which promises liberty of thought, expression, belief, faith and worship to everyone. How can we deal with this question in a narrow spirit? We invoke the name of God, but I make bold to say that while we do so, we are showing a narrow, sectarian spirit, which is contrary to the spirit of the Constitution and which we should try to forget at this time when we have reached the end of a very important stage of our labours.

Shri Rohini Kumar Chaudhuri: Sir, I am at one with my Friend, Pandit Kunzru, in objecting to the amendment which has been moved by my Friend, Mr. Kamath. Sir, I have great admiration for my Friend, Mr. Kamath. I am one who has unbounded confidence in him so far as political affairs are concerned. I must confess that I am very sadly disappointed in him this evening. By this amendment, he shocked the feelings of many when he stoutly refused to accept the amendment which I proposed. Sir, it is not a matter of laughter with me. I believe in a Goddess. I belong to Kamrup where the Goddess Kamakhya is worshipped.

An Honourable Member: God includes Goddess.

Mr. President: It is bad as it is that we have brought in the name of God in our discussion. We should not become flippant about it.

Shri Rohini Kumar Chaudhuri: We should remember that when we started our political movement, we started it with the singing of Bande Mataram. What does Bande Mataram mean? It means an invocation to a Goddess. It means belief in a Goddess. Sir, we who belong to the Sakthi cult, protest against invoking the name of God alone, completely ignoring the Goddess. That is my submission. If we bring in the name of God at all, we should bring in the name of the Goddess also. As I said, this amendment should not have been brought. But as it has been brought, this is my point of view.

The Honourable Shri Satyanarayan Sinha (Bihar: General): Sir, the question may now be put.

Pandit Govind Malaviya (United Provinces: General): Sir, I wish to say a few words.

Mr. President: There are so many others who are wanting to speak. But it has now been suggested that the matter be closed.

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Pandit Govind Malaviya: It has been said that we should not impose our will on any section. I hope the other section of the House also will not do that. I wish, with your permission to say a few words on this matter.

Mr. President: But closure has been moved. I shall put the closure motion to vote.

The question is:

"That the question be now put."

The motion was adopted.

Mr. President: Now I have to put the amendment moved by Mr. Kamath to vote. There is no alternative left to me.

The Honourable Dr. B. R. Ambedkar: He may be asked to withdraw it.

Mr. President: I suggested to him not to move it. It rests with him to withdraw it.

Shri H. V. Kamath: I am not withdrawing it.

Mr. President: He says he does not withdraw it.

The question is:

"That in amendment No. 2 of the List of Amendments (Volume I), the following be substituted for the proposed preamble :—

'In the name of God,

We, the people of India,

having solemnly resolved to constitute India into a Sovereign democratic republic, and to secure to all her citizens

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity; and to promote among them all;

Fraternity, assuring the dignity of the individual and the unity of the nation;

in our Constituent Assembly do hereby adopt, enact and give to ourselves this Constitution.' "

Shri H. V. Kamath: I claim a division.

Pandit Govind Malaviya: I want a division on this question.

Maulana Hasrat Mohani: I also want a divison on this question.

Pandit Govind Malaviya: I want a division because I feel that we are doing an injustice to this country and to its people and I want to know who says what on this matter.

The Assembly divided by show of hands.

Ayes: 41.

Noes: 68.

The amendment was negatived.

Shri H. V. Kamath: This, Sir, is a black day in our annals. God save India.

Pandit Govind Malaviya: Sir, it is so vital a matter and I again beg of you that we might have a division on this matter.

Mr. President: I have had the division now.

Shri A. Thanu Pillai: Sir, Mr. Kamath should not have made that statement, and he should withdraw it.

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Mr. President: I may tell Pandit Govind Malaviya this. I have got here in our Rules the following:

"A matter requiring the decision of the Assembly shall be brought forward by means of a question put by the Chairman.

In all matters requiring to be decided by the members of the Assembly, the Chairman shall exercise a vote only in the case of an equality of votes.

Votes may be taken by voices or division and shall be taken by division if any member so desires."

Here I have taken the voices and then I have adopted the particular method of division by asking members to raise their hands, instead of asking them to rise in their places. I think I have substantially fulfilled the requirement of the Rules.

Shri Mahavir Tyagi: On a point of order, Sir, the President has already once laid down, by means of a Standing Order, as to what will be the method of Division. I have not got the Order with me because it was issued separately. In that Standing Order it is mentioned in so many words that when a member calls a Division the President shall get all the doors closed and say "Ayes to the Right. Noes to the Left." And then the members will file past by the side of the Tellers. That Standing Order was issued during the session and the requirement of that Standing Order has not been fulfilled.

Mr. President: You have not read the rule rightly. Paragraph (4) of rule 30 says: "The Chairman shall determine the method of taking vote by division." I have followed that.

Shri Mahavir Tyagi: My point is once the standing order was issued, it cannot be changed verbally.

Mr. President: Is it suggested that parapraph (4) of rule 30 is superseded?

Shri H. V. Kamath: That has been amplified and clarified in your office circular.

Mr. President: It does not require any clarification. It is very clear. The Chairman shall determine the method of taking vote by division.

"If in the opinion of the person presiding, a division is claimed unnecessarily (that is to say, when he is satisfied in any particular case that there is a clear preponderance of opinion in support of his declaration and against the challengers) he may not follow the ordinary method of having votes recorded in the division lobbies but may have the vote of the House by asking the members who are for 'Aye' and for 'No' respectively to rise in their places, and thereupon as he thinks fit, may either declare the determination of the House immediately or may order a division to be held. When the Chairman there and then declares the determination of the House, the names of voters will not ordinarily be recorded."

An Honourable Member: The word "division" has got a particular meaning in point of phraseology. Claiming of division means that names will have to be recorded. It is not mere counting of hands. That is the practice followed in the Legislative Assembly.

Mr. President: We are not concerned with the procedure in other places. Our procedure is governed by our own rules and I have taken the division in the sense intended by that order. That is my final ruling.

Pandit Govind Malaviya: I have no doubt about the rules. They are quite clear. It is for the Chair to decide the manner in which the views of the House should be obtained. I did not have any doubt in my mind when I made the request to you. But since it is so important a matter about which

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[Pandit Govind Malaviya.]

many of us feel so very keenly, I leave it to you to decide whether anything more should be done. If you are satisfied that what has been done is not enough then in view of our request and our feeling, if you could consider it feasible to have some other method for a division adopted, we shall be very grateful.

Mr. President: I am perfectly satisfied that I have got the view of the House correctly and that is all I am concerned with. We shall go to the next item.

Pandit Govind Malaviya: There was an amendment in my name on this point. You have decided that only Mr. Kamath's amendment will be moved, but my amendment is quite different. It does not bring in the name of God and it is possible that it may not be offensive to anybody.

Mr. President: I am now going to take the amendments as they are on the Order Paper. I will see what is to be done about your amendment when we come to it. Prof. Shah is not here; so his amendment is not moved. Then Mr. Saksena's amendment.

Prof. Shibban Lal Saksena: Sir, I beg to move:

"That for the Preamble, the following be substituted :—

'In the name of God the Almighty, under whose inspiration and guidance, the Father of our Nation, Mahatma Gandhi, led the Nation from slavery into Freedom, by unique adherence to the eternal principles of Satya and Ahimsa, and who sustained the millions of our countrymen and the martyrs of the Nation in their heroic and unremitting struggle to regain the Complete Independence of our Motherland,

We, the People of Bharat, having solemnly resolved to constitute Bharat into a Sovereign, Independent, Democratic, Socialist Republic, and to secure to all its citizens :

JUSTICE, social, economic and political,

LIBERTY of thought, expression, belief, faith and worship,

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity and freedom of the individual and the unity of the country and the Nation;

In our Constituent Assembly this.....day of Vikrami Samvat 2006 (the 25th day of January, 1950 A.D.) do hereby enact, adopt and give to ourselves this Constitution.' "

I have been very much pained to see the attitude of some of our friends regarding the introduction of the holy name of God and the Father of the Nation at the beginning of our Constitution. While they have a right to have their say, other people also have a full right to have their say. This country has always prided on its discoveries in the realm of the spirit and we are now afraid even to put in God's name at the commencement of our Constitution. I am one of those who think that we have produced a great piece of work by preparing this Constitution. There may be some defects in it. But I am sure we have done some very great things. It is only meet and proper that the name of God and the name of the Father of the Nation should be put at the beginning of our Constitution. I am sorry that some people should have thought that we are forcing it on them. There are other Constitutions in the world—the Irish Constitution, for instance—wherein in the very beginning in the Preamble God has been mentioned and homage has been paid to the martyrs who won their freedom. I have therefore been very much pained to

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feel that some Members merely at the mention of the name of God or the Father of the Nation feel that something is sought to be forced upon somebody. If they feel that way, they are at liberty to have their opinion, but why force others who feel intensely in the matter to eliminate God's name? I greatly regret the attitude of my friends. I hope they will reconsider it. This Constitution will probably build our country on a new pattern and on the basis of the ideals set by the Father of the Nation. It is therefore meet and proper that we should humble ourselves before God and pay homage to the Father of the Nation by incorporating their names in the very beginning of the Constitution.

Shri Brajeshwar Prasad (Bihar: General): Mr. President, I rise to oppose the amendment moved by my Friend Prof. Shibban Lal Saksena. I do not want that the name of Mahatma Gandhi should be incorporated in this Constitution, because it is not a Gandhian Constitution. The foundation-stones of this Constitution are the decisions of the American Supreme Court. It is the Government of India Act, 1935, repeated again. If we had a Gandhian Constitution, I would have been the first to offer my support. I do not want that the name of Mahatma Gandhi should be dragged in this rotten Constitution.

Mr. President: I will now put this amendment to vote.

Acharya J. B. Kripalani (United Provinces: General): May I request the Mover of the amendment to withdraw it? It is not behoving us to vote on this amendment. We must be very sparing of the use of the name of the Father of the Nation. My Friend Shibban Lal knows that I yield to nobody in my love and respect for Gandhiji. I think it will be consistent with that respect if we do not bring him into this Constitution that may be changed and reshaped at any time.

Prof. Shibban Lal Saksena: Sir, in response to the appeal of Acharya Kripalani, I beg to withdraw my amendment.

The amendment was, by leave of the Assembly, withdrawn.

(Amendment No. 4 was not moved.)

Pandit Govind Malaviya: The amendment of which I had given notice ran thus:

"That in the Preamble, for the words 'We the people of India' the following be substituted :—

'By the grace of Parameshwar, The Supreme Being, Lord of the Universe (called by different names by different peoples of the world);

From Whom emanates all that is good and wise, and Who is the Prime Source of all Authority,

We the people of Bharata (India),

Humbly acknowledging our devotion to Him,

And gratefully remembering our great leader Mahatma Mohandas Karamchand Gandhi and the innumerable sons and daughters of this land who have laboured, struggled and suffered for our freedom,

And.' "

Dr. P. S. Deshmukh: I rise to a point of order. The essence of this amendment is in two respects. It introduces the name of God and it brings in the name of Mahatma Gandhi. Both of these issues have been decided by this House. In one case there has been some debate and voting; in the other case the honourable Gentleman has withdrawn the motion. I therefore urge

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[Dr. P. S. Deshmukh.]

that this amendment should be ruled out of order since the main ingredients in that amendment have been already decided by the House.

Pandit Govind Malaviya: If the words which I had used had been noted, it would have been seen that I had said that I was reading the amendment which I had intended to move. I had said that "it ran thus and thus". If the House had borne with me for a moment, I was going to say, Sir, that this was the amendment of which I had given notice, but in view of the discussion which had just taken place what I wished to move now was:

I would delete the last portions referring to Mahatma Gandhi and others, and would also delete the word Parameshwara at the beginning. That was what I was going to say to meet the point of view which has been expressed.

The Honourable Dr. B. R. Ambedkar: They have been disposed of!

Pandit Govind Malaviya: Then the amendment would read:

"By the Grace of the Supreme Being, Lord of the Universe, called by different names....."

Maulana Hasrat Mohani: Is he proposing some new amendment? I rise to a point of order. He is out of order. He is proposing something new.

Pandit Govind Malaviya: Then it will satisfy even the unreasonable point of view which has been expressed here. We will not be referring to 'God' as such or to anybody's particular God because my amendment says "called by different names by different peoples of the world" and yet we would be able to put into our Preamble something which has been the most distinctive and permanent feature of the thought and belief, of the tradition, of the culture and of the history of the entire life of the people of this country from time immemorial. I submit, Sir, that we have come here as representatives of the people of India. Honesty demands that we should record here what may be their view. In this Preamble, Sir.....

Mr. President: I shall decide the point of order. The first point is whether it is covered by the amendment which has been defeated. I think it is covered.

Pandit Govind Malaviya: Even after the deletions, if you think so, I shall take my seat.

Mr. President: By simply omitting the word Parameshwar you do not take out of the amendment which has been defeated.

Pandit Govind Malaviya: I thought the objection of some of our friends was to the word "God." I shall obey your Ruling, Sir.

Shri Mahavir Tyagi: I do not want to move my amendment No. 11 but I want to ask Dr. Ambedkar if he is going to keep to the promise he had made

Mr. President: That is a different matter.

Shri Mahavir Tyagi: He told me to remind him at the time when the Preamble was being discussed.

Mr. Naziruddin Ahmad: If there is a breach of promise, then my friend should go to Court!

Shri Mahavir Tyagi: It is not a question of breach of promise. I was assured according to the proceedings, by what Dr. Ambedkar had stated about the investment of sovereignty. I had moved an amendment and he had replied that

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the meaning was "vested in the people" but it was not defined in so many words I had insisted that it be ascertained. Dr. Ambedkar said: "You doubt that it vests with the people. I might tell my friend that I shall not have the least objection."

Mr. President: Is there any amendment?

Shri Mahavir Tyagi: But this is for the Drafting Committee to do it.

Shri Satish Chandra (United Provinces: General): There is an amendment No. 452 in list XXI to the same effect, standing jointly in the names of Shrimati Purnima Banerji and myself.

Shri Mahavir Tyagi: If you permit me they might accommodate it in the Drafting Committee.

Mr. President: I understand there is an amendment to that effect. We shall have to take it up when we come to it.

Amendment No. 14: there are several amendments with regard to the name. Those do not arise now.

Does any Member who has given notice of the amendments printed in the first volume wish to move his amendment?

Honourable Members: No.

Mr. President: I shall go to the supplementary list. There are amendments in the supplementary printed list and I take it that no Member wants to move any of those amendments either.

Honourable Members: No, no.

(At this stage Shrimati Purnima Banerji rose to speak.)

Mr. President: Yours is one of these recent amendments, but I am now thinking of the old printed list.

Then we come to amendment No. 452.

Shri Brajeshwar Prasad: There is amendment No. 313 previous to that in List XIII second page.

Mr. President: Yes, you can move it.

Shri Brajeshwar Prasad: Mr. President, Sir, there are eight amendments standing in my name. I refer to amendments Nos. 313, 314, 316 and 317, 318, 319, 320 and 325. Sir, I would like to move only one amendment.

I refer to amendment No. 313. Mr. President, Sir, I move:

"That for amendment No. 1 of the List of amendments (Vol. 1), the following be substituted :—

'That for the Preamble the following be substituted :—

"WE THE PEOPLE OF INDIA, having resolved to constitute India into a SECULAR CO-OPERATIVE COMMONWEALTH to establish SOCIALIST ORDER and to secure to all its citizens—

1. an adequate means of LIVELIHOOD
2. FREE AND COMPULSORY EDUCATION
3. FREE MEDICAL AID
4. COMPULSORY MILITARY TRAINING

do hereby ordain and establish this Constitution for India".' "

Dr. P. S. Deshmukh: What about a camel and motor cycle?

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Shri Brajeshwar Prasad: It is for you to suggest those things. Sir, this word 'secular' has not found any place in our Constitution. This is the word on which the greatest stress has been laid by our national leaders. I do submit that this word ought to be incorporated in our Preamble because it will tone up the morale of the minorities and it will check the spirit of hatefism that is rampant in politics. I have laid stress on another word. I refer to the word 'Socialist'. I believe that the future of India is in Socialism. I believe in a Socialist order. When I say that I believe in a socialist order, I do not mean that I accept the Marxian interpretation of History. I do not believe in class war nor in the materialist Philosophy which is so widely prevalent among the socialist circles. By socialism I mean an equalitarian social order. Equality of opportunity without equality of income is a mere shibboleth. I believe that in India we have to evolve a new type of socialism consistent with the tradition and history of this land. The theory of materialism is a well-knit dogma. I think that we people in India have not to learn anything from Germany on philosophical speculation.

Now I come to some other words which have found place in the Preamble. There seems to be a confusion of thought. I hold the opinion that the word 'liberty' and 'equality' do not go together. They are incomptibles. They are the enemies of one another; the one can only triumph at the expense of the other. With your kind permission, I would quote a small passage of a few lines from a booklet. I refer to the book entitled "Liberty *versus* equality" by Muriel Jaeger:

"It is becoming more and more widely accepted that ownership is one of those liberties that infringe the liberty of others and so must be abolished, or drastically restricted. And at this point what one may call the "paradox of liberty" becomes acute. If every liberty that does, or may do, harm to one's fellow-men were taken away, there would be no liberty left. The abolition or restriction of private wealth implies some kind of public control. Public control means public planning, for the general good is the whole object of taking wealth out of private hands. This is well-worn platitude; but it is the details that interest us—the effect that the application of these platitudes will have upon our lives from day to day, from year to year, and from generation to generation.

"Public planning means that enterprise, labour, distribution must be strictly regulated. It means, therefore that that one's chance to choose one's occupation must be reduced, since the plan cannot possibly be worked unless enough labour is directed into the occupation where it is needed, regardless of whether enough people want to do that kind of work or not."

Sir, I would crave your indulgence for a few minutes.

Mr. President: Are you going to read the whole book?

Shri Brajeshwar Prasad: No, Sir.

Mr. President: I thought you said you would read one sentence, but at least you have read one paragraph.

Shri Brajeshwar Prasad: I have read a few lines; I wanted to finish one paragraph consisting of 12 lines.

I will just urge another point. I hold that liberty and equality are not merely incompatibles but they can be reconciled only in a class-less society and here, I would again refer to another paragraph and I would like with your permission to read a few lines:

"As for the final goal, the Marxists, who are so severe with "Utopians", have always been rather pathetically vague. But so far as one can discover, they foreseen a state in which everyone will work cheerfully for the common good, any help himself to whatever he wants from the common stock, which will then be so ample that there will be no danger of any rivalry or clashing of interests. They think that this will be the natural result of a society 'without force and without subordination,' and that good social habits will grow of themselves in a classless society, so that special state apparatus will become gradually superfluous. It appears from this that the ultimate Communist idea is complete Liberty combined with complete Equality."

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I do not want to place impossible ideals before the nation. Sir, it is only in a class-less society that we can achieve a reconciliation of the two concepts of liberty and equality.

I have suggested that instead of these ideals laid down in the preamble we should have some pragmatic ideals before us. If we succeed in providing an adequate means of livelihood, free and compulsory education, free medical aid and compulsory military training I would think that our efforts have borne fruit. I do not want to place impossible ideals before the nation which we know full well that neither in our life-time nor in the life-time of our children or our grand children we will not be able to achieve. I would like to refer to another point before I conclude. I object to the word 'sovereignty' in this Preamble. I hold the opinion that the whole concept of Austinian sovereignty has been exploded. A legal concept must have some relation with real facts. If it is not so, it has got no value.

Sir, it is not right to say that the Government of Nepal is a sovereign State. It has got the right; it is sovereign and it can declare war against the U.S.A. The Government of the U.S.S.R. is free to liquidate the Communist Party of Russia. We know that both in the external and internal affairs the State is circumscribed by numerous factors. If the Government of Nepal declares war against America or the U.S.S.R. tries to liquidate the Communist Party, we know what the result would be. Therefore, I hold the opinion that we should not place any undue emphasis upon this word "sovereignty". I hold the opinion that this ideal is neither necessary nor desirable because sovereignty leads to war; sovereignity leads to imperialism. (Clapping and interruption.)

Mr. President: I hope the honourable Member will take the hint.

Shri Brajeshwar Prasad: I have a right to demand protection from you. I can never be hood-winked in this way. I will have my say and let honourable Members clap their hands, I will go on speaking and unless you ask me to close my speech, I will go on speaking. I cannot allow, Sir, without raising my voice of protest...

Shri Mahavir Tyagi: On a point of order, I hope you as the custodian of the rights of honourable Members will see that Members are not shouted down like that.

Mr. President: There is no attempt at shouting him down. They only want to cheer him down. The honourable Member had better finish.

Shri Brajeshwar Prasad: Sir, I will now deal with only one aspect of the question. The word 'sovereign' has found a place in this Preamble. I am rather thick-skinned. I will never resume my seat. I will speak and then take my seat. I feel that this word 'sovereign' is entirely misplaced. A State consists of individuals. Are individuals sovereign in any sense of the term? If individuals are not sovereign, how can a State which consists of individuals be sovereign. It is a very well-known fact that man has no free will of his own, that he is circumscribed by factors of heredity and environment. Both qualitatively and quantitatively he holds a very insignificant place in the universe. If man is so insignificant, if man is a non entity in the world how can a State which consists of individuals be a sovereign State? Therefore, Sir, I am opposed to this idea of sovereignty.

We are sovereign. We are a sovereign State to the extent it is possible for a modern state to be sovereign. We do not aspire to rise to those Austinian heights because, as I have already stated, it is a frivolous concept, it is a

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[Shri Brajeshwar Prasad.]

mischievous concept. The deletion of the word 'sovereign' will not in any way deter us from exercising the functions of sovereignty which are vested in the Government of India. It will not detract one iota of sovereignty. But, by the retention of this word 'sovereign', we are placing a false ideal, a mischievous ideal before the nation. Therefore, I am opposed to this Preamble. Let us have some pragmatic ideals, ideals which we may be capable of achieving in our own life time and in the life time of our children.

Mr President: Does any one wish to say anything about this amendment? I shall put this amendment to vote.

The question is:

"That for amendment No. 1 of the List of Amendments (Vol. 1), the following be substituted :—

'That for the Preamble, the following be substituted :—

"WE THE PEOPLE OF INDIA, having resolved to constitute India into a SECULAR CO-OPERATIVE COMMONWEALTH to establish SOCIALIST ORDER and to secure to all its citizens—

1. an adequate means of LIVELIHOOD
2. FREE AND COMPULSORY EDUCATION
3. FREE MEDICAL AID
4. COMPULSORY MILITARY TRAINING

do hereby ordain and establish this Constitution for India".'"

The amendment was negatived.

Mr. President: We shall take up the amendment of which notice has been given by Shrimati Purnima Banerji, amendment No. 452.

Shri H. V. Kamath: On a point of order, may I submit, Sir, that I have not moved my amendment No. 2? This is with reference to my amendment. Therefore, it cannot arise.

Shri Mahavir Tyagi: On the point of order, may I submit, Sir,.....

Mr. President: The point of order has been raised. I am considering it. Let me find out what he has moved and what he has not moved.

Shri Mahavir Tyagi: On the point of order raised by my honourable Friend Mr. Kamath, I beg to submit that on previous occasions, such amendments have been permitted in the House. When there was no occasion to give amendments because they were time-barred, many of us took the opportunity of just hinging our amendments or connecting them with previous ones. If those Members did not move, it is not the fault of the other honourable Members who have come with their ideas and their amendments. Because there is no other chance of making the amendments relevant, within the time, the only course left to them was just to relate their amendments to previous ones already given notice of. I would therefore submit, Sir, that at this fag end of the debate, you might kindly not give a ruling which will debar the moving of this amendment.

Mr. Naziruddin Ahmad: May I point out, Sir, that this is not an amendment to another amendment, in which case it would have been barred by the rules, but an amendment "with reference to" some other amendment. Therefore, the amendment is in order.

Mr. President: I have as a matter of fact allowed amendments of this nature to be moved. So, I cannot rule this out.

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CASE EXCERPTS ON SECULARISM

1. ***Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130 at page 147**

> **16.** It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism. Instances given in the speech of discrimination against any religion causing the imbalance in the professed goal of secularism, the allegation being against any individual or any political party, cannot be called an appeal on the ground of religion forbidden by sub-section (3). In other words, mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion. When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidate's religion or alienating the electorate against another candidate on the ground of the other candidate's religion. **It also means that the State has no religion and the State practises the policy of neutrality in the matter of religion.**

2. ***T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481 at page 587**

> **161.** The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India. Articles 29 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation.....

3. ***S.R. Bommai v. Union of India*, (1994) 3 SCC 1 at page 149**

> VIII. **Secularism is a part of the basic structure of the Constitution.** The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.
>
> **at page 144**
>
> **146.** These provisions by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or

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favouring any particular religion or religious sect or denomination. **The State is enjoined to accord equal treatment to all religions and religious sects and denominations.**

147. As has been explained by Shri M.C. Setalvad (*Patel Memorial Lectures — 1965 on Secularism*)—

> "Secularism often denotes the way of life and conduct guided by materialistic considerations devoid of religion. The basis of this ideology is that material means alone can advance mankind and that religious beliefs retard the growth of the human beings ... this ideology is of recent growth and it is obvious that it is quite different from the concept of secular State in the West which took root many centuries ago. ...
>
> A different view in relation to religion is the basis of 'secularism' understood in the sense of what may be called a 'secular attitude' towards life. Society generally or the individual constituting it tend progressively to isolate religion from the more significant areas of common life. Many of us, Hindus and Muslims and others, are in our way of life, and outlook on most matters largely governed by ideas and practices which are connected with or are rooted in our religion. The secular attitude would wean us away from this approach so that in our relations with our fellow beings or in dealings with other social groups, we have less and less regard for religion and religious practices and base our lives and actions more on worldly considerations, restricting religion and its influence to what has been called its 'proper' sphere, i.e., the advancement of the spiritual life and well-being of the individual. Secularism of this character is said to be essential to our progress as human beings and as a nation because it will enable us to shake off the narrow and restrictive outlook arising out of casteism, communalism and other like ideas which come in the way of our development.
>
> ... the concept of the secular State is quite distinct from 'secularism' of the kinds we have adverted to above. ... No doubt, the two concepts are interdependent in the sense that it is difficult to conceive of a society or a group of individuals being induced to adopt a secular philosophy or a secular attitude without the aid of a secular State.
>
> A secular State is not easy to define. According to the liberal democratic tradition of the West, the secular State is not hostile to religion but holds itself neutral in matters of religion. ..."

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Thereafter, referring to the **Indian concept of secularism, the learned jurist stated as** follows:

> "... **the secularist way of life was repeatedly preached by leaders of movementso that religious matters came to be regarded entirely as relating to the conscience of the individuals. ...**"
>
> **"The coming of the partition emphasised the great importance of secularism. Notwithstanding the partition, a large Muslim minority consisting of a tenth of the population continued to be the citizens of independent India. There are other important minority groups of citizens. In the circumstances, a secular Constitution for independent India under which all religions could enjoy equal freedom and all citizens equal right and which could weld together into one nation, the different religious communities, become inevitable."**

Thereafter, the learned jurist has gone on to point out that our Constitution undoubtedly lacks a complete separation between the church and the State as in the United States and at the same time we have no established church as in Great Britain or some other countries. In our country, all religions are placed on the basis of equality and it would, therefore, seem that it is erroneous to describe our country as a secular State. He quoted Dr Radhakrishnan who said that "the religious impartiality of the Indian State is not to be confused with secularism or atheism". He also pointed out that the proceedings of the Constituent Assembly show that "two attempts made to introduce the word 'secular' in the Constitution had failed. ...." At the same time, he asserted that, "... nevertheless, it could not be said that the Indian State did not possess some important characteristics of a Secular State" and has pointed out some of the provisions of the Constitution to which we have already made a reference above. He has then stated that the ideal of a Secular State in the sense of a State which treats all religions alike and displays benevolence towards them is in a way more suited to the Indian environment and climate than that of a truly Secular State by which he meant a State which creates complete separation between religion and the State. Justice Chinnappa Reddy, delivering his Ambedkar Memorial Lecture on '*Indian Constitution and Secularism*' has observed that:

> "Indian constitutional secularism is not supportive of religion at all but has adopted what may be termed as permissive attitude towards religion out of respect for individual conscience and dignity. There, even while recognising the right to profess and practise religion, etc., it has excluded all secular activities from the purview of religion and also of practices which are repugnant to

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public order, morality and health and are abhorrent to human rights and dignity, as embodied in the other fundamental rights guaranteed by the Constitution."

at page 163

178. Freedom of faith and religion is an integral part of social structure. Such freedom is not a bounty of the State but constitutes the very foundation on which the State is erected. Human liberty sometimes means to satisfy the human needs in one's own way. Freedom of religion is imparted in every free society because it is a part of the general structure of the liberty in such a society and secondly because restrictions imposed by one religion would be an obstacle for others. In the past religious beliefs have become battlegrounds for power and root cause for suppression of liberty. Religion has often provided a pretext to have control over vast majority of the members of the society. Democratic society realises folly of the vigour of religious practices in society. Strong religious consciousness not only narrows the vision but hampers rule of law. The Founding Fathers of the Constitution, therefore, gave unto themselves "we people of India", the Fundamental Rights and Directive Principles of State Policy to establish an egalitarian social order for all sections of the society in the supreme law of the land itself. Though the concept of "secularism" was not expressly engrafted while making the Constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualise not only of the subject of God but also an understanding between man and man. Secularism in the Constitution is not anti-God and it is sometimes believed to be a stay in a free society. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State on grounds of public interest, order and general welfare. ***The State guarantee individual and corporate religious freedom and dealt with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another.*** The concept of the secular State is, therefore, essential for successful working of the democratic form of Government. There can be no democracy if anti-secular forces are allowed to work dividing followers of different religious faith flying at each other's throats. The secular Government should negate the attempt and bring order in the society. Religion in the positive sense, is an active instrument to allow the citizen full development of his person, not merely in the physical and material but in the non-material and non-secular life.

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at page 205

248. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution.

At page 162.

Rule of law has been chosen as an instrument of social adjustment and resolution of conflicting social problems to integrate diverse sections of the society professing multi-religious faiths, creed, caste or region fostering among them fraternity, transcending social, religious, linguistic or regional barriers. Citizenship is either by birth or by domicile and not as a member of religion, caste, sect, region or language. Secularism has both positive and negative contents. The Constitution struck a balance between temporal parts confining it to the person professing a particular religious faith or belief and allows him to practice, profess and propagate his religion, subject to public order, morality and health. The positive part of secularism has been entrusted to the State to regulate by law or by an executive **order. The State is prohibited to patronise any particular religion as State religion and is enjoined to observe neutrality.** The State strikes a balance to ensure an atmosphere of full faith and confidence among its people to realise full growth of personality and to make him a rational being on secular lines, to improve individual excellence, regional growth, progress and national integrity. Religion being susceptible to the individuals or groups of people professing a particular religion, antagonistic to another religion or groups of persons professing different religion, brings inevitable social or religious frictions. If religion is allowed to overplay, social disunity is bound to erupt leading to national disintegration. Secularism is a part of the basic features of the Constitution. Political parties, group of persons or individuals who would seek to influence electoral process with a view to come to political power, should abide by the Constitution and the laws including secularism, sovereignty, integrity of the nation. They/he should not mix religion with politics. Religious tolerance and fraternity are basic features and postulates of the Constitution as a scheme for national integration and sectional or religious unity. Programmes or principles evolved by political parties based on religion amounts to recognising religion as a part of the political governance which the Constitution expressly prohibited. It violates the basic features of the Constitution. Positive secularism negates such a policy and any action in furtherance thereof would be violative of the basic features of the Constitution. Any act done by a political party or the Government of the State run by that party in furtherance of its programme or policy would also be in violation of the Constitution and the law. When the President receives a report from a Governor or otherwise had such information that the Government of the

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State is not being carried on in accordance with the provisions of the Constitution, the President is entitled to consider such report and reach his satisfaction in accordance with law.

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304. Both the expressions — 'socialist' and 'secular' — by themselves are not capable of precise definition. We are, however, not concerned with their general meaning or content. Our object is to ascertain the meaning of the expression "secular" in the context of our Constitution. As the discussion hereafter would demonstrate, the 42nd Amendment merely made explicit what was implicit in it. The preamble speaks of "social justice", "liberty of belief, faith and worship" and of "equality of status and of opportunity". Article 14 (under the sub-heading "Right of Equality") enjoins the State not to deny to any person equality before the law or the equal protection of laws within the territory of India. Articles 15 and 16 elucidate this doctrine of equality. They say that the State shall not discriminate against any citizen on ground only of religion, race or caste, whether in the matter of employment under the State or otherwise. By Article 25, "all persons" are declared equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion, subject, of course, to public order, morality and health. Articles 26, 27 and 28 elucidate the freedom guaranteed by Article 25. Article 27 declares that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Article 28(1) decrees that no religious instruction shall be provided in any educational institution wholly maintained out of the State funds while Article 28(3) says that no person attending an educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious worship conducted in such institution, except with his or his guardian's (in the case of a minor) consent. Similarly, clause (2) of Article 30 enjoins upon the State not to discriminate against any educational institution, in granting aid, on the ground that it is under the management of a minority, religious or linguistic. Clause (3) of Article 51-A [introduced by the 42nd (Amendment) Act] says that "it shall be the duty of every citizen of India — to promote harmony and spirit of brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities". **What do these articles, read together with the preamble signify? While Article 25 of the Constitution guarantees *to all its people* freedom of religion, Articles 14, 15 and 16 *enjoin upon the State* to treat all its people equally irrespective of their religion, caste, faith or belief. While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State,**

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the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes. How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? *Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions.* This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitution as affirmed in *Kesavananda Bharati* [*Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1] and *Indira N. Gandhi* v. *Raj Narain* [1975 Supp SCC 1 : (1976) 2 SCR 347]. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional. This does not mean that the State has no say whatsoever in matters of religion. Laws can be made regulating the secular affairs of temples, mosques and other places of worships and maths. (See *S.P. Mittal* v. *Union of India* [(1983) 1 SCC 51 : (1983) 1 SCR 729] .)

The power of Parliament to reform and rationalise the personal laws is unquestioned. The command of Article 44 is yet to be realised. The correct perspective appeared to have been placed by Shri K.M. Munshi during the Constituent Assembly Debates. He said:

> "Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors — and important factors — which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say. 'Well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation'."

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4. ***Bal Patil v. Union of India*, (2005) 6 SCC 690 at page 704**

> **37.** These concluding observations were required after the eleven-Judge Bench in *T.M.A. Pai Foundation case* [*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481] held that claims of minorities on both linguistic and religious basis would be each State as a unit. The country has already been reorganised in the year 1956 under the States Reorganisation Act on the basis of language. Differential treatments to linguistic minorities based on language within the State is understandable but if the same concept for minorities on the basis of religion is encouraged, the whole country, which is already under class and social conflicts due to various divisive forces, will further face division on the basis of religious diversities. Such claims to minority status based on religion would increase in the fond hope of various sections of people getting special protections, privileges and treatment as part of the constitutional guarantee. Encouragement to such *fissiparous* tendencies would be a serious jolt to the secular structure of constitutional democracy. We should guard against making our country akin to a theocratic State based on multinationalism. **Our concept of secularism, to put it in a nutshell, is that the "State" will have no religion. The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.**

5. **Abhishek Shukla v. High Court of Judicature, Allahabad ..., 2017 SCC OnLine All 2464**

> 202. In the instant case, we cannot loose sight of the allegation in the present writ petition that respondent no. 7 has encroached on the High Court's property, whereon a religious structure, called "Masjid High Court" has been constructed without permission of the local authority, which is, admittedly, mandatory in nature. Even permission of the High Court, before proceeding to construct the Mosque or to use the name of the High Court, was not sought. Construction of the Mosque by encroaching on the property of the Institution called Judiciary/High Court, would send a wrong message/signal and it may even give an impression to the people at large that the High Court has built a Mosque and provided this facility to a religious group or to people belonging to a particular religion. **This would also be interpreted to mean that the High Court cannot protect its own property from being encroached. The High Court is not obliged, nor expected, under the Constitution, to extend patronage to any particular religion. The High Court is neither pro any particular religion nor anti any particular religion and it is expected to stand aloof, and maintain neutrality in matters of religion and provide equal protection to all religions when it examines any matter on the judicial side or**

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even on the administrative side for that matter. For the High Court, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. This is what is the essence of 'secularism', as enshrined in our Constitution. Calling a Masjid as "Masjid High Court" itself, in our opinion, is wrong, apart from the fact that it cannot stand or be allowed to continue to stand on its property any more. We have accepted the goal of 'secularism' not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. 'Secularism' is a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. Any step inconsistent with the constitutional prescription, in our opinion, would be unconstitutional.

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(1996) 1 Supreme Court Cases 130

(BEFORE J.S. VERMA, N.P. SINGH AND K. VENKATASWAMI, JJ.)

Civil Appeal No. 2836 of 1989

DR RAMESH YESHWANT PRABHOO .. Appellant;

Versus

PRABHAKAR KASHINATH KUNTE AND OTHERS .. Respondents.

With

Civil Appeal No. 2835 of 1989

BAL THACKERAY .. Appellant;

Versus

PRABHAKAR KASHINATH KUNTE AND OTHERS .. Respondents.

Civil Appeals No. 2836 of 1989 with No. 2835 of 1989†,
decided on December 11, 1995

A. Election — Corrupt practice — Appeal on the ground of religion — Expression "on the ground of his religion" in S. 123(3), RPA — Significance of the word 'his' inserted by Act 40 of 1961 — Held, sub-section (3) forbids appeal for votes for any candidate on the ground of 'his' religion and appeal to refrain from voting for any other candidate on the ground of religion of that other candidate — Reference to religion in speech made during election campaign with a secular stance in conformity with fundamental right to freedom of religion by itself not prohibited under sub-section (3) — Secularism in the context of politics of elections explained — Element of prejudicial effect on public order is not implicit under sub-section (3) — Appeal on ground of religion need not be a direct appeal only and it can be inferred from facts and circumstances of the particular case — Manner of construing the speech stated — Understanding in the context by a common man in the audience the test — Representation of the People Act, 1951, S. 123(3) — Words and phrases — "his" — Secularism

Held:

The word 'his' used in sub-section (3) of Section 123, RPA must have significance and it cannot be ignored or equated with the word 'any' to bring within the net of sub-section (3) any appeal in which there is any reference to religion. The religion forming the basis of the appeal to vote or refrain from voting for any person, must be of that candidate for whom the appeal to vote or refrain from voting is made. This is clear from the plain language of sub-section (3) and this is the only manner in which the word 'his' used therein can be construed. When the appeal is to vote on the ground of 'his' religion for the furtherance of the prospects of the election of that candidate, that appeal is made on the basis of the religion of the candidate for whom votes are solicited. On the other hand when the appeal is to refrain from voting for any person on the ground of 'his' religion for prejudicially affecting the election of any candidate, that appeal is based on the religion of the candidate whose election is sought to be prejudicially affected. Thus for soliciting votes for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought; and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the

† From the Judgment and Order dated 7-4-1989 of the Bombay High Court in E P. No 1 of 1988

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ground of the religion of that other candidate. The first is a positive appeal and the second a negative appeal. Sub-section (3) clearly indicates the particular religion on the basis of which an appeal to vote or refrain from voting for any person is prohibited under sub-section (3). (Para 11)

Such an appeal on ground of religion need not only be direct. What is forbidden by sub-section (3) is an appeal of this kind and, therefore, any appeal which amounts to or leads to this inference must necessarily come within the prohibition in sub-section (3). Whether a particular appeal is of this kind, is a question of fact in each case. Where the words used in the appeal are clear and unambiguous amounting to a direct appeal, the exercise of construing the speech is not needed. However, where a reasonable construction of the appeal leads to that conclusion, the result must be the same. The substance of the speech and the manner in which it is meant to be understood by the audience determines its nature, and not the camouflage by an artistic use of the language. For understanding the meaning and effect of the speech, the context has to be found in the speech itself and not outside it with reference to any other background unless the speech itself imports any earlier fact in the context of that speech. The speech has also not to be construed in the abstract or in the manner in which it would be construed after an academic debate. Care must be taken to remember that the public speeches during election campaign ordinarily are addressed to an audience comprised of common men and, therefore, the manner in which it would be understood by such an audience has to be kept in view. (Para 12)

The purpose of enacting the provision is to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any votes on the ground of his religion. This is in keeping with the secular character of the Indian polity and rejection of the scheme of separate electorates based on religion in our constitutional scheme. An appeal of the kind forbidden by sub-section (3) based on the religion of a candidate, need not necessarily be prejudicial to public order and, therefore, the further element of likelihood of prejudice to public order is unnecessary, on account of which it is not implicit in the provision. (Para 13)

A speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism. An election speech made in conformity with the fundamental right to freedom of religion guaranteed under Articles 25 to 30 of the Constitution, cannot be treated as anti-secular to be prohibited by sub-section (3) of Section 123. Mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion. When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidate's religion or alienating the electorate against another candidate on the ground of the other candidate's religion. It also means that the State has no religion and the State practises the policy of neutrality in the matter of religion. (Paras 16 and 18)

M Ismail Faruqui (Dr) v. Union of India (Ayodhya case), (1994) 6 SCC 360, *relied on*

B. **Election — Representation of the People Act, 1951 — S. 123(3) — Held, not violative of Art. 19(1)(a) being a law imposing reasonable restrictions in the interest of 'decency' and hence saved by Art. 19(2) — Appeal for vote in an election on ground of candidate's religion in a secular State in against decency**

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— Words and phrases — 'Decency' — Constitution of India, Art. 19(1)(a) & (2) and preamble — Secularism and freedom of speech

C. Constitution of India — Art. 19(2) — Provides several heads whereunder the absolute right to freedom of speech and expression would not extend — Expression 'in the interests of ... decency and morality' — Meaning and scope of — 'Decency or morality' is not confined to sexual morality alone — 'Decency' indicates action in accordance with current standards of behaviour or propriety — Words and phrases — "decency", "morality", "in the interests of"

Held :

The freedom of speech and expression guaranteed to all citizens under Article 19(1)(*a*) is absolute subject to the reasonable restrictions imposed by any law saved by clause (2) of Article 19, under one of the heads specified therein. The heads specified in clause (2) of Article 19 are, therefore, several and they are intended to cover the entire area within which the absolute freedom to say anything which the speaker may like would not extend, in keeping with the standards of a civilized society, the corresponding rights in others in an orderly society, and the constitutional scheme. (Para 27)

The expression "in the interests of" used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are decency or morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19. In view of the expression "in the interests of" and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words "decency or morality" do not require a narrow or pedantic meaning to be given to these words so as to confine them to sexual morality alone. The ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behaviour or propriety, etc. In a secular polity, the requirement of correct behaviour or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House. Thus, seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society. (Paras 28 and 29)

Oxford Encyclopaedic English Dictionary, *Collins English Dictionary*, *relied on*

Knuller (Publishing, Printing and Promotions) Ltd. v *Director of Public Prosecutions*, (1972) 2 All ER 898 (1972) 3 WLR 143, *relied on*

Sub-section (3) of Section 123 imposes restriction on an appeal to vote for a candidate or not to vote for him on the ground of his religion, etc. This restriction is in the law enacted to provide for the conduct of elections, the qualifications and disqualifications for membership of the Houses, the corrupt practices and other offences at or in connection with such elections. The right to contest the election is given by the statute subject to the conditions prescribed therein. The restriction is limited only to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general or the freedom to profess, practise and propagate religion unconnected with the election campaign. Therefore, sub-section (3) has the protection of clause (2) of Article 19 under the head 'decency' therein. This is so even if it is assumed that the provision is not saved merely as a condition subject to which the statutory right of contesting an election

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is available to the candidate. The fact that the scheme of separate electorates was rejected in framing the Constitution and secularism is the creed adopted in the constitutional scheme, are relevant considerations to treat this as a reasonable restriction on the freedom of speech and expression, for maintaining the standard of behaviour required in conformity with the decency and propriety of the societal norms. Viewed at in any manner, sub-section (3) of Section 123 cannot be held to be unconstitutional. (Para 30)

Jumuna Prasad Mukhariya v. *Lachhi Ram*, (1955) 1 SCR 608 : AIR 1954 SC 608, *relied on*

D. Election — Corrupt practice — Appeal on the ground of religion — 'Promotion of, or attempt to promote, feelings of enmity or hatred ... on grounds of religion' in S. 123(3-A), RPA — Nature and object of the provision — Held, element of prejudicial effect on public order implicit under — Whether the act in question covered by sub-section (3-A) is a question of fact to be determined on the basis of evidence — Penal Code, 1860, S. 153-A — Representation of the People Act, 1951, S. 123(3-A)

Held :

Sub-section (3-A) of Section 123, R.P. Act is similar to Section 153-A of the Penal Code. However, difference in the plain language of the two provisions indicates that mere promotion of disharmony or ill will between different groups of people is an offence under Section 153-A IPC while under sub-section (3-A) of Section 123 of the R.P. Act, it is only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, that is forbidden in the election campaign. The provision is made with the object of curbing the tendency to promote or attempt to promote communal, linguistic or any other factional enmity or hatred to prevent the divisive tendencies to achieve success at the polls on the ground of religion or narrow communal or linguistic affiliations. Any such attempt during the election is viewed with disfavour under the law and is made a corrupt practice under sub-section (3-A) of Section 123. (Paras 19 and 20)

In sub-section (3-A), the element of prejudicial effect on public order is implicit. Such divisive tendencies promoting enmity or hatred between different classes of citizens of India tend to create public unrest and disturb public order. This is a logical inference to draw on proof of the constituent parts of sub-section (3-A). However, whether the act complained of falls within the net of sub-section (3-A) is a question of fact in each case to be decided on the basis of the evidence led to prove the alleged act. (Para 21)

Ziyauddin Burhanuddin Bukhari v. *Brijmohan Ramdass Mehra*, (1976) 2 SCC 17 : 1975 Supp SCR 281, *relied on*

E. Election — Representation of the People Act, 1951 — S. 123(3-A) — Held, not violative of Art. 19(1)(a), being a law imposing reasonable restrictions in the interest of 'public order' and hence saved by Art. 19(2) — Constitution of India, Art. 19(1)(a) & (2)

Held :

The freedom of speech and expression guaranteed to all citizens under Article 19(1)(*a*) is subject to clause (2) of Article 19 which permits the making of any law imposing reasonable restrictions on the exercise of this right in the interests of public order or incitement to an offence. Sub-section (3-A) of Section 123 is undoubtedly a provision made in the interests of public order or incitement to an offence because the promotion or attempt to promote feelings of enmity or hatred between different classes of the citizens of India on any of the grounds specified therein, apart from creating divisive tendency, would also be prejudicial to the

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maintenance of public order and may amount to incitement to commission of offences. Therefore, the constitutional validity of sub-section (3-A) cannot be questioned on ground of violation of Article 19(1)(*a*) as it is saved by Article 19(2). (Para 24)

F. Election — Representation of the People Act, 1951 — S. 123(3) & (3-A) — Corrupt practice — Appeal on the ground of religion — Held, mere reference to Hindutva or Hinduism in election speech does not by itself attract sub-section (3) or (3-A) unless the speech can be construed as an appeal to vote for a candidate on the ground of he being a Hindu or to refrain from voting for a candidate on the ground of he not being a Hindu — 'Hindutva' or 'Hinduism' — Meaning — Ordinarily it means a way of life of the Indian people and does not comprehend practising Hindu religion as a faith and religious fundamentalism — Context of the speech has to be seen to ascertain the meaning, sought to be conveyed by use of the word 'Hindutva' or 'Hinduism' in the speech — Misuse of these expressions to promote fundamentalism cannot be permitted — Words and phrases — "Hindu", "Hindutva" and "Hinduism"

Held:

No precise meaning can be ascribed to the terms 'Hindu', 'Hindutva' and 'Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. Ordinarily, Hindutva is understood as a way of life or a state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism. The word 'Hindutva' is used and understood as a synonym of 'Indianisation' i.e., development of uniform culture by obliterating the differences between all the cultures coexisting in the country. The words 'Hinduism' or 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract the terms 'Hinduism' or 'Hindutva' cannot be confined merely to describe persons practising the Hindu religion as a faith and cannot be considered per se as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism. Misuse of these expressions to promote communalism cannot alter the true meaning of these terms. The mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use Fundamentalism of any colour or kind must be curbed with a heavy hand to preserve and promote the secular creed of the nation. Any misuse of these terms must, therefore, be dealt with strictly.(Paras 37, 39, 42 and 43)

It is, therefore, a fallacy and an error of law to proceed on the assumption that any reference to Hindutva or Hinduism in a speech makes it automatically a speech based on the Hindu religion as opposed to the other religions or that the use of the words 'Hindutva' or 'Hinduism' per se depict an attitude hostile to all persons practising any religion other than the Hindu religion. It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for votes for a Hindu candidate on the ground that he is a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of sub-section (3) or (3-A) of Section 123. It may well be, that these words are used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant. Whether a particular speech in which reference is

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made to Hindutva and/or Hinduism falls within the prohibition under sub-section (3) or (3-A) of Section 123 is, therefore, a question of fact in each case. (Para 44)

Sastri Yagnapurushdasji v. *Muldas Bhudardas Vaishya*, (1966) 3 SCR 242 : AIR 1966 SC 1119; *CWT* v. *R Sridharan*, (1976) 4 SCC 489 : 1977 SCC (Tax) 49 : 1976 Supp SCR 478; *M. Ismail Faruqui (Dr)* v. *Union of India (Ayodhya case)*, (1994) 6 SCC 360; *Kultar Singh* v. *Mukhtiar Singh*, (1964) 7 SCR 790 : AIR 1965 SC 141, *relied on*

Bhagwan Koer v. *J C. Bose*, ILR (1904) 31 Cal 11 : 30 IA 249 . 7 CWN 895; *Jagdev Singh Sidhanti* v. *Pratap Singh Daulta*, (1964) 6 SCR 750 : AIR 1965 SC 183, *cited*

G. **Election — Corrupt practice — Appeal on the ground of religion — Speeches made by leader of the political party, to which the returned candidate belonged, in election meetings, making appeal to Hindu voters to vote for the candidate because of his being a Hindu and also making derogatory reference to Muslims — Meetings also attended and addressed by the returned candidate — Consent of the returned candidate to such speeches found to be implicit — On facts held, the speeches constituted corrupt practice under sub-sections (3) and (3-A) — Both the returned candidate and the party leader who delivered the speeches guilty of corrupt practice — Representation of the People Act, 1951, Ss. 123(3) & (3-A), 100 & 99**

[*See* paras 54 and 57 wherein extracts from the alleged speeches of the leader of the party have been set out]

Held :

The appeal made to the voters by the party leader in his speeches was a clear appeal to the Hindu voters to vote for the party candidate because he was a Hindu. The clear import of the extracts from the said three speeches is to this effect. Derogatory reference was also made to Muslims by calling them 'snake' and referring to them as 'lande' (derogatory term used for those practising circumcision). The language used in the context, amounted to an attempt to promote feelings of enmity or hatred betweenthe Hindus and the Muslims on the ground of religion. All the three speeches amount to corrupt practice under sub-section (3), while the first speech is a corrupt practice also under sub-section (3-A) of Section 123 of the R.P. Act. Since the appeal made to the voters in these speeches was to vote for the party candidate (Dr Ramesh Yeshwant Prabhoo) on the ground of his religion as a Hindu and the appeal was made with the consent of the candidate, he is guilty of these corrupt practices. For the same reason, the party leader (Bal Thackeray) also is guilty of these corrupt practices and, therefore, liable to be named in accordance with Section 99 of the R.P. Act of which due compliance has been made in the present case. (Paras 59 and 61)

There is a greater need for the leaders to be more circumspect and careful in the kind of language they use in the election campaign. This is essential not only for maintaining decency and propriety in the election campaign but also for the preservation of the proper and time-honoured values forming part of our cultural heritage and for a free and fair poll in a secular democracy. The offending speeches in the present case discarded the cherished values of our rich cultural heritage and tended to erode the secular polity. (Para 62)

H. **Election — Representation of the People Act, 1951 — S. 99(1) — Corrupt practice by a person other than the returned candidate — High Court's duty under S. 99(1) to record a finding in that regard and also record names of persons guilty of corrupt practice while making an order under S. 98 disposing of the election petition — High Court has to issue notice under the proviso to such persons, if not parties to the petition, and provide them opportunity of defence which the party to the petition had at the trial so as to**

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equate them with the party to the petition — On facts held, provisions of S. 99(1) complied with

It was alleged in the election petition that the top leader of the political party to which the returned candidate belonged had delivered three speeches on ground of religion in election meetings which constituted corrupt practices under sub-sections (3) and (3-A) of Section 123 of the R.P. Act on the part of such leader also. Notice under Section 99(1) was given after the entire evidence had been recorded and the trial Judge formed the prima facie opinion that the corrupt practices alleged to have been committed under sub-sections (3) and (3-A) of Section 123 appeared to have been proved and the noticee was likely to be named along with the returned candidate to be guilty of those corrupt practices. The notice given was accompanied by copies of pleadings and the entire evidence adduced at the trial for proving those corrupt practices. The notice clearly stated that the noticee had the opportunity to cross-examine such witnesses as had already been examined and of calling evidence in his defence and of being heard. The noticee raised objection to the notice alleging that it was vague, which was rejected by the High Court. That order was challenged by a special leave petition in the Supreme Court which was dismissed granting liberty to the noticee to apply in the High Court for the precise particulars claimed by him. Ultimately certain portions from the material on record were indicated by the petitioner on such a direction being given by the High Court. The election petitioner was called for cross-examination on behalf of the noticee. The noticee was given full opportunity to cross-examine the witnesses already examined and to adduce evidence in his defence and to argue his case in the High Court. The noticee did not choose to enter the witness-box. No material which was not given to the noticee was used against him. Copy of the text of the alleged speeches was furnished to him.

Held :

While deciding the election petition at the conclusion of the trial and making an order under Section 98 disposing of the election petition in one of the ways specified therein, the High Court under Section 99 is required to record the names of all persons guilty of any corrupt practice which has been proved at the trial. Proviso to sub-section (1) then prescribes that a person who is not a party to the petition shall not be so named unless the condition specified in the proviso is fulfilled. The requirement of the proviso is only in respect of a person who is not a party to the petition and is to be named so that he too has the same opportunity which was available to a party to the petition. The opportunity which a party to the petition had at the trial to defend against the allegation of corrupt practice is to be given by such a notice to that person of defending himself if he was not already a party to the petition. Thus the noticee has to be equated with a party to the petition for this purpose. This is the pragmatic test to be applied for deciding the question of compliance of Section 99 of the R.P. Act. If the noticee had the opportunity which he would have got as a party to the petition, then there can be no case of non-compliance of Section 99. The opportunity required to be given by the proviso to sub-section (1) of Section 99 is the same and not more than that available to a party to the petition to defend himself against the charge of corrupt practice.

(Paras 49 and 50)

Applying the above test, it is clear that there is no non-compliance of Section 99 in the present case. The noticee had the same opportunity which the returned candidate had. The noticee was given the opportunity to cross-examine any witness who had already been examined by the High Court and the witnesses who were considered to have given evidence against him, were also enumerated in the notice; and he was given an opportunity to call evidence in his defence and to be heard. In

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this situation, the grievance made that specific portions of the material which formed the record at the trial was not precisely indicated to the noticee has no merit. It was clear from the pleading that the allegation against the noticee was in respect of the three speeches made by him, the particulars of which were given and the text of those speeches also was available to the noticee which he did not even deny. On these facts, there is no ground to allege non-compliance of Section 99 of the R.P. Act. (Paras 50 and 51)

Appeals dismissed R-M/T/15458/C

Advocates who appeared in this case :

D.P. Gupta, Solicitor General, Venugopal Reddy, B.A. Desai and Ashok H. Desai, Ram Jethmalani and Rama Jois, Senior Advocates (A.M. Khanwilkar, Yatendra Sharma, Rajiv Malhotra, V.D. Joshi, Ms V.D. Khanna, M.P. Vashi, Pallav Shishodia, M.N. Shroff, Ms Reema Bhandari, P. Parameswaran, R.P. Srivastava, Navin Prakash, Advocates, with them) for the appearing parties.

Chronological list of cases cited *in para(s)*

1 (1994) 6 SCC 360, *M. Ismail Faruqui (Dr)* v *Union of India (Ayodhya case)* 17, 38
2 (1976) 4 SCC 489 1977 SCC (Tax) 49 : 1976 Supp SCR 478, *CWT* v *R. Sridharan* 36
3 (1976) 2 SCC 17 : 1975 Supp SCR 281, *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra* 22
4. (1972) 2 All ER 898 (1972) 3 WLR 143, *Knuller (Publishing, Printing and Promotions) Ltd.* v. *Director of Public Prosecutions* 29
5. (1966) 3 SCR 242 : AIR 1966 SC 1119, *Sastri Yagnapurushdasji* v. *Muldas Bhudardas Vaishya* 35, 36
6. (1964) 7 SCR 790 . AIR 1965 SC 141, *Kultar Singh* v. *Mukhtiar Singh* 40
7 (1964) 6 SCR 750 AIR 1965 SC 183, *Jagdev Singh Sidhanti* v *Pratap Singh Daulta* 41
8 (1955) 1 SCR 608 : AIR 1954 SC 608, *Jumuna Prasad Mukhariya* v *Lachhi Ram* 8, 30
9 ILR (1904) 31 Cal 11 : 30 IA 249 : 7 CWN 895, *Bhagwan Koer* v. *J.C. Bose* 36

The Judgment of the Court was delivered by

J.S. VERMA, J.— Both these appeals are under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as "the Act/R.P. Act") against the judgment dated 7-4-1989 of the Bombay High Court in Election Petition No. 1 of 1988 by which the election of Dr Ramesh Yeshwant Prabhoo, the returned candidate from 38, Vile Parle Constituency to the Maharashtra State Legislative Assembly, held on 13-12-1987, has been declared to be void on the ground under Section 100(1)(*b*) of the Act. The appellant has been found guilty of the corrupt practices prescribed by sub-sections (3) and (3-A) of Section 123 of the Act at the election, in that he and his agent Bal Thackeray with his consent appealed for votes on the ground of the returned candidate's religion and that they promoted or tended to promote feelings of enmity and hatred between different classes of the citizens of India on the grounds of religion and community. Consequently, Bal Thackeray, after a notice issued under Section 99 of the Act to him, has also been named for commission of these corrupt practices. Civil Appeal No.

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2836 of 1989 is by the returned candidate Dr Ramesh Yeshwant Prabhoo and Civil Appeal No. 2835 of 1989 is by Bal Thackeray against that judgment.

2. The said election was held on 13-12-1987 and the result was declared on 14-12-1987, at which Dr Ramesh Yeshwant Prabhoo was declared to be duly elected. The charge of these corrupt practices is based on three public speeches delivered by Bal Thackeray: on 29-11-1987 at Parle (opposite Shiv Sena Shaka No. 84), on 9-12-1987 at Khar-Danda near Shankar Temple, and on 10-12-1987 at Jaltaran Maidan, Vile Parle (East). The public speech given on 9-12-1987 has been held to amount to the corrupt practice under sub-section (3) of Section 123, while public speeches delivered on 29-11-1987 and 10-12-1987 have been held to be corrupt practices under sub-sections (3) and (3-A) of Section 123 of the Act. The relevant pleading relating to these corrupt practices is contained in paras 6 and 8 of the election petition. Sub-paras (*a*) to (*d*) of para 6 relate to first speech, sub-para (*e*) of para 6 relates to second speech and sub-para (*f*) of para 6 relates to third speech. Para 8 of the election petition then says that returned candidate indulged in the corrupt practices provided by sub-sections (3) and (3-A) of Section 123 of the Act and, therefore, his election is void.

3. After the election petitioner closed his evidence, the returned candidate Dr Prabhoo examined only himself in rebuttal. After close of the evidence of the parties and hearing arguments of both sides, the High Court ordered issue of notice under Section 99 of the Act to Bal Thackeray who filed an affidavit in reply to the notice. The election petitioner and his three witnesses were recalled for cross-examination by counsel for the noticee, Bal Thackeray. The noticee did not examine himself or any other witness in rebuttal. The decision of the High Court is based on this material.

4. Dr Prabhoo was set up as a candidate of the Shiv Sena which was then not a recognised political party for purposes of the Legislative Assembly elections and, therefore, Dr Prabhoo's candidature was shown as "Shiv Sena — Independent". Bal Thackeray is the top leader of Shiv Sena and he participated in the election campaign of Dr Prabhoo as the main speaker in his capacity as the leader of Shiv Sena. The status of Bal Thackeray as the top leader of Shiv Sena has never been disputed. The gist of election petitioner's case which has been found proved by the High Court is that the three public speeches of Bal Thackeray in the election campaign of Dr Prabhoo were all in very intemperate language and incendiary in nature, which were appeals to the voters to vote for Dr Prabhoo because of his religion, i.e., he being a Hindu, and the speeches also promoted or tended to promote enmity and hatred between different classes of the citizens of India on the ground of religion. The High Court has held this charge of the alleged corrupt practices proved against the returned candidate Dr Prabhoo and Bal Thackeray. Accordingly, the election of the returned candidate has been declared to be void on the ground contained in Section 100(1)(*b*) of the Act, and Bal Thackeray has been named in accordance with Section 99 of the Act. Hence these appeals by them.

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5. The averments in para 6 of the election petition alleging the commission of corrupt practices within the meaning of Section 123 of the Act are in sub-paras (*a*) to (*f*) which are as under:

"(*a*) The petitioner states that Respondent 1 during his election campaign indulged in corrupt practices by appealing himself, or by his election agents, or by his supporters with his consent to vote for him and refrain from voting for other candidates on the grounds of religion. The whole tenor of election propaganda of Respondent 1 was that he is a candidate of Hindus and Hindus should vote for him alone. The details of this appeal are given in the later part of this petition.

(*b*) Respondent 1, his election agents and his supporters with the consent of the candidate Respondent 1 also indulged in corrupt practice by promoting and by attempting to promote feelings of enmity and hatred between different classes of citizens of India on grounds of religion, community and language. The examples of this corrupt practice are also listed in the later part of this petition.

(*c*) The campaign for the election of Respondent 1 was headed by Shri Balasaheb Thackeray, the leader of the Shiv Sena, who had put up Respondent 1 in this election. Shri Thackeray addressed several meetings and also issued press statements during the course of the election in question. Out of these meetings Shri Thackeray spoke on 29-11-1987 at a meeting held at Shiv Sena Shaka No. 84 at Vile Parle, which took place from 9 p.m. to 12 midnight. In this meeting Shri Balasaheb Thackeray, Suryakant Mahadik, Pramod Navalkar, Ramesh Mehta, Madhukar Sarpotdar and the candidate Respondent 1 Dr Ramesh Prabhoo himself were also present. Shri Thackeray uttered the following words during this meeting. The words are quoted in Marathi and they are followed by the English translation.

Translation: 'We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so.'

Since the petitioner was all throughout in the constituency for his election campaign, he came to know about the said meeting having been held and attended by Shri Bal Thackeray. Subsequently, he also came to know about the speeches made in the meeting from his friends and active workers of the Party. The petitioner has reliably learnt that the police reporters also attended the meeting and they have taken down the report of the speeches made. The petitioner craves leave to call for the record of the speeches from the Police Department and to prove the point by examining the police reporters who have taken down the speeches. The petitioner craves leave to rely upon the said police report in the custody of the Police. A report regarding the said meeting and the speeches appeared in the newspaper *Mumbai Sakal* (a Marathi daily) dated 1-12-1987 with the photographs under the title "*Hindu Dev-Devtavareel Teeka Sahan Karnar Nahi — Thackeray*" (We will not tolerate the criticism of Hindu gods and goddesses — Thackeray). From the said photograph it is clear that Respondent 1 was also present in the said

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meeting. Thus all the utterances regarding the speeches made by Bal Thackeray to appeal to voters in the name of Hindu religion are with the consent and connivance of the first respondent. The same meeting was also reported in *Sanj Tarun Bharat* (an evening daily) dated 30-11-1987 with the photograph of Shri Thackeray, Respondent 1 and others on the dais. The said photograph further shows that a banner was put up on the dais which reads as under:

'*Garva Say Kaho (OM) Ham Hindu Hai*'

The said meeting was also reported in *Sandhyakal*, another Marathi daily, on 1-12-1987. Hereto annexed and marked Exhibit 'A' and 'A-1' is a copy of the report appearing in the *Mumbai Sakal* with English translation, hereto annexed and marked Exhibits 'B' and 'B-1' is the original report appearing in *Sanj Tarun Bharat* with English translation and hereto annexed and marked Exhibits 'C' and 'C-1' is the said report appearing in *Sandhyakal* with English translation.

(*d*) The petitioner says that a report regarding the said meeting also appeared in the *Urdu Times*, an Urdu daily published from Bombay in its issue dated 1-12-1987. The petitioner does not know how to read and write Urdu. However, he got the said report translated. In the said *Urdu Times* the report appeared with the title '*Shiv Sena ko Musalmano ke voton ki zarurat nahin hai*' (Shiv Sena did not need the votes of Muslims). A true English translation of the said news item is annexed hereto and marked Exhibits 'D' and 'D-1' with a zerox copy of the report in Urdu.

(*e*) Again on 9-12-1987 there was another election meeting which took place from 9 p.m. to about 12 midnight at Khar-Danda, near Shankar Temple. This meeting was addressed by Shri Bal Thackeray, Respondent 1, Harishchandra Dattaji Salvi (a Shiv Sena leader) and Shambhoo Maharaj, a religious leader from Gujarat. In the said meeting Shri Bal Thackeray, while addressing the audience stated as under:

> *Translation*: 'Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by name Prabhoo should be led to victory in the name of religion.'

The petitioner says that the proceedings of the said meeting were recorded by the police. Newspaper reports regarding the meeting also appeared. The petitioner will crave leave to and rely upon the records of the police and also the press report giving the version of the said meeting appearing in various newspapers.

(*f*) The petitioner says that on 10-12-1987 a meeting was held from 9 p.m. to about 12 midnight at Vile Parle (East) at Shahaji Raje Marg. This was addressed by S/Shri Bal Thackeray, Shambhoo Maharaj, Ramesh

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Mehta, Rishi Kapoor, Jitendra Madhukar Joshi and Ramesh Prabhoo, Respondent 1. In this meeting Shri Thackeray uttered the following words while addressing the meeting:

> *Translation*: 'We have come with the ideology of Hinduism. Shiv Sena will implement this ideology. Though this country belongs to Hindus, Ram and Krishn are insulted. (They) valued the Muslim votes more than your votes; we do not want the Muslim votes. A snake like Shahabuddin is sitting in the Janata Party, a man like Nihal Ahmed is also in Janata Party. So the residents of Vile Parle should bury this party (Janata Party).'

The above utterances in these three meetings are the examples of promoting the feelings of enmity between different classes of citizens of India. The sole purpose in doing so and making the appeal was to canvass votes in favour of the first respondent on the ground of religion and make it appear to the voters that Respondent 1 was the only person who could represent the Hindu community. The effect of the said speeches was to promote the feelings of enmity and hatred between Hindus and non-Hindus on the ground of religion, race, caste, community etc. As such the petitioner and most of the respondents from 1 to 13 are Hindus, having full faith in the Hindu religion. The main ground of objection on the way of canvassing for votes by Respondent 1 and his supporters was to bring the element of religion into politics endangering the very foundation of the Constitution of India, viz., secularism. The petitioner honestly believes that it is one thing to follow one's own religion according to his own conviction and another thing to appeal to the voters to vote in the name of the religion."

6. Reliance was placed by the election petitioner on certain news items wherein the public speeches were published and also on certain reports alleged to have been made by some police officers who reported the making of the speeches raising some controversy relating to sufficiency of pleadings and the use of material for proving the contents of the speeches in excess of the exact words pleaded in the election petition. Details of this controversy would be mentioned later while considering that point. However, it may be mentioned that the extent to which there is specific pleading, and the returned candidate himself admitted the contents of the public speeches, can safely be considered subject to the objection raised of the alleged legal infirmities including want of a valid notice under Section 99 of the Act to the noticee Bal Thackeray. More details of the evidence would be mentioned at the appropriate stage.

7. Broadly stated, the contentions of Shri Ram Jethmalani, learned counsel for the appellants in these appeals are: (1) Sub-sections (3) and (3-A) of Section 123 of the Act are constitutionally invalid being violative of guarantee of free speech in Article 19(1)(*a*) of the Constitution; (2) To save both these provisions from constitutional invalidity, they must be read as reasonable restrictions in the interest of public order to get the protection of

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Article 19(2) of the Constitution. In other words, unless the speech is prejudicial to the maintenance of public order, it cannot fall within the net of either sub-section (3) or sub-section (3-A) of Section 123 of the Act; (3) In sub-section (3) of Section 123, the emphasis is on the word 'his' preceding the word 'religion' and its significance must be understood in the light of the restricted scope of the provision indicated by the Union Law Minister during the parliamentary debates to explain the object of introduction of the word 'his' in the provision. In other words, only a direct appeal for votes on the ground of 'his' religion subject to its tendency to prejudice the maintenance of public order is contended to be the limited scope of sub-section (3) of Section 123; (4) A speech in which there be a reference to religion but no direct appeal for votes on the ground of his religion, does not come within the net of sub-section (3) of Section 123; (5) The public speeches in question did not amount to appeal for votes on the ground of his religion and the substance and main thrust thereof was 'Hindutva' which means the Indian culture and not merely the Hindu religion; (6) The public speeches criticised the anti-secular stance of the Congress Party in practising discrimination against Hindus and giving undue favour to the minorities which is not an appeal for votes on the ground of Hindu religion; (7) On behalf of the noticee Bal Thackeray, it was further contended that there was no compliance of the requirements of Section 99 of the Act, inasmuch as the notice contemplated by the provision was not given and the noticee was never informed of the precise charge against him. It was submitted that the notice given was not in conformity with the law and particulars required to be given by the court were never given, the High Court having merely asked the petitioner to indicate the particulars of the charge of the corrupt practice; and (8) that the pleadings in the election petition are deficient being devoid of the material particulars and, therefore, the material brought in at the stage of evidence and relied on to prove the charge of corrupt practice has to be excluded from consideration. Learned counsel for the appellant also made the grievance that the High Court had decided the election petition mainly on the basis of the general impressions and vague assertions made by the election petitioner instead of confining the decision to the precise pleadings and the legally admissible evidence examined in the light of the true meaning and scope of sub-sections (3) and (3-A) of Section 123 of the Act.

8. In reply, Shri Ashok Desai, learned counsel for the respondent refuted these contentions. He submitted that the question of constitutional validity of the provisions is no longer res integra being concluded by the decision of the Constitution Bench in *Jumuna Prasad Mukhariya* v. *Lachhi Ram*[1]. Alternatively, he contended that the freedom of speech guaranteed in the Constitution does not extend to giving speeches of the kind given by Bal Thackeray and, at any rate, these provisions impose reasonable restrictions on the freedom of speech which are saved by Article 19(2) of the Constitution. Shri Desai also submitted that the substance and main thrust of

1 (1955) 1 SCR 608 AIR 1954 SC 608

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the speech, not merely the form, has to be seen in its context to determine if it amounts to an appeal for votes on the ground of 'his' religion, and such appeal need not necessarily be only direct. Learned counsel submitted that each one of the speeches in question was highly incendiary containing appeal to vote for Dr Ramesh Prabhoo because he is a Hindu; and it also tended to promote enmity and hatred between Hindus and Muslims. According to him, each one of the speeches amounted to the corrupt practice both under sub-sections (3) and (3-A) of Section 123 of the Act.

Meaning of sub-sections (3) and (3-A) of Section 123 of the R.P. Act

9. Sub-sections (3) and (3-A) of Section 123 of the R.P. Act are as under:

"123. *Corrupt practices.*— The following shall be deemed to be corrupt practices for the purposes of this Act:

* * *

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

(3-A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

* * *"

10. The submission of Shri Ram Jethmalani, learned counsel for the appellants, is that the appeal to vote or refrain from voting for any person on the ground of 'his' religion etc. for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate, means a direct appeal to vote or refrain from voting on the ground of 'his' religion, etc.; and the appeal must also be provocative in nature to adversely affect public order. The further element of adverse effect on public order, it is urged, is implicit in the provision to save it from constitutional invalidity, which argument is considered separately. Shri Jethmalani laid emphasis on the word 'his' which was inserted by Act 40 of 1961 w.e.f. 20-9-1961 when the existing sub-section (3) was substituted for the old sub-section (3). Shri Jethmalani contended that the object of insertion of the word 'his' in the newly substituted sub-section (3) was to restrict the meaning of the provision and confine it only to a direct appeal based on 'his' religion. Learned counsel placed strong reliance on the statement of the Law

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Minister during the debates in Parliament to support this submission. In reply, Shri Ashok Desai, learned counsel for the respondent, contended that the word 'his' no doubt has significance, but its use does not confine the meaning of sub-section (3) only to a direct appeal on the ground of 'his' religion, etc. and extends to an appeal of which the main thrust in the context is on the religion of the candidate. Shri Desai submitted that an unduly restricted meaning cannot be given to sub-section (3) since the object of the provision is to prohibit appeal for votes during the election on the ground of religion of the candidate.

11. There can be no doubt that the word 'his' used in sub-section (3) must have significance and it cannot be ignored or equated with the word 'any' to bring within the net of sub-section (3) any appeal in which there is any reference to religion. The religion forming the basis of the appeal to vote or refrain from voting for any person, must be of that candidate for whom the appeal to vote or refrain from voting is made. This is clear from the plain language of sub-section (3) and this is the only manner in which the word 'his' used therein can be construed. The expressions "the appeal ... to vote or refrain from voting for any person on the ground of *his* religion, ... for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate" lead clearly to this conclusion. When the appeal is to vote on the ground of 'his' religion for the furtherance of the prospects of the election of that candidate, that appeal is made on the basis of the religion of the candidate for whom votes are solicited. On the other hand when the appeal is to refrain from voting for any person on the ground of 'his' religion for prejudicially affecting the election of any candidate, that appeal is based on the religion of the candidate whose election is sought to be prejudicially affected. It is thus clear that for soliciting votes for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought; and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the ground of the religion of that other candidate. The first is a positive appeal and the second a negative appeal. There is no ambiguity in sub-section (3) and it clearly indicates the particular religion on the basis of which an appeal to vote or refrain from voting for any person is prohibited under sub-section (3).

12. The argument that such an appeal must be a direct appeal, such as 'Vote for A because he is a Hindu' or 'Do not vote for B because he is a Christian', and that no other appeal leading to that conclusion is forbidden, does not appeal to reason. What is forbidden by sub-section (3) is an appeal of this kind and, therefore, any appeal which amounts to or leads to this inference must necessarily come within the prohibition in sub-section (3). Whether a particular appeal is of this kind, is a question of fact in each case. Where the words used in the appeal are clear and unambiguous amounting to a direct appeal, the exercise of construing the speech is not needed. However, where a reasonable construction of the appeal leads to that conclusion, the result must be the same. The substance of the speech and the manner in

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which it is meant to be understood by the audience determines its nature, and not the camouflage by an artistic use of the language. For understanding the meaning and effect of the speech, the context has to be found in the speech itself and not outside it with reference to any other background unless the speech itself imports any earlier fact in the context of that speech. The speech has also not to be construed in the abstract or in the manner in which it would be construed after an academic debate. Care must be taken to remember that the public speeches during election campaign ordinarily are addressed to an audience comprised of common men and, therefore, the manner in which it would be understood by such an audience has to be kept in view.

13. We are unable to accept the submission of Shri Jethmalani that a further element of prejudicial effect on public order, is implicit in sub-section (3). We do not find anything in the language of the provision to read this further element into it. Sub-section (3) in substance forbids appeal for votes for any candidate on the ground of 'his' religion and appeal to refrain from voting for any other candidate on the ground of the religion of that other candidate. Obviously the purpose of enacting the provision is to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any votes on the ground of his religion. This is in keeping with the secular character of the Indian polity and rejection of the scheme of separate electorates based on religion in our constitutional scheme. An appeal of the kind forbidden by sub-section (3) based on the religion of a candidate, need not necessarily be prejudicial to public order and, therefore, the further element of likelihood of prejudice to public order is unnecessary, on account of which it is not implicit in the provision. This, according to us, is the meaning and the correct construction of sub-section (3). The question of constitutional validity of the provision on this meaning is considered later.

14. Reference may now be made to the Parliamentary debates in which the reason ascribed by the Law Minister Shri A.K. Sen for adding the word 'his' in sub-section (3) and its purpose was stated thus—

> "Shri A.K. Sen: *I added the word 'his' in the Select Committee in order to make quite clear as to what was the mischief which was sought to be prevented under this provision.*
>
> * * *
>
> The apprehension was expressed if one's right was going to be curbed by this section. If such a right was going to be curbed by the section, I would have been against such an amendment, because after all, *it is the right of a person to propagate his own language, his own particular culture and various other matters. But that does not mean vilifying another language or creating enmity between communities.*
>
> * * *
>
> ... I am pained to hear Shri Hynniewta giving expression to an apprehension, which to me seems entirely baseless. That apprehension is

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to the effect that clause 23 will deprive him of his right to propagate his language or preserve his language, which cannot be taken away from him as he himself has quoted the relevant article of the Constitution. *If that right is taken away by the Bill, it will be struck down as contravening Article 19 and the section will not be given effect to by any court.* Fortunately, this country is still governed by the rule of law and the courts of law have the last say in these matters.

* * *

That is a different matter. With due respect to the hon. member, he has not really appreciated the rationale of the Supreme Court's decision. With regard to election matters, Parliament is free to enact such legislation as it thinks best and Chapter III does not come in. That is the decision of the Supreme Court. *But in the guise of framing an electoral law, no fundamental right of the citizen can be taken away. That is what I am saying. The right to preserve one's language cannot be taken away by an election law. That is as clear as daylight.*

* * *

You cannot make it an election issue if you say, 'Do not vote for him. He is a Bengali' or 'Do not vote for him. He is a Khasi.' I made it unequivocally clear that it is the purpose and design of this House and of the country to ensure that. *No man shall appeal only because he speaks a particular language and should get voted for that reason; or no man shall appeal against a particular person to the electorate solely because that opponent of his speaks a particular language.*

* * *

They are entitled to do so. The Constitution gives them the right to do so. *But we are on a very narrow point, whether we shall extend the right to a person, to a voter, to say: vote for me because I speak Hindi,* I speak Garhwali, or I speak Nepali or I speak Khasi; *or in the alternative, do not vote for my opponent because he is a man who speaks this particular language, his own language. It is on that sole narrow point that the prohibition is sought to be made.*

... But we are not here on the aesthetics of language or the philosophy of language; nor are we here to debate the fundamental rights of a citizen to preserve his own language and culture. Fortunately, that is guaranteed to every man and woman in this country as it is not elsewhere. ..."

* * *

... But the problem is, *are we going to allow a man to go to the electorate and ask for votes because he happens to speak a particular language or ask the electorate to refrain from voting for a particular person merely on the ground of his speaking a particular language or following a particular religion and so on? If not, we have to support this.* The preservation of the minorities' rights and so on is a different and a wider question.

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* * *

... But, if you say that Bengali language in this area is being suppressed or the schools are being closed, as Shri Hynniewta was saying, because they bore a particular name, then, you are speaking not only to fight in an election but you are also really seeking to protect your fundamental rights, to preserve your own language and culture. That is a different matter.

But, if you say, 'I am a Bengali, you are all Bengalis, vote for me', or 'I am an Assamese and so vote for me because you are Assamese-speaking men', I think, the entire House will deplore that as a hopeless form of election propaganda. And, no progressive party will run an election on that line. *Similarly, on the ground of religion. In the olden days, what speeches we used to hear in Muslim League gatherings! They were purely appeals on the ground of religion. So, the issue is too narrow and not a wide issue* in which the life and death of minorities are involved as Shri Hynniewta sought to make out. It is not at all in question. .. " (emphasis supplied)

15. The clarification given in the speech of the Law Minister clearly shows that a speech for the protection of fundamental rights, preservation of own language, religion and culture, etc. are not forbidden by sub-section (3) of Section 123, and the limit is narrow to the extent indicated.

16. It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism. Instances given in the speech of discrimination against any religion causing the imbalance in the professed goal of secularism, the allegation being against any individual or any political party, cannot be called an appeal on the ground of religion forbidden by sub-section (3). In other words, mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion. When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidate's religion or alienating the electorate against another candidate on the ground of the other candidate's religion. It also means that the State has no religion and the State practises the policy of neutrality in the matter of religion.

17. In *M. Ismail Faruqui (Dr)* v. *Union of India (Ayodhya case)*[2], the Constitution Bench, after a detailed discussion, summarised the true concept of secularism under the Indian Constitution as under: (SCC p. 403, para 37)

"It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The

2 (1994) 6 SCC 360

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Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution."

18. It cannot be doubted that an election speech made in conformity with the fundamental right to freedom of religion guaranteed under Articles 25 to 30 of the Constitution, cannot be treated as anti-secular to be prohibited by sub-section (3) of Section 123, unless it falls within the narrow net of the prohibition indicated earlier. It is obvious that a speech referring to religion during election campaign with a secular stance in conformity with the fundamental right to freedom of religion can be made without being hit by the prohibition contained in sub-section (3), if it does not contain an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion. When it is said that politics and religion do not mix, it obviously does not mean that even such permissible political speeches are forbidden. This is the meaning and true scope of sub-section (3) of Section 123 of the Act.

19. We would now consider the meaning of sub-section (3-A) of Section 123. This sub-section also was inserted along with the substituted sub-section (3) by Act 40 of 1961 w.e.f. 20-9-1961. The meaning of this sub-section is not much in controversy. Sub-section (3-A) is similar to Section 153-A of the Indian Penal Code. In sub-section (3-A), the expression used is "the promotion of, or attempt to promote, feelings of enmity or hatred" as against the expression "Whoever ... promotes or attempts to promote ... disharmony or feelings of enmity, hatred or ill will ..." in Section 153-A IPC. The expression "feelings of enmity or hatred" is common in both the provisions but the additional words in Section 153-A IPC are "disharmony ... or ill will". The difference in the plain language of the two provisions indicates that mere promotion of disharmony or ill will between different groups of people is an offence under Section 153-A IPC while under sub-section (3-A) of Section 123 of the R.P. Act, it is only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, that is forbidden in the election campaign.

20. The provision is made with the object of curbing the tendency to promote or attempt to promote communal, linguistic or any other factional enmity or hatred to prevent the divisive tendencies. The provision in the IPC as well as in the R.P. Act for this purpose was made by amendment at the same time. The amendment in the R.P. Act followed amendments made in the Indian Penal Code to this effect in a bid to curb any tendency to resort to divisive means to achieve success at the polls on the ground of religion or narrow communal or linguistic affiliations. Any such attempt during the

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election is viewed with disfavour under the law and is made a corrupt practice under sub-section (3-A) of Section 123.

21. Shri Jethmalani is right that in sub-section (3-A), the element of prejudicial effect on public order is implicit. Such divisive tendencies promoting enmity or hatred between different classes of citizens of India tend to create public unrest and disturb public order. This is a logical inference to draw on proof of the constituent parts of sub-section (3-A). The meaning of sub-section (3-A) is not seriously disputed between the parties and, therefore, it does not require any further discussion. However, whether the act complained of falls within the net of sub-section (3-A) is a question of fact in each case to be decided on the basis of the evidence led to prove the alleged act

22. The decision in *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra*[1] lends assurance to the correctness of the construction made by us of these provisions. The returned candidate Bukhari was the candidate of Muslim League while the defeated candidate Shauket Chagla was the Congress candidate at the election. Both were Muslims. The returned candidate Bukhari in his appeal to the voters said that Chagla was not true to his religion while he himself was a true Muslim and that Chagla was neither a good Hindu nor a true Muslim. The clear implication of the appeal was that Chagla was not true to his religion whereas Bukhari was, and, therefore, the voters should prefer Bukhari. In short, the appeal for votes was made on the ground that Bukhari was a staunch believer of the Muslim religion as against Chagla who was not. It was this clear appeal based on the ground of the candidate's religion which was held to constitute the corrupt practices defined by sub-sections (3) and (3-A) of Section 123 of the R.P. Act. For this purpose, the true ambit and scope of these provisions was considered and indicated as under: (SCC pp. 24-33, paras 10-47)

> "We propose to indicate, at this stage, what mischief the provisions were designed to suppress because that seems to us to be the most illuminating and certain way of correctly construing these statutory provisions. We cannot do so without adverting to the historical, political, and constitutional background of our democratic set-up, such provisions are necessary in our opinion, to sustain the spirit or climate in which the electoral machinery of this set-up could work.
>
> Our Constitution-makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences,

[1] (1976) 2 SCC 17 : 1975 Supp SCR 281

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which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

It seems to us that Section 123, sub-sections (2), (3) and (3-A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilised, political and social order. Due respect for the religious beliefs and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system. Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low herd instincts and animosities or irrational fears between groups to secure electoral victories. *The line has to be drawn by the courts, between what is permissible and what is prohibited, after taking into account the facts and circumstances of each case interpreted in the context in which the statements or acts complained of were made.*

* * *

We have to determine the effect of statements proved to have been made by a candidate, or, on his behalf and with his consent, during his election, upon the minds and feelings of the ordinary average voters of this country in every case of alleged corrupt practice of undue influence by making statements. We will, therefore, proceed to consider the particular facts of the case before us.

* * *

... In other words, Bukhari, apart from making a direct attack on the alleged religious beliefs and practices of the Chagla family, clearly conveyed to the hearers that Chagla was an unfit person, on the ground of his mixed religious faith and practices, to represent Muslims. *Bukhari had also called upon Muslims to unite against such a person if they wanted their religion to survive. The High Court had very rightly held that these statements contravened the provisions of Section 123(3) of the Act.*

* * *

We do not think that any useful purpose is served by citing authorities, as the learned counsel for the appellant tried to do, to interpret the facts of the case before us by comparing them to the very different facts of other cases. *In all such cases, the line has no doubt to be drawn with care so as not to equate possible impersonal attacks on religious bigotry and intolerance with personal ones actuated by bigotry and intolerance.*

As already indicated by us, our democracy can only survive if those who aspire to become people's representatives and leaders understand the spirit of secular democracy. That spirit was characterised by

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Montesquieu long ago as one of 'virtue'. It implies, as the late Pandit Jawaharlal Nehru once said, 'self-discipline'. *For such a spirit to prevail, candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions.* Heresy hunting propaganda or professedly religious grounds directed against a candidate at an election may be permitted in a theocratic State but not in a secular republic like ours. It is evident that, if such propaganda was permitted here, it would injure the interests of members of religious minority groups more than those of others. *It is forbidden in this country in order to preserve the spirit of equality, fraternity, and amity between rivals even during elections. Indeed, such prohibitions are necessary in the interests of elementary public peace and order.*

* * *

According to his own professions, the appellant wanted votes for himself on the ground that he staunchly adhered to what he believed to be Muslim religion as contrasted with Chagla who did not. There is no doubt whatsoever in our minds that the High Court had rightly found the appellant guilty of the corrupt practices defined by the provisions of Sections 123(2), 123(3) and 123(3-A) of the Act by making the various speeches closely examined by us also." (emphasis supplied)

The meaning of sub-sections (3) and (3-A) of Section 123 was understood and indicated in this decision, in the above manner.

Constitutional Validity of sub-sections (3) and (3-A) of Section 123

23. The next question now relates to the constitutional validity of these provisions on the meaning ascribed to them.

24. Sub-section (3-A) of Section 123 is undoubtedly a provision made in the interests of public order or incitement to an offence because the promotion or attempt to promote feelings of enmity or hatred between different classes of the citizens of India on any of the grounds specified therein, apart from creating divisive tendency, would also be prejudicial to the maintenance of public order and may amount to incitement to commission of offences. The freedom of speech and expression guaranteed to all citizens under Article 19(1)(*a*), which is the basis of the constitutional challenge to this provision, is subject to clause (2) of Article 19 which permits the making of any law imposing reasonable restrictions on the exercise of this right in the interests of public order or incitement to an offence. For this reason, no further attempt was made to press the argument of challenge to the constitutional validity of sub-section (3-A) on the construction we have made of that provision.

25. The question now is of the constitutional validity of sub-section (3) of Section 123. We have already rejected the argument that the element of prejudicial effect on public order is implicit also in sub-section (3) as it is in sub-section (3-A). According to Shri Ram Jethmalani, unless this element also is read into sub-section (3), it is violative of Article 19(1)(*a*) inasmuch

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as clause (2) of Article 19 does not save its validity under any of the other heads specified therein.

26. We have construed sub-section (3) of Section 123 as a restriction only to the extent that votes cannot be sought for a candidate on the ground of his religion, etc. and similarly there can be no appeal to refrain from voting for any person on the same ground. In other words, an appeal to vote for a candidate or not to vote for him on the ground of his religion, etc. is the restriction imposed by sub-section (3). This restriction is in the law enacted to provide for the conduct of elections, the qualifications and disqualifications for membership of the Houses, the corrupt practices and other offences at or in connection with such elections. The right to contest the election is given by the statute subject to the conditions prescribed therein. The restriction is limited only to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general or the freedom to profess, practise and propagate religion unconnected with the election campaign.

27. It is true, as argued by Shri Jethmalani, that the freedom of speech and expression guaranteed to all citizens under Article 19(1)(*a*) is absolute subject to the reasonable restrictions imposed by any law saved by clause (2) of Article 19, under one of the heads specified therein. The heads specified in clause (2) of Article 19 are, therefore, several and they are intended to cover the entire area within which the absolute freedom to say anything which the speaker may like would not extend, in keeping with the standards of a civilized society, the corresponding rights in others in an orderly society, and the constitutional scheme.

28. The expression "in the interests of" used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are: decency or morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19. Shri Jethmalani contended that the words "decency or morality" relate to sexual morality alone. In view of the expression "in the interests of" and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words "decency or morality" do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of 'decency' is "correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or propriety; avoidance of obscenity; and the requirements of correct behaviour" (*The Oxford Encyclopaedic English Dictionary*); "conformity to the prevailing standards of propriety, morality, modesty, etc.: and the quality of being decent" (*Collins English Dictionary*).

29. Thus, the ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behaviour or

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propriety, etc. In a secular polity, the requirement of correct behaviour or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House. In *Knuller (Publishing, Printing and Promotions) Ltd.* v. *Director of Public Prosecutions*[4], the meaning of 'indecency' was indicated as under: (All ER p. 905)

> "... Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting...."

Thus, seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society.

30. In our opinion, the saving in clause (2) of Article 19 permits the imposition of reasonable restrictions on the exercise of the right conferred by Article 19(1)(*a*) by making any law in the interests of decency or morality; and sub-section (3) of Section 123 of the R.P. Act, as construed by us, has the protection of clause (2) of Article 19 under the head 'decency' therein. This conclusion is reached by us even if it is assumed that the provision is not saved merely as a condition subject to which the statutory right of contesting an election is available to the candidate. The fact that the scheme of separate electorates was rejected in framing the Constitution and secularism is the creed adopted in the constitutional scheme, are relevant considerations to treat this as a reasonable restriction on the freedom of speech and expression, for maintaining the standard of behaviour required in conformity with the decency and propriety of the societal norms. Viewed at in any manner, sub-section (3) of Section 123 cannot be held to be unconstitutional. This view is also in accord with the nature of right to contest an election, as understood in *Jumuna Prasad Mukhariya* v. *Lachhi Ram*[1].

31. The argument assailing the constitutional validity of sub-sections (3) and/or (3-A) of Section 123 is rejected.

Meaning of 'Hindutva' and 'Hinduism'

32. The next contention relates to the meaning of 'Hindutva' and 'Hinduism' and the effect of the use of these expressions in the election speeches.

33. We have already indicated the meaning of sub-section (3) of Section 123 of the R.P. Act and the limit of its operation. It may be said straightaway that any speech wherein these expressions are used, irrespective of their meaning, cannot by itself fall within the ambit of sub-section (3) of Section 123, unless the speech can be construed as an appeal to vote for a candidate on the ground that he is a Hindu or to refrain from voting for a candidate on the ground of his religion, i.e., he not being a Hindu. We have also indicated

4 (1972) 2 All ER 898 (1972) 3 WLR 143

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that mere reference to any religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3-A) of Section 123, since reference can be made to any religion in the context of secularism or to criticise any political party for practising discrimination against any religious group or generally for preservation of the Indian culture. In short, mere use of the word 'Hindutva' or 'Hinduism' or mention of any other religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3-A) of Section 123, unless the further elements indicated are also present in that speech. It is also necessary to see the meaning and purport of the speech and the manner in which it was likely to be understood by the audience to which the speech was addressed. These words are not to be construed in the abstract, when used in an election speech.

34. Both sides referred copiously to the meaning of the words 'Hindutva' and 'Hinduism' with reference to several writings. Shri Jethmalani referred to them for the purpose of indicating the several meanings of these words and to emphasise that the word 'Hindutva' relates to Indian culture based on the geographical division known as Hindustan, i.e., India. On the other hand, Shri Ashok Desai emphasised that the term 'Hindutva' used in election speeches is an emphasis on Hindu religion bearing no relation to the fact that India is also known as Hindustan, and the term can relate to Indian culture.

35. The Constitution Bench in *Sastri Yagnapurushdasji* v. *Muldas Bhudardas Vaishya*[5] held thus: (SCR pp. 259-66)

> "Who are Hindus and what are the broad features of Hindu religion, that must be the first part of our enquiry in dealing with the present controversy between the parties. *The historical and etymological genesis of the word 'Hindu' has given rise to a controversy amongst indologists; but the view generally accepted by scholars appears to be that the word 'Hindu' is derived from the River Sindhu otherwise known as Indus which flows from the Punjab.* 'That part of the great Aryan race', says Monier Williams, 'which immigrated from Central Asia, through the mountain passes into India, settled first in the districts near the River Sindhu (now called the Indus). The Persians pronounced this word Hindu and named their Aryan brethren Hindus. The Greeks, who probably gained their first ideas of India from the Persians, dropped the hard aspirate, and called the Hindus 'Indoi' ('*Hinduism*' by Monier Williams, p. 1).
>
> *The Encyclopaedia of Religion and Ethics*, Vol. VI, has described 'Hinduism' as the title applied to that form of religion which prevails among the vast majority of the present population of the Indian Empire (p. 686). As Dr Radhakrishnan has observed: 'The Hindu civilization is so called, since its original founders or earliest followers occupied the territory drained by the Sindhu (the Indus) river system corresponding to the North-West Frontier Province and the Punjab. This is recorded in the Rig Veda, the oldest of the Vedas, the Hindu scriptures which give their

5 (1966) 3 SCR 242 . AIR 1966 SC 1119

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name to this period in Indian history. *The people on the Indian side of the Sindhu were called Hindu by the Persian and the later western* a *invaders' ('The Hindu View of Life' by Dr Radhakrishnan, p. 12). That is the genesis of the word 'Hindu'.*

When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe b *to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.*

... The term 'Hindu', according to Dr Radhakrishnan, had originally a territorial and not a credal significance. It implied residence in a well- c *defined geographical area.* Aboriginal tribes, savage and half-civilized people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were the sons of the same mother. The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practised different rites (*Kurma Purana*) (Ibid. p. 12).

d Monier Williams has observed that 'it must be borne in mind that Hinduism is far more than a mere form of theism resting on Brahmanism. It presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen e by a continual influx of tributary rivers and rivulets, spreading itself over an ever-increasing area of country and finally resolving itself into an intricate Delta of tortuous streams and jungly marshes.... *The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity.* It has ever aimed at accommodating itself to circumstances, and has f carried on the process of adaptation through more than three thousand years. *It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds'.* ('*Religious Thought & Life in India*' by Monier Williams, p. 57).

We have already indicated that the usual tests which can be applied in relation to any recognised religion or religious creed in the world turn g *out to be inadequate in dealing with the problem of Hindu religion.* Normally, any recognised religion or religious creed subscribes to a body of set philosophic concepts and theological beliefs. Does this test apply to the Hindu religion? In answering this question, we would base ourselves mainly on the exposition of the problem by Dr Radhakrishnan in his work on Indian philosophy. ('*Indian Philosophy*' by Dr h Radhakrishnan, Vol. I, pp. 22-23). Unlike other countries, India can claim that philosophy in ancient India was not an auxiliary to any other

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science or art, but always held a prominent position of independence. ... 'In all the fleeting centuries of history', says Dr Radhakrishnan, 'in all the vicissitudes through which India has passed, a certain marked identity is visible. It has held fast to certain psychological traits which constitute its special heritage, and they will be the characteristic marks of the Indian people so long as they are privileged to have a separate existence'. *The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets. Truth is one, but wise men describe it differently.* (एक सद्विप्रा बहुधा वदन्ति।) The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the interrelation between the individual and the universal soul. 'If we can abstract from the variety of opinion', says Dr Radhakrishnan, 'and observe the general spirit of Indian thought, we shall find that it has a disposition to interpret life and nature in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings'. (Ibid, p. 32)

... *Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's point of view.* That is how 'the several views set forth in India in regard to the vital philosophic concepts are considered to be the branches of the selfsame tree. The short cuts and blind alleys are somehow reconciled with the main road of advance to the truth'. (Ibid, p. 48) *When we consider this broad sweep of the Hindu philosophic concepts, it would be realised that under Hindu philosophy, there is no scope for excommunicating any notion or principle as heretical and rejecting it as such.*

* * *

The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavira founded Jainism; Basava became the founder of Lingayat religion, Dhyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; *and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form.* If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.

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* * *

... It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: 'When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions and ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, *Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary*' (*'The Present-Day Experiment in Western Civilisation'* by Toynbee, pp. 48-49).

The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Article 25 has made it clear that in sub-clause (*b*) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly." (emphasis supplied)

36. In a later Constitution Bench decision in *CWT* v. *R. Sridharan*[6], the meaning of the term 'Hinduism' as commonly understood is stated thus: (SCR pp. 481-82: SCC pp. 493-94, paras 10-16)

"... *It is a matter of common knowledge that Hinduism embraces within itself so many diverse forms of beliefs, faiths, practices and worship that it is difficult to define the term 'Hindu' with precision.*

The historical and etymological genesis of the word 'Hindu' has been succinctly explained by Gajendragadkar, C.J. in *Shastri Yagnapurushdasji* v. *Muldas Bhudardas Vaishya*[5].

In Unabridged Edition of *Webster's Third New International Dictionary of the English Language, the term 'Hinduism' has been defined as meaning*

> '*a complex body of social, cultural and religious beliefs and practices* evolved in and largely confined to the Indian subcontinent and marked by a caste system, *an outlook tending to view all forms and theories as aspects of one eternal being and truth*, a belief in ahimsa, karma, dharma, sanskara and moksha, and the practice of the way of works, the way of knowledge, or the way of devotion as the means of release from the bound of rebirths; the way of life and form of thought of a Hindu.'

In Encyclopaedia Britannica (15th Edition), the term 'Hinduism' has been defined as meaning

> '*the civilization of Hindus (originally, the inhabitants of the land of Indus River). It properly denotes the Indian civilization of*

6 (1976) 4 SCC 489 : 1977 SCC (Tax) 49 : 1976 Supp SCR 478

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approximately the last 2000 years, which gradually evolved from Vedism, the religion of the ancient Indo-European peoples who settled in India in the last centuries of the 2nd millennium B.C. *Because it integrates a large variety of heterogeneous elements, Hinduism constitutes a very complex but largely continuous whole, and since it covers the whole of life, it has religious, social, economic, literary, and artistic aspects.* As a religion, Hinduism is an utterly diverse conglomerate of doctrines, cults, and way of life.... *In principle, Hinduism incorporates all forms of belief and worship without necessitating the selection or elimination of any. The Hindu is inclined to revere the divine in every manifestation, whatever it may be, and is doctrinally tolerant, leaving others — including both Hindus and non-Hindus — whatever creed and worship practices suit them best. A Hindu may embrace a non-Hindu religion without ceasing to be a Hindu,* and since the Hindu is disposed to think synthetically and to regard other forms of worship, strange gods, and divergent doctrines as inadequate rather than wrong or objectionable, *he tends to believe that the highest divine powers complement each other for the well-being of the world and mankind.* Few religious ideas are considered to be finally irreconcilable. The core of religion does not even depend on the existence or non-existence of God or on whether there is one god or many. *Since religious truth is said to transcend all verbal definition, it is not conceived in dogmatic terms. Hinduism is, then both a civilization and a conglomerate of religions,* with neither a beginning, a founder, nor a central authority, hierarchy, or organization. *Every attempt at a specific definition of Hinduism has proved unsatisfactory in one way or another, the more so because the finest Indian scholars of Hinduism, including Hindus themselves, have emphasized different aspects of the whole'.*

In his celebrated treatise *Gitarahasya,* B.G. Tilak has given the following broad description of the Hindu religion:

> 'Acceptance of the Vedas with reverence; recognition of the fact that the means or ways of salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion'.

In *Bhagwan Koer* v. *J.C. Bose*[7] *it was held that Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship.*

* * *

This being the scope and nature of the religion, it is not strange that it holds within its fold men of divergent views and traditions which have very little in common except a vague faith in what may be called the fundamentals of the Hindu religion." (emphasis supplied)

7 ILR (1904) 31 Cal 11 : 30 IA 249 : 7 CWN 895

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37. These Constitution Bench decisions, after a detailed discussion, indicate that no precise meaning can be ascribed to the terms 'Hindu', 'Hindutva' and 'Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term 'Hindutva' is related more to the way of life of the people in the sub-continent. It is difficult to appreciate how in the face of these decisions the term 'Hindutva' or 'Hinduism' per se, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition in sub-sections (3) and/or (3-A) of Section 123 of the R.P. Act.

38. Bharucha, J. in *M. Ismail Faruqui (Dr)* v. *Union of India*[2], (*Ayodhya case*), in the separate opinion for himself and Ahmadi, J. (as he then was), observed as under: (SCC p. 442, para 156)

> "... Hinduism is a tolerant faith. It is that tolerance that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land ...."

39. Ordinarily, Hindutva is understood as a way of life or a state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism. In *Indian Muslims — The Need For A Positive Outlook* by Maulana Wahiduddin Khan, (1994), it is said (at p. 19):

> "The strategy worked out to solve the minorities problem was, although differently worded, that of Hindutva or Indianisation. This strategy, briefly stated, aims at developing a uniform culture by obliterating the differences between all of the cultures coexisting in the country. This was felt to be the way to communal harmony and national unity. It was thought that this would put an end once and for all to the minorities' problem."

The above opinion indicates that the word 'Hindutva' is used and understood as a synonym of 'Indianisation', i.e., development of uniform culture by obliterating the differences between all the cultures coexisting in the country.

40. In *Kultar Singh* v. *Mukhtiar Singh*[8], the Constitution Bench construed the meaning of sub-section (3) of Section 123 prior to its amendment. The question there was whether a poster contained an appeal to voters to vote for the candidate on the ground of his religion; and the meaning of the word 'Panth' in the poster was significant for the purpose. It was held as under: (SCR pp. 793-95)

> "It is true that a corrupt practice under Section 123(3) can be committed by a candidate by appealing to the voters to vote for him on the ground of his religion even though his rival candidate may belong to the same religion. If, for instance, a Sikh candidate were to appeal to the voters to vote for him, because he was a Sikh and add that his rival candidate, though a Sikh in name, was not true to the religious tenets of Sikhism or was a heretic and as such, outside the pale of the Sikh

8 (1964) 7 SCR 790 AIR 1965 SC 141

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religion, that would amount to a corrupt practice under Section 123(3), and so, we cannot uphold the contention that Section 123(3) is inapplicable because both the appellant and the respondent are Sikhs. ...

The corrupt practice as prescribed by Section 123(3) undoubtedly constitutes a very healthy and salutary provision which is intended to serve the cause of secular democracy in this country. In order that the democratic process should thrive and succeed, it is of utmost importance that our elections to Parliament and the different legislative bodies must be free from the unhealthy influence of appeals to religion, race, caste, community, or language. If these considerations are allowed any sway in election campaigns, they would vitiate the secular atmosphere of democratic life, and so, Section 123(3) wisely provides a check on this undesirable development by providing that an appeal to any of these factors made in furtherance of the candidature of any candidate as therein prescribed would constitute a corrupt practice and would render the election of the said candidate void.

In considering the question as to whether the distribution of the impugned poster by the appellant constitutes corrupt practice under Section 123(3), there is one point which has to be borne in mind. The appellant had been adopted as its candidate by the Akali Dal Party. *This Party is recognised as a political party by the Election Commission notwithstanding the fact that all of its members are only Sikhs. It is well-known that there are several parties in this country which subscribe to different political and economic ideologies, but the membership of them is either confined to, or predominantly held by, members of particular communities or religions. So long as law does not prohibit the formation of such parties and in fact recognises them for the purpose of election and parliamentary life, it would be necessary to remember that an appeal made by candidates of such parties for votes may, if successful, lead to their election and in an indirect way, may conceivably be influenced by considerations of religion, race, caste, community or language. This infirmity cannot perhaps be avoided so long as parties are allowed to function and are recognised, though their composition may be predominantly based on membership of particular communities or religion. That is why we think, in considering the question as to whether a particular appeal made by a candidate falls within the mischief of Section 123(3), courts should not be astute to read into the words used in the appeal anything more than can be attributed to them on its fair and reasonable construction.*

That takes us to the question of construing the impugned poster. The principles which have to be applied in construing such a document are well-settled. *The document must be read as a whole and its purport and effect determined in a fair, objective and reasonable manner. In reading such documents, it would be unrealistic to ignore the fact that when election meetings are held and appeals are made by candidates of opposing political parties, the atmosphere is usually surcharged with*

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partisan feelings and emotions and the use of hyperboles or exaggerated language, or the adoption of metaphors, and the extravagance of expression in attacking one another, are all a part of the game, and so, when the question about the effect of speeches delivered or pamphlets distributed at election meetings is argued in the cold atmosphere of a judicial chamber, *some allowance must be made and the impugned speeches or pamphlets must be construed in that light.* In doing so, however, it would be unreasonable to ignore the question as to what the effect of the said speech or pamphlet would be on the mind of the ordinary voter who attends such meetings and reads the pamphlets or hears the speeches. It is in the light of these well-established principles that we must now turn to the impugned pamphlet." (emphasis supplied)

41. The test applied in the decision was to construe the meaning of the word 'Panth' not in the abstract but in the context of its use. The conclusion reached was that the word 'Panth' used in the poster did not mean Sikh religion and, therefore, the appeal to the voters was not to vote for the candidate because of his religion. Referring to an earlier decision in *Jagdev Singh Sidhanti* v. *Pratap Singh Daulta*[9], it was reiterated as under: (SCR p. 799)

> "... Political issues which form the subject-matter of controversies at election meetings may indirectly and incidentally introduce considerations of language or religion, but in deciding the question as to whether corrupt practice has been committed under Section 123(3), care must be taken to consider the impugned speech or appeal carefully and always in the light of the relevant political controversy. ..."

42. Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words 'Hinduism' or 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practising the Hindu religion as a faith.

43. Considering the terms 'Hinduism' or 'Hindutva' per se as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism, proceeds from an improper appreciation and perception of the true meaning of these expressions emerging from the detailed discussion in earlier authorities of this Court. Misuse of these expressions to promote communalism cannot alter the true meaning of these terms. The mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use. It is indeed very unfortunate, if in spite of the liberal and tolerant features of 'Hinduism' recognised in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage. Fundamentalism of any colour or kind must

9 (1964) 6 SCR 750 AIR 1965 SC 183

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be curbed with a heavy hand to preserve and promote the secular creed of the nation. Any misuse of these terms must, therefore, be dealt with strictly.

44. It is, therefore, a fallacy and an error of law to proceed on the assumption that any reference to Hindutva or Hinduism in a speech makes it automatically a speech based on the Hindu religion as opposed to the other religions or that the use of the words 'Hindutva' or 'Hinduism' per se depict an attitude hostile to all persons practising any religion other than the Hindu religion. It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for votes for a Hindu candidate on the ground that he is a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of sub-section (3) or (3-A) of Section 123. It may well be, that these words are used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant. The parliamentary debates, including the clarifications made by the Law Minister quoted earlier, also bring out this difference between the prohibited and permissible speech in this context. Whether a particular speech in which reference is made to Hindutva and/or Hinduism falls within the prohibition under sub-section (3) or (3-A) of Section 123 is, therefore, a question of fact in each case.

45. This is the correct premise in our view on which all such matters are to be examined. The fallacy is in the assumption that a speech in which reference is made to Hindutva or Hinduism must be a speech on the ground of Hindu religion so that if the candidate for whom the speech is made happens to be a Hindu, it must necessarily amount to a corrupt practice under sub-section (3) and/or sub-section (3-A) of Section 123 of the R.P. Act. As indicated, there is no such presumption permissible in law contrary to the several Constitution Bench decisions referred to herein.

Non-compliance of Section 99 of the R.P. Act

46. The contention that the notice given to Bal Thackeray under Section 99 of the R.P. Act was not in conformity with that provision and that there is non-compliance of the requirements of Section 99, has no merit. The notice was given after the entire evidence had been recorded and the learned trial Judge formed the prima facie opinion that the corrupt practices alleged to have been committed under sub-sections (3) and (3-A) of Section 123 appeared to have been proved and Bal Thackeray was likely to be named along with the returned candidate to be guilty of those corrupt practices. The notice given was accompanied by copies of pleadings and the entire evidence adduced at the trial for proving those corrupt practices. The notice clearly stated that the noticee had the opportunity to cross-examine such witnesses as had already been examined and of calling evidence in his defence and of being heard. The noticee raised objection to the notice alleging that it was vague, which was rejected by the High Court. That order was challenged by

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a special leave petition in this Court which was dismissed granting liberty to the noticee to apply in the High Court for the precise particulars claimed by him. Ultimately certain portions from the material on record were indicated by the petitioner on such a direction being given by the High Court. In view of the direction of this Court in the special leave petition, it would have been more appropriate for the High Court to indicate the precise portions. However, there is no prejudice caused, inasmuch as the portions were indicated by the election petitioner on the High Court's direction. The election petitioner Prabhakar Kashinath Kunte (PW 1) was called for cross-examination on behalf of the noticee. The noticee was given full opportunity to cross-examine the witnesses already examined and to adduce evidence in his defence and to argue his case in the High Court. The noticee Bal Thackeray did not choose to enter the witness-box and, therefore, the material present has to be examined without any denial by the noticee as a witness in the case.

47. There is no dispute that no material which was not given to the noticee Bal Thackeray was used against him. We have already indicated that the finding of proof of the corrupt practices alleged in the election petition is based on the three speeches of Bal Thackeray which are not denied either by Dr Ramesh Prabhoo or by Bal Thackeray. Copy of the text of those speeches is also undisputed. All this was furnished to the noticee Bal Thackeray. It is difficult to visualise what prejudice could be caused to the noticee on these facts and how there could be any non-compliance of Section 99 of the R.P. Act in this situation.

48. In order to examine the contention of non-compliance of Section 99, it is necessary to examine the requirements of that provision. Section 99 reads as under:

> "99. *Other orders to be made by the High Court.*— (1) At the time of making an order under Section 98 the High Court shall also make an order—
>
> (*a*) where any charge is made in the petition of any corrupt practice having been committed at the election, recording—
>
> (*i*) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and
>
> (*ii*) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and
>
> (*b*) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:
>
> Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (*ii*) of clause (*a*) unless—
>
> (*a*) he has been given notice to appear before the High Court and to show cause why he should not be so named; and

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(*b*) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him, of calling evidence in his defence and of being heard.

(2) In this section and in Section 100, the expression 'agent' has the same meaning as in Section 123."

49. Sub-section (1) requires that at the time of making an order under Section 98, the High Court shall also make an order recording the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. In other words, while deciding the election petition at the conclusion of the trial and making an order under Section 98 disposing of the election petition in one of the ways specified therein, the High Court is required to record the names of all persons guilty of any corrupt practice which has been proved at the trial. Proviso to sub-section (1) then prescribes that a person who is not a party to the petition shall not be so named unless the condition specified in the proviso is fulfilled. The requirement of the proviso is only in respect of a person who is not a party to the petition and is to be named so that he too has the same opportunity which was available to a party to the petition. The requirement specified is of a notice to appear and show cause why he should not be named and if he appears in pursuance of the notice, he has to be given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him and also the opportunity of calling evidence in his defence and of being heard. In short, the opportunity which a party to the petition had at the trial to defend against the allegation of corrupt practice is to be given by such a notice to that person of defending himself if he was not already a party to the petition. In other words, the noticee has to be equated with a party to the petition for this purpose and is to be given the same opportunity which he would get if he was made a party to the petition.

50. This is the pragmatic test to be applied for deciding the question of compliance of Section 99 of the R.P. Act. If the noticee had the opportunity which he would have got as a party to the petition, then there can be no case of non-compliance of Section 99. The opportunity required to be given by the proviso to sub-section (1) of Section 99 is the same and not more than that available to a party to the petition to defend himself against the charge of corrupt practice. Applying the above test, there can be no doubt that there is no non-compliance of Section 99 in the present case. The noticee Bal Thackeray had the same opportunity which the returned candidate Dr Ramesh Yeshwant Prabhoo got as a respondent to the petition. The noticee was given the opportunity to cross-examine any witness who had already been examined by the High Court and the witnesses who were considered to have given evidence against him, were also enumerated in the notice; and he was given an opportunity to call evidence in his defence and to be heard.

51. In this situation, the grievance made that specific portions of the material which formed the record at the trial were not precisely indicated to the noticee has no merit. It was clear from the pleading that the allegation

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against the noticee was in respect of the three speeches made by him, the particulars of which were given and the text of those speeches also was available to the noticee which he did not even deny. On these facts, there is no ground to allege non-compliance of Section 99 of the R.P. Act. This contention on behalf of the noticee Bal Thackeray is, therefore, rejected and the objection raised in the appeal of Bal Thackeray of non-compliance of Section 99 of the R.P. Act has no merit.

52. We would now proceed to examine the facts of this case.

Speeches

53. It is in the light of the above discussion and the meaning of sub-sections (3) and (3-A) of Section 123 that the effect of the alleged offending speeches has to be examined. The three speeches were made on 29-11-1987, 9-12-1987 and 10-12-1987. The High Court has held that the speeches of 29-11-1987 and 10-12-1987 amount to corrupt practices under sub-sections (3) and (3-A) of Section 123, while the speech of 9-12-1987 is a corrupt practice only under sub-section (3) thereof. The returned candidate Dr Ramesh Yeshwant Prabhoo was present in all the three meetings in which these speeches were given by Bal Thackeray. The consent of Dr Prabhoo for these speeches is implied from his conduct including his personal presence in all the three meetings.

54. Certain extracts from the alleged speeches of Bal Thackeray, translated in English, are expressly pleaded in the election petition, as under:

From Speech of 29-11-1987

"We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so."

From Speech of 9-12-1987

"Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by name Prabhoo should be led to victory in the name of religion."

From Speech of 10-12-1987

"We have gone with the ideology of Hinduism. Shiv Sena will implement this ideology. Though this country belongs to Hindus, Ram and Krishn are insulted. (They) valued the Muslim votes more than your votes: we do not want the Muslim votes. A snake like Shahabuddin is sitting in the Janata Party, a man like Nihal Ahmed is also in Janata Party. So the residents of Vile Parle should bury this party (Janata Party)."

55. It has been pleaded in the election petition that the above utterances in the three meetings are examples to show that the appeal to voters emphasised that Dr Ramesh Prabhoo was the only person who could

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represent the Hindu community and, therefore, the voters should vote for Ramesh Prabhoo in the name of religion. The full text of the speeches was adduced in evidence and the contents thereof are not disputed. It may be mentioned that a notice under Section 99 of the R.P. Act was issued to Bal Thackeray who merely filed an affidavit but did not enter the witness-box. The true import and impact of these speeches has, therefore, to be adjudged in the light of the evidence including the statement of Dr Ramesh Yeshwant Prabhoo without the version in evidence of Bal Thackeray.

56. The case was argued even before us on a demurrer treating the contents of the speeches as reproduced in the full text in evidence, of which the specific portions pleaded in the election petition are extracts. The question is: Whether these speeches amount to corrupt practices under sub-sections (3) and/or (3-A) of Section 123 as held by the High Court?

57. We may now quote certain extracts from the three speeches of Bal Thackeray on which reliance has been placed in particular by Shri Ashok Desai to support the judgment of the High Court that they constitute the said corrupt practices. These are:

First speech on 29-11-1987

"All my Hindu brothers, sisters and mothers gathered here. ... Today Dr Prabhoo has been put up as candidate from your Parle. ... But here one cannot do anything at anytime about the snake in the form of Khalistan and Muslim. ... The entire country has been ruined and therefore we took the stand of Hindutva and by taking the said stand we will step in the Legislative Assembly. ... Unless we step forward strongly it would be difficult for us to live because there would be war of religion. ... Muslims will come. What will you Hindu (people) do? Are you going to throw 'Bhasma' (i.e. ashes) on them? ... We won't mind if we do not get votes from a single Muslim and we are not at all desirous to win an election with such votes. ... therefore, there is a dire need of the voice of Hindutva and therefore please send Shiv Sena to Legislative Assembly. ... who are (these) Muslims? Who are these 'lande'? Once Vasant Dada had called me when he was a Chief Minister. He told me that rest is O.K. But asked me as to why I was calling them Lande. But is it correct if they call us 'Kafer' (i.e. traitor) then we will certainly call them 'Lande'. ... They should bear in mind that this country is of Hindus, the same shall remain of Hindus. ... if Shiv Sena comes to power and if the morchas come ---- first of all (we) shall make them come. Everybody will have to take 'diksha' (i.e. initiation) of Hindu religion. ..."

Second speech of 9-12-1987

"... The victory will not be mine or of Dr Prabhoo or of Shiv Sena but the victory will be that of Hinduism. You will be instrumental in victory and you should become instrument for the same. At last you have the right to get rid of the difficulties faced by your caste, creed, gods, deities and Hindu religion. ... Therefore, I want to say that today we are standing for Hinduism. ... Whatever Masjids are there, if one

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starts digging the same, one will find Hindu temples under the same. ... If any body stands against Hindustan you should show courage by performing pooja (i.e. worship) with shoes. ... And a person by name Prabhoo who is contesting the election in the name of religion sent ahead (in the assembly). A 'Jawan' — like Prabhoo should go there (in the assembly). ..."

Third speech of 10-12-1987

"... It will do, if we do not get a vote from any Muslim. If anybody from them is present at this place he should think for himself. I am not in need of their votes. But I want your vote. ... You must send only Dr Ramesh Prabhoo of Shiv Sena, otherwise Hindus will be finished. It will not take much take (*sic*) for Hindustan to be green (i.e. Pakistan?). ..."

58. As earlier stated, the three speeches of Bal Thackeray from which the above extracts have been quoted are admitted. Similarly the interview of Dr Ramesh Yeshwant Prabhoo and its text published in *Janmabhoomi Prawasi* is admitted. Dr Prabhoo was the Mayor of Bombay. Dr Prabhoo (RW 1) admitted his presence in the meetings held on 29-11-1987, 9-12-1987 and 10-12-1987 in which the above speeches were given by Bal Thackeray. He admitted speaking himself also in these meetings. He has said nothing in his statement to suggest that he did not consent to the contents of the speeches of Bal Thackeray. In his deposition, he has expressly admitted that the speeches of Bal Thackeray were according to his election campaign. The element of the candidate's consent for the appeal to the voters made by Bal Thackeray in his speeches is, therefore, adequately proved. About his interview published in the *Janmabhoomi Prawasi*, issue of 9-12-1987, he said that the report is substantially correct, even though the first paragraph of that news item is incorrect. Omitting the first paragraph of the news item which he denied, certain portions, translated into English, from the remaining news item publishing the interview are as under:

"... Dr Prabhoo told me that there was a Hindu wave in Parle. The battle is between Hindus and Muslims i.e. to say between nationalist and anti-nationalist. ...

* * *

Supremely confident about his victory in the Vile Parle bye-election, Dr Prabhoo discounted any possibility of his defeats but he added that if he loses, it will mean that Hinduism has lost, ..."

59. The appeal made to the voters by Bal Thackeray in his aforesaid speech was a clear appeal to the Hindu voters to vote for Dr Ramesh Prabhoo because he is a Hindu. The clear import of the above extracts in each of the three speeches is to this effect. The first speech also makes derogatory reference to Muslims by calling them 'snake' and referring to them as 'lande' (derogatory term used for those practising circumcision). The language used in the context, amounted to an attempt to promote feelings of enmity or hatred between the Hindus and the Muslims on the ground of religion. The first speech, therefore, also constitutes the corrupt practice under sub-section (3-A).

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60. The High Court has held the second speech to fall only under sub-section (3) and not sub-section (3-A), but the third speech has been held to fall both under sub-sections (3) and (3-A). We have already held the third speech also to constitute the corrupt practice under sub-section (3). The correctness of the English translation of a part of the third speech was found to be defective at the hearing and, therefore, an agreed fresh translation thereof was taken on record. Reading the speech in the light of the fresh agreed translation of the defective portion, it appears to us that the High Court's finding that the third speech amounts also to the corrupt practice under sub-section (3-A) cannot be affirmed, even though this variation is of no consequence to the ultimate result.

61. Our conclusion is that all the three speeches of Bal Thackeray amount to corrupt practice under sub-section (3), while the first speech is a corrupt practice also under sub-section (3-A) of Section 123 of the R.P. Act. Since the appeal made to the voters in these speeches was to vote for Dr Ramesh Prabhoo on the ground of his religion as a Hindu and the appeal was made with the consent of the candidate Dr Ramesh Prabhoo, he is guilty of these corrupt practices. For the same reason, Bal Thackeray also is guilty of these corrupt practices and, therefore, liable to be named in accordance with Section 99 of the R.P. Act of which due compliance has been made in the present case.

62. We cannot help recording our distress at this kind of speeches given by a top leader of a political party. The lack of restraint in the language used and the derogatory terms used therein to refer to a group of people in an election speech is indeed to be condemned. The likely impact of such language used by a political leader is greater. It is, therefore, a greater need for the leaders to be more circumspect and careful in the kind of language they use in the election campaign. This is essential not only for maintaining decency and propriety in the election campaign but also for the preservation of the proper and time-honoured values forming part of our cultural heritage and for a free and fair poll in a secular democracy. The offending speeches in the present case discarded the cherished values of our rich cultural heritage and tended to erode the secular polity. We say this, with the fervent hope that our observation has some chastening effect in the future election campaigns.

63. For the aforesaid reasons, both the appeals must fail. We may observe that considerable irrelevant material was brought on record during the trial at the instance of both the parties which, apart from needlessly enlarging the scope of the trial, has led to needless extra expense and wastage of time even in the hearing of these appeals. In these circumstances, it is appropriate to direct the parties to bear their own costs in this Court. Accordingly, both the appeals are dismissed.

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(2005) 6 Supreme Court Cases 690

(BEFORE R.C. LAHOTI, C.J. AND D.M. DHARMADHIKARI AND P.K. BALASUBRAMANYAN, JJ.)

BAL PATIL AND ANOTHER .. Appellants;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Civil Appeal No. 4730 of 1999†, decided on August 8, 2005

A. Constitution of India — Arts. 25 to 30, 15, 16 and Preamble — Nature and scope of Arts. 25 to 30 — Reason for enaction — Constitutional ideal of Indian citizenship and society — Vision for — Held, provisions contained in Arts. 25 to 30 are a protective umbrella against possible deprivations of fundamental rights or religious freedoms of religious and linguistic minorities, and were included in Ch. III of the Constitution to give a guarantee of security to the identified minorities and thus to maintain unity and integrity of the country — History of partition of India in this regard, traced — However, emphasised strongly, that the constitutional ideal is to create social conditions where there remains no necessity to shield or protect rights of a minority or majority — The Constitution has accepted one common citizenship for every Indian regardless of his religion, language, culture or faith, based simply on a person's birth in India — Clarion call given for need to develop enlightened citizenship where each citizen, of whatever religion or language, is more concerned about his duties and responsibilities to protect the rights *of the other group* than asserting his own — Pluralistic, diverse and multicultural nature of India society, discussed in extenso — Grave danger to fabric and core of Indian society from encouragement of claims to minority status and development of fissiparous tendencies therefrom, which would seriously undermine secular structure of India's constitutional democracy, highlighted — Need to discourage claims of various sections of society to "minority" status, emphasised — National Commission for Minorities Act, 1992 — Ss. 2(c) and 9 — Identification of "minority" under S. 2(c) — Considerations to be kept in view — Constitution of India — Constitutional ideal for Indian Citizenship and Society — Envisioned

B. Constitution of India — Arts. 25 to 30 and Preamble — "Minorities" — Scope, and definition of — Constitutional scheme and statutory scheme under National Commission for Minorities Act, 1992 — Relative scope — Held, though not specifically defined, "minority" as understood from the constitutional scheme signifies an identifiable group of people or community who were seen as deserving protection from a likely deprivation of their religious, cultural and educational rights by other communities who happened to be in a majority and likely to gain power in a democratic form

† From the Judgment and Order dated 17-9-1998 of the Bombay High Court in WP No. 4066 of 1998

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of government based on election — The minorities initially recognised were based on religion and on a national level e.g. Muslims, Christians, Anglo-Indians and Parsis — It was not in the contemplation of the framers of the Constitution to add to the list of religious minorities — So-called minority communities like Sikhs and Jains were not treated as national minorities at the time of framing of the Constitution — However, provisions of National Commission for Minorities Act, 1992 provide for notifying certain communities as "minorities" who might require special treatment and protection of their religious, cultural and educational rights — National Commission for Minorities Act, 1992 — S. 2(c)

C. National Commission for Minorities Act, 1992 — Ss. 2(c) and 9 — "Minority" under S. 2(c) — Community/group that may be notified as — Notification of Jains under S. 2(c) — Considerations to be kept in view by Central Government acting under S. 2(c) and National and State Commissions in rendering advice under S. 9 to Central Government in respect thereof — Held, only such a community/group is to be notified as "minority" under S. 2(c) as might require special treatment and protection of its religious, cultural and educational rights, and monitoring of its progress and development through the Minorities Commission(s) — Central Government exercising power under S. 2(c) has to act not merely on advice and recommendation of the Commission(s) but on consideration of the social, cultural and religious conditions of the community concerned in each State on the basis of its own assessment and considered opinion — Numerical minority of a community in a State cannot be the sole criterion — Constitutional goal of creating social conditions where there remains no necessity to shield or protect rights of a minority or majority has to be kept in view by the Commissions — Instead of encouraging claims for addition to the list of minorities under the Act, they must direct their activities to maintain the integrity and unity of India by gradually eliminating the minority and majority classes — They must act in a manner so as to prevent generation of feelings of multinationalism in various sections of the people of Bharat — Central Government directed to consider claims/counter-claims of Jains to minority status in terms of these parameters — Constitution of India — Arts. 25 to 30 — Jains — If a "minority"

D. National Commission for Minorities Act, 1992 — Ss. 2(c) and 9 — Identification of "minority" under S. 2(c) — Authority competent for — Held, is Central Government alone, which on its own assessment and considered opinion has to accept or reject claim under S. 2(c) — Recommendations made by National or State Minorities Commissions are in the nature of advice only and can have no binding effect — Moreover, it is not for Supreme Court to issue any direction or mandate on basis of claims/counter-claims of any community — Constitution of India — Art. 32

E. National Commission for Minorities Act, 1992 — S. 2(c) — Unit for identification of "minority" under — Held, following *T.M.A. Pai*, (2002) 8 SCC 481, that henceforth before Central Government takes decision on claims of a community [Jains in this case] under S. 2(c), the identification has to be done on a Statewise basis — Constitution of India — Arts. 25 to 30

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F. National Commission for Minorities Act, 1992 — Ss. 9 and 2(c) — Functions of Commissions under — Scope — Goal to be achieved thereunder — Identification of "minority" under S. 2(c) — Power of Commissions to make recommendations for, held, can be inferred from S. 9 which is only illustrative and not exhaustive — Recommendations so made, would not be binding on Central Government but would only be in nature of advice

G. Constitution of India — Arts. 25 to 30 and Preamble — "Secularism" — Meaning of, in the Indian context

Disposing of the appeal in the terms below, the Supreme Court

Held :

Definition of "minority"

The expression "minority" has been used in Articles 29 and 30 of the Constitution but it has nowhere been defined. The Preamble to the Constitution proclaims to guarantee to every citizen "liberty of thought, expression, belief, faith and worship". The group of Articles 25 to 30 guarantee protection of religious, cultural and educational rights to both majority and minority communities. It appears that keeping in view the constitutional guarantees for protection of cultural, educational and religious rights of all citizens, it was not felt necessary to define "minority". Minority as understood from the constitutional scheme signifies an identifiable group of people or community who were seen as deserving protection from a likely deprivation of their religious, cultural and educational rights by other communities who happened to be in majority and likely to gain political power in a democratic form of government based on election. The minorities initially recognised were based on religion and on a national level e.g. Muslims, Christians, Anglo-Indians and Parsis. The so-called minority communities like Sikhs and Jains were not treated as national minorities at the time of framing the Constitution. It was not in the contemplation of the framers of the Constitution to add to the list of religious minorities. The provisions of the National Commission for Minorities Act, 1992 instead of giving definition of "minority" only provide for notifying certain communities as "minorities" who might require special treatment and protection of their religious, cultural and educational rights. The definition of "minority" given under the said Act in Section 2(*c*) thereof is in fact not a definition as such but only a provision enabling the Central Government to identify a community as a "minority". (Paras 11, 12, 25, 27 and 33)

Unit for determination of "minority"

After the verdict in *T.M.A. Pai*, (2002) 8 SCC 481, the legal position stands clarified that henceforth the unit for determining status of both linguistic and religious minorities would be the "State". Therefore, henceforth, before the Central Government takes decision on claims of Jains as a "minority" under Section 2(*c*) of the Act, the identification has to be done on a Statewise basis.

(Paras 16 and 17)

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481, *followed*

Exercise of power under S. 2(c) of the Act by the Central Government

Section 2(*c*) of the Act enables the Central Government to identify a community as a "minority", which in the considered opinion of the Central Government deserves to be notified for the purpose of protecting and monitoring

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its progress and development through the Commission. The power of the Central Government under Section 2(*c*) has to be exercised not merely on the advice and recommendation of the Commission but on consideration of the social, cultural and religious conditions of the Jain community in each State. Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and the propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as a minority.

(Paras 12 and 17)

Functions of Minorities Commissions

The Commission set up under the Act has several functions to perform, which are provided in Section 9. The functions entrusted are for ensuring progress and development of minorities and protecting their religious, cultural and educational rights. There is no specific function conferred under Section 9 on the Commission to identify any community as a "minority" and recommend to the Central Government that it be so notified under Section 2(*c*) of the Act. However, on considering the general functions of the Commission enumerated under Section 9, which are only illustrative and not exhaustive, the Commission cannot be said to have transgressed its authority in entertaining representations, demands and counter-demands of members of Jain community for the status of "minority". Keeping in view the provisions of the Act, the recommendation made by the Commission in favour of the Jains is in the nature of advice and can have no binding effect. The power under Section 2(*c*) of the Act vests in the Central Government which alone, on its own assessment, has to accept or reject the claim of status of minority by a community. It is not for the Supreme Court to issue any direction or mandate on the basis of the claim of some members of the Jain community, which is opposed by another section of the same community.

(Paras 14, 15 and 19)

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481, *relied on*

Nature of Arts. 25 to 30 — Constitutional ideal of Indian society and citizenship

The provisions contained in the group of Articles 25 to 30 are a protective umbrella against the possible deprivations of fundamental right of religious freedoms of religious and linguistic minorities. (Para 17)

India is a world in miniature. The group of Articles 25 to 30 of the Constitution, as the historical background of the partition of India shows [traced in paras 21 to 23 herein], was only to give a guarantee of security to the identified minorities and thus to maintain the unity and integrity of the country. It was felt necessary to allay the apprehensions and fears in the minds of Muslims and other [identified] religious communities by providing to them a special guarantee and protection of their religious, cultural and educational rights. The Constitution through all its organs is committed to protect religious, cultural and educational rights of all. Articles 25 to 30 guarantee cultural and religious freedoms to both majority and minority groups. The ideal of a democratic society, which has adopted right to equality as its fundamental creed, should be the elimination of majority and minority and so-called forward and backward classes. The constitutional ideal, which can be gathered from the group of articles in the Constitution under the chapters of fundamental rights and

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fundamental duties, is to create social conditions where there remains no necessity to shield or protect rights of a minority or majority. The Constitution has accepted one common citizenship for every Indian regardless of his religion, language, culture or faith. The only qualification for citizenship is a person's birth in India. Such enlightened citizenship has to be developed where each citizen, of whatever religion or language, is more concerned about his duties and responsibilities to protect rights of the other group than asserting his own rights. The constitutional goal is to develop citizenship in which everyone enjoys full fundamental freedoms of religion, faith and worship and no one is apprehensive of encroachment of his rights by others in minority or majority.

(Paras 33, 34, 21 to 25 and 27)

The country has already been reorganised in the year 1956 under the States Reorganisation Act on the basis of language. Differential treatments to linguistic minorities based on language within the State is understandable but if the same concept for minorities on the basis of religion is encouraged, the whole country, which is already under class and social conflicts due to various divisive forces, will further face division on the basis of religious diversities. Such claims to minority status based on religion would increase in the fond hope of various sections of people getting special protections, privileges and treatment as part of the constitutional guarantee. If, only on the basis of different religious thought or less numerical strength or lack of health, wealth, education, power or social rights, a claim of a section of Indian society to the status of "minority" is considered and conceded, there would be no end to such claims in a society as multireligious and multilinguistic as India is. A claim by one group of citizens would lead to a similar claim by another group of citizens and conflict and strife would ensue. As such, Hindu society being based on caste, is itself divided into various minority groups. Each caste claims to be separate from the other. In the caste-ridden Indian society, no section or distinct group of people can claim to be in majority. All are minorities amongst Hindus. Many of them claim such status because of their small number and expect protection from the State on the ground that they are backward. If each minority group feels afraid of the other group, an atmosphere of mutual fear and distrust would be created posing serious threat to the integrity of our nation. That would sow seeds of multinationalism in India. Encouragement to such *fissiparous* tendencies would be a serious jolt to the secular structure of constitutional democracy. We should guard against making our country akin to a theocratic State based on multinationalism.

(Paras 37 and 35)

Indian concept of "Secularism"

Our concept of secularism, to put it in a nutshell, is that the State will have no religion. The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship. (Para 37)

Seervai, H.M.: *Constitutional Law of India*, 4th Edn., Vol. 1, para 1.314, pp. 153-54, *referred to*

[Ed.: *See also* Vikramjit Banerjee and Sumeet Malik, "Changing Perceptions of Secularism", (1998) 7 SCC J-3.]

Considerations to be kept in view and aim to be pursued by Minorities Commissions in tendering advice to the Central Government

The constitutional goal of creating social conditions where there remains no necessity to shield or protect rights of a minority or majority [as elucidated in

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paras 33 and 34 herein] has to be kept in view by the Minorities Commissions set up at the Central or State levels. Commissions set up for minorities have to direct their activities to maintain the integrity and unity of India by gradually eliminating the minority and majority classes. The Minorities Commissions should act in a manner so as to prevent the generation of feelings of multinationalism in various sections of people of Bharat. The Commissions instead of encouraging claims from different communities for being added to the list of notified minorities under the Act, should suggest ways and means to help to create social conditions where the list of notified minorities is gradually reduced and done away with altogether. (Paras 35, 36 and 20)

H. Constitution of India — Arts. 25 and 26 — "Hindu" — Scope — If includes Jains — Discussed in detail (Paras 27, 28, 30 and 31)

Encyclopaedia of Religion and Ethics, Vol. 7, p. 465; A.K. Roy: *History of Jains*, pp. 5 to 23; *Vinoba Sahitya*, Vol. 7, pp. 271 to 284, *referred to*

D-M/ATZ/32746/C

Advocates who appeared in this case :
U.U. Lalit, Senior Advocate (Prasenjit Keswani, Nitin Sangra, Amol Chitale and Prashant Kumar, Advocates, with him) for the Appellants;
B. Datta, Additional Solicitor General (Ms Rekha Pandey and Hemant Sharma, Advocates, with him) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2002) 8 SCC 481, *T.M.A. Pai Foundation* v. *State of Karnataka* 695*g*, 695*g-h*, 695*h*, 696*a*, 696*c-d*, 696*d-e*, 696*e-f*, 696*f-g*, 697*a-b*, 698*e-f*, 699*e-f*, 704*c-d*

The Judgment of the Court was delivered by

D.M. DHARMADHIKARI, J.— The appellant is an organisation representing a section of Jain community. It approached by writ petition the High Court of Bombay seeking issuance of a mandamus/direction to the Central Government to notify "Jains" as a "minority" community under Section 2(*c*) of the National Commission for Minorities Act, 1992 (shortly referred to as the Act).

2. Section 2(*c*) of the Act defines minority thus:

> "2. (*c*) 'minority', for the purposes of this Act, means a community notified as such by the Central Government;"

3. The High Court of Bombay by the impugned order simply disposed of the petition on the ground that the claim of various communities to the status of "minority" for purpose of seeking constitutional protections is one of the main issues pending before a Bench of eleven Judges of this Court in the case of *T.M.A. Pai Foundation*[1].

4. This appeal stood adjourned on several dates awaiting the judgment in *T.M.A. Pai Foundation case*[1]. In the counter-affidavit filed, the Central Government stated that they would abide by the judgment of the eleven-Judge Bench in *T.M.A. Pai Foundation case*[1] and thereafter consider the claim of Jains to the status of minority community under the Act.

1 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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5. During the pendency of this appeal, the eleven-Judge Bench decision in *T.M.A. Pai*[1] was delivered.

6. Amongst several questions which were formulated for answer by the eleven-Judge Bench the most important question included was as under: (SCC p. 587, para 161)

> "*Q. 1.* What is the meaning and content of the expression 'minorities' in Article 30 of the Constitution of India?"

The answer in the opinion of majority in the Bench of eleven Judges speaking through Kirpal, C.J. (as he then was) is the following: (SCC p. 587, para 161)

> "*A.* Linguistic and religious minorities are covered by the expression 'minority' under Article 30 of the Constitution. Since reorganisation of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. *Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered Statewise.* (emphasis added)

7. After the decision of the *eleven-Judge Bench case*[1], an additional affidavit by the Central Government through its Joint Secretary, Ministry of Social Justice & Empowerment has been filed. The stand now taken by the Central Government in this appeal before this Court is that in accordance with the law laid down by the majority opinion in *T.M.A. Pai case*[1], it is "for the State Government to decide as to whether the Jain community should be treated as a minority community in their respective States after taking into account their circumstances/conditions in that State". It is also informed that the State Governments of Chhattisgarh, Maharashtra, Madhya Pradesh, Uttar Pradesh and Uttaranchal have already notified Jains as "minority" in accordance with the provisions of the respective State Minority Commissions Act.

8. Learned Counsel U.U. Lalit, in the light of law declared in the decision of the *eleven-Judge Bench*[1] and the consequent stand taken by the Central Government, strenuously urged that for the purpose of notifying a community as "minority" at the national level, the Central Government, which is empowered to consider the claim of a particular community for being notified as such under Section 2(*c*), cannot shirk its statutory responsibility. It is argued that the legal position explained by the majority view in the *eleven-Judge Bench case*[1] that the State Governments can determine the minority status of a community in States formed on linguistic basis under the States Reorganisation Act, 1956 does not render the power of the Central Government under Section 2(*c*) of the Act redundant.

9. Learned counsel representing the claim of the members of the Jain community before this Court further submitted that in accordance with Section 2(*c*) of the Act, Muslims, Christians, Sikhs, Buddhists, Zoroastrians (Parsees) have already been notified as minority communities for the purpose of the Act and the Jains, having substantiated their claim of being a religious

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minority, the refusal to notify them as such under the Act is unjustified and abdication of statutory powers of the Central Government.

10. We have heard Learned Additional Solicitor General Shri B. Dutta, appearing for the Central Government who merely reiterated the stand taken in the affidavit filed on behalf of the Government that in view of the judgment in *T.M.A. Pai case*[1], the Central Government henceforth will have no role to play. It is for the respective State Governments to take decision on the claim of Jains depending upon their social condition in the respective States.

11. The expression "minority" has been used in Articles 29 and 30 of the Constitution but it has nowhere been defined. The Preamble to the Constitution proclaims to guarantee to every citizen "liberty of thought, expression, belief, faith and worship". Group of Articles 25 to 30 guarantee protection of religious, cultural and educational rights to both majority and minority communities. It appears that keeping in view the constitutional guarantees for protection of cultural, educational and religious rights of all citizens, it was not felt necessary to define "minority". Minority as understood from the constitutional scheme signifies an identifiable group of people or community who were seen as deserving protection from likely deprivation of their religious, cultural and educational rights by other communities who happen to be in majority and likely to gain political power in a democratic form of government based on election.

12. In the background of the constitutional scheme, the provisions of the Act therefore instead of giving definition of "minority" only provide for notifying certain communities as "minorities" who might require special treatment and protection of their religious, cultural and educational rights. The definition of "minority" given under the Act in Section 2(*c*) is in fact not a definition as such but only a provision enabling the Central Government to identify a community as a "minority" which in the considered opinion of the Central Government deserves to be notified for the purpose of protecting and monitoring its progress and development through the Commission.

13. The Statement of Objects and Reasons for the enactment reads thus:

> "1. The Minorities Commission was set up in January 1978 for providing an institutional arrangement for evaluating the safeguards provided in the Constitution for protection of the minorities and to make recommendations for ensuring implementation of the safeguards and the laws.
>
> 2. The Minorities Commission with statutory status would infuse confidence among the minorities about the working and effectiveness of the Commission. It would also carry more weight with the State Governments/Union Territory Administration and the Ministries/ Departments and the other organisations of the Central Government.
>
> 3. It has, therefore, been decided to give statutory status to the Minorities Commission by the proposed legislation.
>
> 4. The National Commission for Minorities will consist of a Chairperson and six members.

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5. The main task of the Commission shall be to evaluate the progress of the development of minorities, monitor the working of the safeguards provided in the Constitution for the protection of the interests of minorities and in laws enacted by the Central Government or State Governments, besides looking into the specific complaints regarding deprivation of rights and safeguards of the minorities. It shall also cause studies, research and analysis to be undertaken on the issues relating to socio-economic and educational development of the minorities and make recommendations for the effective implementation of the safeguards for the protection of interests of minorities by the Central Government or State Governments. It may also suggest appropriate measures in respect of any minority to be undertaken by the Central Government or State Governments."

14. The Commission set up under the Act has several functions to perform, which are provided in Section 9. The functions entrusted are for ensuring progress and development of minorities and protecting their religious, cultural and educational rights. There is no specific function conferred under Section 9 on the Commission to identify any community as a "minority" and recommend to the Central Government that it be so notified under Section 2(*c*) of the Act.

15. On considering the general functions of the Commission enumerated under Section 9 which are only illustrative and not exhaustive, the Commission cannot be said to have transgressed its authority in entertaining representation, demands and counter-demands of members of Jain community for the status of "minority". Keeping in view the provisions of the Act, the recommendation made by the Commission in favour of the Jains is in the nature of advice and can have no binding effect. The power under Section 2(*c*) of the Act vests in the Central Government which alone, on its own assessment, has to accept or reject the claim of status of minority by a community.

16. After the verdict in the eleven-Judge Bench in *T.M.A. Pai Foundation case*[1], the legal position stands clarified that henceforth the unit for determining status of both linguistic and religious minorities would be a State. This position is doubly clear not only from the answer given in conclusion to Question 1 quoted above but also the observations contained in paras 76 and 81 of the majority judgment quoted hereinafter: (SCC pp. 552-53)

> *"76. If, therefore, the State has to be regarded as the unit for determining 'linguistic minority' vis-à-vis Article 30, then with 'religious minority' being on the same footing, it is the State in relation to which the majority or minority status will have to be determined.*
>
> * * *
>
> *81.* As a result of the insertion of Entry 25 into List III, Parliament can now legislate in relation to education, which was only a State subject previously. The jurisdiction of Parliament is to make laws for the whole or a part of India. It is well recognised that geographical classification is not violative of Article 14. It would, therefore, be possible that, with

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respect to a particular State or group of States, Parliament may legislate in relation to education. However, Article 30 gives the right to a linguistic or religious minority of a State to establish and administer educational institutions of their choice. The minority for the purpose of Article 30 cannot have different meanings depending upon who is legislating. *Language being the basis for the establishment of different States for the purposes of Article 30, a 'linguistic minority' will have to be determined in relation to the State in which the educational institution is sought to be established. The position with regard to the religious minority is similar, since both religious and linguistic minorities have been put on a par in Article 30.*" (emphasis added)

17. Henceforth, before the Central Government takes decision on claims of Jains as a "minority" under Section 2(*c*) of the Act, the identification has to be done on a Statewise basis. The power of the Central Government has to be exercised not merely on the advice and recommendation of the Commission but on consideration of the social, cultural and religious conditions of the Jain community in each State. Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as a minority. The provisions contained in the group of Articles 25 to 30 are a protective umbrella against the possible deprivations of fundamental right of religious freedoms of religious and linguistic minorities.

18. The recommendation in favour of Jains by the National Minority Commission was made before the eleven-Judge Bench of this Court in *T.M.A. Pai case*[1] had clarified the concept of "minority" for the purpose of extending constitutional protection.

19. It is not for this Court to issue any direction or mandate on the basis of the claim of some members of the Jain community, which is opposed by another section of the same community.

20. Before parting with this case, this Court cannot resist from making some observations which are considered necessary in order to remind the National and State Commissions for Minorities, the scope and nature of their functions under the provisions of the Act and the role they have to play in constitutional perspective.

21. The history of the struggle for independence of India bears ample testimony of the fact that the concept of "minorities" and the demands for special care and protection of their religious and cultural rights arose after the bitter experience of religious conflicts which intermittently arose in about 150 years of the British Rule. The demand for partition gained momentum at the time the Britishers decided to leave by handing over self-rule to Indians. The Britishers always treated Hindus and Muslims as two different groups of citizens requiring different treatment. To those groups were added

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Anglo-Indians and Christians as a result of large-scale intermarriages and conversions of several sections of communities in India to Christianity. Prior to passing of the Independence Act of India to hand over self-rule to Indians, the Britishers in the course of gradually conceding some democratic rights to Indians, contemplated formation of separate constituencies on reservations of certain seats in legislature in proportion to the population of Hindus and Muslims. That attempt was strongly resisted by both prominent Hindu and Muslim national leaders who had jointly and actively participated in the struggle for independence of India.

22. The attempt of the Britishers to form separate electorates and make reservations of seats on the basis of population of Hindus and Muslims, however, ultimately led to revival of the demand for reservation of constituencies and seats in the first elected government to be formed in free India. Resistance to such demands by Hindu and some Muslim leaders ultimately led to partition of India and formation of a separate Muslim State presently known as Pakistan.

23. Many other revelations concerning competing claims for reservation of seats on religious basis can be gathered from the personal diary of prominent national leader late Abdul Kalam Azad. The diary was made public, in accordance with his last wish only after 25 years of Independence. The publication of Azad's diary made it necessary for constitutional expert H.M. Seervai to rewrite his chapter under the caption '*Partition of India — Legend and Reality*' in his book on *Constitutional Law of India*. Many apprehensions and fears were expressed and disturbed the minds of the Muslims. They thought that in democracy to be set up in India, the Hindus being in majority would always dominate and retain political power on the basis of their voting strength. There were also apprehensions expressed by many prominent Muslim leaders that there might be interference with and discouragement to their cultural, religious and educational rights. Abdul Kalam Azad acted as mediator in negotiations between the national leaders of the times namely late Nehru and Patel on one side and late Jinnah and Liaqat Ali on the other. Nehru and Patel insisted that in the new Constitution, there would be one united India belonging to the people of various religious faiths and cultures with all having full freedom of their social, cultural, religious and other constitutional rights. They advocated one single citizenship to every Indian regardless of his language or religion. The opposing group of Muslim leaders, in the interest of members of their community, insisted on providing to them participation in democratic processes proportionate to their ratio of the population and thus counterbalance the likely domination of Hindu majority. They also insisted that separate electoral constituencies based on their population be formed and seats be reserved for them in different parts of India. Late Abdul Kalam Azad tried his utmost to find a midway and thus break the stalemate between the two opposing groups but Nehru and Patel remained resolute and rejected the proposal of Jinnah and Liaqat Ali. The tragic result was that provinces with the highest Muslim

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population in the erstwhile States of Sindh, Punjab and Baluchistan had to be ceded to form a separate theocratic nation — Pakistan. See the following para 1.314 at pp. 153-54 of *Constitutional Law of India* by H.M. Seervai, 4th Edn., Vol. 1:

> "*1.314.* Azad passionately believed in Hindu-Muslim unity, but he found that from the mid-twenties Gandhi had lost interest in Hindu-Muslim unity and took no steps to secure it. Further, Azad had played a leading part in providing a framework for the Constitution of a free and united India on which the Cabinet Mission Plan was largely based, a Plan which offered India her last chance to remain united. However, Gandhi, Nehru and Patel destroyed the Plan, and accepted partition instead. Azad did his utmost to prevent the partition of India, but he failed to persuade Nehru and Gandhi not to accept partition."

24. It is against this background of partition that at the time of giving final shape to the Constitution of India, it was felt necessary to allay the apprehensions and fears in the minds of Muslims and other religious communities by providing to them a special guarantee and protection of their religious, cultural and educational rights. Such protection was found necessary to maintain the unity and integrity of free India because even after partition of India communities like Muslims and Christians in greater numbers living in different parts of India opted to continue to live in India as children of its soil.

25. It is with the above aim in view that the framers of the Constitution engrafted group of Articles 25 to 30 in the Constitution of India. The minorities initially recognised were based on religion and on a national level e.g. Muslims, Christians, Anglo-Indians and Parsis. Muslims constituted the largest religious minority because the Mughal period of rule in India was the longest followed by the British Rule during which many Indians had adopted Muslim and Christian religions.

26. Parsis constituted a numerically smaller minority. They had migrated from their native State Iran and settled on the shores of Gujarat adopting the Gujarati language, customs and rituals thus assimilating themselves into the Indian population.

27. The so-called minority communities like Sikhs and Jains were not treated as national minorities at the time of framing the Constitution. Sikhs and Jains, in fact, have throughout been treated as part of the wider Hindu community which has different sects, sub-sects, faiths, modes of worship and religious philosophies. In various codified customary laws like the Hindu Marriage Act, Hindu Succession Act, Hindu Adoption and Maintenance Act and other laws of the pre- and post-Constitution periods, definition of "Hindu" included all sects and sub-sects of Hindu religions including Sikhs and Jains.

28. The word "Hindu" conveys the image of diverse groups of communities living in India. If you search for a person by the name Hindu,

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he is unidentifiable. He can be identified only on the basis of his caste as an upper caste Brahmin, Kshatriya or Vaish or of lower caste described in ancient India as Shudras. Those who fall in the Hindu class of "Shudras" are now included in the Constitution in the category of Scheduled Castes with special privileges and treatment for their upliftment. This was found necessary to bring them on a par with upper castes in Hindu society. The aboriginals, who have no caste were considered as distinct from the four castes or Varnas of Hindu society. They have been treated favourably in the Constitution as Scheduled Tribes. For them also there are provisions for special treatment and grant of special privileges to bring them on level with the other castes of the main advanced streams of Indian society.

29. There is a very serious debate and difference of opinion between religious philosophers and historians as to whether Jains are of Hindu stock and whether their religion is more ancient than the Vedic religion of the Hindus. The spiritual philosophy of Hindus and Jains in many respects is different but the quintessence of the spiritual thought of both the religions seems to be the same. The influence of Hindu Vedic religion is quite apparent in the customs, style of living, belief and faith of Jains. Jains do not worship images or idols of Gods but worship their Tirathankars meaning their ideal personalities who have attained human perfection and excellence by a process of self-improvement. The literal meaning of the word "Jain" is one who has attained "victory". It signifies a person who has attained victory over himself by the process of self-purification. "Jain" is a religious devout who is continuously striving to gain control over his desires, senses and organs to ultimately become master of his own self.

30. This philosophy is to some extent similar to the Vedic philosophy explained by Lord Krishna in the *Bhagwat Gita*, where Lord Krishna describes qualities of a perfect human as "stithpragya". *Gita* has used the example of tortoise to describe a balanced human being as one who has gained full control over his organs like a tortoise does, which whenever needed opens its limbs of body and when not needed, closes them.

31. Thus, "Hinduism" can be called a general religion and common faith of India whereas "Jainism" is a special religion formed on the basis of quintessence of Hindu religion. Jainism places greater emphasis on non-violence ("Ahimsa") and compassion ("karuna"). Their only difference from Hindus is that Jains do not believe in any creator like God but worship only the perfect human being whom they called Tirathankar. Lord Mahavir was one in the generation of Thirthankars. The Tirathankars are embodiments of perfect human beings who have achieved human excellence at mental and physical levels. In a philosophical sense, Jainism is a reformist movement amongst Hindus like Brahamsamajis, Aryasamajis and Lingayats. The three main principles of Jainism are Ahimsa, Anekantvad and Aparigrah. [See (*1*) *Encyclopaedia of Religion and Ethics*, Vol. 7 p. 465; (2) *History of Jains* by A.K. Roy pp. 5 to 23 and *Vinoba Sahitya*, Vol. 7 pp. 271 to 284.]

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32. It is not necessary to go into greater details of philosophical and ideological beliefs and conduct of Jains. They have been dealt with in necessary detail in the recommendations of the National Commission for Minorities.

33. We have traced the history of India and its struggle for independence to show how the concept of minority developed prior to and at the time of framing of the Constitution and later in the course of its working. History tells us that there were certain religious communities in India who were required to be given full assurance of protection of their religious and cultural rights. India is a country of people with the largest number of religions and languages living together and forming a nation. Such diversity of religions, culture and way of life is not to be found in any part of the world. John Stuart Mill described India as "a world placed at closed quarters". India is a world in miniature. The group of Articles 25 to 30 of the Constitution, as the historical background of partition of India shows, was only to give a guarantee of security to the identified minorities and thus to maintain the integrity of the country. It was not in the contemplation of the framers of the Constitution to add to the list of religious minorities. The Constitution through all its organs is committed to protect religious, cultural and educational rights of all. Articles 25 to 30 guarantee cultural and religious freedoms to both majority and minority groups. Ideal of a democratic society, which has adopted right to equality as its fundamental creed, should be elimination of majority and minority and so-called forward and backward classes. The Constitution has accepted one common citizenship for every Indian regardless of his religion, language, culture or faith. The only qualification for citizenship is a person's birth in India. We have to develop such enlightened citizenship where each citizen of whatever religion or language is more concerned about his duties and responsibilities to protect rights of the other group than asserting his own rights. The constitutional goal is to develop citizenship in which everyone enjoys full fundamental freedoms of religion, faith and worship and no one is apprehensive of encroachment of his rights by others in minority or majority.

34. The constitutional ideal, which can be gathered from the group of articles in the Constitution under the chapters of fundamental rights and fundamental duties, is to create social conditions where there remains no necessity to shield or protect rights of a minority or majority.

35. The abovementioned constitutional goal has to be kept in view by the Minorities Commissions set up at the Central or State level. Commissions set up for minorities have to direct their activities to maintain the integrity and unity of India by gradually eliminating the minority and majority classes. If, only on the basis of a different religious thought or less numerical strength or lack of health, wealth, education, power or social rights, a claim of a section of Indian society to the status of "minority" is considered and conceded, there would be no end to such claims in a society as multireligious and multilinguistic as India is. A claim by one group of citizens would lead to a similar claim by another group of citizens and conflict and strife would

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ensue. As such, Hindu society being based on caste, is itself divided into various minority groups. Each caste claims to be separate from the other. In a caste-ridden Indian society, no section or distinct group of people can claim to be in majority. All are minorities amongst Hindus. Many of them claim such status because of their small number and expect protection from the State on the ground that they are backward. If each minority group feels afraid of the other group, an atmosphere of mutual fear and distrust would be created posing serious threat to the integrity of our nation. That would sow seeds of multinationalism in India. It is, therefore, necessary that the Minorities Commissions should act in a manner so as to prevent generating feelings of multinationalism in various sections of people of Bharat.

36. The Commission instead of encouraging claims from different communities for being added to the list of notified minorities under the Act, should suggest ways and means to help to create social conditions where the list of notified minorities is gradually reduced and done away with altogether.

37. These concluding observations were required after the eleven-Judge Bench in *T.M.A. Pai Foundation case*[1] held that claims of minorities on both linguistic and religious basis would be each State as a unit. The country has already been reorganised in the year 1956 under the States Reorganisation Act on the basis of language. Differential treatments to linguistic minorities based on language within the State is understandable but if the same concept for minorities on the basis of religion is encouraged, the whole country, which is already under class and social conflicts due to various divisive forces, will further face division on the basis of religious diversities. Such claims to minority status based on religion would increase in the fond hope of various sections of people getting special protections, privileges and treatment as part of the constitutional guarantee. Encouragement to such *fissiparous* tendencies would be a serious jolt to the secular structure of constitutional democracy. We should guard against making our country akin to a theocratic State based on multinationalism. Our concept of secularism, to put it in a nutshell, is that the "State" will have no religion. The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.

38. Let the Commission gear its activities to keep them in right direction with the above constitutional perspective, principles and ideals in its view.

39. With these observations and concluding remarks, this appeal stands disposed of as we do not find that any case is made out for grant of any relief to the appellants in exercise of writ jurisdiction of the High Court and hence, the appellate jurisdiction of this Court.

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Public Interest Litigation (PIL) No. 13243 of 2017

Abhishek Shukla v. High Court of Judicature

2017 SCC OnLine All 2464 : AIR 2018 All 32 : (2018) 2 All LJ 353

In the High Court of Allahabad

(BEFORE DILIP B. BHOSALE, C.J. AND MANOJ KUMAR GUPTA, J.)

Abhishek Shukla ..... Petitioner

v.

High Court of Judicature, Allahabad and 7 Others ..... Respondents

Public Interest Litigation (PIL) No. 13243 of 2017

Decided on November 8, 2017, [Reserved on: 20th September, 2017]

Counsel for Petitioner:- In Person, Anil Tiwari, Jitendra Kumar Pandey

Counsel for Respondent:- C.S.C., Anoop Trivedi, Deba Siddiqui, Manish Goyal, Mansoor Ahmad, Rajmani Yadav, Siddharth Nandan, Syed Safdar Ali Kazmi

ORDER

DILIP B. BHOSALE, C.J.:— This petition, in the public interest, under Article 226 of the Constitution of India, has been instituted by an Advocate practicing in this Court seeking a direction commanding the official respondents to immediately remove the encroachment made on a plot of land allotted to the High Court and Advocate General's office, bearing Nazul Plot No. 59, Civil Station, Allahabad, measuring 8019.57 Sq. Meters (for short 'the plot'). The allegation of encroachment was initially made against an unknown person, who subsequently was identified as the respondent no. 7-Waqf. It is stated that respondent no. 7 has recently constructed a Masjid on the portion of the plot, towards it's south-west corner, measuring about 100' × 50' known as "Masjid High Court", hereinafter referred to as "the site in dispute". Respondent no. 7 is a registered Waqf, bearing No. 3155-Allahabad, and it is represented through its President-Managing Committee.

2. The questions raised and which fall for our consideration are:

i. Whether respondent no. 7 has encroached on the site in dispute and constructed/created a public Mosque over the same, some time after disposal of Writ Petition No. 32344 of 2001, instituted by ex-lessees; or whether it was constructed/created in 1981, as claimed by respondent nos. 7 and 8?

ii. Whether the site in dispute was ever dedicated by the lessees, including respondent no. 8 by way of waqf/for the purpose of a public Mosque, divesting themselves completely and permanently from the same, and if yes, whether they could have done so in the facts and in the circumstances of the case?

iii. Whether respondent no. 7 perfected title to the site in dispute by adverse possession, resulting in extinguishment of the title of the High Court/State by operation of Section 27 of the Limitation Act?

iv. Whether right of the High Court/State to seek ejectment of respondent no. 7 stands extinguished on account of estoppel, waiver and acquiescence, delay and laches?

3. Having regard to the nature of controversy and for addressing the questions, that fall for our consideration, narration of factual matrix in depth is of great consequence. We have, therefore, divided the narration of facts into two parts. The first part would consist of the facts which are either admitted or are not disputed and in the second part, we would make reference to the facts/case, as narrated by the parties in the writ

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petition, counter affidavits, supplementary affidavits, rejoinder affidavits, civil misc. applications etc.

4. Before proceeding further, we wish to note for sake of clarity that Waqf Masjid High Court sought its impleadment as a party respondent by filing an application, which was allowed on 11.4.2017. On the same date, on an oral prayer made by Azim Ahmad Kazmi, one of the ex-lessees and a practicing advocate of this Court, was permitted to be added as a party respondent. In the entire proceedings, which were held after the above two were permitted to be added as respondents, Waqf Masjid High Court has been referred to as respondent no. 7 while Azim Ahmad Kazmi as respondent no. 8. However, it seems that while carrying out amendments in the cause title, the petitioner, who was appearing in person, has arrayed Azim Ahmad Kazmi as respondent no. 7 while Waqf Masjid High Court as respondent no. 8, but in all the affidavits and the orders of the Court, Waqf Masjid High Court has been referred to as respondent no. 7 while Azim Ahmad Kazmi as respondent no. 8. Therefore, to maintain consistency, in the instant judgment, we would refer to the Waqf-Masjid High Court as respondent no. 7 and Azim Ahmad Kazmi as respondent no. 8.

Facts admitted or not disputed:

5. The factual matrix either admitted or not disputed is as follows: In 1868, on 11 January, a lease of the plot was granted in favour of Thomas Crowby for a period of 50 years by the Secretary of State for India in Council and it was signed by the Commissioner of Allahabad Division, for construction of a dwelling house. On expiry of the period of 50 years, on 12th April, 1923, a fresh lease was executed in favour of the successors of Thomas Crowby, namely Mr. William Charles Ducasse, with effect from 1st January, 1918 till 31st December, 1967.

6. On 16th April, 1945, the legal representative of Mr. William Charles Ducasse, one Mr. Edmond John Ducasse, with the permission of the Collector, Allahabad executed a sale deed in respect of the plot and the dwelling house (for short 'the bungalow') in favour of Lala Purshottam Das. The sale deed was registered on 18th April, 1945.

7. Thereafter, on 30th October, 1958, legal representatives of Lala Purshottam Das, assigned the lease hold rights alongwith the bungalow in favour of the family members of Mohd. Ahmad Kazmi, who then was a practicing Advocate of this Court and also a former Member of Parliament (1952-1957). A registered sale deed was executed by the legal representatives of Lala Purshottam Das, namely, Shyam Sunder and Smt. Durga Devi on 30th October, 1958 for a sum of Rs. 55,000/- in favour of the wife of Mohd. Ahmad Kazmi, Smt. Maimoona Khatoon Kazmi and their two daughters, namely, Smt. Sabra Khatoon Kazmi, wife of Advocate N A Kazmi and Smt. Shakra Khatoon Kazmi (for short 'original lessees').

8. On 3rd January, 1961, the lessees, with the permission of the Collector, executed a sale deed in respect of an area of 22500 sq. fts./2500 sq. yards approximately towards south of the plot in favour of M/s Great Eastern Electroplaters Ltd. for a sum of Rs. 25,000/-.

9. The lease, which had been granted on 12th April, 1923, expired on 31st December, 1967, but the same was not renewed for a long time. Subsequently, a fresh lease deed was executed on behalf of the Governor of Uttar Pradesh on 19th March, 1996, for a period of 30 years with effect from 1st January, 1968 till 31st December, 1997 in favour of the lessees - Smt. Shakra Khatoon Kazmi, Smt. Sabra Khatoon Kazmi, and legal representatives of the deceased lessee Smt. Maimoona Khatoon Kazmi, namely, Shamim Ahmad Kazmi, Aleem Ahmad Kazmi, Azeem Ahmad Kazmi, Maaz Ahmad Kazmi and Umar Ahmad Kazmi, the sons of Nazim Ahmad Kazmi, who hereinafter shall be referred to as "the lessees". This deed contained a clause that the lease deed would be renewed for two successive terms of 30 years each, but the total period shall not exceed 90 years, including the original term. In view thereof, on

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17th July, 1998, i.e. after expiry of the period of 30 years on 31st December, 1997, this deed was renewed for a further period of 30 years with effect from 1st January, 1998.

10. On 15th December, 2000, the State Government issued an order, conveying its decision to the Collector, Allahabad, to resume the plot for the purposes of extension of the building of the High Court and for the Advocate General's Office. In view thereof, the District Magistrate, issued a notice dated 11th January, 2001 to the original lessees/legal representatives of the deceased lessee, informing them about the Government Order dated 15th December, 2000, cancelling the lease and resuming possession of the plot, as the same was required for a public purpose, as stipulated under clause 3 (c) of the lease. The notice clearly mentioned that the lessees should remove the bungalow and handover vacant possession of the plot in accordance with clause 3 (c) of the lease deed.

11. The lessees submitted their objections to the notice before the District Magistrate on 2nd February, 2001 and prayed for revocation of the order dated 15th December, 2000. The District Magistrate, considered and rejected the objections by his order dated 24th August, 2001 and forwarded the same to the lessees alongwith cheques of Rs. 10 lacs towards compensation for the bungalow. At this stage, we are not making any further reference to a controversy whether possession of the plot was taken, including the site in dispute. Being aggrieved by the order dated 24th August, 2001, the lessees preferred a writ petition, bearing Civil Misc. Writ Petition No. 32344 of 2001 on 2nd September, 2001, challenging the order of the Government dated 15th December, 2000, the notice dated 11th January, 2001 and also the order of the District Magistrate dated 24th August, 2001.

12. In the writ petition (No. 32344 of 2001) filed by the lessees, this Court on the very same day, i.e. 2nd September, 2001, granted an order of stay of possession of the plot. The writ petition was thereafter heard and disposed of finally, vide judgment dated 7th December, 2001. In the writ petition, this Court considered the question- "whether the order passed by the State Government dated 15th December, 2000 for cancellation of lease and resumption of possession of the plot was legally valid and the submission advanced on behalf of the lessees that public purpose, if any, existed prior to 17th July, 1998, when the lease was renewed and by renewal of the lease, the State Government was estopped from pleading that there was a public purpose". While disposing of the writ petition, this Court dealt with the aforesaid question and the submissions advanced on behalf of the lessees and all other contentions urged on their behalf in depth and dismissed the writ petition, vide judgment dated 7th December, 2001. All relevant clauses of the lease deed were considered in the light of the provisions of the Transfer of Property Act, Government Grants Act, Land Acquisition Act and the judgments cited by the parties in the course of hearing of the writ petition. We would not like to burden this judgment by quoting all that has been observed in the said judgment and deem it sufficient to reproduce paragraphs 11, 12, 19 and 20 thereof, which read thus:

> "11. The lease deed dated 19.3.1996 and the deed of renewal dated 17.7.1998 have also been signed by the lessees which is the requirement of law in view of Section 107, Transfer of Property Act and they are bound by the terms and conditions contained therein. **Clause 3 (C) of the lease deed gives absolute power that if the land is required for its own purpose or for any public purpose, the State Government shall have right to give one month's notice to the lessees to remove any building standing on the demised premises and within two months of the receipt of the notice to take possession thereof on the expiry of that period.** The rights, privileges and obligations of the lessees have to be regulated only according to the terms of the grant in view of Section 3 of Government Grants Act. It has been held in *Express Newspapers Pvt. Ltd.* v. *Union of India*, (1986) 1 SCC 133 : AIR 1986 SC 872, (head note C) that the

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overriding effect of Section 3 is that a grant of property by the Government partakes of the nature of law since it overrides even legal provisions which are contrary to the tenor of the document. Land Acquisition Act is a general law providing for acquisition of land. The terms of the lease deed create special provisions governing the rights of the parties. On the legal maxim *specialia generalibus derogant*, the special provisions prevail over the general provisions. Therefore, it is not pen to the lessees to contend that the State Government should have taken recourse to a general provision lie the Land Acquisition Act instead of proceeding under clause 3 (C) of the lease deed. A similar contention that the State Government should have taken recourse to the provisions of Land Acquisition Act was considered by a Division Bench in *Tek Chand* v. *Union of India*, AIR 1980 P&H 339, but was repelled with the finding that it did not amount to any discrimination.

12. Sri S. U. Khan has next submitted that public purpose, if any, existed prior to 17.7.1998 when the lease was renewed and by renewal of the lease, the State Government is estopped from pleading that there is a public purpose. Learned counsel has further submitted that by renewal of the lease, the lessees legitimately expected that they will remain in occupation for 30 years from 1.1.1998, the date from which the lease was renewed. In support of this submission, learned counsel has placed reliance upon *Punjab Communications* v. *Union of India*, (1999) 4 SCC 727 : AIR 1999 SC 1801. **In our opinion, the contention raised has no substance. The existence of a public purpose is not a new development. The petitioners have filed a copy of the letter dated 29.8.1998 sent by the District Magistrate to the Special Secretary, State Government, wherein, he had given estimate of the expenses involved in acquiring the property under the provisions of Land Acquisition Act. This letter makes reference to some earlier correspondence which had taken place between the Chief Standing Counsel of U. P. Government and the District Magistrate on 2.12.1997.** This clearly shows that even before the renewal of the lease in favour of the lessees, the taking over of possession of the property for expansion of the High Court and the office of Advocate-General, U.P., was being seriously considered. **It is, therefore, wrong to suggest that the requirement of the land for a public purpose was not in existence when the lease was renewed. We fail to understand as to how the State Government is estopped from resuming the land merely on account of renewal of the lease in favour of the lessees. Since the very inception, when the lease was executed in favour of the successors of Thomas Crowby on 12.4.1923 and then again when the lease was executed in favour of the present lessees on 19.3.1996, there has always been a clause that the lessor will have a right to resume the lease and take possession of the plot.** The lessees took the lease and got its extension subject to such a condition and they were fully aware of the same. That apart, it is not their case that they have altered their position to their detriment after renewal of the lease on account of any representation done by the State Government. **The doctrine of legitimate expectation can have no play here in view of the specific clause in the lease deed.** Therefore, the contentions raised by Sri Khan have no substance and must be rejected.

19. After the State Government had passed the order on 15.12.2000 and the period of notice given by the District Magistrate had expired, the lessees have no legal right to remain in possession. However, they continue to be in juridical possession. In view of what has been discussed above, the State Government cannot dispossess them forcibly but can take possession in accordance with procedure established by law.

20. In view of the discussion made above, we find no illegality in the order passed by the State Government on 15.12.2000. the notice dated 11.1.2001 and

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the order passed by the District Magistrate on 24.8.2001. **The writ petition accordingly fails and is hereby dismissed. It is, however, made clear that the State Government is not entitled to take forcible possession. It may take possession of the demised premises in accordance with the procedure established by law."**

(*emphasis supplied)*

13. The above judgment of the High Court dated 7th December, 2001 was then carried to the Supreme Court, by way of Special Leave Petition filed by the lessees, bearing Special Leave to Appeal (Civil) No. 11817 of 2002. The SLP was heard on 3rd March, 2003, by the Supreme Court and the following interim order was passed:

"The question involved in these appeals pertains to the right of the State to terminate the lease and take possession of its own land given on lease to the appellants. Shri M.N. Krishnamani, learned senior counsel appearing for the appellants, relies on a judgment of this Court in the case of *Inder Parshad* v. *Union of India*, (1994) 5 SCC 239, while Shri Rakesh Dwivedi, learned senior counsel appearing for the respondents, relies on another judgment of this Court in the case of *Union of India* v. *Harish Chand Anand*, 1995 Supp (4) SCC 113. **We are of the opinion that the issue requires consideration, therefore, we grant leave however, we make it clear that the interim order of status quo granted earlier is vacated. It is open to the State of U.P. to take possession of the land by giving the appellants three months' time to vacate and put the respondent-State in possession of the land and the respondent is free to use the land for the public purpose for which it has been sought to be reacquired. The question of compensation if payable to the appellants will be decided at the time of final disposal of this appeal.**

Printing dispensed with. The appeals shall be heard on the SLP paper book. Parties may file additional documents, if any, within 10 weeks. Original Record need not be called for."

(*emphasis supplied*)

14. The SLP was then converted into a civil appeal, bearing Civil Appeal No. 2006 of 2003 and was disposed of in 2012.

15. The Supreme Court, while deciding the SLP-Civil Appeal No. 2006 of 2003, formulated the following questions for consideration: "whether the order passed by the State Government on 15th December, 2000 for cancellation of lease and resumption of possession is legally valid", and "whether the State Government can dispossess the lessees in accordance with the Government Grants Act, 1895 (for short 'the Grants Act') without resorting to other procedure established by any other law". After considering the entire materials on record and making a detailed reference to the provisions of the Grants Act in paragraphs 14 to 20 of the judgment, the Supreme Court observed thus:

"14. The deed of renewal executed at 17th July, 1998 is a very short one and recites that the renewal is being done on the same terms and conditions including the clause for re-entry as is continued in the original lease deed dated 19th March, 1996 and the terms and conditions of the aforesaid deed would be binding upon the parties. **The clause of re-entry was not introduced for the first time in the deed executed in 1996 but also contained as one of the clause in lease deed dated 12th April, 1923 wherein it was stipulated that if the Government shall at any time require to re-enter on the demised plot it can do so, on paying the cost of the building that may be on the site and that the lessee shall have no further claim of any sort against the Government.** In fact, in the deed executed on 19th March, 1996, the right of re-entry has been fettered by the condition "required by the lessor for his or for any public purpose". As the State

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Government is resuming the leased property for his or for any public purpose, which under the terms of the grant it has absolute power to do, the order passed by it on 15th December, 2000 is perfectly valid and does not suffer from any illegality.

15. The Division Bench noticed the fact that in paragraph 7 of the Supplementary counter affidavit filed in reply to the amendment application, it is averred that the properties, reference of which has been made in para 23 of the writ petition were in fact acquired at the instance of the Allahabad Development Authority for building of residential and commercial complex and for development of the area and the proceeding for acquisition had commenced on the basis of the proposals received from Allahabad Development Authority. In para 8 of the Supplementary counter affidavit, it is averred that when Nazul plot No. 13, Civil Station, Allahabad, which is situated in Civil Lines Area, was resumed by the State Government for the purpose of construction of a bus station, the same was done in exercise of power vested with it in a similar clause of the lease deed and no proceedings under the Land Acquisition Act had been initiated. The resumption by the State Government in the said case was challenged before the Division Bench of the Allahabad High Court which was dismissed on 16th December, 1999 and the Special Leave Petition No. 4329 of 2000 preferred against the judgment of the High Court was summarily dismissed by this Court on 7th September, 2001. Therefore, **the contention of the lessee that it was for the first time in their case that a lease had been cancelled and the plot has been resumed by the State Government under the terms of the deed is, therefore, not correct and a similar course of action has been taken in the past also. Therefore, the violation of Article 14 cannot be alleged in the present case.**

16. The first question is thereby answered in negative, against the appellants and in favour of the respondents.

17. For taking possession, the State Government is required to follow the law, if any, prescribed. In the absence of any specific law, the State Government may take possession by filing a suit. Under the Provisions of the Land Acquisition Act, 1894, if the State Government decides to acquire the property in accordance with the provisions of the said Act, no separate proceedings have to be taken for getting possession of the land. It may even invoke the urgency provisions contained in Section 17 of the said Act and the Collector may take possession of the land immediately after the publication of the notice under Section 9. In such a case, the person in possession of the land acquired would be dispossessed forthwith. However, if the Government proceeds under the terms of the Government Grants Act, 1895 then what procedure is to be followed. **Section 3 of Government Grants Act, 1895, stipulates that the lease made by or on behalf of the Government to take effect according to their tenor - All provisions, restrictions, conditions and limitations contained in any such creation, conferment or grant referred to any Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary.**

18. In the case of *The State of U.P.* v. *Zahoor Ahmad* (supra), **this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause3(C) of the deed, it is clear that the State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period subject to the condition that**

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the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department.

19. In the case in hand, the District Magistrate, Allahabad High Court issued a notice on 11th January, 2001 to the appellants intimating that the State Government had passed order on 15th December, 2000 cancelling lease deed and resuming possession of the disputed property as the same was required for public purpose. The appellants sent an application but instead of filing objections before the State Government represented before the Chief Minister of U.P. on 31st January, 2001 praying for revocation of order dated 15th December, 2000. Objection was filed before the District Magistrate, Allahabad who after consideration of the objection rejected the same by order dated 24th August, 2001 enclosing therein a cheque for rupees ten lakhs towards compensation for the building standing over the plot. The appellants refused to accept the cheques. **The respondents thereafter dispossessed the appellants from the part of the land on 1st September, 2001.**

20. **Under Clause 3(C) of the lease deed**, the respondent-State was permitted resumption of the land which required for its own use or for public purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Awas Department. In the case in hand such procedure was followed. **Therefore, we are of the view that there is no other procedure or law required to be followed, as a special procedure for resumption of land has been laid down under the lease deed. As a special procedure for resumption of land is prescribed under the lease deed, the High Court was not correct in holding that the State Government cannot dispossess the appellants but can take possession according to the procedure adopted by any other law. The finding of the High Court to such extent is set aside but the rest portion of the judgment affirming the order of the State Government dated 15th December, 2000, the notice dated11th January, 2001 and an order passed by the District Magistrate dated 24th August, 2001 is upheld.** The appeal preferred by appellants Azim Ahmad Kazmi & Ors. is dismissed and the appeal preferred by the State of U.P. and Anr. stands disposed of with aforesaid observations. The interim order of stay is vacated. **The State Government is allowed to take possession of the demised premises for extension of High Court building etc., as decided. However, the appellants are given three months time to hand over the possession of the land and building to the State and, if so necessary, the State Government will issue a fresh cheque for rupees ten lakhs in favour of the appellants, if earlier cheque has expired and not encashed. If the appellants fail to handover the possession of demised premises or create any third party interest in such case the State Government and the District Magistrate, Allahabad in particular will take forcible possession of the demised premises.**"

(*emphasis supplied*)

16. The facts, narrated in this paragraph and sub-paragraphs may not be treated as admitted by the parties. After dismissal of the writ petition by this Court, vide judgment dated 7th December, 2001, respondent no. 7 applied for registration of a Waqf to respondent no. 9-U P Sunni Central Board of Waqf (for short 'the Board') and it was, accordingly, registered under Section 36 of the Waqf Act, 1995 (for short 'the

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Waqf Act'). Till respondent no. 7-Waqf came to be registered on 30th May, 2002, it did not make any attempt or overt act claiming any right over the site in dispute, where the Mosque, known as Masjid High Court exists as of today.

17. The District Magistrate, in view of the interim order passed by the Supreme Court on 3rd March, 2003, claims that he handed over possession of the plot to the High Court by executing a "possession transfer certificate" dated 26th May, 2004. While handing over the possession, according to respondent nos. 7 and 8, the portion of the plot in dispute (i.e. the site in dispute), allegedly in the possession of respondent no. 7, was not taken in possession by the District Magistrate, nor did he hand over the same to the High Court. Thereafter, a lot of correspondence was exchanged amongst the parties with reference to a "public Mosque" situated over the site in dispute. It is not in dispute that as of today, there is pakka construction of the Mosque, which, according to respondent no. 7, was made sometime between 2009 and 2012. According to respondent no. 7, the lessees had a private Mosque over the said portion of the plot, which was then converted into a public Mosque sometime in 1981 and in 1997, a Committee was constituted, which applied for its registration as a Waqf, as aforementioned, sometime in May 2002. Till the Committee was constituted, respondent no. 8 claims that his grand-father was the Mutawalli of the public Mosque till his death on 21.06.1994 and then he took over as Mutawalli.

18. Respondent no. 8, one of the lessees, who is a practicing Advocate of this High Court, never made any reference to these facts (i.e. private Mosque, public Mosque and that he was Mutawalli, till the Committee of Management was constituted) in the earlier round of litigation to which he was a party and which attained finality by the judgment and order of the Supreme Court. He, however, for the first time, by filing counter affidavits in the instant proceedings, has not only supported the stand of respondent no. 7, but has independently stated that a private Mosque was created by his family members in 1959, who were very religious and pious muslims, by dedicating the site in dispute as a private Mosque, to facilitate his family members, servants and others living in the compound to offer Namaaz. He claims that initially, a "small platform and tin-shed" was constructed which was being used as a private Mosque. Though respondent no. 8 as also respondent no. 7 claim that this small tin-shed was then extended, measuring 45 × 90 fts., where since 1981 members of public, including Muslim Lawyers, Judges and Staff of the High Court started offering Namaz. While handing over possession of the plot to the High Court, this portion, where initially a private Mosque and then a public Mosque is situated, continued to be in their possession and then between 2009 and 2012, they raised pakka construction of the Mosque which exists as of today. Admittedly, no permission of the local authorities was obtained for raising any such construction by respondent no. 7, though in a feeble attempt made in response to our query, respondent no. 7 alleged to have made an application for compounding of unauthorized construction made by them. No application or its copy was, however, placed on record for our perusal.

19. We propose to make further reference to the case of respondent nos. 7 and 8, as is revealed from their affidavits/counters and also while dealing with the arguments advanced by learned counsel for the parties and addressing the questions, including to the correspondences to which, not only respondent nos. 7 and 8 have made reference and relied upon in support of their case, but even the petitioner, and other respondents in the pleadings placed heavy reliance thereon.

The relevant 'Facts' narrated in the pleadings of the parties:—

20. We now narrate the case pleaded by the parties in the petition/counter affidavits/additional affidavits/affidavits etc. In the backdrop of the facts narrated in foregoing paragraphs, the petitioner, who is a practicing Advocate in this High Court, has filed the instant writ petition declaring that he has no personal interest and that

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he has filed it purely in public interest seeking removal of encroachment and grabbing of Government/High Court land by constructing a Mosque. He has also declared that, apart from he being a practicing Advocate, he is also involved in social work and awareness building programme to inculcate the spirit of Nationalism and Indian culture amongst the youths and in spreading the message of universal brotherhood. Though he has not narrated facts in detail, he has brought the facts that are necessary for entertaining the writ petition in public interest. He has specifically stated that pakka construction of the Mosque has been raised without permission only after allotment of the plot in favour of the High Court and has, therefore, prayed for directions to the respondents to immediately remove the unauthorized structure of the Mosque over the land allotted to the High Court and also to take action against all officials who were responsible for allowing such an encroachment and construction of the Mosque in the name of religion.

21. Respondent no. 7 has taken strong objection to the maintainability of the writ petition. It is however, pertinent to note that though an independent application was filed raising preliminary objection, in the course of hearing of the petition, it was pressed/argued only while arguing the case in reply to the arguments advanced by the petitioner and the official respondents. We will make reference and deal with the preliminary objections once we complete narration of the facts that are reflected in the counter affidavits filed by all respondents.

22. Respondent no. 1-High Court has filed the first counter affidavit dated 16th May, 2017 through its Officer-on-Special Duty (Litigation). After stating the facts, which have already been narrated in the foregoing paragraphs, respondent no. 1 has made reference to the correspondence exchanged between respondent nos. 7, 8, 1, Additional District Magistrate (Nazul), District Magistrate, Allahabad, Principal Secretary (Law), and Mukhya Nagar Adhikari, starting with a letter that has come on record dated 6th December, 1999 and has also made reference to the resolution/decisions taken/passed from time to time by different Committees of the High Court in respect of the plot, taking note of the alleged encroachment made by respondent no. 7. We would make reference to the correspondence referred to in the counter affidavit at an appropriate stage. Suffice it to say, at this stage, that the correspondence referred to in the pleading, make reference to the Mosque/Namaz Sthal and how and when it came into existence.

23. The Security Committee of the High Court, after allotment of the plot, considered its sharing with the Advocate General or their office in its meeting dated 10th September, 2008 and resolved to part with 4068.09 Sq. Meters land out of 8006.92 Sq. Meters to the Advocate General and keep 3938.83 Sq. Meters of land for construction of an Administrative Annexe for the High Court. It is further stated that the Government, vide its order dated 9th December, 2011 granted administrative approval for construction of the Administrative Block (Annexe) and also sanctioned a sum of Rs. 270 lacs for the said purpose. When the Government Order dated 9th December, 2011 was placed before the Chief Justice on 19th December, 2011, he directed demarcation of the plot by raising boundary wall and to complete construction of "Administrative Annexe" on priority basis. The High Court has also placed the report dated 30th December, 2004 on record of the District Magistrate, Allahabad, stating that there was no Mosque in existence and that the bifurcation plan dated 10th September, 2008 did not make any mention of the Mosque.

24. Thereafter, the Chairman, Building Committee of the High Court, issued verbal direction on 6th June, 2016, to provide records, maps, site plan etc. and further directed the Construction Agency to record exact measurements of the construction site, including the measurement of the encroached portion of the plot. Accordingly, the Project Manager, vide its letter dated 8th June, 2016, placed measurement alongwith map of the under-construction Administrative Annexe on record. which reads thus:

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Sl. No.	Name of Building	Total Area awarded	Existing Area	Different
1	Total Plot Area	8006.92	8019.57	(+) 12.65
2	Advocate General Building (A)	4068.09	4291.64	(+) 223.55
3	Administrative Annexe (B)	3938.83	2916.27	(−) 1022.56
4	Encroachment Area (C)		423.70.	423.70.
5	Encroachment Area (D)		387.96	(+) 387.96

25. The Project Manager, on the basis of the aforesaid measurement, confirmed that the total area allotted for construction of Administrative Annexe was 3938.83 Sq. Meters. The Building Committee, upon perusal of the letter dated 8th June, 2016, in its meeting dated 15th June, 2016, passed the following order/resolution:

> "I have perused the note dated 08 June 2016 submitted by the Project Manager, Construction & Design Services, U.P. Jal Nigam and the note dated 13 June 2016 submitted by the OSD (J) (Infrastructure-HC), Allahabad. The Security Committee in its meeting held on 10 September 2008 noted that out of the total area measuring 8006.92 square meters, area measuring 4068.09 square meters in the portion marked W in the plan should be given to the Advocate General and area measuring 3938.83 square meters in the portion marked 'B' in the plan should be retained by the High Court for construction of the High Court Complex.
>
> **The Project Manager, Construction and Design Services, U.P. Jal Nigam in the note dated 8 June 2016 has pointed out that it is only after adding (i) the encroachment area 223.55 square meters in 'A'; (ii) 423.70 square meters in 'C'; and (iii) 387.96 square meters in 'D' that the total area allocated for the High Court would come to 3938.83 square meters. It would, therefore, be expedient for the High Court to take appropriate steps for taking possession of the aforesaid encroached areas.**
>
> The matter be placed before Hon'ble The Acting Chief Justice for perusal and orders."

(*emphasis supplied*)

26. The counter affidavit has, thus, confirmed that an area of 1022.56 Sq. Meters is under encroachment, which is little more than one fourth of the plot allotted to the High Court.

27. The High Court has also made reference in their counter to the letter issued by the President, Mosque Committee dated 1st September, 2016, wherein it is clearly stated that the Mosque Committee is ready to demolish the portion of the Mosque by placing a map showing the same on record. The map is annexed to the counter affidavit, as Annexure-CA-12. Thereafter, as stated in the counter affidavit, the Steering Committee-Infrastructural Development, High Court, in its meeting dated 27th October, 2016, after considering the minutes dated 29th July, 2016 and office note dated 19th October, 2016 regarding encroachment over the plot "resolved that all the encroachment from all the properties of the High Court must be removed. Modalities for the same be finalized after obtaining status report.". The High Court has, thereafter, made reference to what transpired before this Bench on earlier dates to which, we do not propose to make any reference since by consent of learned counsel for the parties, we decided to hear the writ petition on merits, finally. In the counter affidavit, the High Court, after making reference to the relevant provisions of the Waqf

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Act, has also raised question as to how the site in dispute/Mosque could be a dedication by unauthorized occupants when the lease in favour of the lessees had expired. Lastly, the counter affidavit, makes reference to the resolution dated 1st December, 2016 passed by the Steering Committee, whereby it was resolved that the Sub-Committee for monitoring construction work of Administrative Annexe (adjacent to the new building of the office of Advocate General) shall take steps for removal of the encroachments, made on two sides of the plot. Other side encroachment, which was by the Advocate General, in the course of hearing of the petition, we were informed, has been removed by them, and handed over possession of the encroached portion to the High Court.

28. Respondent no. 1-High Court filed a supplementary counter affidavit on 29th August, 2017 in the midst of the hearing of the writ petition, to which, respondent no. 7, strongly objected to for taking it on record. They accepted it without prejudice to their rights and contentions in respect thereof. We propose to make reference to this affidavit, at an appropriate stage, if we decide to look into the same.

29. We may, however, state at this stage that even before the hearing commenced and also in the course of hearing, we had directed respondent no. 1-High Court and respondent nos. 3 and 4-State to keep the entire original record ready for our perusal. Mr. A K Goyal and Mr. Manish Goyal, counsel for the State and the High Court respectively, submitted that by the affidavit dated 29th August, 2017, they have brought copies of original (relevant) documents on record to which direct and indirect reference has already been made in the pleadings of the parties. They further submitted that they would like to make reference thereto, in reply to the lengthy arguments advanced (as a matter of fact when the affidavit dated 29th August, 2017 was filed, Mr. Jain, learned Senior Counsel for respondent no. 7 had not concluded his arguments) by Mr. Jain, in their rejoinder arguments. It is necessary to mention at this stage that learned counsel for respondent nos. 7 along with one member of the Waqf Committee, Mr. Ateeq Ahmad Khan, respondent no. 9 and respondent no. 8-in person, were allowed to go through the entire original record in presence of Mr. Goyal, learned counsel for the State, at their request and it was so recorded in the order sheet dated 12th September, 2017.

30. The Additional District Magistrate (Nazul), Allahabad has filed a counter affidavit dated 11th April, 2017 on behalf of respondent nos. 3 and 4. In the counter affidavit, they have made reference to the facts as reflected in the earlier part of the judgment. In paragraph 12 of the counter affidavit, these respondents have specifically stated that pursuant to the interim order of the Supreme Court dated 3rd March, 2003, possession of the plot was taken by following the due procedure and it was further handed over to the Registrar General, High Court. It is also stated that a compensation of Rs. 10 lacs, as per the judgment of the Supreme Court dated 17th July, 2012, whereby the appeal came to be disposed of finally, has also been paid to the lessees by a Bank Draft dated 6th December, 2013. This compensation was towards the cost of bungalow that was constructed by the original lessee. These respondents have also made reference to the correspondence exchanged/made in respect of the alleged encroachment made by respondent no. 7 over the plot, to which, we will make reference in the latter part of the judgment. The affidavit, however, specifically states that when the lease was renewed for 30 years on 17th July, 1998, and even before that, there was no Mosque over the plot. The maps do not show existence of either Mosque or even "Namaaz Sthal" for that matter at the site in dispute.

31. A supplementary counter affidavit was filed by the State respondents on 29.8.2017, along with which, photo copies of the record of earlier Writ Petition No. 32344 of 2001 and other record of the State Government relating to the controversy, and to which reference directly or indirectly, was made in the pleadings of the parties, are brought on record. Mr. Jain objected to filing of the said affidavit, but accepted its

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copy without prejudice to their rights and contentions. We will deal with the objection of Mr. Jain, to the filing of the said affidavit, while disposing of an application filed by him, in which the same prayer was made.

32. Respondent no. 7, who is the main contesting respondent, has filed six affidavits, dated 18th April, 2017, 15th May, 2017, 18th July, 2017, 23rd August, 2017, 29th August, 2017 - in reply to the affidavits of respondent nos. 1, 3 and 4 and the petition. All affidavits are made by one Manzarul Islam, President of Managing Committee of Waqf-Masjid High Court, who is also an advocate practicing in this Court. Respondent no. 7 has also filed six miscellaneous applications, dated 10th April, 2017, 20th July, 2017, two applications both dated 2nd August, 2017 and the remaining two dated 19/20th September, 2017. By the first miscellaneous application dated 10th April, 2017, respondent no. 7 seeks its impleadment in the writ petition. By the second miscellaneous application dated 20th July, 2017, respondent no. 7 seeks adjournment on the grounds mentioned therein. By the third miscellaneous application dated 2nd August, 2017, respondent no. 7 raised a preliminary objection to the maintainability of the writ petition. By the fourth miscellaneous application dated 2nd August, 2017, respondent no. 7 challenged the resolution dated 1st December, 2016 passed by the Steering Committee of the High Court insofar it affects the Mosque in question. By the fifth miscellaneous application dated 19/20.9.2017 it was prayed that the supplementary counter affidavit dated 29.8.2017 filed by State respondents be not taken on record and further prayer has been made for carrying out correction in the order sheet and by the last miscellaneous application it was prayed that the hearing of the PIL be deferred till SLP (Civil) No. 8519 of 2006 *Union of India* v. *State of Gujarat* is decided by the Supreme Court. This application was, however, filed only after the arguments in rejoinder, on behalf of the petitioner, were closed.

33. We would like to make reference to the relevant averments in all affidavits/counter affidavits/reply affidavits filed by respondent no. 7. In the affidavit dated 18th April, 2017, it is stated that the writ petition may not be entertained since the High Court is already seized of the matter on administrative side and for that purpose, the High Court has been making correspondence with the State Government and the District Administration. Respondent no. 7 assert that an area of about 50 × 100 fts., which is the site in dispute, is being used as a public Mosque since 1981-82 and it is also registered with the U P Sunni Central Waqf Board, Lucknow. They have also stated that every day Namaaz preceded by Azaan and Iqamat is being duly offered/performed regularly (five times a day) ever since the Mosque came into existence in 1981-82, by Muslim lawyers, judges, officers and other staff of the High Court alongwith visiting litigants and general public. They have also stated that large number of people come to offer special weekly Namaaz on Fridays and the annual Eid (Eid-ul-Fitr) and Baqrid (Eid-ul-Azha) Namaaz. During the month of Ramzan, Namaaz, Taraweeh (late evening special prayers) is led by a Hafiz Quran, which is also attended by large number of people. At the time of Eid and Baqrid, like in other Mosques of the city, they sprinkle lime powder along the road/passage leading to the mosque and it is cleaned and sanitized by the Nagar Nigam. The police, from the Civil Lines Police Station, also depute personnel for security arrangements on the occasion of Eid, Baqrid and Alwida (last Friday of Ramzan) prayers. Since 1981-82, when the private Mosque of the lessees become a public Mosque, there had been a Tin-shed, Mehraab, Mimber, Wuzukhana, well and bathroom/lavatory etc. in the premises of the Mosque. A regular Pesh Imam and Muazzin have also been appointed since then to perform their duties.

34. They have then proceeded to make reference to letters/correspondences exchanged between the parties, to which, as observed earlier, we would make reference at an appropriate stage of the judgment. They have emphatically denied that

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the State Government took possession of the site in dispute or the land where the Mosque exists. In other words, the possession thereof, as claimed by the State Government, was never handed over to the Registrar General of the High Court. They also stated that the High Court, while taking possession of the plot, did not take possession of the site in dispute. They also state that the "Kabza Hastantaran Praman Patra" dated 26th June, 2004 shows only paper or notional possession, but actual possession of the plot was never handed over to the High Court. In paragraphs 9 to 14 of this affidavit, they have specifically stated that the possession of the plot was taken by the State Government on 21st March, 2004, excluding the site in dispute/Mosque. Then they have also made reference to the application for registration of the Mosque as Waqf under Section 36 of the Waqf Act in the year 2001 and its registration on 30th May, 2002. Then the affidavit proceeds to make reference to the decisions taken by the different Committees of the High Court and by Hon'ble the Chief Justice in respect of the Mosque/alleged encroachment and also the visit of Hon'ble Judges of this Court to the site for spot inspection. They have also stated that during the spot inspection by two Hon'ble Judges of this Court, who also as members of the Building Committee of the High Court, suggested to the Managing Committee of the Mosque that the boundary wall of the Mosque may be suitably altered, so as to make a provision for the movement of Fire-Brigade vehicles around the building. Then, they have also made reference to their letter dated 1st September, 2016 addressed to the High Court stating that they shall remove the portion of the Mosque/boundary wall, as indicated in the map (which is referred to in the foregoing paragraph as Annexure-CA-12). Then, they have stated that though the possession of the bungalow was taken by the District Magistrate on 21st March, 2004, the possession of the Mosque remained undisturbed. The High Court, before commencing the construction of the Administrative Annexe, also raised boundary wall towards southern and western portion of the plot, adjacent to the Mosque, excluding the area of Mosque. Reference to the representation submitted by the Mosque Committee in October, 2016 to the High Court is also made, stating that the cause espoused by the petitioner, in the instant public interest litigation, is under consideration of the High Court on its administrative side and as such, no cause of action has accrued to the petitioner to file this writ petition on ill informed facts.

35. In the 2nd counter affidavit dated 15th May, 2017, respondent no. 7, apart from raising preliminary objection regarding maintainability of the PIL, have also stated that the writ petition is barred by limitation, as the Mosque in question, came into existence and is being used openly and continuously as a public Mosque since 1981 and as such, the right and title of the State Government, if any, stood extinguished as provided under Section 27 of the Limitation Act. They have also stated that in view of the conduct of the State Government and the High Court, they are now estopped from raising any objection to the Mosque.

36. Then, the counter affidavit proceeds to make a detailed reference to the facts about the origin of Mosque. They have stated that the lessees, in 1959, established a private Mosque in a Tin-shed erected over the plot, situated in the south west corner of the plot, which continued to exist and in 1981, it was converted into a public Mosque on its "dedication" made by the lessees. It further states that the Tin-shed of the Mosque was replaced as pakka construction between 2009-11. The contents of paragraphs 9 to 13, in our opinion, in this counter affidavit (dated 15th May, 2017) need to be reproduced to understand the exact case made out by respondent no. 7 in respect of the establishment of a public Mosque and its backdrop. Paragraphs 9 to 13 read thus:

> "9. That since there was no Mosque nearby the High Court, therefore, the Muslim Advocate, their clerks, Muslim Employees of the High Court, as well as the Muslim clients, **used to offer Namaz Juma, Zohar and Asar in the Verandah, beneath**

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the present Court Room No. 29 of the High Court, till the year 1976.

10. That in the year 1976, the said Verandah was required for extension of High Court office and it was not possible to offer Namaz in the Verandah, therefore, a delegation of Muslim advocates comprising of the deponent and Mr. S.I. Zafri, Advocate (as His Lordship then was), Late N.A. Kazmi, Late Inamul Haq, Late Basheer Ahmad, Advocates, Late P.B. Salamat, Barrister, and Mr. M.A. Qadeer, Advocate, met with the then Chief Justice, Hon'ble Justice Mr. Kunwar Bahadur Asthana, and made a request for providing some alternative place for offering Namaz. **The Hon'ble Chief Justice orally directed the Registrar to specify some alternative place for offering Namaz, therefore, the said place of Namaz was shifted to the ground floor Varandah towards east and beneath the present Court Room Nos. 26, 27 and 28, where the Namaz continued to be offered in the same manner.**

11. That in the year 1981, in the place adjacent to the aforesaid verandah, Judges Chambers were constructed, therefore, again a delegation of Muslim lawyers comprising the deponent and Mr. S.I. Zafri, Advocate (as His Lordship then was), Late N.A. Kazmi, Late Inamul Haq, Late Mazhar Hasan Khan and Mr. M. A. Qadeer, Advocate, along with several others, **met Hon'ble the Chief Justice, Mr. Justice Satish Chandra, and apprised His Lordship of their problem. His Lordship directed Sri Girish Kumar Verma, as officer of the Court, [later Registrar (Protocol)] to specify some other place so that the Namaz could be offered.** Thereafter, the Namaz was directed to be held in South-West corner of the cricket ground of the High Court, where the Namaz Juma, Zohar and Asar started being held in which the Muslim Advocates, Clerks, employees of this Hon'ble Court used to offer Juma prayer on Fridays, and Zohar and Asar prayers on other days of the week.

12. **That later on, in the same year, i.e. 1981, late N.A. Kazmi, Advocate, who was the husband of one of the lessees of plot No. 59, Civil Station, Allahabad, namely, Smt. Sabra Khatoon Kazmi, and used to reside as head of the family at bungalow No. 27, Kanpur Road, (P.D. Tandon Road), Allahabad (on plot No. 59, Civil Station, Allahabad), after taking the permission of the lessees aforementioned, whoc had dedicated the land for the private mosque, permitted the High Court staff, lawyers, their clerks and other general public to offer Namaz at their private existing Mosque situated in south-west corner of the bungalow, within enclosed boundary wall and having tin shed, and also provided a separate entrance to the Mosque for the public. Thus, the nature of the private Mosque was changed to a public Mosque, which has got all attributes of Mosque, namely, Minber, Mihrab and Wuzukhana; where Azan, Iqamat and Namaz in congregation are being continuously performed 5 times daily since then.** Further, Namaz of Eid and Baqrid, and Taraveeh during the month of Ramzan, are also being regularly offered in the said Mosque since 1981.

13. That **various Hon'ble Judges of this Court, including Hon'ble Mr. Justice S.I. Jafri, Hon'ble Mr. Justice Abdul Raheem Chaudhary and Hon'ble Mr. Justice I.M. Quddusi; Mr. A.H. Ansari, the then Registrar (Listing) and several Assistant Registrars, Section Officers, and other Muslim Employees of the High Court, Advocates and their clerks, litigants and Muslim residents of the neighbouring area had been offering Namaz in the said Mosque."**

(*emphasis supplied*)

37. Then, the counter affidavit proceeds to state that after the Waqf Act came into operation with effect from 1st January, 1996, which made compulsory for every Waqf to be registered with the State Waqf Board, on 7 June, 2001, the Managing

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Committee, that was managing the affairs of the Mosque, made an application for its registration. The application was annexed with a Yaddasht (memoir) regarding the history of the Mosque. After receiving the application, the Waqf Board inspected the spot and recorded the statements of several Namazi and reported the existence and user of the Mosque. Thus, after making proper enquiry, according to respondent no. 7, the Board registered the Mosque, being Waqf No. 3155-Allahabad and issued a registration certificate under Section 36 of the Waqf Act.

38. Further, they have stated that the Mosque is in existence since last about six decades having been established in 1959 by the lessees as a private Mosque and thereafter as a public Mosque since the year 1981 and that the right, title and interest of the State Government in the land beneath the Mosque got extinguished under the provisions of the Indian Limitation Act. Reference to some documents, including the map, is also made in the counter affidavit, to show the existence of Tin-shed which was being used as Mosque by the members of public since 1981. Reference is also made to a letter dated 10th April, 2004 written by the former Judge of this High Court, Mr. Justice S.I. Jafri, after his retirement, stating that the Mosque in question, is in existence since very long time and he also offered Namaz in the said Mosque. The counter affidavit also makes reference to the report submitted by Vikramajeet Tiwari, after a spot visit on 6th December, 1999 and also the report of the Mukhya Nagar Adhikari, Nagar Nigam, Allahabad dated 6th December, 1999. We will make reference to the correspondence and the documents, as stated earlier, in the latter part of the judgment. Respondent no. 7 has also denied all the averments made by the petitioners and respondent nos. 1 to 4 in their affidavit/counter affidavits.

39. This counter affidavit (second) further proceeds to place their case in response to every paragraph in the writ petition, whereby all the averments made in the writ petition have been denied by reiterating their case as reflected in the earlier part of this affidavit.

40. The third affidavit has been filed on behalf of respondent no. 7, in reply to the counter affidavit filed by respondent no. 1-High Court. At the outset, it is stated that the first respondent's counter affidavit makes incorrect and misleading statements/facts. It would be relevant to reproduce paragraph no. 3 of the said affidavit to understand the case of respondent no. 7, made out in response to the facts, as surfaced from the affidavit of respondent no. 1. Paragraph no. 3 of the third affidavit dated 18th July, 2017 reads thus:

> "3. That before giving paragraph wise reply of the said counter, the answering respondent submits that the **crucial question of fact in this case is as to whether either the State Government or the High Court ever took possession of the area over which the mosque stands since the cancellation of the lease on 15.12.2000. Even after the vacation of the interim order by the Supreme Court, vide its order dated 3.3.2003, the State Government took possession of the leased land on 21.3.2004 excepting the area of the Mosque.** The detailed facts in this regard have been stated in paragraph No. 10 to 30 of the affidavit dated 18.4.2017 filed by the deponent. The High Court is relying upon some correspondence between it and the District Authorities to prove that there was no mosque at the site when the lease was cancelled on 15.12.2000 and even on 21.3.2004 when possession was taken or thereafter and that the State Government took possession of the land in question which had no mosque at that time. **This correspondence on which the High Court relies cannot be said to be the documentary evidence of the transfer of possession either to the State Government or to the High Court. Neither the State Government nor the High Court has any proof to show that they have ever taken possession of the land of the Mosque. On the other hand, there is ample evidence on record showing that the area over which Mosque stands was excluded from**

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the other area of the leased land at the time possession was taken on 21.3.2004."

(*emphasis supplied*)

41. Then this affidavit proceeds to make comments in reply to all paragraphs in the counter affidavit of respondent no. 1. Most of the contents thereof are nothing but reiteration of the case made out by them in the second counter affidavit filed in reply to the PIL. While placing reply to paragraph 9 of the counter affidavit filed by respondent no. 1, in paragraph 11 of the affidavit, respondent no. 7 has stated that the State Government, while taking forcible possession of the leased land and the bungalow in view of the interim order of the Supreme Court dated 3rd March, 2003 on 21st March, 2004, did not on their own take the possession of the portion of the plot where the Mosque is standing and, therefore, the question of handing over possession of this portion to the High Court did not arise.

42. In paragraph 12 of this affidavit, in reply to paragraph 10 of the counter affidavit filed by respondent no. 1-High Court, it is denied that 7618.54 Sq. Meters of land was transferred to the Registrar General of the High Court even after the order of the Supreme Court dated 3rd March, 2003 and that the possession of the land continued with the erstwhile lessees. Even the case of handing over possession to the Registrar General on 26th April, 2004 has also been denied by respondent no. 7. The correspondence exchanged between the High Court and the State Government, according to respondent no. 7, shows that they were not sure whether there exists a Mosque at the site in question. In support of this contention, a letter dated 17th January, 20005 written by the State Government to the Registrar General of the High Court, is heavily relied upon. In support, it is also stated that in pursuance of the order dated 19th December, 2011 issued by the Chief Justice for demarcation of land, under possession of the High Court, while constructing the boundary wall, the portion of the plot where the Mosque exists was rightly excluded. However, while submitting the building plan for approval before the Allahabad Development Authority for the proposed Administrative Annexe Building, the High Court wrongly showed the area under its possession in the said building plan to be 4725.89 Sq. Meters, i.e. including the portion of the plot where the Mosque exists. This shows that the High Court is incorrectly claiming the possession over the portion of land where the Mosque exists. Respondent no. 7, in this affidavit, also asserts that the High Court, while submitting the building plan on 6th September, 2013, had wrongly indicated the area in possession of respondent no. 7 to be 280 Sq. Meters, whereas the actual area is 376 Sq. Meters on the spot.

43. This affidavit further states that the Waqf in question, is fully covered under the definition of Waqf under Section 3 (r) of the Waqf Act and that a deed of Waqf is not a condition precedent for creation of Waqf and it can be created even orally and by user too. Then, reliance is placed on *Yaddasht* (memoir) to show that the Waqf came to be registered with the U P Sunni Central Waqf Board, as stated earlier.

44. This respondent also asserts that though the Waqf was registered on 30th May, 2002, it is not their case that it was created on 30th May, 2002 for the fist time and, that it was created as a private Waqf in the year 1959 itself and thereafter, as a public Mosque in 1981. It further states that the U P Sunni Central Waqf Board registered the Mosque as Waqf after proper enquiry and the High Court was aware of its registration, but never objected its existence or registration.

45. The fourth affidavit is a supplementary counter affidavit filed by respondent no. 7 on 29th August, 2017. It appears from the contents thereof that it was filed in reply to the question, that arose in the course of argument, as to when the application for registration of Waqf was made by the Managing Committee before the U P Sunni Central Waqf Board. In continuation of the averments made in the earlier two

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affidavits dated 18th April, 2017 and 15th May, 2017 regarding the origin and establishment of the public Mosque, it is submitted that on 4th July, 1997, the local Muslim residents and Muslim Advocates, who were regularly offering Namaaz in the Mosque in question, convened a meeting and decided to nominate some persons from amongst themselves to look after the affairs of the Mosque. Accordingly, a Committee comprising of the following ten persons was constituted and it took over the management of the affairs of the public Mosque from 4th July, 1997:

(1) Mr. M Islam, Advocate (President); (2) Mr. S Alim Shah, Advocate (Vice President); (3) Mr. W H Khan, Advocate (Vice President); (4) Mr. Siraj-ul Haq, Advocate (Secretary); (5) Haji Abdul Rashid son of Abdul Hamid (Treasurer); (6) Mr. S M A Kazmi, Advocate (Member); (7) Mr. S A Jilani, Advocate (Member); (8) Mr. Afzal Ahmad, Advocate (Member); (9) Mr. Javed Habib, Advocate (Member); and (10) Mr. M A Siddiqui, Advocate (Member).

46. It is further admitted that the application was moved for registration of the Waqf for the first time on 7th June, 2001 and it came to be registered on 30th May, 2002. The registration certificate issued by the Waqf Board dated 30th May, 2002 is placed on the record as Annexure-SCA-2 of the affidavit.

47. Respondent no. 7 has then filed two more affidavits both dated 23rd August, 2017 in reply to the supplementary affidavit dated 17th August, 2017 filed by the petitioner and in reply to the affidavit filed in support of the application dated 16th August, 2017. In these affidavits, the averments made in the said affidavits, are simply denied by respondent no. 7.

48. That then takes us to the counter affidavits dated 15th May, 2017 and 14th August, 2017 filed by respondent no. 8. He was added subsequently as respondent no. 8 in the writ petition to which, he did not object and, as a matter of fact, filed a detailed counter affidavit, not only in support of the case made out by respondent no. 7, but has also independently mentioned the brief history of the plot and creation and existence of the Mosque. Most of the averments in both these affidavits are similar. Respondent no. 8 belongs to the family of original lessees and was also one of the lessees when the writ petition and SLP were filed and disposed of.

49. Respondent no. 8 is also a practicing Advocate of this High Court. He states that family of the original lessees was a very religious and pious muslim family and in view of their ardent wish, they "**dedicated**" the site in dispute for establishment of initially a private Mosque in 1959 and then as a public Mosque in 1981 to facilitate the offering of Namaaz by his family members, their servants and others living in the compound and then to others. According to respondent no. 8, an area measuring 50 x 100 fts. towards south-west corner of the plot was demarcated as a public Mosque and, accordingly, it was dedicated by the original lessees in 1981 to be used for offering Namaaz-ba-Jamaat (congregational prayers) five times a day as mandated by the Holy Quran and the said place is known as Masjid. He has specifically stated that initially a "small platform" and "tin-shed" was constructed over the area demarcated for the purpose as it was only being used by the family members of the lesseess, their servants, licensees and tenants living in the compound of the bungalow as private Mosque. He then stated, on the basis of the information given by elders, that muslim lawyers and their clerks, muslim employees and staff members of the High Court as well as muslim litigants visiting the High Court used to offer 'Zuhr' (afternoon) and 'Asr' (early evening) Namaaz daily in the northern verandah of the High Court and then he proceeds to support the averments, as quoted in paragraph of the second affidavit of respondent no. 7. He also supports the case of conversion of this Mosque into a public Mosque in 1981. He has, however, not stated when the small tin-shed of the private Mosque was extended to be used as a public Mosque. He also states that his grand-father used to look after the affairs of the Mosque and was its Mutawalli

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during his life time. After his death on 21st June, 1994, respondent no. 8 took over as Mutawalli and continued to be for few years. He has not stated the exact date when the Committee took over the Management of the Waqf though he has stated that it was elected from amongst the Namazees to manage affairs of the Mosque in question. He then proceeds to state about the lease deed, its extension and cancellation and also made reference to the earlier litigation, but has not explained why no reference to the Mosque/Waqf was not made in the earlier round of litigation. He also supports the case of respondent no. 7, stating that though forcible possession of the leased land and bungalow was taken, the Mosque, with all its essential characteristics and properties, remained undisturbed and the Managing Committee continued to be in its possession and has been enjoying the Mosque as public Mosque right from inception till today.

50. He has emphatically denied the contents of the letters dated 5th March, 2005 and 5th April, 2005 of the District Magistrate, addressed to the Joint Registrar (P), High Court, wherein it was stated that when on 6th December, 1999, one Mr. Vikramjeet Tiwari, the then Additional District Magistrate (F/R), Allahabad made a spot inspection and enquired from him, he told Mr. Vikramjeet Tiwari, that there was no Mosque on the spot. He has also denied the contents of letter dated 5th April, 2005 that when respondent no. 8 and some others came to know that the State Government was intending to resume the plot for being given to the High Court and that they would handover its possession to the High Court, they started inciting the religious feelings in the name of masjid and somehow or the other, in order to take undue advantage, gave the name of masjid to the tin-shed situated on south-west corner of the plot and hanged a board of masjid on the wall.

51. He also submitted para-wise reply in the subsequent part of his affidavit. Though two separate counter affidavits are filed, but sum and substance of both the affidavits, is one and the same, therefore, we are not making specific reference to the averments in the second affidavit dated 14th August, 2017.

52. Respondent no. 9-U P Sunni Central Waqf Board has also filed a counter affidavit dated 16th July, 2017. In their counter affidavit, the main contention urged on behalf of the Board is that the writ petition is not maintainable for the reliefs as sought therein. After making reference to Sections 85 and 93 of the Waqf Act, it is stated that once a property is registered with the Board under Section 36 of the Waqf Act, the decision of the Board in respect thereof would be final unless revoked or modified by the Waqf Tribunal. It is further stated that the structure of Mosque is in fact vested with the Board and there cannot be any proceeding or compromise without its sanction. The validity of the registration cannot be gone into in the instant proceedings and the writ petition with such averments and reliefs is not maintainable. A question is also raised as to how removal of a Mosque would be in public interest. This respondent has also placed its parawise reply on record which is mostly in the form of denial. Paragraph 26 of this affidavit states that for the purpose of the Waqf Act, it is compulsory for every Waqf to be registered at the office of the Board. Whenever, an application is made for registration, the Board, after making proper enquiry, register the Waqf. In the present case also, it states, after making proper enquiry, respondent no. 7-Waqf came to be registered and registration certificate was issued on 30th May, 2002 appointing the following members of the Managing Committee: (a) Manzarul Islam Advocate, President, (b) Aleem Elahi Shah Advocate, Vice President, (c) Wazahat Husain Khan Advocate, Vice President, (d) Sirazul Haq Advocate, Secretary, (e) Abdul Rasheed Advocate, Asst. Secretary, (f) S.M.A. Kazmi Advocate, Member, (g) Afzal Ahmad Advocate, Member, (h) S.A. Gilani Advocate, Member, (i) Javed Habib Advocate, Member and (j) Mehboob Ahmad Advocate, Member.

53. In this backdrop, we have heard learned counsel for the parties at great length. Mr. Navin Sinha, learned Senior Counsel advanced arguments on behalf of the

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petitioner. He argued for about 4 hours. Then Mr. Manish Goyal, for respondent no. 1, argued for about an hour and sought liberty to advance arguments in rejoinder. Mr. Ravi Kiran Jain, who appeared on behalf of respondent no. 7, argued for about 14-15 hours on different dates. We have also heard Mr. A K Goyal, learned Additional Chief Standing Counsel for the respondent-State. Then we have heard respondent no. 8-in person, and Mr. S Safdar Ali Kazmi, learned counsel for respondent no. 9. We have also heard Mr. Anil Tiwari and Sri Nasiruzzaman for the intervenors. At this stage, we may also record that in order to give a fair opportunity to all parties, after hearing Mr. Navin Sinha, learned counsel for the petitioner, for about one and half hours, Mr. Manish Goyal for the High Court, for about two and half hours and Mr. A K Goyal for the State, for some time, in rejoinder, we once again, at the requests of respondent nos. 7, 8 and 9 heard learned counsel on their behalf. Mr. Jain argued for about 3-4 hours. With the assistance of all, we have gone through the entire materials placed before us and also perused the relevant provisions of the Waqf Act, Rules and also the Constitution of India.

54. Learned counsel for the parties have also relied upon several judgments in support of their contentions to which, we propose to make reference while dealing with their arguments at appropriate stage.

55. It is against this backdrop, at the outset, we now deal with an application, bearing Civil Misc. Application No. 13243 of 2017 filed on behalf of respondent no. 7, raising preliminary objections to the maintainability of the writ petition. The first objection raised by Mr. Ravi Kiran Jain, was to the maintainability of the instant petition, styled as a public interest litigation, on the ground that it does not fulfill the requirement of Rule 3-A of Chapter XXII of the Rules of the Allahabad High Court. He contended that as provided for in the Rule the petitioner is required to precisely and specifically state that he has no personal or private interest in the subject matter of the writ petition. Our attention was drawn to the petitioner's averment stating that "he would suffer irreparable loss and injury, if no relief, as prayed, is granted". This, according to Mr. Jain, shows that the petitioner has personal interest in the litigation. This submission deserves to be rejected outright. In paragraph 7 of the writ petition, the petitioner has specifically stated that "this petition is purely public interest litigation and he has no private interest except the welfare of this Hon'ble Institution, as a responsible Advocate". The averments in paragraph 27 cannot be read out of context to contend that the petitioner has personal interest in this petition. The petitioner, being an Advocate, cannot have any personal interest in the matter. This objection, therefore, deserves to be rejected outright. In this connection, we would also like to make reference to the judgments relied upon by learned counsel for the petitioner.

56. The Supreme Court in *S P Gupta* v. *Union of India*[1], where seven judges Bench of the Supreme Court, while dealing with important questions, touching the Constitution and relating to independence of judiciary, observed that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from a breach of public duty or from a violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the peace of realization of the constitutional objective. The Supreme Court also added a note of caution that care should be taken to see that a member of the public who approaches the Court in cases of this kind, is acting *bona fide* and not for personal gain or private interest or political motive or other consideration. The Court must not allow its process to be abused by any such person to gain private/personal or political objective.

57. In the present case, there can be no doubt that the petitioner, who is a

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practicing lawyer, has a vital interest not only in the independence of judiciary, but also in its well being. If any illegal action is taken by any individual/anybody or for that matter, the entity like respondent no. 7, which has the effect of impairing the independence of judiciary or is against the interest of the Institution as a whole, a practicing lawyer can approach this Court under Article 226 of the Constitution of India by way of a public interest litigation for protecting the Institution in all respects.

58. It would be relevant to reproduce the relevant observations in paragraph 25 in *S P Gupta* (supra), which read thus:

> "**25.** ... ...The petitioners are lawyers practising in the High Court of Bombay. The first petitioner is a member of the Bombay Bar Association, petitioners, Nos. 2 and 3 are members of the Advocates Association of Western India and petitioner No. 4 is the President of the Incorporated Law Society. **There can be no doubt that the petitioners have a vital interest in the independence of the judiciary and if an unconstitutional or illegal action is taken by the State or any public authority which has the effect of impairing the independence of the judiciary, the petitioners would certainly be interested in challenging the constitutionality or legality of such action. The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice.** They assist the court in dispensing justice and it can hardly be disputed that without their help, it would be well nigh impossible for the Court to administer justice. They are really and truly officers of the Court in which they daily sit and practice. **They have, therefore, a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because, they are equal partners with the Judges in the administration of justice. Iqbal Chagla and others cannot be regarded as mere bystanders or meddlesome interlopers in filing the writ petition.** The complaint of the petitioners in the writ petition was that the circular letter issued by the Law Minister constituted a serious threat to the independence of the judiciary and it was unconstitutional and void and if this complaint be true, and for the purpose of determining the standing of the petitioners to file the writ petition, we must assume this complaint to be correct the petitioners already had locus standi to maintain the writ petition. The circular letter, on the averments made in the writ petition, did not cause any specific legal injury to an individual or to a determinate class or group of individuals, but it caused public injury by prejudicially affecting the independence of the judiciary. **The petitioners being lawyers had sufficient interest to challenge the constitutionality of the circular letter and they were, therefore, entitled to file the writ petition as a public interest litigation. They had clearly a concern deeper than that of a busybody and they cannot be told off at the gates.** We may point out that this was precisely the principle applied by this Court to uphold the standing of the Fertiliser Corporation Kamgar Union to challenge the sale of a part of the undertaking by the Fertiliser Corporation of India in *Fertiliser Corporation Kamgar Union* v. *Union of India* ((1981) 1 SCC 568 : AIR 1981 SC 344) (supra). **Justice Krishna Iyer pointed out that if a citizen "belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered.**" We must, therefore, hold that Iqbal Chagla and others had locus standi to maintain their writ petition. What we have said in relation to the writ petition of Iqbal Chagla and others must apply equally in relation to the writ petitions of S.P. Gupta and J.C. Kalra and others. So far as the writ petition of V.M.

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Tarkunde is concerned, Mr. Mridul, learned advocate appearing on behalf of the Law Minister, did not contest the maintainability of that writ petition since S.N. Kumar to whom, according to the averments made in the writ petition, a specific legal injury was caused, appeared in the writ petition and claimed relief against the decision of the Central Government to discontinue him as an additional Judge. We must, therefore, reject the preliminary objection raised by Mr. Mridul challenging the locus standi of the petitioners in the first group of writ petitions. Concept of Independence of the Judiciary:"

(*emphasis supplied*)

59. There can be no doubt that the petitioner in the instant writ petition has a vital interest in the institution of High Court/judiciary and if any, unconstitutional and illegal action is taken by any one, which has the effect of impairing the institution, its independence and its existence, person like the petitioner, would certainly be interested in challenging the constitutionality or legality of such action. In the present case, the action under challenge is the alleged encroachment made on the High Court's property, where religious activities are being carried in the Masjid, constructed by respondent no. 7. The petitioner, being an Advocate practicing in this Court and being a member of the Bar Association, has special interest in preserving the independence, integrity and secular character of the judiciary, and if its independence, integrity and secular character is threatened by any act of respondent no. 7, he would naturally be concerned about it, because, he is an equal partner with judges in the administration of justice. Therefore, we are of the considered view that the petition, as instituted by an Advocate practicing in this Court, for the relief as prayed, is maintainable and it deserves to be decided on merits in accordance with law.

60. Mr. Jain, learned Senior Counsel for respondent no. 7, vehemently submitted that if the public interest litigation is permitted to be misused, the very purpose for which it is conceived namely, to come to the rescue of poor and downtrodden will be defeated. The Court should discourage a petition, such as the instant PIL which is completely unjustified and, as a matter of fact, is not in public interest. He also submitted that PIL, such as the instant writ petition, is not maintainable in the matter of religious institutions and that too, on the basis of affidavits of parties. In support, he placed reliance upon the judgment of the Supreme Court in *Jaipur Shahar Hindu Vikas Samiti* v. *State of Rajasthan*[2]. Paragraphs 47 and 49 read thus:

"47. **The scope of Public Interest Litigation is very limited, particularly, in the matter of religious institutions. It is always better not to entertain this type of Public Interest Litigations simply on the basis of affidavits of the parties. The public trusts and religious institutions are governed by particular legislation which provide for a proper mechanism for adjudication of disputes relating to the properties of the trust and their management thereof. It is not proper for the Court to entertain such litigation and pass orders**. It is also needless to mention that the forums cannot be misused by the rival groups in the guise of public interest litigation.

49. The concept of Public Interest Litigation is a phenomenon which is evolved to bring justice to the reach of people who are handicapped by ignorance, indigence, illiteracy and other down trodden people. Through the Public Interest Litigation, the cause of several people who are not able to approach the Court is espoused. In the guise of Public Interest Litigation, we are coming across several cases where it is exploited for the benefit of certain individuals. The Courts have to be very cautious and careful while entertaining Public Interest Litigation. The Judiciary should deal with the misuse of Public Interest Litigation with iron hand. If the Public Interest Litigation is permitted to be misused the very purpose for which it is conceived, namely to come to the rescue of the poor and down trodden will be defeated. **The**

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Courts should discourage the unjustified litigants at the initial stage itself and the person who misuses the forum should be made accountable for it. In the realm of Public Interest Litigation, the Courts while protecting the larger public interest involved, should at the same time have to look at the effective way in which the relief can be granted to the people, whose rights are adversely affected or at stake. When their interest can be protected and the controversy or the dispute can be adjudicated by a mechanism created under a particular statute, the parties should be relegated to the appropriate forum, instead of entertaining the writ petition filed as Public Interest Litigation."

(*emphasis supplied*)

61. This PIL is not in respect of any matter of religious institution, much less respondent no. 7. We are not called upon to examine their internal matters or any dispute pertaining to their management, for which a forum is created and available under the provisions of the Waqf Act, 1995. In the present case, the allegation is of encroachment on the High Court's property. We are, therefore, of the view that this judgment is of no avail to respondent no. 7, relied upon in support of their objection as to maintainability of this petition.

62. Reliance was also placed on the judgment of the Supreme Court in the *State of Uttaranchal* v. *Balwant Singh Chaufal*[1]. Relevant paragraphs 153, 154 and 155 of the report read thus:

"153. In *J Jayalalitha* v. *Govt. of T.N.* (1999) 1 SCC 53, this Court laid down that **public interest litigation can be filed by any person challenging the misuse or improper use of any public property including the political party in power for the reason that interest of individuals cannot be placed above or preferred to a larger public interest.**

154. This court has been quite conscious that the forum of this Court should not be abused by any one for personal gain or for any oblique motive. In BALCO, (2002) 2 SCC 333, this Court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the Court must take care that the forum be not abused by any person for personal gain.

155. In *Dattaraj Nathuji Thaware*, (2005) 1 SCC 590, this Court expressed its anguish on misuse of the forum of the Court under the garb of public interest litigation and observed (SCC p. 595, para 12) that the

> "**[p]ublic interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity-seeking is not lurking.** It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. ... The court must not allow its process to be abused for oblique considerations."

(*emphasis supplied*)

63. In *Dattaraj Nathuji Thaware* v. *State of Maharashtra*[1], the Supreme Court, while dealing with public interest litigation instituted by a member of the legal profession, after observing that this is a sad reflection on members of the legal profession and is almost a black spot on the noble profession, in paragraphs 9, 11 to 12 and 17 observed thus:

"9. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name

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of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, **Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.**

11. The Court has to be satisfied about (a) the credentials of the applicant; (b) **the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions.** In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

12 Courts must do justice by promotion of good faith, and prevent law from crafty invasions. **Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good.** (See *State of Maharashtra* v. *Prabhu*, ((1994) 2 SCC 481), and *Andhra Pradesh State Financial Corporation* v. *GAR Re-Rolling Mills*, ((1994) 2 SCC 647 : AIR 1994 SC 2151). No litigant has a right to unlimited draught on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See *Dr. B.K. Subbarao* v. *Mr. K. Parasaran*, (1996 (7) JT 265). Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public.

17. **It is disturbing feature which needs immediate remedial measure by the Bar Councils and the Bar Association to see that the process of law is not abused and polluted by its member.** It is high time that the Bar Councils and the Bar Associations ensure that no member of the Bar becomes party as petitioner or in aiding and/or abetting files frivolous petitions carrying the attractive brand name of "Public Interest Litigation". That will be keeping in line with the high traditions of the Bar. No one should be permitted to bring disgrace to the noble profession. We would have imposed exemplary cost in this regard but taking note of the fact that the High Court had already imposed costs of Rs. 25,000/-, we do not propose to impose any further cost."

64. In the present case, the petitioner cannot be stated to have any personal interest or private motive or political motivation or any oblique consideration. As

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observed earlier, he being a member of the legal profession has sufficient interest in the well being of the institution. That apart, it is not even the case of respondent nos. 7 and 8 in the pleadings that the petitioner has any private interest, malice or political motivation to file such a petition, though it was submitted across the Bar by Mr. Ravi Kiran Jain, Senior Advocate on behalf of respondent no. 7 that the petition came to be filed after the present Government in Uttar Pradesh took over. We do not find any substance in such allegation or the attempt to connect the filing of the petition with State politics. Having regard to the nature of challenge, it cannot be accepted that the petitioner has abused the process of law.

65. In *B. P Singhal* v. *Union of India*[5], the Supreme Court, while dealing with the question of maintainability of the writ petition, in paragraph 12, observed thus:

> "12. The respondents submitted that a writ petition by way of PIL, to secure relief for the Governors who have been removed from office, is not maintainable as none of the aggrieved persons had approached the court for relief and the writ petitioner has no locus to maintain a petition seeking relief on their behalf. **It is pointed out that Governors do not belong to a helpless section of society which by reason of poverty, ignorance, disability or other disadvantage, is not capable of seeking relief.** Reliance is placed on the following observations of this Court in *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87:
>
> > "25. ... cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. **In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission**, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protect, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want."
>
> (*emphasis supplied*)

66. From a careful perusal of the above judgments, in our opinion, it is clear that these are of no avail to respondent no. 7. On the basis of these judgments, we are not persuaded to conclude, as argued on behalf of respondent no. 7, that the instant writ petition is careless, meaningless or clumsy attempt or against public interest. It is well settled that a public interest litigation can be filed by any person, challenging the misuse or improper use of any public property. It cannot be said that the jurisdiction of this Court under Article 226 of the Constitution, in public interest, is being abused by the petitioner for his personal gain. We are satisfied about the credentials of the petitioner and the *prima facie* correctness or nature of information given by him. We are not prepared to accept that the facts stated in the writ petition are vague and indefinite. As observed by the Supreme Court in *J Jayalalitha* v. *Government of Tamil Nadu*[6], the Courts are justified in entertaining a public interest litigation bringing to the notice of the Court the misuse or improper use of the property of an Institution like the High Court and, in our opinion, an Advocate is the best and most suitable person to bring such misuse or improper use of its property to the notice of the Court by way of a public interest litigation. In the circumstances, the first contention that the writ petition in public interest, at the instant of the petitioner, is not maintainable, must be rejected.

67. The next objection is to the effect that before approaching this Court by way of a writ petition, the petitioner ought to have made a demand for redressal of his

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grievance before the authority concerned and since no such demand was made, the petition deserves to be dismissed. Though such an averment is made in the application, learned senior counsel Mr. Jain, did not press this objection seriously. Even otherwise, we do not find any substance in the submission and the objection in view of the sequence of events and peculiar facts and circumstances of the case, deserves to be and is rejected outright.

68. One more objection raised by Mr. Jain was that in view of Section 83 read with Section 85 of the Waqf Act, 1995[Z] the Waqf Tribunal alone can decide the dispute sought to be raised by way of the instant Public Interest Litigation and the instant petition is not maintainable. Relevant part of Section 83 and Section 85 of the Waqf Act are reproduced for convenience of reference:—

> "83. Constitution of Tribunals, etc.-(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.
>
> (2) Any mutawalli person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf.
>
> (5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.
>
> (6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.
>
> (7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.
>
> (8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).
>
> (9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:
>
> Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit."
>
> "85. Bar of jurisdiction of civil courts.-No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal."

69. Sub section (1) of Section 83 was amended by Act No. 27 of 2013. Prior to its amendment, it was in the following terms:—

> "(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals".

70. Mr. Jain in support of his contention placed reliance on the Supreme Court

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judgement in *Board of Wakf, West Bengal* v. *Anis Fatma Begum*[8] and judgement dated 9 January 2017 rendered by a Division Bench of this Court in Writ-C No. 45667 of 2015 *Nabi Baksh* v. *Chairman, U.P. Sunni Central Waqf Board*. On the other hand, rebutting the contention of Mr. Jain, Mr. Navin Sinha, learned senior counsel appearing on behalf of the petitioner submitted that the issue as to whether respondent no. 7 had ever come into existence; whether there was in fact any actual dedication of the property; whether the property alleged to be dedicated could have been dedicated or not; whether dedication was a paper transaction and a devise to circumvent the process of law; whether respondent no. 7 has encroached upon the property of the State/High Court and whether the pucca construction raised by respondent no. 7 without approval and sanction of the Development Authority are liable to be demolished or not, are issues which could not be determined by the Waqf Tribunal and therefore, this Court would have full jurisdiction in the matter. In support of his contention, he has placed reliance on the judgements of the Supreme Court in *Ram Swarup* v. *Shikar Chand*[9], *Ramesh Gobindram (Dead) through LRs.* v. *Sugra Humayun Mirza Wakf*[10] and *U.P. Sunni Central Board of Waqf* v. *ADJ, Muzaffar Nagar*[11].

71. After examining the rival contentions and the precedents cited by the parties, we are of the opinion that the issue relating to exclusion of the jurisdiction of the Civil Courts in matters concerning waqf/waqf properties is no more *res integra*. The Supreme Court in *Ramesh Gobindram* (supra) examined in great detail the provisions of the Act in the context of the plea relating to ouster of the jurisdiction of the Civil Courts and thereafter held that:

> "25. **Whenever a question arises whether "any dispute, question or other matter" relating to "any wakf or wakf property or other matter" falls within the jurisdiction of a Civil Court the answer would depend upon whether any such dispute, question or other matter is required under the Act to be determined by the Tribunal constituted under the Act. If the answer be in the affirmative, the jurisdiction of Civil Court would be excluded qua such a question, for in that case the Tribunal alone can entertain and determine any such question.** The bar of jurisdiction contained in Section 85 is in that sense much wider than that contained in Section 6(5) read with Section 7 of the Wakf Act. While the latter bars the jurisdiction of the Civil Court only in relation of questions specified in Sections 6(1) and 7(1), the bar of jurisdiction contained in Section 85 would exclude the jurisdiction of the Civil Courts not only in relation to matters that specifically fall in Sections 6 and 7 but also other matters required to be determined by a Tribunal under the Act. There are a host of such matters in which the Tribunal exercises original or appellate jurisdiction.
>
> 26. To illustrate the point we may usefully refer to some of the provisions of the Act where the bar contained in the said section would get attracted. Section 33 of the Act deals with the power of inspection by a Chief Executive Officer or person authorized by him. In the event of any failure or negligence on the part of a mutawalli in the performance of his duties leading to any loss or damage, the Chief Executive Officer can with the prior approval of the Board pass an order for the recovery of the amount or property which has been mis-appropriated, misapplied or fraudulently retained. Sub-section(4) of Section 33 then entitles the aggrieved person to file an appeal to the Tribunal and empowers the Tribunal to deal with and adjudicate upon the validity of the orders passed by the Chief Executive Officer. Similarly under Section 35 the Tribunal may direct the mutawalli or any other person concerned to furnish security or direct conditional attachment of the whole or any portion of the property so specified.
>
> 27. Section 47 of the Act requires the accounts of the wakfs to be audited whereas Section 48 empowers the Board to examine the audit report, and to call for an explanation of any person in regard to any matter and pass such orders as it

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may think fit including an order for recovery of the amount certified by the auditor under Section 47(2) of the Act. The mutawalli or any other person aggrieved by any such direction has the right to appeal to the Tribunal under Section 48. Similar provisions giving powers to the Wakf Board to pass orders in respect of matters stipulated therein are found in Sections 51, 54, 61, 64, 67, 72 and 73 of the Act. Suffice it to say that there are a host of questions and matters that have to be determined by the Tribunal under the Act, in relation to the wakf or wakf property or other matters.

28. **Section 85 of the Act clearly bars jurisdiction of the Civil Courts to entertain any suit or proceedings in relation to orders passed by or proceedings that may be commenced before the Tribunal. It follows that although Section 85 is wider than what is contained in Sections 6 and 7 of the Act, the exclusion of jurisdiction of Civil Courts even under Section 85 is not absolute. It is limited only to matters that are required by the Act to be determined by a Tribunal. So long as the dispute or question raised before the Civil Court does not fall within four corners of the powers vested in the Tribunal, the jurisdiction of the former to entertain a suit or proceedings in relation to any such question cannot be said to be barred."**

(*emphasis supplied*)

72. The contention that Section 83 of the Act has widened the sphere of the jurisdiction of Tribunal than what is specified in Section 85, was repelled by observing that:

"32. There is, in our view, nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the Civil Courts extends (sic) beyond what has been provided for in Section 6(5), Section 7 and Section 85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question of other matter relating to a wakf or wakf property which does not ipso facto mean that the jurisdiction of the Civil Courts stands completely excluded by reasons of such establishment.

33. **It is noteworthy that the expression "for the determination of any dispute, question or other matter relating to a wakf or wakf property" appearing in Section 83(1) also appears in Section 85 of the Act. Section 85 does not, however, exclude the jurisdiction of the Civil Courts in respect of any or every question or disputes only because the same relates to a wakf or a wakf property. Section 85 in terms provides that the jurisdiction of the Civil Court shall stand excluded in relation to only such matters as are required by or under this Act to be determined by the Tribunal.**

34. The crucial question that shall have to be answered in every case **where a plea regarding exclusion of the jurisdiction of the Civil Court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a Civil Court. If it is not, the jurisdiction of the Civil Court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the Civil Court would stand excluded."**

(*emphasis supplied*)

73. The issue before the Supreme Court in the said matter was whether a suit for eviction of a tenant from the wakf property would lie before the Tribunal or the regular civil court. The Supreme Court, having regard to the scheme of the Act, held that the Tribunal would not have jurisdiction to decide the dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligation of the lessors and the lessees of such property.

74. At this stage, it is worth noticing that Parliament intervened and carried out amendment in sub-section (1) of Section 83 and brought disputes relating to eviction

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of a tenant or determination of rights and obligations of the lessor and the lessee of the wakf property within the ambit and jurisdiction of the Waqf Tribunal. Further, it is pertinent to note that while amending sub-section (1) of Section 83, no material change was made in Section 85 except for substituting "civil court, revenue court and other authority" for "civil court". As a result, even a suit for eviction of tenant or for determination of rights and obligations of the lessor and the lessee of wakf property would fall within the exclusive jurisdiction of Waqf Tribunal. But the basic principle culled out by the Supreme Court for determining the plea relating to exclusion of the jurisdiction of the Civil Court, laid down in paragraph 34 of the judgment in *Ramesh Gobindram* (supra), would still hold good. In other words, while determining whether the Waqf Tribunal alone would have jurisdiction in a particular matter or not, it has to be seen whether the Tribunal under the Act or the Rules is required to deal with the matter sought to be brought before the Civil Court. If not, Section 85 will not come into play nor would the jurisdiction of the civil court stand ousted.

75. In the instant case, the property in dispute has not been notified as a wakf property in the official gazette in terms of Section 5, thus, there was no occasion to raise any dispute questioning the correctness of the list as contemplated under Section 6 and Section 7 of the Act. The jurisdiction of the Tribunal under Section 7 could only be invoked by the Board or mutwalli of the waqf or any person interested therein/any person aggrieved by the publication of the list of auqaf under Section 5. It has been held by Supreme Court in *Board of Muslim Waqf, Rajasthan* v. *Radhakishan*[12] that "any person interested", would not include a stranger, a non-muslim. In *Ramesh Gobindram* (supra), the Supreme Court has cited with approval the law laid down in *Radhakishan* (supra). It also followed *Radhakishan* (supra) in *Board of Muslim Waqfs* v. *Smt. Hadi Begum*[13] where it was held that if a property is included in the list published under sub-section (2) of Section 5, it would not bind a non-muslim, nor would he be under any obligation to initiate proceedings for declaration of his title within the period of one year as provided under Section 5 as the provision thereof makes the list final and conclusive only between the Board, mutwalli and the person interested in the waqf. It has been held thus:—

> "The right, title and interest of a person who is non-muslim and is in possession of certain property is not put in jeopardy simply because that property is included in the list published under sub-sec. (2) of S. 5 and he is not required to file a suit in a Civil Court for declaration of his title within the period of one year and the list would not be final and conclusive against him. **Sub-sec. (4) of S. 6 makes the list final and conclusive only between the Board, the mutawalli and the person interested in the wakf.**"
>
> (*emphasis supplied*)

76. The next provision under the Act is Section 33 which invests the Chief Executive Officer with the power to pass orders for recovery of amounts or property which has been misappropriated, misapplied or fraudulently retained by a mutwalli. It is nobody's case that the said provision would get attracted to the facts of the instant case. Section 47 and 48 of the Act relates to audit of accounts of a waqf. Likewise, the other provisions of the Act are Sections 51, 54, 61, 64, 67, 72 and 73, none of which cover the issues which are required to be decided in the instant public interest litigation under Article 226 of the Constitution of India. There is no provision under the Act which empowers the Tribunal to determine the issue as to whether the waqf had encroached upon the property of a stranger, a non-muslim; whether pucca construction raised by it were illegal and dehors the statutory provisions, liable to be demolished; and/or grant relief which have been claimed in the instant writ petition or similar to those claimed herein.

77. It has been held by the Supreme Court in a more recent judgment in *Bhanwar*

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Lal v. *Rajasthan Board of Muslim Wakf*[14] that where some of the reliefs claimed fall within the exclusive jurisdiction of the Wakf Tribunal, whereas for other reliefs the civil court would be competent, in such a case, it is the civil court, having regard to its plenary jurisdiction conferred upon it under Section 9 CPC, which would be competent to try the suit. In this regard, it has been observed thus:—

> "23. The suit is for cancellation of sale deed, rent and for possession as well as rendition of accounts and for removal of trustees. However, pleading in the suit are not filed before us and, therefore, the exact nature of relief claimed as well as averments made in the plaint or written statements are not known to us. We are making these remarks for the reason that **some of the reliefs claimed in the suit appeared to be falling within the exclusive jurisdiction of the Tribunal whereas for other reliefs the civil suit would be competent.** Going by the ratio of Ramesh Gobind Ram, suit for possession and rent is to be tried by the civil court. However, the suit pertaining to removal of trustees and rendition of accounts would fall within the domain of the Tribunal. In so far as relief of cancellation of sale deed is concerned this is to be tried by the civil court for the reason that it is not covered by Section 6 or 7 of the Act whereby any jurisdiction is conferred upon the Tribunal to decided such an issue. Moreover, relief of possession, which can be given by the civil court, depends upon the question as to whether the sale deed is valid or not. Thus, the issue of sale deed and possession are inextricably mixed with each other". (*emphasis supplied*)

78. Having regard to the law laid down in these judgments and the fact that most of the issues raised in the instant petition would fall outside the domain of the Wakf Tribunal, we do not find any substance in the contention of Mr. Jain that it is the Wakf Tribunal which alone will have jurisdiction in the matter.

79. There is one more aspect of the matter. Section 85 of the Act bars jurisdiction of the "civil court, revenue court and any other authority". It does not include a High Court nor could it be, as power of the High Court to issue prerogative writs under Article 226 of the Constitution being one of the basic features, cannot be curtailed. In other words, the bar placed under this Act can neither eclipse nor subsume constitutional powers conferred on the High Court. In appropriate case, it is always open to the High Court to invoke its power under Article 226 of the Constitution, Whether or not, such power is exercised, is a matter of judicial discretion to be exercised having regard to the facts and circumstances of a particular case. Thus, even otherwise, we are of the firm opinion that even if certain matters would fall within the jurisdiction of the Tribunal, yet there cannot be an absolute bar in exercise of power under Article 226 of the Constitution.

80. The judgment in *Anis Fatma Begum* (supra) cited by Mr. Jain, was in regard to demarcation of the wakf property. The parties instead of approaching the Waqf Tribunal invoked the original civil jurisdiction of the High Court in instituting a suit before the Calcutta High Court. In context of the nature of dispute raised in the suit, the Supreme Court was satisfied that it would fall within the jurisdiction of the Waqf Tribunal and accordingly observed as under:—

> "9. The dispute in the present case relates to a Wakf.
>
> 10. In our opinion, all matters pertaining to Wakfs should be filed in the first instance before the Wakf Tribunal constituted under Section 83 of the Wakf Act, 1995 and should not be entertained by the Civil Court or by the High Court straightaway under Article 226 of the Constitution of India."

81. Even in that judgement, the Supreme Court agreed with the ratio in *Ramesh Gobindram* to the effect that all and every dispute relating to waqf is not excluded from the jurisdiction of the civil court. However, the law propounded in *Ramesh Gobindram's case* was distinguished by observing thus:—

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"**22.** Learned Counsel for the respondent, however, relied on the decision of this Court in *Ramesh Govindram* v. *Sugra Humayun Mirza Waqf*, (2010) 8 SCALE 698 = (2010 All. CJ 2099), in the aforesaid decision it was held that eviction proceedings can only be decided by the Civil Court and not by the Waqf Tribunal.

23. The dispute in the present case is not an eviction. Dispute Hence, the aforesaid decision in Ramesh Gobindram's case is distinguishable."

82. In *Nabi Baksh*, the judgement cited by Mr. Jain, the dispute was in regard to appointment of a mutwalli of a registered wakf. The High Court remitted the matter to the Waqf Tribunal for determining the issue as to whether the order of the Chairman of the Waqf Board appointing a person as mutwalli is valid or not. In the said judgment, no proposition of law of general application has been laid down. It was on the facts of that case that the matter was found covered by Section 83 and was accordingly remitted for decision by the Waqf Tribunal. The said judgement thus also does not support the submission advanced by Mr. Jain.

83. One more facet of the argument of Mr. Jain was that the writ jurisdiction could not be exercised to seek eviction of respondent no. 7. It was urged that the High Court should institute a suit before the Civil Court and in this regard reliance was placed on a Division Bench judgement of this Court in *Waqf Alalaulad* v. *Sundardas Daulatram and sons*[15]. In that matter, a writ of mandamus was filed before this Court by the tenant of the wakf property. The tenant was running a picture hall and the period of lease had expired. The tenant claimed that it was forcibly dispossessed by the lessor and accordingly, sought restoration of possession. The learned single judge before whom the writ was filed, initially passed an interim mandamus directing restoration of possession and by a subsequent order, the interim mandamus was confirmed. The order confirming the interim mandamus was challenged by the lessor in Special Appeal before a Division Bench. The Division Bench found that the petitioner was not dispossessed by force but its own manager handed over possession to the lessor. In such circumstances, the Court held that it was not a case of forcible dispossession or grabbing of property and thus the High Court should not have exercised its extraordinary jurisdiction. The said decision is also of no avail to respondent no. 7 as concededly in the instant case, the allegation against it was of encroachment of the property of the State/High Court and of setting up of a false plea to circumvent the judgments passed by this Court and the Apex Court, which had attained finality. Therefore, on facts, we find that the judgments cited by Mr. Jain are clearly distinguishable and are of no assistance to the propositions sought to be advanced by him.

84. At this stage, before we proceed further, it would be relevant to further bear in mind a few more provisions of the Waqf Act, 1995 to which our attention was drawn by learned counsel appearing for the parties in the course of arguments.

85. Before the Waqf Act, 1995 came into force with effect from 1st January, 2006, the Waqf Act, 1954 was in force. The Waqf Act, 1954 had many deficiencies in it as also in the set up of the Waqf Boards, especially, their powers of superintendence and control over the management of individual Waqfs. To clarify some of these matters, the Waqf Act, 1954 had to be amended thrice - in 1959, in 1964 and in 1969 - within a period of 15 years. Thereafter, comprehensive amendments were made by the Waqf (Amendment) Act, 1984, which were based largely on the recommendations of the Waqf Inquiry Committee. Only two provisions of the Waqf (Amendment) Act, 1984 could, however, be enforced. The main criticism related to provisions concerning the powers of the Waqf Commissioner and that the Waqf (Amendment) Act, 1984 was a gross interference by the State and the Central Government in the day to day management and administration of the waqfs by the Trustees and Mutawallis. In this backdrop, the Waqf Act, 1995, which is now in force, was introduced. Insofar as Uttar

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Pradesh is concerned, before this Act came into force, the U P Muslim Waqf Act, 1960 (for short "U P Waqf Act, 1960") was in force.

86. The Waqf Act, 1995, amongst other, defines "Mutawalli", 'Waqf' and 'Waqif'. These three definitions are relevant for our purpose, which read thus:

> "(i) "**mutawalli**" means **any person appointed**, either verbally or under any deed or instrument by which a waqf has been created, or by a competent authority, to be the mutawalli of a waqf and **includes any person who is a mutawalli of a waqf by virtue of any custom or who is a naib-mutawalli**, khadim, mujawar, sajjadanashin, amin or other person appointed by a mutwalli to perform the duties of a mutawalli and save as otherwise provided in this Act, **any person, committee or corporation for the time being managing or administering any waqf or waqf property.**
>
> **Provided that no member of a committee or corporation shall be deemed to be a mutawalli unless such member is an office bearer of such committee or corporation;**
>
> Provided further that the mutawalli shall be a citizen of India and shall fulfil such other qualifications as may be prescribed:
>
> Provided also that in case a waqf has specified any qualifications, such qualifications may be provided in the rules as may be made by the State Government.
>
> (r) **"waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-**
>
> (i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;
>
> (ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;
>
> (iii) "grants", including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and
>
> (iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law, **and "waqif" means any person making such dedication.**"
>
> (*emphasis supplied*)

87. Section 4 provides the procedure for conducting a preliminary survey of auqaf. Section 5 provides for publication of a list of auqaf on receipt of a report under sub-section (3) of Section 4. We would further look into these provisions at an appropriate stage. Section 6 speaks about disputes regarding auqaf to be instituted by way of a suit before Tribunal and Section 7 talks about power of Tribunal to determine disputes regarding auqaf.

88. Section 32 of the Waqf Act, 1995 defines the powers and functions of the Board constituted under Section 14. Under this provision, it is the duty of the Board to exercise its powers under the Act so as to ensure that the auqaf under its superintendence is properly maintained, controlled and administered. One of the functions of the Board is also to settle schemes of management for a Waqf and to appoint and remove Mutawallis in accordance with the provisions of the Waqf Act, 1995.

89. Section 36 provides for registration of a waqf, whether created before or after the commencement of this Act. This provision provides the procedure to be followed for registration of every Waqf on an application for registration is made in the form

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prescribed and after inviting all necessary information, in particular a description of the waqf property sufficient for the identification thereof. Every application under this provision requires to be accompanied by a copy of the waqf deed or if no such deed has been executed or copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the applicant, of the origin, nature and objects of the waqf. The application needs to be signed and verified by the applicant in the manner provided in the Code of Civil Procedure 1908 for signing and verification of pleadings. On receipt of an application for registration, sub-section (7) of Section 36 provides that the Board may, before registration of waqf make such inquiries as it thinks fit in respect of the "genuineness and validity" of the application and "correctness of any particulars" therein and when the application is made by any person other than the person administering the waqf property, the Board shall, before registering the waqf, give notice of the application to the person administering the waqf property and shall hear him, if he desires to be heard.

90. The Board is also obliged to maintain a register of auqaf under Section 37 of the Waqf Act, 1995. Section 40 of the Waqf Act, 1995 provides that the Board may itself collect information regarding any property which it has reason to believe to be waqf property and if any question arises whether a particular property is waqf property or not or whether a waqf is 'Sunni' waqf or a 'Shia' waqf it may, after making such inquiry as it may deem fit, decide the question.

91. Our attention was also drawn to Section 87 of the Waqf Act, 1995, which came to be omitted by Act 27 of 2013 with effect from 1st November, 2013. It starts with a *non obstante* clause, as it stood then, and states that no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any waqf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any court after the commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted before such commencement, no such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any court after such commencement unless such waqf has been registered in accordance with the provisions of this Act. We have made reference to this provision, in view of the submission advanced by learned counsel for the parties with reference to these provisions in the course of hearing.

92. Section 29 of the U P Waqf Act, 1960 is also relevant. This section also provides the procedure for registration of Waqf. It is *pari materia* with Section 36 of the Waqf Act, 1995. We do not find it necessary to make further reference to this provision and suffice it to say that even before the Waqf Act, 1995 came into force, registration of waqf was provided for under this provision of the U P Waqf Act, 1960.

Before we consider the First Question, we would like to consider and deal with the Second Question as formulated in paragraph two of this judgment:

93. It was submitted by respondent no. 8-in person, who is also one of the lessees and a member of their family, which purchased the plot by a registered sale deed dated 30th October, 1958, that the lessees belonged to a very religious and pious muslim family and it was their ardent wish to "dedicate" a portion of the plot in dispute for establishment of a Mosque to offer Namaaz by their family members, servants and others living in the compound and, accordingly, a small platform and Tin-shed was constructed over the area (i.e. the site in dispute) demarcated for the purpose and, that was being used as private Mosque. Thereafter, in 1981-82, in the circumstances, as stated while narrating the facts in depth, the private Mosque was converted into a public Mosque, of which initially, his grand-father and then he acted as Mutawalli till the Committee was constituted in 1997 and since then (1981-82), it is being used as public Mosque by lawyers, staff of the High Court, litigants and public at large.

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94. Mr. Jain, learned Senior Counsel for respondent no. 7, in support of the submission advanced by respondent no. 8, submitted, as stated by respondent no. 7 in their counter affidavit, that after the dedication of the portion of the plot (site in dispute) by the family of lessees, the private Mosque created by them is being used as a public Mosque continuously since 1981.

95. Thus, the question for our consideration is whether the site in dispute was ever dedicated by the lessees, including respondent no. 8 for the purpose of Mosque, and if answer to this question is in the affirmative, whether they could have done so and invested/conferred independent title in respondent no. 7 so as to sustain its claim of immunity from the judgment of the High Court and the Supreme Court. The connected issue/question which arises and falls for our consideration is whether the alleged dedication was a device, a ploy, to circumvent the binding decisions and thus avoid a decree which attained finality.

96. Clause (r) of Section 3 of the Waqf Act, 1995, defines 'waqf' to mean the "permanent dedication" by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable. The word 'dedication' as it appears in the definition, means property essentially dedicated to God.

97. The Supreme Court in *Syed Mohammad Salie Labbai* v. *Mohd. Hanifa Vice Versa*[16], while dealing with the appeals arising from the Suit framed point no. 2, as follows:

> "(2) That there is clear evidence of the manner in which the properties appear to have been dedicated and there is no clear declaration of dedication for the purpose of the mosque and the prayers offered in the mosque were only by leave and licence of the founder, and there was no public wakf of the mosque at all which was only a private mosque or a family mosque of the defendants. The learned counsel submitted that the High Court has completely overlooked this legal aspect of the matter."

98. While dealing with this point, after considering several judgments and also commentaries on Muslim Law, in paragraph 40, the Supreme Court carved out the conditions to be satisfied in order to create a valid dedication of a public nature which read thus:

> "(1) That **the founder must declare his intention to dedicate a property for the purpose of a mosque**. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied.
>
> (2) **That the founder must divest himself completely from the ownership of the property**, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or an Imam of the mosque. **Even if there is no actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with azan and ikamat, the wakf is complete and irrevocable; and**
>
> (3) **That the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.**
>
> As regards the adjuncts the law is that where a mosque is built or dedicated for the public if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque."
>
> (*emphasis supplied*)

99. The Bombay High Court in *Akbarally A Adamji Peerbhoy* v. *Mahomedally Adamji Peerbhoy*[17], while dealing with the question of "dedication" of vacant place as a

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Mosque observed that "even a vacant place may be dedicated as a mosque without having the appearance of a mosque. The general law of Islam in regard to devotions is so broad and liberal that the mosque in question will, even if not endowed with an Amil, be capable of furnishing for any devotee Muslim (at least of the Dawoodi Bohra community) a place where he may - with or without the administrations of an Amil or authorised leader of prayers-five times every day of his life offer prayers. The book speak of an open space of building ground being consecrated a place or building as a masjid that there should be an Amil or any other religious officer appointed."

100. A dedication by way of waqf may be either oral or in writing and it may be in any appropriate words showing an "intention" to dedicate the property by way of waqf. Undoubtedly, a waqf normally requires express dedication, but if land has been used from time immemorial for a religious purpose then the land by user becomes waqf although there is no evidence of an express dedication. (See: *Mohammad Shah* v. *Fasihuddin Ansari*, AIR 1956 SC 713). Once the site is dedicated for the purpose of building a public mosque and after the mosque is built, prayers are offered in the mosque, the site and the mosque become Waqf properties and the ownership of the founder stands completely extinguished.

101. Privy Council in *Beli Ram & Brothers* v. *Chaudri Mohammad Afzal*[18] observed that once there is an effective dedication in waqf it cannot be revoked; and breaches of trust on the part of a trustee however numerous, and extending over however long a period, cannot put an end to the trust. It is established law that once there is an effective dedication in waqf, it cannot be revoked.

102. The Supreme Court in *Syed Mohd. Salie Labbai (Dead) by L. Rs.* v. *Mohd. Hanifa (Dead) by L. Rs.*[19] also defined/explained the word 'waqf' in the context of dedication. The relevant observations made by the Supreme Court in paragraph 35 of the judgment read thus:

> "35. ... ...**The word "wakf" means detention or appropriation. According to the well recognized Hanafi School of Mahomedan Law when a Mahomedan dedicates his property for objects of charity or to God, he completely parts with the corpus which vests in God and never returns to the founder. Mahomedan Law contemplates two kinds of Wakfs - a wakf which is private in nature where although the ultimate object is public charity or God, but the property vests in a set of beneficiaries chosen by the founder who appoints a Mutawalli to manage the wakf property. We are, however, not concerned with private wakfs which are normally known as wakf-alal-aulad. We are concerned with public wakf i.e. dedication made for the purpose of public charity e.g. an Imam-Bada, a mosque, a Serai and the like. So far as the dedication to a mosque is concerned, it is governed by special rules and special equity in the light of which a particular dedication has to be determined.** A mosque is obviously a place where the Muslims offer their prayers. It is well known that there are certain formalities which have to be observed by the Muslims before they observe the prayers. These formalities are -
>
> (i) Wazoo i.e. washing of hands and feet in a manner prescribed by Shariat;
>
> (ii) the recitation of "Azaan" and "Ikamat" which is usually done by the Pesh Imam or the Muayzin;
>
> (iii) there must be a person who possesses virtuous qualities and a knowledge of Koran and other religious rites who should lead the prayers. This is necessary in case of prayers offered in congregation. **A single Muslim can also offer his prayers with or without an Imam but the prayers in a congregation or a Jamat are offered only behind an Imam who leads the prayers. As Islam is an extremely modern and liberal religion, there is no question of any person being denied admission in a mosque for the purpose of**

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offering prayers and that is why the law is so strict that the moment a person is allowed to offer his prayers in a mosque, the mosque becomes dedicated to the public. Finally, it is not necessary for the dedication of a public mosque that a Muttawalli or a Pesh Imam should be appointed which could be done later by the members of the Muslim community. **All that is necessary is that there should be a declaration of the intention to dedicate either expressly or impliedly and a divestment of his interest in the property by the owner followed by delivery of possession**. Here also **the delivery of possession does not involve any ritual formality or any technical rule. For instance in the case of a mosque if the Mahomedans of the village, town or the area are permitted to offer their prayers either on the vacant land or in a mosque build for the said purpose that amounts to the delivery of possession and divestment and after the prayers have been offered the dedication becomes complete.** Unfortunately, the Courts which decided the previous litigation between the parties do not appear to be aware of the considerations mentioned above."

(emphasis supplied)

103. Mulla's Principles of Mohammedan Law, while defining 'Waqf' in paragraph 173, has stated that 'Waqf' means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable. In paragraph 174, it is stated that the dedication must be permanent. A Waqf, therefore, for a limited period, e.g. twenty years, is not valid. The purpose for which a Waqf is created must be of a permanent character. In paragraph 176, Mulla states that the subject of Waqf must belong to wakif (dedicator). It is relevant to reproduce paragraph 176 from the Mulla's Commentary of Mohammedan Law, 20th Edition p. 199, which reads thus:

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

(*emphasis supplied*)

104. To constitute a valid Waqf, it is necessary that there must be a dedication and second, it must be of a permanent character, which means that once a Waqf is created relating to any property, it remains a Waqf property for ever. This attribute of permanence is essential for (i) the act of dedication; (ii) the object for which the dedication is made; (iii) the period for which dedication is made and (iv) the property dedicated. This was affirmed by the Supreme Court in *Sayyed Ali* v. *Andhra Pradesh Waqf Board, Hyderabad*[22].

105. The general law of Islam in regard to dedication is undoubtedly broad and liberal. It could be either oral or in writing or in any appropriate words showing an intention to dedicate the property to Waqf. Further, it must be an express dedication unless the land/property has been used from time "immemorial" for a religious purpose and in that event, even if there is no evidence of express dedication, it could be treated as an express dedication. When a wakif dedicates any property by way of Waqf, his right in the said property extinguishes and it becomes the property of God. In other words, the right, title and interest in the property gets divested completely and the Wakif thereafter cannot claim any right whatsoever in the said property. Thus, once the Wakif dedicates a site/land for the purpose of building a public Mosque and after the Masque is built, prayers are offered in the Mosque, site of the Mosque become

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Waqf property and the ownership of the founder gets completely extinguished.

106. Further, the primary requirement to create a valid dedication of a public nature is that the property dedicated to a Waqf must belong to the founder/Wakif and he should be owner of the property. The Wakif/founder must declare his intention to dedicate the property for the purpose of Mosque and he must divest himself completely from the ownership thereof. The waqf created or the dedication must be of a permanent character. In other words, any property which was temporarily or for a limited period in the possession of a Wakif, he cannot either dedicate or validly create a Waqf.

107. In this backdrop, we would like to look into the lease deed that was executed in favour of the lessees and on the basis of which, the lessees claim that they had the right to validly create a Waqf. The relevant terms and conditions of the lease deed read thus:

"**2. ... ...**

4. That they shall not at any time without the written consent of such Collector alter or vary any part of the external elevation or plan of such house from the original elevation or plan thereof.

5. **That they shall not at any time without the written consent of such Collector erect any building on the demised premises.**

6. ... ...

7. **That they will not** at any time carry on or permit to be carried on upon the said premises any trade or business whatsoever or **use the same for any other purposes than as a commercial without the consent in writing of such Collector first had and obtained.**

8. **That they will yield upto the lessor the said premises with such house** in good and substantial repair **on the expiration or sooner determination of the said term.**

3. IT IS HEREBY FURTHER AGREED BETWEEN THE PARTIES HERETO:

(a) That if the said rent or any part thereof shall be in arrear and unpaid for the space of one calendar month whether the same shall have been lawfully demanded or not or if there shall be a breach or non-observance of any of the covenants by the lessees herein contained then and in any such case the lessor may notwithstanding the waiver of any cause or **right or re-entry, re-enter upon the said premises and expel the lessees and all occupiers of the same therefrom and this demise shall absolutely determine and the lessees shall forfeit all rights to remove or recover any compensation for any building erected by them on the said premises** AND ALSO the said premium already paid shall become forfeited to the lessor.

(b) ... ...

(c) **That if the demised premises are at any time required by the lessor for his or for any public purpose he shall have the right to give one month's clear notice in writing to the lessees to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof on the expiry of that period subject however to the condition that if the lessor is willing to purchase the building on the demised premises, the lessees shall be paid for such building such amount as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department.**

(d) ... ...

(e) **That the lessees will not in any way sub-divide or transfer the demised land or building thereon without the previous sanction in**

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writing of the U.P. Government who may while according such sanction lay down or impose such further conditions as they may deem fit. Any transfer or alienation made in contravention of the conditions contained in this clause shall be void.

(f) That the lessees shall not keep or allow to be kept on the said land Gumti or wooden stall or shop."

(*emphasis supplied*)

108. From a bare perusal of the lease deed, it is clear that the lessees were not absolute owners of the plot and their right in the property was limited. Even the user of the land leased was prescribed and any inconsistent user was not permissible. It is also apparent that the Government had reserved its right to cancel the lease and take possession of the plot for a public purpose. Perhaps in view of the terms and conditions, after the interim order of the Supreme Court dated 3rd March, 2003, the lessees, as submitted on behalf of respondent nos. 1 to 4, on their own vacated the plot and handed over possession thereof to the State, including of the site in dispute. We will further deal with this factual aspect little later.

109. We have also perused the maps that were annexed to the lease deeds and it is clear that though the map shows tin-shed, smaller than the tin-shed shown in the map annexed to the application for registration of Waqf, towards the south-west corner of the plot, it is not described either as 'Mosque' or 'Namaaz Sthal'. As against this, the maps placed on record by respondent nos. 7 and 8 in the present proceedings, mentioning the tin-shed as 'Namaaz Sthal' by introducing the words 'Namaaz Sthal' in handwriting and expanding the size of the shed, while applying for registration of waqf. This map is a photocopy of the maps annexed to the lease deeds, which is not and cannot be a matter of controversy.

110. In this backdrop, the contention urged by Mr. Navin Sinha, learned Senior Counsel for the petitioner, was that the lessees could not have dedicated the site in dispute and created a Waqf when, admittedly, they were not the owners and the plot belonged to the State.

111. In this connection, we have perused the judgment of this Court in *Mst. Piran* v. *Hafiz Mohammad Ishaq*[21]. In this case, the court was dealing with an appeal arising from the judgment in a Suit which was instituted for a declaration that half share in the house was waqf property and that the person claiming so was a Mutawalli thereof and was entitled to realize half of the rent payable by the tenant, and for an injunction against one who was interfering with his right to realize the rent in respect of the waqf property. The suit was resisted on the ground that no valid waqf could have been created by either of the waqf deeds because an undivided share in the property could not have been made the subject of a waqf and there could be no waqf of the house standing on a site belonging to the State, which had leased it for a fixed term of years. It was contended on behalf of the appellant that since the house is situated on the site leased by the Government for a fixed period, there cannot be dedication of such property of permanent character. The observations made by this Court in paragraphs 13, 14 and 17 are relevant for our purpose, which read thus:

"13. **Under the Mohammedan Law, every kind of property is capable of being dedicated. What is necessary is that it must admit of yielding permanent benefit.** The validity of a wakf, points out Syed Ameer Ali, "does not depend upon the nature of the property dedicated, but on the probability or presumption of permanent benefit being derived from it by any mode of dealing of which it is capable, or by converting it into something else. It is only where the object is absolutely unfit for being turned into profitable use that its dedication falls to the ground". It is generally accepted now by jurists under the Mohammedan law that a wakf can be made of movable property as well as of immovable property.

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There is no dispute also that a wakf of land which has been leased out or mortgaged is valid. The doctrine now accepted extends to upholding the validity of a wakf of a building without the land on which it is situated. **But if the building which is the subject of a wakf is situated on land belonging to another, is the wakf valid? The Durr-ul-Mukhtar declares that "the wakf of a building on land held in aariat (bailment) or ijara (lease) is not valid" (quoted in Syed Ameer Ali's Mohammedan Law. This dictum was followed with approval by a Full Bench of the Oudh Chief Court in** Mt. Rahman *v.* Mt. Baqridan, **AIR 1936 Oudh 213 (218), where, negativing the contention that a valid wakf could be made or the rights of a usufructuary mortgagee in immovable property, one of the grounds relied upon was that the wakif was not the owner of the mortgaged property and had no permanent control over that property. A question arose before this Court in** Haji Amir Ahmad *v.* Ejaz Husain, **AIR 1936 All 15, whether a wakf could be created of the rights of a grove-holder, and while upholding the validity of such wakf Sulaiman, C. J., relied upon the fact that what had been dedicated were "permanent rights which amount to a permanent occupation of the land and full proprietary rights over the trees that stand on the land and also, the right to maintain the grove as such on the land"**. He pointed out that the wakf had full dominion over the grove-holder's rights, that these rights had been recognised by the Tenancy Act and were not rights of a temporary character, that the grove-holder was not liable to ejectment arbitrarily so long as he and his heirs and transferees maintained the grove and the land did not lose its character as a grove (the old trees when they fell down being replaced by new ones and in that way the land could retain its character as a grove for ever), that the wakif and his heirs had a right to maintain the grove on the land for all time and were not liable to ejectment at the will of the zamindar. Upon these considerations he held that even though the ownership of the site did not vest in the wakif and could not be transferred by him the wakf of his rights as a grove-holder was valid. He emphasised these considerations because, as he observed, "the essence of a wakf is its permanent character" and that any property which was temporarily or for a limited period in the possession of the wakif could not be validly dedicated because such a dedication will never be of a permanent character. The view expressed by him is not inconsistent with the rule stated in the Durr-ul-Mukhtan. On the contrary, the learned Chief Justice is supported by the opinion expressed by Syed Ameer Ali that "where the lease is of a permanent character and the lessee cannot be ejected from the land without process of law, the lessee is entitled to dedicate any building on such land."

14. **In the instant case the site upon which the house stands having been leased for a fixed term, it is difficult to say that the dedication is of property of a permanent character since upon the expiry of the term and the resumption of the site the house as such cannot continue. It is not possible to conceive of a permanent benefit being derived from it.**

"17. I am, therefore, of the view that upon the terms of the wakf deeds and upon the consideration that the house of which a half share was dedicated as wakf property stood on a site leased for a fixed term, the wakfs by Iddu and Rahiman were invalid."

(*emphasis supplied*)

112. Thus, on the facts, that were admitted by the parties and upon consideration that the house, of which half share was dedicated as waqf property, stood on the site leased for a fixed term, learned Judge rightly held that the waqf created was invalid. We find ourselves in agreement with the view taken by learned Single Judge (R S Pathak, J) in this judgment.

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113. It is also necessary to consider the case of the petitioner, respondent no. 1-High Court and respondent nos. 2 to 4-State on one hand and the case of respondent nos. 7, 8 and 9 on the other hand. It was submitted on behalf of the petitioner and respondent nos. 1 to 4 that respondent no. 7 encroached upon the site in dispute after allotment of the plot to the High Court and more precisely some time after dismissal of the writ petition by this Court, bearing Civil Misc. Writ Petition No. 32344 of 2001 filed by the lessees. On the other hand, it was submitted on behalf of respondent nos. 7 and 8, that the original lessees established a private Mosque in 1959 in a Tin-shed towards the south-west corner of the plot for the benefit of their family members, servants and other persons living in the compound and it was then converted into a public Mosque in 1981 of which, respondent no. 8's grand-father initially and then respondent no. 8 were Mutawalli till the Managing Committee was constituted sometime in 1997 and thereafter, respondent no. 7-President and the Managing Committee are In-charge of the said Mosque, which came to be registered in 2002.

114. In this backdrop, we would now consider the case of respondent nos. 7 to 9 of dedication of the site in dispute from another angle. We have already seen the judgment of the High Court in the writ petition filed by the lessees, challenging the Government Order dated 15th December, 2000, the notice dated 11th January, 2000 and the order dated 24th August, 2001 passed by the District Magistrate, whereby the lease was cancelled and the lessees were directed to handover possession of the plot to the State. It is pertinent to note that the lessees, including respondent no. 8 did not even whisper either before this Court or the Supreme Court about the purported establishment of a private Mosque in 1959 or its existence since then in a small Tin-shed situated in the south-west corner of the plot. On the contrary, throughout in the earlier round of litigation, to which we have already made reference in depth, focus of the lessees was only on getting maximum compensation for the plot, including 30% solatium, 12% additional amount and interest etc. which was calculated by them as Rs. 2.62 crores and that the said proposal was rejected by the Government outright, vide order dated 17th July, 2000.

115. It is also pertinent to note that the terms and conditions of the lease deed, in particular clause 3 (c) thereof were considered in depth by the High Court and it rejected the petitioner's claim holding that the State Government could take immediate possession of the plot. We have already quoted the relevant observations made by the High Court while dismissing the writ petition in paragraph 4.2 of this judgment. The sum and substance that appears from the judgment of the High Court, for our purpose, is that at no point of time, the lessees, who claim that there was a private Mosque and then after dedication, it was converted into a public Mosque in 1981 and was looked after/managed by respondent no. 8's grand father initially and then by respondent no. 8, had so stated before this Court or the Supreme Court even remotely. On the contrary, the lessees claimed compensation in respect of the entire plot, including the site in dispute, which falsifies their case of a dedication of the south-west corner of the plot measuring about 5000 Sq. fts. to waqf/Mosque.

116. In this backdrop, there are only two possibilities, firstly, the case of dedication may be true, and secondly, it is after thought. If the case of dedication was true, the lessees, who claim to be true, pious and religious Muslims, would have definitely brought it to the notice of this Court when cancellation of lease was challenged in the Civil Misc. Writ Petition No. 32344 of 2001 or at least before the Supreme Court. On the contrary, they got two lease deeds dated 19th March, 1996 and 31st December, 1997 executed in their favour in respect of the plot, including the site in dispute, to which their right and title, according to them, had been divested in view of their claim of dedication in 1981 to public Mosque/Waqf. This shows that there was no dedication and that the lessees continued to claim exclusive right in the site in dispute, and accordingly, claimed compensation in respect of the entire plot.

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117. In the writ petition (32344 of 2001), the respondents had filed an application for vacation of the interim order dated 2nd September 2001 and in paragraph 11 thereof, it was specifically averred that the occupiers handed over the peaceful possession of the open land and premises that was occupied by Delight Restaurant on 1st September 2001 itself to the Additional District Magistrate (F/R), Allahabad, Mukhya Nagar Adhikari, Nagar Nigam, Allahabad and Tehsildar, Sadar, Allahabad. Those officials, it was further stated, had obtained possession on behalf of the State and a copy of the possession certificate dated 1st September 2001, bearing signatures of the aforesaid officials was filed alongwith the counter affidavit in the said writ petition. It is also revealed from the record that some of the occupants had requested to be granted some more time to them, as there were some '*Parda Nasheen*' ladies residing in the premises and needed further time to vacate and shift to another place whereas some unauthorized occupants started removing their effects from the plot. In paragraph 12 of the said counter affidavit, it is specifically stated that the entire proceedings were stopped at the intervention of this Court, vide its order dated 2nd September, 2001. It is also pertinent to note that the lessees had filed a supplementary affidavit in the said writ petition and even in that affidavit, they did not make any reference to any private or public Mosque, as stated by respondent No. 8 for the first time in these proceedings.

118. Thereafter, the matter was carried to the Supreme Court in which the interim order, as quoted in paragraph 4.3 of this judgment, was vacated and while vacating the interim order of status quo, the Supreme Court allowed the State to take possession of the plot by giving the lessees/appellants three months' time to vacate and put the respondent-State in possession of the plot and also allowed them to use the plot for public purpose for which it had been sought to be acquired. It is pertinent to note that while passing this order, the Supreme Court observed that the question of compensation if payable to the appellants will be decided at the time of final disposal of the appeal. This observation further supports the case of the State Government that the appeal was kept pending only for the limited purpose to consider whether compensation is payable to the appellants. So far as the right of the lessees to remain in possession is concerned, that was finally decided and they were directed to vacate and handover the possession to the State Government.

119. The Supreme Court thereafter, proceeded to hear and decide the appeal, bearing Civil Appeal No. 2006 of 2003 by a judgment dated 16th July, 2012. The appeal was dismissed. We have already quoted the relevant observations made by the Supreme Court in paragraph 4.5 of this judgment. Even before the Supreme Court, the lessees did not whisper about dedication or private/public Mosque. When the appeal was disposed of, it appears that the pakka construction of the Mosque was either already raised or it was at the verge of completion since it is the case of the lessees that respondent no. 7 made pucca construction between 2009-12. It is also pertinent to note that the Supreme Court, while disposing of the appeal in 2012, in paragraph 20 of the judgment, observed/issued directions that if the lessees (appellants) fail to handover the possession of the plot including the site in dispute (demised premises) or create any third party interest, in such case, the State Government and the District Magistrate, Allahabad shall take forcible possession of the demised premises.

120. It is necessary to state, at this stage, that not only respondent no. 8 or his deceased grandfather, when the writ petition was filed, but even members of the Committee, who claim that it was constituted in 1997, are Advocates practicing in the High Court, including one of them being a designated Senior Advocate Mr. W H Khan. It is also pertinent to note that none of the Committee members or the President of the Committee claim that they did not know about the pendency of the writ petition in the High Court and SLP/Civil Appeal thereafter in the Supreme Court. We are

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constrained to observe that the pleas taken by respondent no. 8 are not only dishonest, they also appear to be collusive and supportive of the intent of respondent no. 7 to grab and to illegally occupy the property of the High Court. When all efforts of lessees/respondent no. 8 failed to protect the property, it appears that respondent no. 7 with the connivance of respondent no. 8 entered the property, in particular the site in dispute at the south-west corner and attempted to establish a Mosque for the first time after the judgment of the High Court and thereafter, when the interim order was vacated by the Supreme Court, vide its order dated 3rd March, 2003. It is also pertinent to note that if the claim of respondent No. 8, which he has made for the first time in the instant proceedings, that the site in dispute where the Mosque exists as of today was dedicated in 1981 and thereby divested their title over the said portion, how and why did he not bring it to the notice of the High Court initially and then of the Supreme Court in the earlier round of litigation or if his case was correct, why did he claim compensation of the dedicated land. [Even, when the lease deed was executed in 1996 and 1998 (see sub-para 3.4), why did the lessees accept the lease of the site in dispute, if it was dedicated]. These questions remained unanswered. Learned counsel appearing for respondent nos. 7 and 8 could not and did not give any satisfactory reply to these questions.

121. Now, we proceed to examine the case of dedication on the basis of the judgments and documents heavily relied upon by the parties and the judgments in support of their contentions.

122. The judgment heavily relied upon by respondent no. 8 in *Syed Ahmad Jawwad* v. *Smt. Qudesiya Saidullah*[22], in our opinion, is distinguishable. Firstly, the question that fell for consideration before the learned Single Judge in this judgment, was not the same as we are considering in the present case. We once again make it clear that apart from considering whether a Waqf in respect of lease-hold rights of Nazul land can be created, we are primarily considering the question whether the lessees, in fact, dedicated the site in dispute and, if yes, whether they could have done so. As seen earlier, in *Mst. Peeran* (supra), another learned Single Judge held that when the site upon which the dedicated house stands, has been leased for a fixed term, the dedication cannot be said to be of a permanent character because upon expiry of the term of the lease and resumption of the site of the house, Waqf as such cannot continue. This judgment was considered by the learned Single Judge in *Syed Ahmad Jawwad* (supra) and in para 25 of the report observed thus:

> "25. In the above back drop it is apt here to consider the star case of the plaintiff -respondent on which the trial Court has also placed reliance; *Mst. Peeran* v. *Abdul Razaaq* AIR 1966 Allahabad 261. This Court in the above case held that the waqf of house which was situated on a site of lease for fixed term was invalid. The term of lease could not be deciphered out from the judgment. It appears that it was a lease by the State government for a fixed term. In the aforesaid case the Hon'ble Judge distinguished the case of *Haji Meer Ahmed* reported in AIR 1936 Allahabad 15 decided by Suleman Chief Justice. The said judgment was distinguished as the waqf in that case was a private waqf. In the present case also waqf is a private waqf. It is waqf Alal Aulad therefore the judgment of this Court given in the case of *Mst. Peeran* is distinguishable. The waqf which was under consideration in the case of *Mst. Peeran* v. *Hafiz Mohammad Ishaq* (supra) was a public waqf. This fact is clear from para 2 of the report. The waqf was created for the upkeep and maintenance of Bada Immam Bada Mosque. In the case of *Ashwani Kumar* v. *U.P. Public Service Commission* (2003) 11 SCC 584 : AIR 2003 S.C. 2661 (14) the following words of Lord Denning in the matter of applying precedents have come locus classicus:—
>
> "Each case depends on its own facts and a close similarity between one case

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and an another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decided cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not all decisive."

123. In Paragraph 26 of the report, while placing reliance on *Purshottam Dass Tandon* v. *State of U P Lucknow*,[23] it was concluded that lease of Nazul land was of a permanent character:—

"26. Even otherwise it was laid down in the case of *Mst. Peeran* what is necessary for a waqf has utmost admit admit of yielding permanent benefit. The lease deed of Nazul land in the facts of the present case is in my opinion yielding permanent benefit. Indisputably the lease has expired sometime in the year 2002 and the second term and the last term of renewal of lease was not granted due to the pendency of the present litigation and as a matter of fact it was refused by the Nazul Department of Nagar Mahapalika. Still Smt. Qudesiya Saidullah the plaintiff-respondent is continuing in its occupation without any hindrance or interference by the State Government. Therefore, in my opinion the view taken by the Court below that the waqf was void being in respect of a fixed term lease which is not of a permanent character is legally incorrect. The lease in question is of permanent character in view of the law laid down by Division Bench of this Court in the case of *Purshottam Das Tandon* (supra)."

(*emphasis supplied*)

124. It is clear from the observations made that the waqf under consideration was of private nature i.e. waqf-alal-alaud and it was for the said reason that **Mst. Peeran** was distinguished. However, in the instant case, respondent no. 7 allegedly came into existence as a Managing Body of a public waqf. Thus, even as per the said judgment, the law laid down in **Mst. Peeran** would apply to the facts of the instant case. Moreover, in our opinion, the conclusion drawn by the learned Single Judge in the said judgment from **Purshottam Das Tandon** that lease of Nazul land is of a permanent character, does not seem to be correct. In *Purshottam Das Tandon* (supra), a Division Bench of this Court considered the issue as to whether Government could deny renewal of lease of Nazul land. While dealing with the said question, the Court found, as a matter of fact, that Government had taken policy decision to renew leases of Nazul land by issuing various Government Orders from time to time. The contention of the State that grant of lease was a concession and the policy decision to renew leases could be withdrawn any time was repelled by applying the doctrine of election and promissory estoppel. Even, while so holding, the Court added a caveat and recognised the right of the Government to refuse renewal where demised premises was needed for a public purpose. The relevant observations from the report are extracted below:—

"5. ..... Taking up the issue if lessees had any right to get fresh lease executed it need not be repeated that the Collector no doubt issued notices in 1958 to the lessees to surrender and leave the land but the government, the lessor, reconsidered the matter in March, 1958 and directed the Collector to grant fresh lease for the entire land in possession of the lessees if they desired to retain it on prevailing market rate of rent and premium. (See supplementary affidavit of State filed in Civil Misc. Writ No. 2293 of 1969 on 4th February, 1986). Whatever doubt remained was dispelled by order dated 23rd April, 1959, a government decision after careful consideration to renew lease of entire area on premium mentioned therein. And this decision never changed. Learned Additional Advocate General urged that leases granted by the Secretary of the State for India were governed by Government Grants Act, 1864. Therefore, provisions of Transfer of Property Act were inapplicable. And under Government Grants Act, its nature could be determined by

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its tenor only. According to him once the time for which leases were granted came to an end it stood determined by efflux of time. And the leases had no right left in it. Reliance was placed on *State of Madras* v. *Osmar Haji and Company*, AIR 1970 Mad 27. Various terms and conditions of the lease deed filed in Civil Misc. Writ No. 2293 were also placed in support of the submission that lessees had no right left in it. **The argument is devoid of any substance because the State always was and is agreeable to execute fresh leases. Even the learned Addl. Advocate General had to accept that government never adopted shut door policy so far grant of fresh lease was concerned. Apart from it the government by its own conduct stretching over long years has given rise to right in favour of the lessees to get a fresh lease from the State. Since leases were in respect of government land, they wre undoubtedly governed by Government Grants Act and their nature could be determined by their tenor. Therefore, after expiry of time for which leases were granted they came to an end. And the government could refuse to grant fresh lease or take over the same. But as seen earlier it did not. Rather it decided to execute fresh leases in favour of every lessee on terms and conditions mentioned in government order. It was said so even in paragraph 3 of the supplementary affidavit filed on 4th February, 1986.** In doing so or taking this decision the government was acting in accordance with rules as paragraph 50 of the Manual itself contemplates for renewal or grant of fresh lease after expiry of the lease without any option for renewal. In law where a person, having two alternative courses of actions mutually exclusive chooses to adopt one and rejects the other expressly or impliedly then he is said to have elected to choose one. He is subsequently precluded for adopting the course which he intended to reject. It is known as doctrine of election ..... The government, therefore, having exercised its option and decided to renew leases it is too late in the day for learned Additional Advocate General to urge that granting of lease was only a concession which could be withdrawn by the government at any time. Nor it can be claimed that the principle of election could not apply to government in view of weighty pronouncements by the Supreme Court that government of a constitutional democracy cannot claim immunity from applicability of principles of equity and fairness. The government thus having abandoned its right of re-entry, the learned counsel for the petitioner, appears to be right in his submission that it resulted in creating a jural or legal relationship between lessor and lessee permitting them not only to continue in possession but to get a fresh lease executed in their favour. Moreover, in a country wedded to ideals of democracy and welfare state it would be unthinkable to import such outdated concept. **If the land is needed or building has to be demolished in public interest for general welfare probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking the lessees to vacate land or remove Malwa for no rhyme or reason but because the State was the owner cannot be accepted to be in consonance with present day philosophy and thinking about role of State."**

(*emphasis supplied*)

125. The Division Bench in *Purshottam Das Tandon* (Supra), thus never held that lease of Nazul land was of a permanent character, a perpetual lease, and in all events it was to be renewed at the option of the lessee. The right of the State to resume possession of the lease land where required for a public purpose was specifically acknowledged.

126. The Supreme Court in a recent decision in the *State of U.P.* v. *United Bank of India*[21] considered the issue as to the nature of rights of a lessee in Nazul land and whether he could create a mortgage in respect of such property without the consent of the State Government. After considering the provisions of the Grants Act as well as the

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stipulations in the lease deed, which were identical to those in the case at hand, the Supreme Court held that the lessee only had 'limited rights' in the Nazul land. He was not competent to create a mortgage in respect thereof, without the permission of the State Government. The mortgage created over the property was held to be void *ab initio*. The relevant portion from the report reads thus:—

"36 It is admitted fact that the suit property is the Nazul Land, and as per the definition of Nazul, as provided in the Rule 1 of the Nazul Rules, it means any land or building which, being the property of Government is not administered as a State Property.

38. In Form 3 of the Nazul Manual it is mentioned in the renewal lease deed that "In pursuance of the premises the lessor hereby demises upto the Lessee all and singular the hereditaments and premises comprised in and demised by the within the written lease, now standing thereon with the same exceptions and reservations as are therein expressed to hold unto the lease..... and subject to and with the benefit of such and the like lessee's and lessor's covenants respectively and the like provisions and conditions in all respects (including the proviso for reentry) as are contained in the within written lease.

39. This "within written lease" is the original lease deed as mentioned in the Form 2 of the Nazul Manual. Form 2 of lease of Nazul land for building purposes **it is one of the conditions between the lessor and the lessee that "the lessee will not in any way transfer or sublet the demised premises or buildings erected thereon without the previous sanction in writing of the lessor".**

40. In the present case **there was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State.**

41. In the present case the appellant-Bank, which is a nationalized bank before lending public money by way of loan as against the security of disputed property by way of depositing title deed, was supposed to verify the title of the mortgagor in respect of the disputed property. But neither any evidence nor a single sheet of paper has been produced by the Bank to show that the title of the mortgagor was verified and non-encumbrance certificate in respect of disputed property was obtained or no objection from the State Government was taken by the Bank. Further, even if we hold that the mortgage was valid, in the cases of government grant, the government is very much a necessary party and the Calcutta High Court should not have passed the so called compromise mortgage decree without issuing notice to the Government. This is an infirmity done by the High Court and accordingly the mortgage decree is bad in law. **Moreover, the High Court should have taken into account the fact that the ABP Co. only has the leasehold interest and the Bank could not have been given right to auction the property as the ABP had only limited right which had expired in the year 1987."**

48.6 Consequently, **a mortgage decree obtained by the Bank on the basis of settlement, in absence of and behind the back of the State of U.P. could not have been enforced against the State.** The subsequent proceedings of transferring the decree to the Debt Recovery Tribunal and again passing an order for auction sale of the property on the basis of settlement is wholly illegal and without jurisdiction.

48.7 **The appellant Bank has no right, title or interest in the property so**

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as to claim a right of conversion of the property into a freehold property.

48.8 The impugned notice issued by the State of U.P. directing resumption of the property is legal and valid and cannot be quashed at the instance of the Bank."

(*emphasis supplied*)

127. Having regard to the law enunciated by the Supreme Court in *United Bank of India* (supra), we are unable to endorse the view taken by the learned Single Judge in *Syed Ahmad Jawwad* (supra) that lease of Nazul land is of a permanent character and accordingly we overrule the said part of the judgment of the learned Single Judge.

128. In our case, indubitably, the High Court and the Supreme Court have already upheld the decision of the State Government to resume possession of the leased property for public purpose. The Supreme Court even before confirming the judgment of the High Court, vide its interim order dated 3 March 2003, permitted the State to take forcible possession of the leased property. Further, undoubtedly, these directions were not possible if the lease in favour of the lessees was of a permanent character. In fact, the contention of the lessees to the said effect was specifically repelled. We thus have no hesitation in holding that the lessees were not competent to dedicate or part possession of any part of the leased land to waqf/mosque and that too without the consent of the lessor.

129. In the present case, at the cost of repetition, it is also necessary to notice that if the claim of the lessees that they dedicated a portion of the plot for creating public Mosque in 1981 and they had divested themselves of the said portion of the plot, why, they got the lease executed in respect of the plot, including the site in dispute either in 1996 (19th March, 1996), for a period of 30 years w.e.f. 1966, and on 31st December, 1997, for a further period of 30 years, which, according to them, they had dedicated to the Waqf. Why the lessees, who claim to be true Muslims, did not inform the Collector or the State either in 1996 or in 1998, while executing the lease deeds about creation of a public Mosque and/or dedication of a portion of the plot by way of Waqf. That apart, even while contesting the litigation before this Court and then before the Supreme Court, the lessees did not whisper about either the dedication or creation of a public Mosque over the plot. On the contrary, they claimed compensation for the whole plot. If their claim was correct and if they were really pious muslims, how could they and why did they claim compensation for the said portion of the land (site in dispute) in which, they claim that they had created a public Mosque and divested their rights permanently in respect thereof. No explanation whatsoever has come forward either from respondent no. 8 or from any other respondents by way of affidavits or in the course of arguments. These all aspects, undoubtedly, go against the case tried to be developed by respondent nos. 7 and 8. We may also notice that not only respondent no. 8, but all those, who are claiming rights in the said portion of the plot where the Mosque is standing, are Advocates practicing in this Court. It was possible for them at every stage to take all care to see that their rights are not affected, if at all their claim was correct or at least they could have intervened in the proceedings before this Court and the Supreme Court. It is not their case that they were not aware of those proceedings. These facts also support the contention urged on behalf of respondent nos. 1 to 4 that there was no Mosque at all, and it came up only after the High Court's judgment by way of an encroachment after the plot was vacated by the lessees.

130. Next we would like to examine the case of respondent no. 7 in respect of registration of Waqf. Respondent nos. 7 and 8, both, claim that in 1981, private Mosque was dedicated to Waqf as public Mosque. They have also stated the background in which Nafees Ahmad Kazmi, grand-father of respondent no. 8, with the consent of Wakifs, allowed the lawyers, staff of the High Court and others to offer

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Namaaz in the Tin-shed where, according to these respondents, lessees had their private Mosque. According to respondent no. 8, Nafees Ahmad Kazmi was Mutawalli during his life time and when he passed away, respondent no. 8 took over as Mutawalli for few years and then, in 1997 Intezamia Committee consisting of lawyers practicing in this Court took over the management of the public Mosque. The case of respondent no. 7 is not consistent with what has been stated by respondent No. 8 on affidavit and also argued across the Bar. The certificate of registration of the Waqf dated 18.10.2002 has been brought on record by respondent no. 7. The original document is in urdu and its translation in vernacular language, as brought on record by the respondent, reads thus:—

"U.P. SUNNI CENTRAL BOARD OF WAQFS

Waqf No.3155-Allahabad
LUCKNOW
CERTIFICATE OF REGISTRATION
(U/S 36 OF THE WAQF ACT XXXIII of 1995)

IT IS HEREBY CERTIFIED THAT THE WAQF DETAILED BELOW HAS
THIS DAY BEEN DULY REGISTERED U/S 36 OF THE WAQF ACT 1995 (XXXXII OF 1995) AT THE OFFICE OF THE U.P. SUNNI CENTRAL BOARD OF WAQFS

1. WAQF NO.... 3155.. DISTRICT इलाहाबाद NATURE OF WAQF

अली युल–खैर

2. NAME OF THE WAQF मसजिद हाई कोर्ट

3. SITUATED AT वाकेय – अन्दरूने बंगला नं0 27 कानपुर रोड

इलाहाबाद ।

.....

4. NAME OF THE WAQIF (IF ANY) 1. मुसम्मात मैमुना खातून काजमी

.... NATURE & DATE OF WAQFNAMA

2. मुसम्मात सावरा खातून काजमी

3. मुसम्मात साकरा खातून काजमी

5. NAME OF THE MUTWALLI COMMITTEE - जनाब सिराजुल

हक एडवोकेट करेली कालोनी इलाहाबाद (तफसील इन्तेजामिया कमेटी पुश्त

पर मुलाहेजा हो)..... (सिक्रेटरी इन्तेजामिया कमेटी) .....

PERIOD WITH EFFECT FROM 30.05.2002 to 29.05.2007 (मियाद

कमेटी बराये पॉच साल)

DESCRIPTION OF WAQF / DETAIL OF PROPERTY मस्जिद हाईकोर्ट

इलाहाबाद वाके अन्दरूने बंगला नं0 27 कानपूर रोड इलाहाबाद महदूदा

(i) LAND .....
(ii) HOUSE .....
(iii) SHOP .....
(iv) OTHER

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BOUNDARIES

(i) NORTH बंगला न0 27 बदहू (ii) SOUTH जीप कम्पनी (iii) EAST बंगला न0 27 (iv) WEST आवामी रास्ता बराये मस्जिद कानपूर रोड (पी0डी0 टण्डन मार्ग)

VALUATION .....X.....

ANNUAL INCOME .....X.....
(i) RENT.....X.....

(ii) DONATION .....X.....

(iii) OTHER SOURCE .....X.....

DATE FROM WHICH UNDER THE POSSESSION AND THE MANAGEMENT OF THE MUTWALLI COMMITTEE

जनाब सिराजुल हक एडवोकेट करेली कालोनी इलाहाबाद (सिक्रेटरी इन्तेजामिया कमेटी)
(30.05.2002)

REMARKS बाहुक्म मोअज्जि मेम्बर बोर्ड गोरखा 30.05.2002 वक्फ मजकूर का इन्दराज बोर्ड में किया गया

SEAL OF THE BOARD GIVEN UNDER MY HAND

THIS 18th DAY OF ..... OCTOBER ... 2002

CHIEF EXECUTIVE OFFICER
& EX OFFICE SECRETARY

131. A perusal of the certificate of registration reveals that respondent no. 7 was registered as a Waqf under Section 36 of the Waqf Act, 1995. The waqifs were (1) Mst. Maimuna Khatun Kazmi, (2) Mst. Shabra Khatun Kazmi and (3) Mst. Sakra Khatoon Kazmi. Out of these, Mst. Maimuna Khatun Kazmi was not even alive on the date the Waqf was got registered, having died on 26.01.1989. It is pertinent to note that all the alleged waqifs were the ex-lessees and parties to the litigation before the High Court as well as the Supreme Court. None of them, nor their heirs, can dispute that the judgments of the High Court and the Supreme Court were binding on them.

132. It is the admitted case of respondent no. 7 that there is no waqf deed in existence. It however claims that the entire facts and circumstances under which the private place of worship was thrown open to the members of the general public resulting in its dedication to the Almighty as well as the manner in which the Masjid was being managed had been reduced to writing in a deed titled *Yaaddast, Waqf Masjid, High Court*, Allahabad. The said *yaaddast* was allegedly annexed with the application filed by respondent no. 7 for registration of the Waqf. The application is dated 7.6.2001 and was filed under the signatures of one M. Sirajul Haq, alleged Secretary of the managing committee of the waqf, which comprised of the following members:—

"1. Janab Manzarul Islam, Advocate son of Late Mohd. Ahmad 13, Allahabad — PRESIDENT

2. Janab Aleemun Nabi Shah son of Sri. S. Mohd. Shah — Vice President

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	29, Kanpur Road, Allahabad.	
3.	Janab Wajahat Husain Khan Sahab son of Mr. Akhtar Husain Khan resident of Ashok Nagar, Allahabad	Vice President
4.	M. Sirajul Haque Sahab, Advocate High Court, Allahabad	Secretary
5.	Haji Abdul Rasheet, 83, Shambhoo Barreek, Allahabad	Treasurer
6.	Janab S.M.A. Kazmi, Advocate High Court, Allahabad	
7.	Janab S.A. Jilani, Advocate High Court, Allahabad	
8.	Janab Afzal Ahmad, Advocate son of Sri Mukhtar Ahmad 32/B Elgin road, Allahabad	
9.	Janab Haved Habib, Advocate son of Late Janab Babib Ullah resident of	
10.	Janab Mahboob Ahmad Siddiqui son of Late Zamirul Hasan Siddiqui resident of Hasan Manzil, Allahabad."	

133. The application does not disclose the date on which the Waqf came into existence nor the date of formation of the Managing Committee. Likewise, the certificate of registration of Waqf also does not disclose the date on which the Waqf was constituted, though it mentions 30.05.2002 as the date on which the Waqf property came under management of Mutwalli/Committee. The yaaddast brought on record before this court by respondent no. 7 states that around the year 1981-82 the practice of offering namaz from verandah of the High Court came to an end on account of construction of the Chambers of Judges. Thereafter, on intervention of the then Chief Justice Satish Chandra, they were assigned a place in the cricket ground. However, the said place being open to the sky, the namazees had to face the vagaries of weather. Barely after a month, Syed Nafis Ahmad Kazmi, advocate, husband of Shabra khatoon, with the permission of *Kunandgaan* permitted members of the general public to offer prayers from the private Masjid inside the bungalow. They also opened a separate *rasta* for ingress and egress. Thus, what was at one time a private Masjid acquired the character of a public Masjid. Mst. Maimuna Khatoon Kazmi, ex-lessee died in January 1989 and Syed Nafis Ahmad Kazmi in 1994. However, Mst. Shabra Khatoon Kazmi and Mst. Shakra Khatoon Kazmi were alive. Nafis Ahmad Kazmi, husband of Shabra khatoon, deputed Munsi Sadaryab Husain as Naib Mutwalli to manage the affairs of Masjid. After the death of Syed Nafis Ahmad Kazmi, the namazees permitted Munsi Sadaryab Husain to continue as Naib Mutwalli. He continued to manage the Masjid from the donations received. The Masjid popularly known as Masjid High Court was duly registered in the record of Nagar Nigam and

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during festivals, the Nagar Nigam ensured cleanliness of the passage leading to the Masjid. Since it had became necessary under the Muslim Waqf Act, 1995 to get the waqf registered, it was decided to get it registered. Munsi Sadaryab Husain, on account of his bad health, requested the namazees to entrust the responsibility upon some other person. The namazees accordingly constituted a Committee so that it may get the Waqf registered with the Waqf Board. The relevant portion of the *Yaaddaast* is reproduced below for convenience of reference:—

> तकरीबन 1981–82 में मजकूरा बरामदे से मुत्तसल हाईकोर्ट के जजों के चैम्बर कायम होने की वजह से रजिस्ट्रार ने इस बरामदे में भी नमाज अदा न करने को कहा जिस पर हाईकोर्ट के वकला का वफद बरामूल सैयद नफीस अहमद काज़मी, इनामुल हक, मज़हर हसन खां, शम्सुल इस्लाम जाफरी जो बाद में इसी हाईकोर्ट के जज हुए मन्जरूल इस्लाम वगैरह ने उस वक्त के चीफ जस्टिस सतीश चन्द्रा से मुलाकात की जिस पर चीफ जस्टिस ने रजिस्ट्रार की मंशा पर उस वक्त आफिसर जनाब गिरीश कुमार वर्मा मौजूदा रजिस्ट्रार प्रोटोकाल ने किकेट ग्राउंड के जुनूबी कोने के जगह नमाज के लिए मखसूत कर दी। इसके बाद मज़कूरा जगह पर नमाज अदा होने लगी मगर खुली जगह होने की वजह से धूप और बरसात में नमाजियों को तकलीफ होती थी। उस जगह पर मुश्किल से एक माह नमाज पढ़ी गयी होगी के नमाजियों की तकलीफ को देखते हुए सैयद नफीस अहमद काजमी ने अपने बंगले की प्राइवेट मस्जिद को वक्फ कुनन्दगान के इजाजत से आम पब्लिक को नमाज अदा करने की इजाजत मरहमत फरमा दी। और मस्जिद के लिए मगरिब की जानिब एक कुशादा रास्ता खोल दिया इस तरह मज़कूरा प्राइवेट मस्जिद अब एक पब्लिक मस्जिद में मुनतकिल हो गई और इसमें अवामुन्नास ईदैन, अलविदा, जुमा, तरावीह, पंचवक्ता नमाज़ अदा करने लगे। साथ ही दर्स व तदरीस वाज़ हेकायत का सिलसिला भी जारी हो गया। वकला, मुलाज़मीन, मुंशियाने और अवामुन्नास के साथ जस्टिस शम्शुल इस्लाम जाफरी, जस्टिस चौधरी अब्दुरहीम, जस्टिस सैयद रफत आलम, जस्टिस इशरत मसरूर कुद्दूसी, जस्टिस नसीमउद्दीन, जस्टिस इकरामुल बारी, जस्टिस मो0 असगर खान भी नमाज जुमा मे शामिल होते रहे है। हाईकोर्ट के एडीशनल रजिस्ट्रार अनवार हुसैन अंसारी, आफिसराने स्पेशल ड्यूटी मकसूद अहमद और टी0एन0 खान के अलावा हाईकोर्ट जजो के मुस्लिम सेक्रेटरी साहेबान हाईकोर्ट के मुस्लिम ऑफिस सुपरीन्टेन्डेन्ट और दीगर तमाम मुस्लिम अफसरान व मुलाज़मीन हर जुमा को इस मस्जिद में और बकिया दिनों में नमाज़ जोहर व नमाज असर में बराबर शामिल होते चले आ रहे है।
>
> मोहतरमा मैमूना खातून काजमी का इन्तेकाल जनवरी 1989 में और सैयद नफीस अहमद काजमी, का इन्तेकाल 1994 में हो गया था। लेकिन मोहतरमा साबरा खातून काजमी और मोतरमा शाकरा खातून काज़मी अभी बकैद हयात है। नफीस अहमद

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काज़मी ने मस्जिद के मुकामी उमूर के लिए मुंशी सदरयाब हुसैन को नायब मुतावल्ली मुकर्रर कर रखा था जो मस्जिद के सारे उमूर का इन्तेजाम करे थे। सैयद नफीस अहमद काज़मी के इन्तेकाल के बाद नमाज़ियों की राय से मुंशी सदर याब हुसैन को नायब मुतवल्ली बना दिया गया लेकिन वक्फ कुनन्दगान की अयानत और सरपरस्ती बदस्तूर जारी रही और मस्जिद के अखराजात के लिए अवामुन्नास से चन्दा भी होता रहा।

यह मस्जिद एतराफ में मस्जिद हाईकोर्ट के नाम से मौसूम है। इस मस्जिद का ज़िक नगर निगम के अफसरान की रिपोर्टों में भी दर्ज है और हर साल ईद और बकरीद के मौके पर नगर निगम की जानिब से मस्जिद के रास्ते और नालियों की सफाई और चूने का छिड़काव किया जाता है और थाना सिविल लाइन्स के पुलिस भी हर ईद और बकरीद में अम्नआम्मा की गरज से तैनात की जाती है और मज़कूरा थाना में भी इस मस्जिद का बकायदा इन्देराज है।

अब चूंकि मरकज़ी हुकूमत का नया एक्ट नम्बरी 43 सन् 1995 नाफिज़ हो गया है जिसकी रू से हर वक्फ का इन्देराज वक्फ बोर्ड में जरूरी है। लेहाज़ा यह पाया गया कि इसका इन्दराज यूपी सुन्नी सेन्ट्रल वक्फ बोर्ड लखनऊ में करा लिया जाये। मुंशी सदर याब मुतवल्ली वक्फ ने अपनी खराबी सेहत और तकाज़ए उमरी के सबब जिम्मेदारी बांटने की तजवीज़ रखी लेहाजा नमाज़ियो ने मुत्तफीका राय से इन्तेज़ामिया कमेटी बराए वक्फ हाज़ा मुनतखब करके उसे मजाज़ किया कि यह वक्फ बोर्ड में वक्फ हाज़ा इन्देराज कराके अपने हक में तौलियत नामा जारी करालें।

मन्जरूल इस्लाम
एडवोकेट
इन्तेजामिया कमेटी वक्फ मस्जिद हाईकोर्ट
सिविल स्टेशन पुरूषोत्तमदास टंडन मार्ग इला०"

134. This document again does not bear any date. It is not even part of the record of the Waqf Board. However, from the facts stated therein, it is clear that it was prepared for getting the Waqf registered, in the year 2002 i.e.much after the State Government had resumed the lease on 15.12.2000, issued the ex-lessees with notice dated 11.01.2001 to vacate the demised land, and the writ petition filed by them was dismissed by the High Court by judgment dated 07.12.2001. The document, as noted above, has been filed before this Court for the first time.

135. From the contents thereof, it appears, according to respondent no. 7, that one Munsi Sadaryab Hussain was acting as Deputy Mutawalli as defined under Section 3 (i) of the Waqf Act, 1995. He continued to do so till the Committee was constituted. The name of Munsi Sadaryab Hussain however does not appear anywhere on record except for the reference to his name in the Memorandum (Yaaddasst). The Memorandum (Yaaddasst) does not state that either Nafees Ahmad Kazmi initially or then respondent no. 8 were Mutawallis of the public Mosque, as pleaded by respondent no. 8.

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136. At this stage, it would be relevant to have further glance at the provisions of Section 4 of the Waqf Act, 1995, which provides for preliminary survey of auqaf. Under this provision, the State Government is obliged to appoint for the State a Survey Commissioner of auqaf and as many Additional or Assistant Survey Commissioners, as may be necessary, for the purpose of making a survey of auqaf in the State. On the basis of the survey, it further provides, that the State shall maintain a list of auqaf and the survey of auqaf shall be completed within a period of one year from the date of commencement of the Waqf (Amendment) Act, 2013, in case such survey was not done before the commencement of the Waqf (Amendment) Act, 2013. The survey requires to be done under the general supervision and control of the Survey Commissioner of Auqaf and while conducting the survey, it is kept open to the concerned authority to hold such enquiry, as he may consider necessary. Sub-section (3) of Section 4 provides that the Survey Commissioner should submit his report containing the details as prescribed thereunder in clauses (a) to (f). For conducting the survey and while making any enquiry, sub-section (4) provides that the Survey Commissioner shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure in respect of the matters mentioned in clauses (a) to (f) thereof. Section 5 provides publication of list of auqaf on receipt of a report under sub-section (3) of Section 4 and forward a copy of the same to the Board. Under sub-section (2) of Section 5, the Board is obliged to examine the report forwarded to it and forward it back to the Government within a period of six months for publication in the Official Gazette a list of Sunni (auqaf) or Shia (auqaf) in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed in subsection (3) thereof. Sub-section (3) provides, the revenue authorities shall include the list of auqaf referred to in sub-section (2), while updating the land records; and take into consideration the list of auqaf referred to in sub-section (2), while deciding mutation in the land records. The State Government, under subsection (4), is obliged to maintain a record of the lists published under sub-section (2) from time to time.

137. It is not the case of respondent no. 7 that its name appears in the list published under Section 5 of the Waqf Act, 1995. No satisfactory explanation came forward either from respondent no. 7 or from respondent no. 9-Board for the absence of respondent no. 7-Waqf in the list published under Section 5 of the Act.

138. The registration, for the first time, was made on 30th May, 2002 on the basis of the application submitted by respondent no. 7 some time in 2001 for a period of five years which expired on 29th May, 2007. Admittedly, it was not renewed till 2012 and then, it was renewed and the registration, according to respondent no. 7, is valid till 2020. Section 36 of the Waqf Act, 1995 provides that an application for registration shall be made by the Mutawalli, provided that such application may be made by the waqf or his descendants or a beneficiary of the waqf or any Muslim belonging to the sect to which the waqf belongs. In the present case, the application was made by the Committee which claims that it took over the management of the Waqf in 1997. The Committee consists of all renowned lawyers belonging to Muslim community, including designated senior lawyers therein. They claim that the public Waqf/Mosque was created in 1981, but admittedly, they did not take steps for its registration under the U P Muslim Waqf Act, 1960 or even under the Waqf Act, 1995 till they made an application for registration in May 2002. We wish to emphasize that under Section 36 (8) of the Waqf Act, 1995, in case of an Auqaf created before the commencement of the Act, an application for registration was required to be made within three months from such commencement. Section 60 confers power upon the Board to extend the time within which any act is required to be done by the Mutwalli under the Act, if it is satisfied that it is necessary so to do. Section 61 provides for the consequences when the Mutwalli fails to apply for registration of a waqf. He could be punished with fine,

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which may extend to 10,000/- rupees. Thus, even if we accept the contention of respondent no. 7 based on the decision of this Court in *Waqf Masjid Hauz Wali* v. *Arun*[25] that an existing waqf even if not registered would not cease to be a waqf but having regard to the specific time frame provided under the statute as well as the consequences of not seeking registration within the stipulated time, we see no reason why the Committee consisting of eminent lawyers did not apply for registration of the waqf till May 2002, if it had been in existence since the year 1981. The conduct of respondent no. 7 and for that matter, respondent nos. 8 and 9, supports the case of the petitioner that creation of Waqf, including its registration was after thought and further it was done only after the judgment of this Court in the writ petition.

139. Section 36 provides that application may be made by the waqf and for making an application certain requirements are to be complied with, as we find in sub-sections (2), (3), (4) and (5) of Section 36 of the Act, 1995. Sub-section (6) provides that the Board may require the applicant to supply any further particulars or information that it may consider necessary. Sub-section (7) provides that on receipt of an application for registration, the Board is obliged to, before the registration of the waqf, make such inquiries as it thinks fit in respect of the genuineness and validity of the application and correctness of any particulars therein and when the application is made by any person other than the person administering the waqf property, the Board shall, before registering the waqf, give notice of the application to the person administering the waqf property and shall hear him if he desires to be heard. None of the requirements as contemplated by sub-section (7) of Section 36 of the Act, 1995 were complied with either by the Board or even by respondent no. 7 for that matter. The Board did not examine whether the application was genuine and whether it contained correct particulars, including the property which was claimed to be the waqf property. Respondent no. 8 claims that he was Mutawalli, after his grand-father passed away of the public Mosque which was established in 1981. How his name disappeared and why notice was not given to him is also not clear. As a matter of fact, the *Yaaddasht* shows the name of one Munsi Sadaryar Husain, as Deputy Mutawalli. The manner in which the application was made, having regard to our findings on the questions addressed earlier, in our opinion, would show that even the registration, though was made by the Board, would not sustain in law. However, we are not expressing any opinion in respect thereof and leave it open to the Board to take appropriate decision in respect thereof.

140. At this stage, we would deal with the case of respondent nos. 7, 8 and 9, based on a letter from Mukhya Nagar Adhikari, Nagar Nigam, Allahabad dated 6th December 1999 with a map attached thereto, that the Masjid was in existence even before filing of the writ petition by the lessees in 2001, to counter the case of the petitioner that respondent no. 7 encroached on the High Court's property after disposal of the said writ petition (32344 of 2001). In other words, it was contended on the basis of the said document that even before the Waqf was got formally registered, the masjid was in existence. The document reads thus:—

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"प्रेषक,

मुख्य नगर अधिकारी
नगर निगम, इलाहाबाद

सेवा में,

जिलाधिकारी
इलाहाबाद

पत्र संख्या : डी 1596/नजूल/99 दिनांक : 6.12.99

विषय: नजूल भूखण्ड संख्या 59 सिविल स्टेशन, इलाहाबाद को माननीय मुख्य स्थायी अधिवक्ता, उ0प्र0 उच्च न्यायालय, इलाहाबाद के कार्यालय भवन हेतु अध्यात्ति किए जाने के सम्बन्ध में।

महोदय,

कृपया उपर्युक्त विषयक अपने कार्यालय पत्र संख्या 2492 दिनांक 10.12.98 एवं पत्र संख्या 630/नजूल/सि.ला. XX1-8 दिनांक 28.7.99 का सन्दर्भ ग्रहण करें। स्थल का निरीक्षण कराया गया। भूखण्ड पर निर्माण निम्न प्रकार है।

1.	मुख्य भवन का क्षेत्रफल	624.28 वर्गमीटर लगभग
2.	अन्य निर्माण सर्वेन्ट क्वार्टर आदि	722.57 वर्गमीटर लगभग
3.	अस्थायी निर्माण शेड	245.00 वर्गमीटर
	कुल भवनों से अच्छादित-क्षेत्रफल	1591.85 वर्गमीटर

उक्त के अतिरिक्त भूखण्ड पर निम्न पेड़ पाये गये।

1. आम — आयु लगभग 10–15 वर्ष
2. जामुन — " "
3. ताड़ —
4. खजूर —
5. मेहदी की 10 झाड़ भी लगी पायी गयी।
6. प्रश्नगत भूखण्ड पर एक मस्जिद भी स्थित है जिसका क्षेत्रफल लगभग 450 वर्गगज है। इस प्रकार भूखण्ड पर कुल निर्मित क्षेत्रफल 1968.09 व0मी0 है।

अतः कृपया उक्त के मूल्य का आंकलन सार्वजनिक निर्माण विभाग से कराने का कष्ट करें। सर्वे मानचित्र की प्रति संलग्न कर प्रेषित है। प्रश्नगत भूखण्ड को फ्री-होल्ड किए जाने हेतु कोई आवेदन-पत्र इस कार्यालय में प्राप्त होना नहीं पाया जाता है।

भवदीय,
ह0 अपठनीय
मुख्य नगर अधिकारी

141. The document contains several over-writings. The area covered by the Masjid was shown as 150 sq. yds, typed with a manual typewriter; it was subsequently altered to 450 sq. yds. The alteration was made by hand. It is not clear as to whether the alteration was done by the authority signing the letter or subsequently. The important fact to be noticed is that the communication does not state that the alleged Masjid was a public Masjid. It also does not disclose any date from which the Masjid had been in existence. The map, which is annexed with the said letter is photocopy of the map, which was part of the lease deed executed in the year 1996, in favour of the lesseés. Towards the south-western corner, a portion delineated with pen has been shown as Namaz Sthal. The original map, which was part of the lease deed, does not show any such delineation and the respondent-State allege that it was an interpolation made subsequently in the records of Nagar Nigam. We therefore directed the State to produce the original records. A perusal of the original record revealed that the map annexed with the letter does not bear any such delineation, nor "Namaz Sthal" is mentioned anywhere. Evidently, the copy of the map brought on record mentioning Namaz Sthal towards the south-west corner of the building was an addition/interpolation made subsequently. Apart from it, the said document does not

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refer to any enquiry having been made with regard to the facts, which were in existence in 1981-82, when the alleged dedication had taken place. The State respondents have taken a specific stand that the letter dated 6 December 1999 by Mukhya Nagar Adhikari, Nagar Nigam, was not based on an actual spot inspection. It stands substantiated from the recitals contained in the letter itself, wherein it was mentioned that the facts disclosed were based on an inspection got carried out. Who conducted the inspection has not been stated, nor the date of alleged inspection mentioned. The State, in support of its stand, placed reliance on a letter of even date by Vikramjit Tiwari, Additional District Magistrate (Finance & Revenue), Allahabad addressed to Officer Incharge, Nazul, Collectorate, Allahabad. The said communication, it seems, was sent to clarify the actual state of affairs existing on that date, as the letter written by Mukhya Nagar Adhikari, Nagar Nigam, Allahabad painted an incorrect picture. It is stated therein that upon actual inspection of the site by the said officer along with nazul clerk, it transpired that the letter of Mukhya Nagar Adhikari contained incomplete, incorrect, and misleading facts. One of the lessees Aziz Ahamd Kazmi who was there at the time of inspection admitted that there never existed any Masjid, but only some portion of the bungalow was being used by the lessees and their family members for offering namaz. Upon actual verification by the concerned officer, he did not find any Masjid in existence. It is further stated that there appeared to be a collusion between the employees of the Nagar Nigam and interested persons/lessees to paint an incorrect picture, with intent to create obstruction in the construction of the office of the Chief Standing Counsel. The relevant portion from the said communication states thus:

> "नगर निगम ने अपने पत्र संख्या – डी–1596/नजूल/99 दिनांक 6–12–99 के द्वारा आज उत्तर प्रस्तुत किया है, वह अपूर्ण त्रुटिपूर्ण तथा भ्रामक है। इस अवधारणा की पुष्टि तब हुयी जब मैने श्री रामपलट नजूल लिपिक के साथ उक्त नजूल भूखण्ड का भ्रमण एव निरीक्षण किया। निरीक्षण के समय पट्टाधारक में से एक श्री अजीज अहमद काजमी मिले किन्तु वे सुसंगत जानकारी देने में असफल रहे। पूँछतॉछ के दौरान उन्होने यह स्वीकार किया कि उक्त नजूल भूखण्ड में इस समय परिसर में कोई मस्जिद नहीं है, बल्कि पूर्व में निर्मित बंगले के एक कमरे में ही केवल परिवार के लोग नमाज आदि पढा करते है। इससे स्पष्ट है कि पट्टेदार की स्वंय स्वीकृति है कि परिसर में कोई मस्जिद नहीं है। मौके पर मेरे द्वारा भ्रमण किये जाने पर ऐसी कोई पृथक मस्जिद नहीं पायी गयी है। जब कि नगर निगम की आख्या दिनॉक 6.12.99 के अंतिम प्रस्तर के कमॉक–6 पर यह उल्लेख किया गया है कि प्रश्नगत भूखण्ड पर एक मस्जिद भी स्थित है जिसका क्षेत्रफल 450 वर्गगज है। ऐसा प्रतीत होता है कि नगर निगम के नूजल अनुभाग में कार्यरत अधिकारियो/कर्मचारियों दवारा इस सम्पूर्ण प्रकरण में दुरभिसंधि की मानसिकता से ग्रस्त होकर भ्रामक स्थिति उत्पन्न करने पर आमादा है।"

142. It is apt to note that at the relevant time, the proposal to resume the leased land, was under active consideration of the State Government. The entire communication was, in fact, made in the aforesaid context. The State Government had sought information from the District Magistrate about the value of the building and trees standing on the demised land; whether the lessees had already got it converted into freehold or not, to facilitate decision on the issue. The District Magistrate in turn sought information from the Municipal Commissioner. This led to the communication dated 09.12.1999 from the Municipal Commissioner. Having regard to these facts and the back ground in which the report was submitted by the Municipal Commissioner, we find sufficient force in the stand of the state government that the letter of Municipal Commissioner dated 6th December 1999 was not based on any spot inspection held by him, but on facts misrepresented to him.

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143. Apart from these documents, no other document, which dates back to the period before the waqf was got registered, has been brought on record, which could have established that any public mosque was in existence since 1981-82, or thereafter, so that members of the general public had been offering prayers therein. The mere fact, even if it is accepted as correct, that there existed a separate enclosure for the use of members of the family, servants and employees of the lessee for worship/offering prayers will not *ipso facto* constitute a waqf. In fact, in a similar situation, a Division Bench of the Oudh Judicial Commissioners Court, in *Kaniz Mehdi Begum* v. *Mirja Rasul Beg*[25] held as under:—

> "In high class Muhammadan families where the woman necessarily remain secluded, it is no uncommon thing for a mosque to be constructed inside a private house to enable them to perform their devotions without publicity."
>
> "..... the mere construction of a mosque in a private house with evidence that it had been used for worship by the members of the family occupying that house is sufficient, without any other act or declaration on the part of the owner to constitute a waqf."

144. Respondent no. 7 has brought on record the affidavits of Mohammad Hasim, Mohammad Akram, Farred Uddin, Mohammad Aqil, Ateeq Ahmad Kadri stating that in the year 1981 Late Nafis Ahmad Kadri, Advocate permitted the High Court employees, Advocates and the Muslims of the area to offer five times namaz in the Mosque situated in Bungalow No. 27, P.D. Tandon Road, and since then they have been offering prayers without any interruption. However, having regard to entire facts and circumstances discussed above, we are unable to accept these self serving statements. We are of the firm opinion that there was no public mosque, nor any waqf, in existence, at the time when the proposal to resume the leased land was mooted, nor even at the time it was allotted to the High Court and the Advocate General Office, not even till the writ petition was dismissed by this court by judgment dated 07.12.2001. It was around the said period that respondent no. 7 with connivance of respondent no. 8 (ex-lessee), knowing well the fate of pending litigation, started creating evidence regarding existence of a public mosque, oblivious of the fact that in the writ petition filed by them, nor even in the SLP before the Supreme Court, any such plea was taken.

145. In somewhat identical circumstances, the Privy Council in *Mohammad Ali Mohammad Khan* v. *Mt. Bismillah Begum* and another held that the execution of deed of waqf was not a genuine transaction but a device to shield claims against the properties without any intention of divesting the ownership in the property. In that case, the wife of the judgment debtor against whom there was a money decree, resisted the attachment of the properties in execution of the decree by the setting up a plea that her husband had created a waqf of some of the attached property while the rest were transferred to her in lieu of her claim for dower. The Privy Council taking into account the fact that after execution of the waqf deed, her husband procured a deed of conveyance in his own name, disbelieved the theory that he had divested himself of his title. The suit filed by the wife was dismissed holding as under:—

> "Although he executed the deed in 1916 and became on its execution the mutwalli of the same, yet in 1921 he procured the conveyance of the properties in his own name. If he had really intended to create a wakf, it is difficult to see why the conveyance was not executed in his favour as a mutwalli.
>
> On a careful consideration of the whole evidence, their Lordships have come to the conclusion that defendant No. 2 executed the deed of wakf but without any intention of divesting himself of his ownership of the property, and that his real intention was to utilise the document should it become necessary as a shield against any claims that the appellant might have against him either then or at any

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future time."

146. In the instant case as well, we are of the considered opinion that the lessees never had any intention of dedicating and divesting themselves of their title; that the creation of waqf was a device to create obstruction in resumption of the demised land and taking over of its possession; that no valid waqf ever came into existence; and that all steps in this regard were taken around the period when writ petition filed by the lessees was dismissed and the lessees had lost all hope of retaining possession over the demised land. Thus, we answer the second question in the negative.

Question Nos. 1 & 3/Encroachment and Adverse Possession:

147. Next, we would like to consider the question whether right of the High Court/State stands extinguished by operation of Section 27 of the Limitation Act and that respondent no. 7 have perfected their title to the site in dispute, by holding in adverse possession for upwards 30 years or whether respondent no. 7 encroached on the site in dispute and created an alleged public Mosque over the same, some time after disposal of Writ Petition No. 32344 of 2001, instituted by ex-lessees.

148. Mr. Ravi Kiran Jain, learned Senior Counsel appearing for respondent no. 7, after drawing our attention to Section 27 and Article 112 of the Limitation Act, submitted that the 30 years period of limitation provided under Article 112, for the relief as prayed in the writ petition, started to run in 1981-82 and since the writ petition has been filed after more than 30 years, it deserves to be dismissed outright. He submitted, the very object of prescribing a period of limitation is to ensure that action, whether it is a suit or a writ petition under Article 226 of the Constitution, is commenced within a particular period. He submitted, since the State/High Court failed to initiate any action before the expiry of the period of 30 years, as provided under Article 112 since 1981-82, respondent no. 7 has acquired ownership by adverse possession which since beginning has been open, hostile, exclusive and continuous.

149. Then, he submitted that the public Mosque came into existence in 1981 by dedication and same continued till the question of cancellation of the lease for allotting the plot to the High Court was under consideration and, thereafter, till 21st March, 2004 when possession of the bungalow was forcibly taken by the district authorities, leaving aside the area in which the Mosque exists. He further submitted that correspondence after 21st March, 2004 between the State and the High Court support their case about existence of the Mosque at the site in dispute and their exclusive possession thereon. The letter of the District Magistrate dated 13th April, 2006 further makes it clear that the High Court felt satisfied that the public Mosque should remain untouched. He submitted that even if it is assumed that the dedication of Mosque could not have been validly made on leased land, the right and title in that land, either of the State or of the High Court came to be extinguished in view of Section 27 of the Limitation Act. This provision, Mr. Jain submitted, provided that if a person fails to institute a suit for possession within the period limited by the Act, his right upon such property stands extinguished and title also would vest in the person in possession. He submitted that the effect of Section 27 of the Limitation Act, insofar as the instant case is concerned, is that the rights of the State as well as of the High Court to the site in dispute was extinguished resulting in conferment of a title by adverse possession on respondent no. 7. He reiterated that the cause of action arose to the State Government in the year 1981 in view of the provisions contained in the lease deeds dated 12th April, 1923, 19th March, 1996 and 17th July, 1998. He submitted that after the Kazmi family dedicated the property to the public Mosque in contravention of the conditions of the lease deed and divested themselves from the ownership of the area of the Mosque, the State Government failed to take any action. On the other hand, a fresh lease was executed/granted containing similar clauses. He, therefore, submitted that even if it is assumed that the lessees were living in the bungalow,

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without there being any lease effective on that date, the act of the lessees of divesting themselves by dedicating the area for a public Mosque gave cause of action to the State in 1981 itself, to evict the lessees and since it was not done within the prescribed period, the right and title of the State and consequently of the High Court stood extinguished.

150. Mr. Navin Sinha, learned Senior Advocate and Mr. Manish Goel, learned counsel appearing on behalf of the petitioner and respondent no. 1-High Court respectively, submitted that respondent no. 7, on the facts of this case, cannot be said to have perfected title by adverse possession. It was submitted, though not admitted, that mere possession of the land, however long it may be, would not ripen into possessory title unless possessor has *animus possidendi* to hold the land adverse to the title of the true owner. It was further submitted that assertion of title by the possessor, in the present case, respondent No. 7, must be clear and unequivocal, though it need not be addressed to the real owner. After inviting our attention to the relevant documents to which, we have either made reference or propose to make while dealing with the question of possession and creation of Waqf, it was submitted that the period for the purpose of reckoning adverse possession would commence from the date when both, the actual possession and assertion of title by the possessor, are shown to exist. Apart from the fact that respondent no. 7 or 8 have miserably failed to bring any acceptable material to show that the public Mosque came into existence in 1981 and it was being used as such, it cannot be said that their possession was adequate in continuity, in publicity and in extent. They have not shown as to when the possession become adverse, so that the starting point of limitation against the State could be found. After referring to Article 112 of the Limitation Act, which prescribes a longer period of 30 years as the limitation in regard to a suit by the Government, it was submitted that no material whatsoever is placed on record that respondent no. 7 perfected title by adverse possession. It was also submitted that the possession of the lessees on the plot was permissive possession and, therefore, in any case, it cannot be treated as adverse possession. Such possession, for howsoever long a length of time it may have continued, shall neither be converted into adverse possession nor title. It is only hostile possession, which is one of the conditions for adverse possession and since that has not been proved nor even pleaded, it is not open to respondent no. 7 to claim any right by adverse possession.

151. In this backdrop, first we proceed to examine when respondent no. 7 came into possession of the site in dispute at the south-west corner of the plot and the consequences flowing out of it. This will also answer the first question, as framed in paragraph 2 of the judgment.

152. While deciding issue No. 2 we have already repelled the claim of respondent no. 7 that the site in dispute at south-west corner of the plot was dedicated by the lessees to the Almighty or that a public mosque came in existence over the said part since the year 1981. We have also categorically held that in fact there had been no dedication of any part of the plot in favour of respondent no. 7, but only an attempt was made to create evidence of existence of a public mosque in and around the year 2001 when the writ petition filed by the ex-lessees was disposed of by this Court by judgement dated 7.12.2001 with intent to obstruct their eviction. In the counter affidavit filed by the State respondents in previous Writ Petition No. 32344 of 2001 a specific plea was taken to the effect that in pursuance of the notice dated 11.1.2001 issued by the District Magistrate requiring the lessees to vacate, possession was taken on 1.9.2001. A copy of the said possession memo has been brought on record alongwith counter affidavit of the State-respondents as well as affidavit of respondent no. 7 dated 19.9.2017 and it reads thus:—

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'कब्जा प्राप्ति प्रमाणपत्र

शासनादेश संख्या यू0ओ0 24/9–आ–4–2000 दिनांक 15–12–2000 एवं शासनादेश संख्या 486/पी0एस0/एल0आर0/2001 दिनांक 6–8–2001 के क्रम में जिलाधिकारी इलाहाबाद के आदेश संख्या 3622/नजूल–सि0ला0–xx1-8/6(97-98) दिनांक 24–8–2001 के अनुपालन में नजूल भूखण्ड संख्या 59 सिविल स्टेशन (27 कानपुर रोड) इलाहाबाद क्षेत्रफल एक एकड़ 4272 वर्गगज अथवा 7618.54 वर्गमीटर का कब्जा आज दिनांक 1/9/2001 को निम्नलिखित अधिकारियों की उपस्थिति में स्थल पर शासन की ओर से प्राप्त किया गया।

ह0	ह0 1/9/2001	ह0 1/9/2001
(शफरलाल जायसवाल)	(डा0 विक्रमाजीत तिवारी)	तहसीलदार सदर
मुख्य नगर अधिकारी	अपरजिलाधिकारी (वित्त एवं राजस्व)	इलाहाबाद'
नगर निगम, इलाहाबाद	इलाहाबाद	

153. However, some of the occupants requested for some more time being given to them as there were Pardanaseen ladies residing in the premises and needed time to vacate and shift to another place, whereas some unauthorized occupants started removing their effects from the land. On 2.9.2001 a stay order was granted in favour of the ex-lessees in the writ petition filed by them, as a consequence whereof, further proceedings were stopped. In this regard, assertions made in paragraphs 11 and 12 of the counter affidavit of Dr. Vikrmajeet Tiwari, Additional District Magistrate, Finance & Revenue, Allahabad filed on behalf of State-respondents in the "earlier writ petition" are extracted below:—

> "11. That the answering respondents have acted strictly according to the tender of the lease deed and clause 3(c) in particular. The petitioners have been given due notice of the resumption of the lease and were given sufficient time for removing their effects and vacating the premises even after the amount of compensation tendered to them and the period of notice already expired which prompted the authorities to take possession of the land alongwith the building standing over it on the spot, and as such, **deponent alongwith the members of this staff went to the site to take actual possession of the premises on 1.9.2001 and took possession for the open land and premises occupied at that time by Delight Restaurant and adjoining space which was handed over peacefully by the occupiers.** Whereas, some of the occupants requested the deponent to given some more time to them as there were some 'Pardanaseen Ladies' residing in the premises and needed time to vacate and shift to another place. Whereas some unauthorised occupants started removing their effects of their own from the land.
>
> The Photo-state copy of the relevant document in regard to taking-over the possession by the answering respondents is being filed herewith and marked as **Annexure No. CA-8** to the present counter affidavit.
>
> 12. That, however, the entire proceedings were stopped on the intervention of this Hon'ble Court on 2.9.2001 as the petitioners came-up before this Hon'ble Court for the relief sought in the present writ petition."

(*emphasis supplied*)

154. After the writ petition filed by the ex-lessees was dismissed by this Court by judgment dated 7.12.2001, the matter was carried in SLP before the Supreme Court. The Supreme Court initially granted an order of status quo. However, by order dated 3.03.2003, the Supreme Court vacated the order of status quo and permitted State respondents to take possession of the land by giving the appellants (ex-lessees) three

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months time to vacate. The Supreme Court also made it clear that after obtaining possession, the respondent State would be free to use land for the public purpose for which it was resumed. In pursuance thereof, the respondent State published a public notice in newspaper 'Amar Ujala' dated 16.11.2003 granting three months time to the occupants of the plot to vacate. (At this stage, we also observe that respondent no. 7 did not come forward in response to the public notice. If the claim of respondent no. 7 was correct and honest, they definitely would have approached the official respondents in response to the Advertisement.) In compliance thereof, the ex-lessees voluntarily vacated the plot and communicated the same to the District Magistrate, Allahabad vide letter dated 21.3.2004 written by Smt. Shakra Khatoon Kazmi, one of the ex-lessees. The letter was countersigned by one M. S. Faruqui S/o Sri Mohd. Miya Faruqui, R/o 383 Dayra Bahadurganj, Allahabad. For convenience of reference the communication dated 21.3.2004 is reproduced below:—

"सेवा में,

जिलाधिकारी,
इलाहाबाद

महोदय,

विशेष अनुज्ञा याचिका संख्या 11817/2002 अजीम अहमद काजमी एवं अन्य बनाम उत्तर प्रदेश तथा अन्य में मा0 उच्चतम न्यायालय द्वारा पारित निर्णय दिनांक 3–3–2003 तथा अमर उजाला समाचार पत्र में प्रकाशित विज्ञप्ति दिनांक 16–11–2003 के अनुपालन में मैंने आज दि0 21–3–04 को नजूल भूखण्ड संख्या 59 सिविल स्टेशन (भवन संख्या 27 कानपुर रोड) आज स्वेच्छा खाली कर दिया है तथा अपना सामान मैं स्वयं ले जा रही हूँ।

दिनांक 21–3–2004 ह0 (उर्दू में)

(श्रीमती शाकरा खातून काजमी)
पुत्री सैयद मोहम्मद अहमद काजमी

उपस्थित:–

1– श्री एम0 एस फारूकी
पुत्र श्री मोहम्मद मियाँ फारूकी
383 दायरा बहादुरगंज, इलाहाबाद

155. The State upon coming into possession of the plot (leased premises) handed over its possession to Nagar Nigam Allahabad for management as is evident from the communication dated 21.3.2004. The Nagar Nigam Allahabad deputed security guards for securing the property which had come under its management. It is established from the material brought on record that on 8.4.2004, the security guards informed the Legal Adviser, Nagar Nigam Allahabad that four ladies alongwith children accompanied by 4-5 males forcibly entered the plot from the back side saying that they had been permitted by the State Government to occupy the premises. The Legal Adviser/Incharge Officer, Nazul, Nagar Nigam Allahabad sent a communication to the Station House Officer, Civil Lines Allahabad intimating about the trespass committed by the family members of the ex-lessees alongwith certain other persons and requested for a first information report being lodged. In pursuance thereof, first information report under Sections 457/447/448 IPC was registered against Smt. Shakra Khatoon Kazmi and three unnamed females and five unnamed males. The Municipal Commissioner, Nagar Nigam, Allahabad on the same date also sent a communication to the District Magistrate, Allahabad narrating the entire incident. On 27.5.2004 the District Magistrate requested the Registrar General, High Court, Allahabad to take possession of the plot and in pursuance thereof, formal possession

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was handed over to the High Court Allahabad through its Registrar General on 26.6.2004. The possession memo dated 26.6.2004 reads thus:—

"कब्जा हस्तान्तरण प्रमाणपत्र

एतद्द्वारा नजूल भूखण्ड संख्या ५९ सिविल स्टेशन, इलाहाबाद का एवं उस पर स्थित संरचनाओं एवं वृक्षादि का कब्जा माननीय उच्च न्यायालय के विस्तार हेतु शनिवार दिनांक २६.०६.२००४ को हस्तांतरित किया गया।

ह0 26/6/2004
(एस0एन श्रीवास्तव)
अपर जिला मजिस्ट्रेट(नजूल)
इलाहाबाद

ह0 26/6/2004
(ओ0 एन0 खण्डेलवाल)
महानिबन्धक
उच्च न्यायालय इलाहाबाद

कब्जा गृहीता

156. Respondent no. 7 also does not dispute that on 21.3.2004 the ex-lessees voluntarily handed over the possession of the plot alongwith the building to the District Magistrate, Allahabad. However, it claims that the south west portion of the plot (site in dispute) over which the mosque is stated to have existed was neither disturbed nor its possession taken by the State respondents. The plea taken in this regard in paragraph 21 of the counter affidavit filed by respondent no. 7 dated 15.5.2017 is extracted below:—

"21. That on 21.03.2004, when the District Administration came on the spot for evicting the lessees from the bungalow No. 27, Kanpur Road, Allahabad, the deponent and other members of the Managing Committee of Waqf Masjid High Court, Allahabad, namely, Sarva Sri Ateeq Ahmad Khan, Advocate, S.M.A. Kazmi, Senior Advocate (deceased), M.A. Qadeer, Senior Advocate, I.M. Khan, Advocate, reached at the spot and pointed out that the area over which the Mosque is existing is not in the possession of the lessees. The deponent and others present at the spot referred to the report dated 6.12.1999 submitted by the Mukhya Nagar Adhikari, Nagar Nigam, Allahabad, and also the registration certificate issued by the Waqf Board certifying that the Mosque in question is registered as Waqf; they also informed the authorities that the police personnel are deputed during the Eid, Bakrid and Alwida Namaz in this Mosque and convinced the District authorities present there that the Mosque (public Mosque) is in existence since 1981; Namaz-ba-Jamat (congregational prayer) is being offered therein and it may not be dismantled and the Masjid may remain intact for offering Namaz therein. On that pointing out, and after having been convinced about the status of the Mosque in question as a public mosque, the District Officials did not disturb the existence and possession of the Masjid."

157. However, we are unable to accept the case set up by respondent no. 7 in this regard. Admittedly, the ex-lessees voluntarily handed over possession of the leased land to the District Magistrate on 21.3.2004 after removing their effects. The communication sent in this regard by one of the ex-lessees nowhere mentions that she was not delivering the possession of the site in dispute (any portion of Nazul plot No. 59 Civil Station Allahabad) allegedly in possession of respondent no. 7. On the contrary, the communication specifically states that possession of Nazul plot no. 59 (the plot) Civil Station Allahabad was being handed over in compliance of the order of the Supreme Court dated 3.03.2003 and the notice published in newspaper dated 16.11.2003. Undoubtedly, the order of the Supreme Court dated 3.03.2003 was in respect of the entire Nazul plot and not in respect of part of the leased land (the plot). It is pertinent to note that although the Supreme Court had permitted the State to take possession of the plot-leased land by order dated 3.03.2003 and in pursuance whereof, the possession was handed over voluntarily to the State Government,

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however, it seems that at the stage of final hearing these facts were not brought to its notice. Consequently, the Supreme Court in its final verdict, while dismissing the appeal, once again vacated the stay order and permitted the State to take possession of the demised premises by giving three months notice. However, what is relevant for our purpose is that the Supreme Court while issuing such directions clarified that if the appellants before it (ex-lessees) fail to hand over possession or create any third party interest, in such case the State Government and District Magistrate, Allahabad would be entitled to take forcible possession of the demised premises.

158. We have already held that no part of the land was ever dedicated to the Wakf/Masjid and the effort to get respondent no. 7 registered with the Wakf Board was a device, a ploy, to obstruct their eviction and thus, it flows therefrom that respondent no. 7 had no separate or distinct claim but its alleged possession was on behalf of the lessees. Consequently, in our considered view, once the lessees voluntarily handed over the possession of the demised land to the District Magistrate on 21.3.2004, it could not be accepted that any portion of the leased land, in particular, South West corner, remained in possession of respondent no. 7. We are further of the opinion that having regard to the events that followed the handing over of possession to the State Government, respondent no. 7 in collusion with ex-lessees/respondent no. 8 succeeded in encroaching/(re) - entering the leased land from the rear side some time in April 2004. The possession so obtained by respondent no. 7 in collusion with the ex-lessees cannot be recognised as legal possession, nor even litigious possession, but an act of rank tresspass. In any event, as per direction of the Supreme Court, even if the lessees had succeeded in creating third party interests, the State was entitled to ignore the same and take forcible possession. This also explains why respondent no. 7 never agitated its alleged claim in respect of any part of the land before any authority or court in the past despite having full knowledge of the entire litigation that ensued between the State respondents and the ex-lessees.

159. In this backdrop, before we address the issue of adverse possession, it would be relevant to refer to the judgments relied upon by learned counsel for the parties in support of their contentions. Initially, we would like to refer to the judgments relied upon by Mr. Ravi Kiran Jain, learned Senior Counsel for respondent no. 7 and respondent no. 8 in person. The Bombay High Court in *Lala Hem Chand* v. *Lala Peary Lal*[22] while dealing with the question whether it has been proved that the property was dedicated and that it was held in adverse possession by Lala Janaki Das and Ramchand for statutory period, after referring to Section 28 of the Limitation Act, observed thus:

> "... ... ...
>
> Lala Janaki Das and Ramchand having held, the property adversely for upwards of twelve 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 Section 28 of the Indian 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 Section 10 of the Indian 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 twelve 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 anv has become extinct bv**

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limitation, in whichever manner he may have obtained possession, permissively or by trespass."

(*emphasis supplied*)

160. In *Masjid Shahid Ganj Mosque* v. *Shiromani Gurdwara Prabandhak*[28], the Bombay High Court in paragraph 16 observed thus:

"16. The property now in question having been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than twelve years, the right of the mutawali to possession for the purposes of the waqf came to an end under Article 144 of the Indian Limitation Act and the title derived under the dedication from the settlor or wakif became extinct under Section 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 (*Jawahra* v. *Akbar Husain* (1884) I.L.R. 7 All. 178); that 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 Indian 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 waqf 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 waqf. 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 person possessing adversely to the waqf 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. Chidam-baranatha Thambiran* v. *Nallasiva Mudaliar* (1917) I.L.R. 41 Mad. 124, 135). The individual character of the right to go to a mosque for worship matters nothing when the land is no longer waqf 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."

(*emphasis supplied*)

161. While addressing the question whether the plaintiff perfected his title by adverse possession and became the absolute owner of the property, the Hyderabad High Court in *Nannekhan* v. *Ganpati*[29] considered the submission that the possession of the plaintiff had become adverse and that under the provisions of Section 28 of the Limitation Act read with Sections 6 and 8, the title of the defendant had become extinguished and, therefore, he had no right to dispossess the plaintiff. In paragraph 6 of the judgment, the Supreme Court observed thus:

"(6) **Section 28, Limitation Act lays down that at the termination of the period laid down under the law of limitation to any person for instituting a suit for possession of any property, the right of that person to such property shall be extinguished.** Ordinarily the right would get extinguished **but here the person against whom adverse possession is set up is a minor.** The question, therefore, is whether the title of the respondent had become perfect by

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prescription even against him.

Section 6, Limitation Act relates to the period of limitation for filing suits with respect to persons suffering under a legal disability. It lays down that where a person entitled to institute a suit is a minor at the time from which the period of limitation is to be reckoned, he may institute the suit within the same period after disability was ceased as would otherwise have been allowed from the time prescribed therefor. It has to be borne in mind that the provisions of this section are governed and controlled by S.8, Limitation Act which lays down that nothing in S.6 shall be deemed to extend for more than 3 years from the cessation of the disability the period within which any suit must be instituted.

From a reading of these two sections, it would be evident that if the minor has, at the date of his attaining the majority, a larger period than that of 3 years as provided under the law of limitation for filing a suit he can file that suit within the original period of limitation though it may, in some cases, be of more than 3 years. But if the period prescribed under the law expires during the time when he is a minor nevertheless the suit would have to be brought within 3 years from the date of his attaining majority."

(*emphasis supplied*)

162. In *Prem Singh* v. *Birbal*[10] the Supreme Court, while dealing with Section 27 of the Limitation Act, in particular in paragraphs 11 and 12, observed thus:

"11. **Limitation is a statute of repose. It ordinarily bars a remedy, but, does not extinguish a right. The only exception to the said rule is to be found in Section 27 of the Limitation Act, 1963 which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.**

12. An extinction of right, as contemplated by the provisions of the Limitation Act, *prima facie* would be attracted in all types of suits. **The Schedule appended to the Limitation Act, as prescribed by the articles, provides that upon lapse of the prescribed period, the institution of a suit will be barred. Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out or is raised by the defendant or not, in the event a suit is found to be barred by limitation, every suit instituted, appeal preferred and every application made after the prescribed period shall be dismissed.**"

(*emphasis supplied*)

163. The Constitution Bench of five judges in *State of Madhya Pradesh* v. *Bhailal Bhai*[11] while dealing with the discretionary power under Article 226 of the Constitution, in paragraphs 17 and 21 observed thus:

"17. At the same time we cannot lose sight of the fact that **the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions.** It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the

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payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. **It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on grounds like limitation the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution.**

21. The learned Judges appear to have failed to notice that the delay in these petitions was more than the delay in the petition made in *Bhailal Bhai's case*, 1960 M.P.C. 304 out of which Civil Appeal No. 362 of 62 has arisen. On behalf of the respondents-petitioners in these appeals (C.A. Nos. 861 to 867 of 1962) Mr. Andley has argued that the delay in these cases even is not such as would justify refusal of the order for refund. **He argued that assuming that the remedy of recovery by action in a civil court stood barred on the date these applications were made that would be no reason to refuse relief under Art. 226 of the Constitution. Learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable.** ... ..."

(*emphasis supplied*)

164. This Court in *Waqf Alalaulad* v. *Sundardas Daulatram and sons*[32] while dealing with a preliminary objection as to the maintainability of writ petition under Article 226 of the Constitution, in paragraph 13 observed thus:

"13. As regards the third preliminary objection it may be mentioned that Supreme Court in *Krishna Ram Mahale* v. *Mrs. Shobha Venkat Rao*, (1989) 4 SCC 131 : AIR 1989 SC 2097 (supra), relevant extract from which has been reproduced before, **has held that no person can forcibly be dispossessed from property even by the owner except by recourse to law. If a person is sought to be dispossessed by brute force he has a right to approach this Court, to protect his possession and it is the duty of this Court to issue appropriate order, direction or writ in the nature of mandamus to the Government to protect the possession of the property of such a person till he is dispossessed therefrom through a Court.** In the instant case period of lease expired on 31-12-1994. But the tenants have a right to continue in its possession till they are evicted through Court. They thus have the right to approach the Court to protect their possession of the property. Their writ petition as such cannot be said to be not maintainable. The third preliminary objection is also rejected.

(*emphasis supplied*)

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165. In *Bharat Barrel & Drum Mfg. Co. Private Ltd.* v. *The Employees' Estate Insurance Corporation*[33], the Supreme Court, while dealing with the question of limitation in paragraph 6, observed thus:

"6. ... ...

A, statute prescribing limitation however does not confer a right of action nor speaking generally does it confer on a person a right to relief which has been barred by eflux of time prescribed by the law. **The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant, without asserting them in a court of law.** The, principle which forms the basis of this rule is expressed in the maxim *vigilantibus non dormientibus, jura subveniunt* (the laws give help to those who are watchful and not to those who sleep). **Therefore the object of the statutes of limitations is to compel a person to exercise his right to action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. While this is so there are two aspects of the statutes of limitation the one concerns the extinguishment of the right if a claim or action is not commenced with a particular time and the other merely bars the claim without affecting the right which either remains merely as a moral obligation or can be availed of to furnish the consideration for a fresh enforceable obligation. Where a statute prescribing the limitation extinguishes the right it affects substantive rights while that which purely pertains to the commencement of action without touching the right is said to be procedural.** ... ..."

(*emphasis supplied*)

166. The Supreme Court in *Y L Ghatge* v. *Saburao Bala Yadav*[34] while dealing with the question of adverse possession, in paragraph 5, observed thus:

"5. ... ...**The effect of Section 28 of the Limitation Act was that right to the property was extinguished resulting in conferment of a title by adverse possession on the persons in possession of the concerned properties. It is well known that the effect of Section 28 of the Limitation Act is not only to bar the remedy but also extinguish the right.** The right to the property itself was dead and gone. It could not be revived by a provision like the one contained in Section 52-A of the Act. ... ..."

.....**It is a well established proposition of law that the law of limitation fixing a period of limitation for the limitation of any suit or proceeding is a procedural law and not a substantive one. Section 52-A had, by no stretch of imagination, the effect of reviving an extinguished and lost claim and giving life to a dead horse.** If the claim was not barred and the right to the property was not extinguished when Section 52-A came into force, then a suit instituted thereafter could not be defeated under any of the Articles of the Limitation Act of 1908 or even of the new Limitation Act of 1963. In express terms it overrides in the provisions of the Limitation Act including the provisions in Section 28 of the Limitation Act, 1908. But then the overriding effect of Section 52-A will have its play and operation, only if by the time it came into force, Section 28 had not extinguished the right to the property in question. Otherwise not. In *Mahant Biseshwar Dass* v. *Sashinath Jhan*, AIR 1943 Pat 289, a Bench of the Patna High Court pointed out that where the right of the plaintiff had become barred by limitation before the amending Act of 1929 was passed the mere institution of the

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suit after 1929 cannot have the effect of reviving that right. By the amending Act of 1929 in Section 10 of the Limitation Act it was provided that no suit instituted against a person in whom property had become vested in trust for any specific purpose or against his legal representatives or assigns for the purposes mentioned in the section would be barred by any length of time. From the category of assigns, assigns for valuable consideration were left out. .. .."

(*emphasis supplied*)

167. Mr. Navin Sinha and Mr. Manish Goel also relied upon few judgments in support of their contentions urged on the question of adverse possession to which, we find it necessary to make reference. The first judgment is in *P.T. Munichikkanna Reddy* v. *Revamma*[25], in which the Supreme Court under the heading 'Characterising adverse possession', in paragraphs 5, 6 and 8, observed thus:

"5. **Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession.** It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See *Downing* v. *Bird*, 100 So. 2d 57 (Fla 1958), *Arkansas Commemorative Commission* v. *City of Little Rock*, 227 Ark 1085 : 303 SW 2d 569 (1957); *Monnot* v. *Murphy*, 207 NY 240: 100 NE 742 (1913); *City of Rock Springs* v. *Sturm*, 39 Wyo. 494 : 273 P 908, 97 ALR 1 (1929).]

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. **Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title.** (See American Jurisprudence, Vol. 3, 2d, Page 81). *It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess can not be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.*

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
2. **Specific Positive *intention to dispossess* on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor.** Right thereby accrues in favour of adverse possessor as *intent to dispossess* is an express statement of urgency and intention in the upkeep of the property."

(*emphasis supplied*)

168. The Privy Council in *Ejas Ali Qidwai* v. *Special Manager, Court of Wards, Balrampur Estate*[26] on the question of adverse possession, observed as under:

"There can be little doubt that he obtained possession with the consent of all the

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persons interested in the estate, and his possession was, at its inception, merely permissive. It is not suggested that there was any subsequent change which converted it into adverse possession. **The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.**"

(*emphasis supplied*)

169. In *Thakur Kishan Singh (Dead)* v. *Arvind Kumar*[17] the Supreme Court in paragraph 5, observed thus:

"5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. **The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession.** ... ..."

(*emphasis supplied*)

170. In *Konda Lakshmana Bapuji* v. *Govt. of A.P.*[18], the Supreme Court, in paragraphs 53 and 61, observed thus:

53. **The question of a person perfecting title by adverse possession is a mixed question of law and fact. The principle of law in regard to adverse possession is firmly established. It is a well-settled proposition that mere possession of the land, however long it may be, would not ripen into possessory title unless the possessor has animus possidendi to hold the land adverse to the title of the true owner.** It is true that assertion of title to the land in dispute by the possessor would, in an appropriate case, be sufficient indication of the animus possidendi to hold adverse to the title of the true owner. But such an assertion of title must be clear and unequivocal though it need not be addressed to the real owner. **For reckoning the statutory period to perfect title by prescription both the possession as well as the animus possidendi must be shown to exist. Where, however, at the commencement of the possession there is no animus possidendi, the period for the purpose of reckoning adverse possession will commence from the date when both the actual possession and assertion of title by the possessor are shown to exist.** The length of possession to perfect title by adverse possession as against the Government is 30 years.

61. In *Balkrishan* v. *Satyaprakash*, JT (2001) 2 SC 357, this Court held:

"7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three *nec - nec vi, nec clam and nec precario*. In other words, **he must show that his possession is adequate in continuity in publicity and in extent.** In *S.M. Karim* v. *Bibi Sakina*, AIR 1964 SC 1254 speaking for this Court, Hidayatullah, J. (as he then was) observed thus:

> "**Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.**"

In that case the requirement of animus possidendi was not adverted to as on facts it was shown to be present; the controversy, however, was about the other

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ingredient of adverse possession. **It is clear that it must be shown by the person claiming title by prescription that he has been in possession of the land for the statutory period which is adequate in continuity in publicity and in extent with the animus of holding the land adverse to the true owner.**"

(*emphasis supplied*)

171. In *R Hanumaiah* v. *Secretary to Government of Karnataka, Revenue Department*[29], the Supreme Court, while considering the nature of proof required in suit for declaration of title against the Government, in paragraphs 19 to 23, observed thus:

"19. **Suits for declaration of title against the Government, though similar to suits for declaration of title against private individuals differ significantly in some aspects. The *first* difference is in regard to the presumption available in favour of the Government.** All lands which are not the property of any person or which are not vested in a local authority, belong to the Government. All unoccupied lands are the property of the Government, unless any person can establish his right or title to any such land. This presumption available to the Government, is not available to any person or individual. **The *second* difference is in regard to the period for which title and/or possession has to be established by a person suing for declaration of title. Establishing title/possession for a period exceeding twelve years may be adequate to establish title in a declaratory suit against any individual. On the other hand, title/possession for a period exceeding thirty years will have to be established to succeed in a declaratory suit for title against Government.** This follows from Article 112 of Limitation Act, 1963, which prescribes a longer period of thirty years as limitation in regard to suits by the Government as against the period of 12 years for suits by private individuals. The reason is obvious. Government properties are spread over the entire State and it is not always possible for the Government to protect or safeguard its properties from encroachments. Many a time, its own officers who are expected to protect its properties and maintain proper records, either due to negligence or collusion, create entries in records to help private parties, to lay claim of ownership or possession against the Government. Any loss of government property is ultimately the loss to the community. Courts owe a duty to be vigilant to ensure that public property is not converted into private property by unscrupulous elements.

20. Many civil courts deal with suits for declaration of title and injunction against Government, in a casual manner, ignoring or overlooking the special features relating to government properties. Instances of such suits against the Government being routinely decreed, either ex parte or for want of proper contest, merely acting upon the oral assertions of plaintiffs or stray revenue entries are common. **Whether the Government contests the suit or not, before a suit for declaration of title against a Government is decreed, the plaintiff should establish, either his title by producing the title deeds which satisfactorily trace title for a minimum period of thirty years prior to the date of the suit** (except where title is claimed with reference to a grant or transfer by the Government or a statutory development authority), **or by establishing adverse possession for a period of more than thirty years. In such suits, courts cannot, ignoring the presumptions available in favour of the Government, grant declaratory or injunctive decrees against the Government by relying upon one of the principles underlying pleadings that plaint averments which are not denied or traversed are deemed to have been accepted or admitted.**

21. **A court should necessarily seek an answer to the following question,**

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before it grants a decree declaring title against the Government: whether the plaintiff has produced title deeds tracing the title for a period of more than thirty years; or whether the plaintiff has established his adverse possession to the knowledge of the Government for a period of more than thirty years, so as to convert his possession into title. Incidental to that question, the court should also find out whether the plaintiff is recorded to be the owner or holder or occupant of the property in the revenue records or municipal records, for more than thirty years, and what is the nature of possession claimed by the plaintiff, if he is in possession - authorized or unauthorized; permissive; casual and occasional; furtive and clandestine; open, continuous and hostile; deemed or implied (following a title).

22. Mere temporary use or occupation without the animus to claim ownership or mere use at sufferance will not be sufficient to create any right adverse to the Government. **In order to oust or defeat the title of the Government, a claimant has to establish a clear title which is superior to or better than the title of the Government or establish perfection of title by adverse possession for a period of more than thirty years with the knowledge of the Government. To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner (and therefore necessarily with the knowledge of the owner) and continued during the entire period necessary to create a bar under the law of limitation.** In short, it should be adequate in continuity, publicity and in extent. Mere vague or doubtful assertions that the claimant has been in adverse possession will not be sufficient. Unexplained stray or sporadic entries for a year or for a few years will not be sufficient and should be ignored.

23. As noticed above, many a time it is possible for a private citizen to get his name entered as the occupant of government land, with the help of collusive government servants. Only entries based on appropriate documents like grants, title deeds etc. or based upon actual verification of physical possession by an authority authorized to recognize such possession and make appropriate entries can be used against the Government. **By its very nature, a claim based on adverse possession requires clear and categorical pleadings and evidence, much more so, if it is against the Government. Be that as it may.**"

(*emphasis supplied*)

172. The case of adverse possession is always based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. Specific positive intention to dispossess on the part of an adverse possessor also needs to be demonstrated to claim any right on the basis of such plea. The principle of law is firmly established that a person, who bases his title on adverse possession, must specifically plead and also prove by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. Mere possession for howsoever length of time, does not get ripened into adverse possession, unless the possessor had *animus possidendi* to hold the land adverse to the title of true owner.

173. In the present case, these respondents pleaded ownership not by adverse possession, but on basis of alleged dedication made in their favour, by the ex-lessees. We have already disbelieved the case set up in this regard. Thus, the alleged possession of respondent no. 7 prior to tresspass made in March 2004 was at best permissive possession, on behalf of the lessees, and there was no question of even entertaining a plea of adverse possession on the basis thereof. Perhaps, that may be the reason why case of adverse possession has not been pleaded by respondent no. 7.

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The possession, which seems to have been obtained by respondent no. 7 over the site in dispute, after the lessees handed over voluntary possession of the entire plot on 21.3.2004, even if assumed to be hostile to the State/High Court, would not ripen into possessory title, as the period of limitation prescribed under law i.e., 30 years, has yet not expired. As noted above, there is no specific pleading by these respondents when their alleged possession became adverse, nor the date since when it was being openly claimed as hostile to the true owner.

174. Having regard to these facts and the principles laid down on the subject in various judgment cited above, we are of the firm opinion that the plea of adverse possession or extinguishment of right and title of the State or the High Court, in view of Section 27 of the Limitation Act, deserves to be rejected outright. At the cost of repetition, we may further observe that if, at all, the case of the lessees and respondent nos. 7 and respondent no. 8 was correct, they would have certainly raised such plea in the proceedings or at least in the earlier round of litigation either by raising such plea or by seeking intervention opposing the prayers made by the lessees. Having miserably failed to do so, it is not open to respondent Nos. 7 and 8 to raise any such plea even across the Bar.

175. Thus, for the reasons recorded not only while dealing with questions 1 and 3, but even the second question, we hold that respondent no. 7, in collusion with the ex-lessees, encroached/re-entered on the site in dispute some times in 2004, and in any case after decision of the writ petition, much after the Government resumed the leased land by issuing Government Order dated 15th December 2000 and its allotment to the High Court and Advocate General Office. We further hold that pucca constructions were made by respondent no. 7 during the period 2009-2012, while the appeal filed by the ex-lessees was pending before the Supreme Court. We also hold that respondent no. 7 had miserably failed to establish/prove that they created/constructed (big tin shed) Mosque in 1981-82, as claimed by them.

Question No. 4:

176. We now proceed to examine the contention of respondent no. 7 that the right of the High Court/State to dispossess respondent no. 7 stood extinguished on account of estoppel, waiver, acquiescence, delay and latches. One of the main planks of the argument of Mr. Jain was that the State Government/High Court despite full knowledge did not take any step to take possession of the south west corner over which the mosque existed, thus it is estopped from taking possession of the same.

177. Before dealing with the facts, we would briefly advert to the decisions cited by Mr. Jain wherein the principles of estoppel, waiver, acquiescence, delay and laches have been explained in some detail. In *Provash Chandra Dalui* v. *Biswanath Banerjee*[10] the Supreme Court explained the principle of waiver thus:—

> "21. **The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right.** It means the forsaking the assertion of a right at the proper opportunity. The first respondent filed suit at the proper opportunity after the land was transferred to him, and no covenant to treat the appellants as Thika tenants could be shown to have run with the land. **Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped.** An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the linquishment and the conferment of the right in question. Nothing of the kind could be proved in this case to estopp the first respondent."

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180. Mr. Jain also heavily relied upon the judgment of the Supreme Court in *Banda Development Authority, Banda* v. *Motil Lal Agarwal*[41] in contending that where there is inordinate delay in filing the writ petition, the Court should be loath in granting relief to the petitioner. On the same principle he also placed reliance on another decision of the Supreme Court in *R and M Trust* v. *Koramangala Residents Vigilance*[44] which is a judgment rendered in the context of a public interest litigation instituted before the Karnataka High Court by the residents association challenging the issue of license to certain builders for construction of multi storied buildings in the area. The grievance of the association was that the license was granted to the builders for construction of multi storied buildings oblivious of the fact that multi storey buildings were causing strain on public amenities. It was alleged that the developers by using their influence and money were obtaining licenses contrary to the statutory prohibitions. A learned Single Judge dismissed the writ petition on the ground of delay and laches but in the appeal filed before the Division Bench, the writ petition was allowed and the respondent builder was directed to demolish the alleged illegal constructions. In the aforesaid context, the Supreme Court while examining the issue noticed that a three storey building was constructed in 1987 but the writ petition was filed in November, 1991 when almost the entire building was complete. Apart from it, the Supreme Court while examining the main issue as to whether there had been violation of any statutory provisions in granting license for construction of multi storey building held that there was no such prohibition. Having regard to these facts, the Supreme Court observed that the delay in moving the court in a public interest litigation was fatal. Paragraphs 24, 33, 34 and 35 of the report upon which great emphasis was placed are as under:—

> " 24. Public Interest Litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought very bad name. Courts should be very very slow in entertaining petitions involving public interest in a very rare cases where public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the down trodden and not for the purpose of serving private ends. It has now become common for unscrupulous people to serve their private ends and jeopardize the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contracts. In order to serve their professional rivalry they utilize the service of the innocent people or organization in filing public interest litigation. The Courts are sometimes persuaded to issue certain directions without understanding implication and giving a handle in the hands of the authorities to misuse it. Therefore, the courts should not exercise this jurisdiction lightly but should exercise in a very rare and few cases involving public interest of large number of people who cannot afford litigation and are made to suffer at the hands of the authorities. The parameters have already been laid down in a decision of this Court in the case of *Balco Employees' Union (Regd.)* v. *Union of India* reported in (2002) 2 SCC 333, wherein this Court has issued guidelines as to what kind of public interest litigation should be entertained and all the previous cases were reviewed by this court. It was observed as under:—
>
> > "77. Public Interest litigation, or PIL as it is more commonly known, entered the Indian Judicial process in 1970. It will not be incorrect to say that it is primarily the Judges who have innovated this type of litigation as there was a dire need for it. At that stage, it was intended to vindicate public interest where fundamental and other rights of the people who were poor, ignorant or in socially or economically disadvantageous position and were unable to seek legal redress were required to be espoused. PIL was not meant to be adversarial in nature and was to be a cooperative and collaborative effort of the parties and the court so as

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to secure justice for the poor and the weaker sections of the community who were not in a position to protect their own interests. Public interest litigation was intended to means nothing more than what words themselves said viz. "litigation in the interest of the public".

78. While PIL initially was invoked mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with the passage of time, petitions have been entertained in other spheres, Prof. S.B. Sathe has summarized the extent of the jurisdiction which has now been exercised in the following words::

"PIL may, therefore, be described as satisfying one or more of the following parameters. These are not exclusive but merely descriptive;

Where the concerns underlying a petition are not individualist but are shared widely by a large number of people (bonded labour, undertrial prisoners, prison inmates.)

Where the affected persons belong to the disadvantaged sections of society (women, children, bonded labour, unorganized labour, etc.)

Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children, bonded labour, unorganized labour, etc.)

Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children of the prostitutes).

Where judicial intervention is necessary for the protection of the sanctity of democratic institutions (independence of the judiciary, existence of grievances redressal forums.)

Where administrative decisions related to development are harmful to the environment and jeopardize people's right to natural resources such as air or water."

79. There is, in recent years, a feeling which is not without any foundation that public interest litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counterproductive.

80. PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There has been in recent times, increasingly instances of abuse of PIL. Therefore, there is a need; to reemphasize the parameters within which PIL can be resorted to by petitioner and entertained by the Court. This aspect has come up for consideration before this Court and all we need to do is to recapitulate and reemphasize the same."

33. There is no doubt that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution. We cannot disturb the third party interest created on account of delay. Even otherwise also why Court should come to rescue of person who is not vigilant of his rights?

34. **We are of the opinion that delay in this case is equally fatal, the construction already started by the appellants in 1987 and building had come up to three floors. Thereafter it was stopped in 1988 and in March, 1991 it resumed after permission was granted. The Writ Petition was filed in November, 1991 meanwhile almost construction was complete.**

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Therefore, delay was fatal in the present case and learned single judge rightly held it. It was also brought to our notice that 46 multi storey buildings have come up in this area. Learned counsel has produced photographs to show that buildings more than three and four floors have been constructed in and around this area.

35. However, **we are satisfied that there is no prohibition under the provisions of the Act and Rules putting the ceiling on construction of the multi storey building. We are also satisfied that the delay is also fatal in the present case."**

(*emphasis supplied*)

181. In this backdrop, we proceed to examine the fourth question and the contentions urged on behalf of respondent no. 7. It is worth noticing that on 17.1.2006 respondent no. 7 through its President and members of the Managing Committee addressed a communication to the District Magistrate claiming its existence over the site in dispute. It was further claimed therein that on 21.3.2004 while the possession of the plot was taken from the lessees, the portion over which the Masjid (site in dispute) was in existence remained intact and was not touched. The prayer made in the communication was that status quo be maintained over the portion over which Masjid existed, having regard to the sentiments of the Muslim community. Alongwith the communication, a map showing existence of a Masjid over an area of 100 ft. × 50 ft. was also filed. On receipt of the same, the District Magistrate, Allahabad got the site inspected and thereafter vide his communication dated 13.4.2006 addressed to the Secretary, Housing and Urban Planning, U.P. Government, Lucknow intimated him about the existence of a Masjid at the relevant time. In the said communication, he further noted that although the State Government on 30.3.2005 had already rejected the request made by the ex-lessees to exempt any part of the land from resumption proceedings but having regard to the facts obtaining at that time, an area measuring 96 ft. × 45 ft. be exempted. It was followed by various correspondence between the President of the Managing Committee of respondent no. 7 and the State Respondents wherein similar request was made. It was contended that since then, despite full knowledge of the existence of the mosque, the State Government nor the High Court took any step to dispossess respondent no. 7 or to demolish the construction raised (at that stage it was only tin shed) by it amounting to acquiescence, estoppel and waiver.

182. A great reliance was placed on the order passed by the then Chief Justice on 19.11.2011 on the administrative side for proper demarcation of land and for raising boundary wall to facilitate construction of the High Court building. It was claimed that thereafter the High Court got the boundary wall constructed enclosing the portion of the plot coming to its share, excluding the area of mosque and the passage leading to it. This, according to respondent no. 7, was a positive act on part of the High Court relinquishing its right, title and interest over part of the land. It was further urged that the High Court itself did not take any step for dispossessing respondent no. 7 or to demolish the constructions raised by it, consequently, the relief which the High Court itself could not have claimed, also could not be allowed under the guise of the present public interest litigation.

183. We are unable to accept the contention of Mr. Jain. It is evident from the material placed on record that following the claim made by the ex-lessees and respondent no. 7 regarding existence of mosque over South West corner of the plot, a lot of correspondence took place between the State Government and the district authorities on one hand and the district authorities and the High Court on the other hand. On 30.12.2004 the District Magistrate addressed a communication to the Principal Secretary, U.P. Government, Lucknow informing him that at the relevant time

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no Masjid was in existence but on the South West corner the area of the small tin shed had been extended to 96 ft. × 45 ft. It was also specifically stated in the said communication that the possession of the entire plot (area 7618.54 sq. meters) was handed over to the High Court on 26.6.2004. There is also on record another letter of the District Magistrate, Allahabad dated 5.4.2005 addressed to the Joint Registrar (P) High Court, Allahabad reiterating that no Masjid was in existence till the time writ petition filed by the ex-lessees was dismissed. However, when notice was issued to the ex-lessees to vacate in pursuance of the order of the Supreme Court dated 3.03.2003 they realised that they would soon be evicted and consequently, they started inciting religious feelings and describing the tin shed located on the South West corner as a Masjid and in furtherance of their intention to thwart their eviction placed a Board with Masjid High Court written on it. It is further mentioned therein that in compliance of the order of the Supreme Court dated 3.03.2003, the possession of the entire area of the demised land had already been taken from the ex-lessees. Consequently, permission to offer Namaj could not be granted to any person. It also categorically states that despite the possession of the plot being handed over to the High Court, respondent no. 8 is making consistent efforts to re-enter the premises in the name of religion. It is pertinent to note at this stage that after holding a detailed inquiry the State Government on 3.03.2005 had rejected the request of the ex-lessees to exempt any part of the plot in dispute. It seems that only thereafter, respondent no. 7 came in the picture and filed an application before the District Magistrate on 17.1.2006 requesting him not to interfere in its possession, as a Masjid was in existence and prayers were being offered by the members of the Muslim community. As a consequence, as noted above, once again certain communication ensued between the District Magistrate and the State Government but it is the categorical case of the State Government before this Court, as urged across the Bar by Sri Manish Goyal, Additional Advocate General that the State Government did not consider it necessary to re-visit the matter, having already rejected a similar request on 3.03.2005. At the other end, the Security Committee of the High Court in its meeting held on 10.9.2008 took a decision in regard to the manner in which the plot was to be apportioned between the High Court and the State Government for extension of the High Court building and the office of the Advocate General respectively. The Committee resolved that an area of 4068.09 sq. meters would be given to the Advocate General and the remaining area of 3938.83 sq. meters would be retained by it for construction of High Court Complex. The State Government on 9.12.2011 sanctioned a sum of Rs. 270 lakhs for construction of the Administrative Annexe of the High Court, following which the then Chief Justice passed an order dated 19.12.2011 for proper demarcation of the land by raising boundary wall and for construction work being started on priority basis. Immediately thereafter, the order of the Chief Justice was communicated to the Construction Agency i.e. Construction and Designs Service Unit-33, U.P. Jal Nigam. On 6.6.2016 the Chairman Building Committee issued directions for providing records, maps, site plan etc. to it. The Construction Agency was also directed to record exact measurement of the construction site. The Project Manager, Construction and Designs Service, U.P. Jal Nigam vide letter dated 8.6.2016 informed the High Court the details of actual plot area, the area allocated for Advocate General building as well as for the administrative Annexe of the High Court. It was further pointed out in the said letter that there was an encroachment over an area of 423.70 sq. meters shown with letter 'C' in the map annexed with the said letter and another encroachment measuring 387.96 sq. meters shown with letter 'D'. These encroachments shown with letters 'C' and 'D' were being claimed by respondent no. 7 to be in its possession. The Chairman, Building Committee for Administrative Annexe after perusing the office note dated 8.6.2016 submitted in pursuance of the letter of the Project Manager, U.P. Jal Nigam dated 8.6.2016 passed an order dated 15.6.2016 that proper steps be taken for taking

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possession of the encroached areas. (Resolution of the Building Committee quoted in paragraph 8.3).

184. At this stage, at the cost of repetition, it is worth noticing the case pleaded by respondent no. 7 themselves, according to which on 29.7.2016 the Chairman of the Building Committee accompanied by Hon'ble Member visited the spot and desired removal of East-North corner of the Mosque so as to provide space for free movement of the fire brigade around the proposed High Court Annexe. The suggestion was voluntarily accepted by respondent no. 7 and a written communication in that regard was sent to the Registrar General on 1.9.2016. However, it seems that the proposal mooted by respondent no. 7 was not acceptable to the High Court and ultimately the Steering Committee-Infrastructural Development, High Court on 27.10.2016 resolved that "all the encroachments from all the properties of the High Court must be removed. Modalties for the same be finalised after obtaining status report." Again on 1.12.2016, the Steering Committee, Infrastructural Development High Court, after considering the minutes of the meeting of Sub-Committee dated 20.11.2016 resolved that "Hon'ble the Sub-Committee for monitoring the construction work of Administrative Annexe (adjacent to the new building of the office of Advocate General) shall take steps for removal of the encroachments, made on two sides." It has also come on record that the Government vide government order dated 31.3.2016 approved the proposal for a nine storey building for the High Court Annexe.

185. It is clear from the facts narrated above that consistently since after possession of the plot was delivered to the High Court regular correspondence was exchanged between the authorities to verify the alleged claim of respondent no. 7 regarding existence of a public mosque. However, the same was not found to be true and the State Government also rejected the request made by the ex-lessees to exempt any portion of the land from resumption proceedings. Soon after the funds were sanctioned by the State Government, the High Court took all steps to start construction work and to retrieve possession of the portion of the plot trespassed by respondent no. 7. Respondent no. 7 itself being conscious of the fact that it does not have any semblance of title, volunteered to surrender a small portion of the site in dispute in their possession. The Building Committee on 15.6.2016 and the Steering Committee, Infrastructural Development, High Court on 27.10.2016 and 1.12.2016 issued directions to ensure removal of all encroachments. Having regard to these facts it cannot be said that the High Court has acquiesced to the illegal continuance of respondent no. 7 over any portion of the plot or that now it is estopped from claiming possession over the same. Likewise the plea of waiver, delay and laches also does not have any force and is rejected outright.

186. We may note at this stage that while deciding issue no. 2 we have already refused to accept the contention that relief of possession if pressed against respondent no. 7 would be barred by limitation or that respondent no. 7 has perfected its title under Section 27 of the Limitation Act. The doctrine of estoppel, waiver, acquiescence, delay and laches have their origin in the doctrine of equity. Arthur Caspersz, an illustrious author in his treatise "Estoppels and the Substantive Law" has observed that "when an argument against a relief, otherwise just, is founded upon mere delay not amounting to bar by limitation, the validity of that defence must be tried by principles substantially equitable." In other words, in order to sustain a defence based on acquiescence, waiver, delay and laches, the party seeking to invoke these principles must (i) do equity and (ii) come with clean hands. Snell's Principles of Equity 27th Edition, Chapter 3 delineates 12 maxims of equity, out of which maxim nos. 5 and 6 which have relevance for our purpose are as under:—

"5. He who seeks equity must do equity.

6. He who comes into equity must come with clean hands."

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187. If we apply these principles to the case of respondent no. 7, we find that respondent no. 7 does not pass muster. The very birth of respondent no. 7 is an outcome of a deep rooted conspiracy not only to circumvent the implementation of the judgment of the writ court and thwart the process of law but to grab public property in the name of religion. The fraud was perpetrated with impunity when respondent no. 7 in collusion with the ex-lessees tresspassed over the site in dispute despite the possession of the entire plot having been delivered by the ex-lessees voluntarily on 21.3.2014. The ex-lessees in collusion with respondent no. 7, employed the cloak of religious sentiments to perpetrate their illegal designs by undertaking massive pucca construction at the site during the period 2009-2012, without the approval of the Allahabad Development Authority (respondent no. 5), despite having full knowledge of the legal position that the constructions so raised were wholly illegal and against statutory prohibitions. It is not in dispute, under the provisions of the U.P. Urban Planning and Development Act, 1973, prior permission for raising pucca construction was required to be obtained. The Development Authority is invested with the power to demolish constructions raised without its approval. It has been so provided under Sections 26-A and 27 of the said Act apart from other penal provisions. There is no manner of doubt that even today the Development Authority is competent to demolish the unauthorized constructions in exercise of its statutory powers as there cannot be any estoppel or waiver against statutory provisions. In such a scenario, we are of the firm opinion that respondent no. 7 which has its genesis in fraud and which owe its existence to the perpetuation of fraud committed under religious umbrella, cannot claim equity, to defeat the reliefs sought in the Writ Petition. The contention is completely devoid of merit, totally inequitable, and if accepted, will shake the faith of common man in rule of law.

188. We also would like to look into the order of the Supreme Court in Special Leave to Appeal No. 8519 of 2006, relied upon by respondent no. 7, wherein the Supreme Court has prescribed 29th September, 2009 as the cut off date, after which no unauthorized construction would be carried out by any one in the name of temple, church, mosque or gurudwara. The own case of respondent no. 7 is that the said order is applicable also to any construction raised over the site in dispute. The pucca constructions raised by respondent no. 7 in place of the tin shed, on their own showing, were during the period 2009-2012, thus, were in the teeth of the said direction of the Supreme Court. The own case of respondent no. 7 obliges it to honour these directions; it cannot be permitted to raise specious pleas to perpetuate its alleged existence; the judgments cited being not applicable to the peculiar facts of the instant case.

189. We would like to advert to one more limb of the argument of Mr. Jain, which he raised after the arguments advance on behalf of respondent no. 1-High Court in rejoinder, to the effect that the possession memo dated 1.9.2001 by which possession was taken by the State and the possession memo dated 26.6.2004 by which the same was handed over to the High Court were paper transactions and in fact no actual physical possession passed either to the State or thereafter to the High Court. In support of the said contention he has placed reliance on the decision of the Supreme Court in *Banda Development Authority* (supra) and *Balwant Narayan Bhagde* v. *M.D. Bhagwat*[45] and judgment of this Court in *Brij Mohan* v. *State of U.P.*[46] wherein the procedure to be followed for taking possession, the manner in which possession memo is to be prepared, has been laid down. However, we do not consider it necessary to examine these decisions in detail having regard to the findings recorded by us that the ex-lessees voluntarily delivered possession of the entire plot to the State Government on 21.3.2004. Once the State Government had come in possession of the plot in question, the manner in which it delivers possession to the High Court can not be questioned by respondent no. 7. The argument is thus devoid of any force and is

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accordingly rejected.

190. We would now advert to a submission made by Sri S.A. Kazmi, learned counsel for respondent no. 9 while advancing arguments in rejoinder on 31.8.2014 and 12.9.2017. He urged that the Mosque existing over the site in dispute being a structure of religious character should not be touched as otherwise it would be an infringement of the fundamental right to freedom of religion conferred upon all persons under Articles 25 and 26 of the Constitution of India. He contended that the structure in question being a Mosque is being used by members of the minority community for offering namaj and for performing other rituals recognised by the religion as pious, therefore, if the reliefs claimed in the writ petition are granted, it would not only offend the sentiments of the minority community but would be a direct attack on the rights conferred upon them by Articles 25 and 26 of the Constitution. In support of his contention he has placed reliance on the judgment of the Supreme Court in *Dr. M. Ismail Faruqui* v. *Union of India*[47]. Alternatively, it is urged that if this Court comes to the conclusion that the offending structure is an encroachment or is required to be demolished, in that event, only 11 meters be taken, which is essential for free movement of the fire brigade leaving the remaining structure intact. It is pointed out that the Board has carried out a spot survey and has prepared a site plan, copy whereof has been brought on record alongwith supplementary counter affidavit filed before the Court on 12.9.2017 at the verge of conclusion of the arguments. It is urged that the Board is ready to surrender 11 meters of the building of the Mosque. It would make available the requisite set-back for free movement of fire brigade and the hindrance in construction of the High Court Annexe building would thus stand removed on one hand, while on the other hand, the right of the minority community to offer prayers would also stand safeguarded.

191. The submission advanced by learned counsel for respondent no. 9 raises the larger issue of secularism enshrined in our Constitution. The polity assured to the people of India by the Constitution "secularism", as described in the Preamble wherein the word "secular" was added by the 42nd Amendment. Though the word "secular" was so added in 1976, the secular nature of the Constitution was already embodied in the provisions (Arts. 25-30) of the Constitution. The Supreme Court in 1973 observed in *Kesavananda Bharati* v. *State of Kerala*[48] that 'secularism' was a basic feature of the Indian Constitution. Further, in this case, Khanna, J said that 'secularism' means, the State shall not discriminate against any citizen on the ground of religion only. Similarly, in *Indira Nehru Gandhi* v. *Rajnarain*[49] Y V Chandrachud, explained the basic feature of 'secularism' to mean that the State shall have no religion of its own and all persons shall be equally entitled to the freedom of conscience and the right to freely profess, practice and propagate religion. In India, the State is 'secular' in that there is no official religion. India is not a theocratic State. The Constitution does not envisage the involvement of the State in matters associated with religion and religious institutions, and even indeed with the practice, profession and propagation of religion in its most limited and distilled meaning. In short, the State is prohibited to identify itself with or favouring any particular religion, because the State is enjoined to accord equal treatment to all religions and religious sects or denominations. (See: *Bommai S R* v. *Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918).

192. Thus, the word "secular" in the Preamble highlights the fundamental rights guaranteed in Articles 25 to 28 that the State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion of their own choice. The concept of secularism is a basic feature of the Constitution of India and the way of life adopted by the people of India as their abiding faith and creed. (See: *Dr. M Ismail Faruqui* v. *Union of India*, (1994) 6 SCC 360 : AIR 1995 SC 605). In *S R Bommai* v. *Union of India*[50], a nine judge Bench referred to the concept of 'secularism' in the India context. P B Sawant, J

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dealt with this aspect and after referring to the Setalvad Lecture in Patel Memorial 1985 on secularism observed thus:

"As stated above, religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. It is our cardinal faith. Any profession and action which go counter to the aforesaid creed are a prima facie proof of the conduct in defiance of the provisions of our Constitution....." (at pages 147-48) (of SCC) : (at p. 3064 of AIR)

Similarly, K. Ramaswamy, J. in the same decision stated:

"..... ..... Though the concept of "secularism" was not expressly engrafted while making the Constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualise not only of the subject of God but also an understanding between man and man. Secularism in the Constitution is not anti-God and it is sometimes believed to be a stay in a free society, **Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State on grounds of public interest, order and general welfare. The State guarantee individual and corporate religious freedom and dealt with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another. The concept of the secular State is, therefore, essential for successful working of the democratic form of Government.** There can be no democracy if anti-secular forces are allowed to work dividing followers of different religious faith flying at each other's throats. The secular Government should negate the attempt and bring order in the society. Religion in the positive sense, is an active instrument to allow the citizen full development of his person, not merely in the physical and material but in the non-material and non-secular life." (at page 163) (of SCC) : (at p. 3080 of AIR).

".....it would thus be clear that Constitution made demarcation between religious part personal to the individual and secular part thereof. **The State does not extend patronage to any particular religion, State is neither pro particular religion nor anti particular religion, it stands aloof, in other words maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on secular part.**" (at page 168) (of SCC) : (at p. 3085 of AIR).

B.P. Jeevan Reddy, J. in the same context in the decision stated thus:

".....While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, **so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes.** How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements'? **Secularism is thus more than a passive attitude of religious tolerance. It is a positive**

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concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. **What is material is that it is a constitutional goal and a basic feature of the Constitution** as affirmed in *Kesavananda, Bharati*, (1973) 4 SCC 225: 1973 Suppl. SCR 1 : (AIR 1973 SC 1461) and *Indira N. Gandhi* v. *Raj Narain*, 1975 Supp SCC 1: (1976) 2 SCR 347 : (AIR 1975 SC 2299). **Any step inconsistent with this constitutional policy is, in plain words, unconstitutional.** This does not mean that the State has no say whatsoever in matters of religion. Laws can be made regulating the secular affairs of temples, mosques and other places of worships and maths, (See: *S P Mittal* v. *Union of India*, (1983) 1 SCC 51 : (1983) 1 SCR 729 : (AIR 1983 SC 1)".

(*emphasis supplied*)

193. In *Bommai* (supra) most of the judges of the nine Judge Bench have founded their conclusions as to contents of 'secularism' under the Indian Constitution on its various relevant provisions such as Arts.25-28, 30, Arts.14-16 and 51-A. Drawing from the foregoing provisions, the majority of the nine Judges Bench has laid down the following ingredients of 'secularism' under our Constitution, which could be taken as conclusive, since those conclusions till this date have not been overruled by any larger Bench. The relevant conclusions drawn, for our purpose, are as follows:

I. The Constitution prohibits the establishment of a *theocratic* State (Arts. 156, 162).

II. Not only is the State prohibited from establishing any religion of its own, but it is prohibited further from identifying itself with or favouring any particular religion, because the State is enjoined to accord equal treatment to all religions and religious sects or denominations.

III. Secularism under the Indian Constitution does not mean anti-God or an atheist society. It only means the conferment of equal status to all religions, without any preference in favour of or discrimination against any one of them. Under a secular State, the existence of a legal right or public duty does not depend on the profession or practice of any particular religion. The State attempts to secure the good of all citizens irrespective of their religious beliefs or practices.

IV. Secularism, as comprising the foregoing ingredients, (a) is a *basic feature* of our Constitution and (b) any State Government which violates any of the foregoing mandates, or pursues any 'unsecular' policy or course of action, renders itself amenable to action under Art. 356.

194. Dr. S. Radha Krishnan, the noted statesman and philosopher described the secular character of the State in the following words:—

"When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian State will not identify itself with or be controlled by any particular religion. **We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and government.** *This view of religious impartiality, of comprehension and forbearance*, has a prophetic role to play within the national and international life. **No group of citizens shall arrogate to itself rights and privileges, which it denies to others. No person should suffer any**

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form of disability or discrimination because of his religion but all like should be free to share to the fullest degree in the common life."

(*emphasis supplied*)

195. In the words of Dr. B.R. Ambedkar "a secular State does not impose that we shall not take into consideration the religious sentiments of the people. All that a secular State means is that the Parliament shall not be competent to impose any particular religion upon rest of the people."

196. A nine judge bench in *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*[51] explained the secular character of the Indian Constitution by observing that:

"75. ..... There is no mysticism in the secular character of the State. **Secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion.**"

(*emphasis supplied*)

197. In a recent Constitution Bench judgment in *Abhiram Singh* v. *C.D. Commachen*[52] the Supreme Court after referring to various earlier decisions on the secular character of our Constitution observed that:

"74. The upshot of the above discussion clearly is that under the constitutional scheme mixing religion with State power is not permissible while freedom to practice, profess and propagate religion of one's choice is guaranteed. **The State being secular in character will not identify itself with any one of the religions or religious denominations.** This necessarily implies that religion will not play any role in the governance of the country which must at all times be secular in nature The elections to the State Legislature or to Parliament or for that matter or any other body in the State is a secular exercise just as the functions of the elected representatives must be secular in both outlook and practice. **Suffice it to say that the constitutional ethos forbids mixing of religions or religious considerations with the secular functions of the State. This necessarily implies that interpretation of any statue must not offend the fundamental mandate under the Constitution.** An interpretation which has the effect of eroding or diluting the constitutional objective of keeping the State and its activities free from religious considerations, therefore, must be avoided. This Court has in several pronouncements ruled that while interpreting an enactment, the Courts should remain cognizant of the constitutional goals and the purpose of the Act and interpret the provisions accordingly."

(*emphasis supplied*)

198. M.N. Venkatachliah, J. in one of his papers on "Law in a Pluralist Society" explained the purpose and usefulness of law in a plural society like ours by observing that:—

"In a pluralist, secular polity law is perhaps the greatest integrating force. A cultivated respect for law and its institutions and symbols; a pride in the country's heritage and achievements faith that people live under the protection of an adequate legal system are indispensable for sustaining unity in pluralist diversity."

199. Right of belief and practice of religion guaranteed by Article 25 is subject to public order, morality, health and other provisions of Part III. Thus, while a citizen has complete freedom to profess, practice and propagate religion of his choice, he cannot claim right to erect structures in the name of religion in an unauthorised manner over public land or over land of others. The law forbids him from so doing. This is founded on the principle that no group of citizens shall arrogate to itself rights and privileges, which it denies to others. This is also based on the principle that no person should suffer any form of disability or discrimination because of an act of another section of

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the society undertaken under the cloak of religion, which the law denounces.

200. In a Constitution Bench judgment in *Dr. M Ismail Faruqui* (supra), J.S. Verma, J. speaking for the majority, while dealing with an identical plea as made before us in the context of Articles 25 and 26 of the Constitution, held that:—

> "**80 ..... this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution.** The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.
>
> 81. **While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof.** Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.
>
> 83. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the namaz can be offered. **As indicated hereinabove, in British India, no such protection was given to a mosque and the mosque was subjected to the provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that property.**"
>
> (*emphasis supplied*)

201. In the same judgment it was also considered as to whether a mosque in Muslim religion has any unique or special status higher than that of places of worship of other religions in secular India to make it immune from acquisition under the sovereign power of the State. It was held that a mosque is not an essential part of the practice of the religion of Islam and Namaj (prayer) by Muslims can be offered anywhere even in open. Accordingly, it was held that acquisition of a mosque is not prohibited. The Supreme Court recognised only one exception to the said proposition and that is where the place of worship at a particular place has some special significance and forms an integral part of the right to worship. These observations which sufficiently answers the submissions advanced before us are as under:—

> "**85.** The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See Mulla's Principles of Mahomedan Law, 19th Edn. by *M. Hidayatullah - S.* 217 and AIR 1940 PC 116). If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. **A mosque is not an essential part of the practice of the religion of Islam and Namaz. (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India.** Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, **its status and immunity from acquisition in the secular ethos of India under the**

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Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practice the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right."

202. In the instant case, we cannot loose sight of the allegation in the present writ petition that respondent no. 7 has encroached on the High Court's property, whereon a religious structure, called "Masjid High Court" has been constructed without permission of the local authority, which is, admittedly, mandatory in nature. Even permission of the High Court, before proceeding to construct the Mosque or to use the name of the High Court, was not sought. Construction of the Mosque by encroaching on the property of the Institution called Judiciary/High Court, would send a wrong message/signal and it may even give an impression to the people at large that the High Court has built a Mosque and provided this facility to a religious group or to people belonging to a particular religion. This would also be interpreted to mean that the High Court cannot protect its own property from being encroached. The High Court is not obliged, nor expected, under the Constitution, to extend patronage to any particular religion. The High Court is neither pro any particular religion nor anti any particular religion and it is expected to stand aloof, and maintain neutrality in matters of religion and provide equal protection to all religions when it examines any matter on the judicial side or even on the administrative side for that matter. For the High Court, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. This is what is the essence of 'secularism', as enshrined in our Constitution. Calling a Masjid as "Masjid High Court" itself, in our opinion, is wrong, apart from the fact that it cannot stand or be allowed to continue to stand on its property any more. We have accepted the goal of 'secularism' not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. 'Secularism' is a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. Any step inconsistent with the constitutional prescription, in our opinion, would be unconstitutional.

203. For the above reasons, we do not find any substance in the contention that granting relief in the instant case would offend the constitutional rights of the minority community.

204. We would now advert to the alternative submission, for taking possession of 11 mts. of land, leaving the rest intact. It is noteworthy that after the Allahabad Development Authority, Allahabad pointed out that 11 meters setback on the back side is required for free movement of fire brigade, the Building Committee held a meeting on 29.7.2016. It is recorded in the Minutes of the meeting of the Building Committee that it visited the site on 29.7.2016 in the presence of Sri M.A. Qadir, Senior Advocate, Sri W.H. Khan, Senior Advocate and others concerned alongwith Sri Rajeev Sharma, Incharge Registrar General, Sri Rohitash Singh Gangwar, OSD Infrastructure and Resident Engineer. After discussion, the Committee resolved that:

> "the boundary-wall of the mosque may be suitably altered so as to make the provision for the movement of the Fire Brigade's vehicles on the back side of the High Court building.
>
> The project Manager, C. & D.S., Unit-33 UP Jal Nigam, Allahabad is directed to

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submit a scaled map for alteration of the boundary-wall of the mosque in order to confirm with the norms as required for sanction of the map by the Allahabad Development Authority."

205. Evidently, the aforesaid arrangement was suggested by the Building Committee to facilitate construction of the High Court Annexe building without any further delay. It was purely an adhoc arrangement to obviate delay in undertaking construction of the High Court Annexe building. It was not at all an arrangement or consensus arrived at, as alleged, between the parties to settle the issue relating to encroachment made by respondent no. 7. This is also amply borne out from the resolution passed by the Steering Committee, Infrastructural Development High Court on 27.10.2016 wherein it was resolved that "all the encroachment from all the properties of the High Court must be removed. Modalities for the same be finalized after obtaining status report." On 1.12.2016, the Steering Committee, Infrastructural Development High Court again resolved that "Hon'ble the SubCommittee for monitoring the construction work of Administrative Annexe (adjacent to the new building of the office of Advocate General) shall take steps for removal of the encroachments, made on two sides."

206. However, respondent no. 7 by misinterpreting the decision taken by the Building Committee in the meeting dated 29.7.2016 as a final settlement between the parties filed an application No. 243210 of 2017 for quashing the resolution of the Steering Committee dated 1.12.2016. Firstly, as noted, the decision of the Building Committee dated 29.7.2016 was not a final settlement but merely a proposal made by way of an interim arrangement to facilitate construction of the Administrative Annexe without any delay pending resolution of the dispute finally; second, in our considered opinion, respondent no. 7 in the instant public interest litigation, by filing a misc. application, cannot be permitted to seek such a relief; thirdly, even otherwise, in view of the findings recorded, no case is made out for quashing the resolution of the Steering Committee taken in its meeting held on 1.12.2016. The prayer made in the misc. application accordingly stands rejected.

207. Reverting back to the contention advanced by learned counsel for respondent no. 9, we may note at this stage that during the course of hearing of the instant matter, the same proposal for surrendering 11 meters was once again mooted before us, as is evident from the order dated 11.4.2017. In context thereof, by order dated 2.5.2017, respondent no. 1 was directed to place on record a scaled map drawn by the Project Manager, C & D. S. Unit-33 U.P. Jal Nigam, Allahabad showing proposed alteration of the boundary wall of the Mosque so as to confirm with the norms required for sanction of map by the Allahabad Development Authority. On the next date, i.e. 18.5.2017 a scaled map drawn on the instructions of the Project Manager was placed on record. On that very day, counsel for respondent nos. 7 and 8 submitted before the Court that the Project Manager alongwith Resident Engineer and Architect should explain the map to their clients on the site on a date fixed by the Court. The suggestion was accepted by the Court and the Project Manager alongwith Resident Engineer and the Architect were directed to explain to respondent nos. 7 and 8 the portion which was required to be demolished by way of an "interim arrangement" as specifically noted in the order dated 18.5.2017. Accordingly, the Project Manager alongwith all concerned visited the site and explained to these respondents the portion required to be demolished. These facts were placed on record before the Court on 22.5.2017. *On the same date, respondent no. 7 filed an application stating that it is not ready to carry out the proposed alterations as suggested in the map brought on record by respondent no. 1. In consequence, the interim arrangement could not materialize.* Counsel for respondent no. 7 sought time for filing any affidavit in rebuttal and submitted that the interim arrangement having failed, the main matter itself be heard finally. Accordingly, time was granted to the parties to exchange affidavits and

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the matter was fixed for final hearing on 17.7.2017.

208. Having regard to these facts, we do not find any substance in the submission of respondent no. 9 for taking possession of only 11 meters required for free movement of the fire brigade, leaving the rest intact. We may notice at this stage that even while the said argument was advanced by Sri Kazmi, learned counsel for respondent no. 9, Mr. Jain, on instructions from the members of the Committee of Management, reiterated his stand that such a proposal is not acceptable to them. (Though such discussion did take place in the course of arguments, respondent no. 1-High Court was also not ready to take only 11 meters, as aforementioned, and insisted for possession of the entire site in dispute). There is already an authoritative pronouncement of the Supreme Court in *Dr. M.I. Faruqui* (supra) that while offering of prayer or worship is a religious practice but its offering at any particular place is not an essential and integral part of religious practice. It is not the case of respondent no. 7 nor even of respondent no. 9 that the site in dispute has any special significance for offering prayers, so as to leave it untouched, or force a settlement not acceptable to the respondents (except respondent no. 9).

209. We now take up Civil Misc. Application No. 311223 of 2017 wherein the main prayer made is for not taking on record the supplementary counter affidavit dated 29.8.2017 filed by respondents no. 3 and 4. It is contended that the supplementary counter affidavit contains new facts and documents and since before that date, counsel for respondent no. 7 had already advanced substantial part of his arguments, consequently, an affidavit bringing on record new facts could not be filed at that stage. In the same context, it has also been urged that on various dates, Mr. Jain argued at great length on behalf of respondent no. 7 and the said fact was left out from being mentioned in the order sheet.

210. At the outset, we may notice that on 30.8.2017 when supplementary counter affidavit dated 29.8.2017 was filed by respondents no. 3 and 4, similar objection was raised by learned counsel for respondent no. 7, consequently, we permitted him to accept supplementary counter affidavit without prejudice to the rights and contentions in respect thereof. Sri A.K. Goyal, learned Additional Chief Standing Counsel appearing on behalf of the State respondents pointed out that the supplementary counter affidavit only contains copies of relevant record of the State Government in respect whereof directly or indirectly counsel for the parties have already made their submissions before the Court. He further submitted that these documents being already part of the original record which has already been produced before us, as required, the filing of the relevant documents from the original record would only be for the benefit of the parties.

211. On 12.9.2017, on the request made by Miss Deba Siddiqui, Advocate on Record for respondent no. 7, respondent no. 8 in person, and counsel for respondent no. 9, we permitted them to inspect the original record of the State Government in the office of Mr. A.K. Goyal, learned Additional Chief Standing Counsel. We even permitted Sri Ateeq Ahmad Khan, a learned Advocate of this Court and a member of the Committee to remain present at the time of inspection of original record despite certain objection from Mr. A.K Goyal. All these facts are specifically recorded in the order dated 12.9.2017. In pursuance thereof, the record was inspected by all concerned. In such view of the matter, we are of the opinion that filing of the supplementary counter affidavit dated 29.8.2017 annexing therewith copies of the relevant documents from the original record to which full access was duly provided to respondents no. 7, 8 and 9, has not caused any prejudice to them, but has rather helped them in also having copies of the relevant documents from the original record. Since all the documents placed alongwith the supplementary counter affidavit are part of the original record of the State Government or the writ proceedings of the earlier

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petition filed by respondent no. 7, therefore, in our opinion, even if we ignore from consideration the supplementary counter affidavit, there would be no difficulty for this Court in placing reliance on the documents from the original record placed before us. As regards the objection of Mr. Jain that in the order sheet of the Court it is left out from being recorded that he had advanced arguments on various dates prior to filing of the supplementary counter affidavit dated 29.8.2017, we may note in all fairness to Mr. Jain that before filing of the supplementary counter affidavit dated 29.8.2017 he had advanced his arguments on various dates in great detail. Therefore, to keep the record straight, we have taken special care to mention in our judgment even the number of hours for which Mr. Jain had advanced arguments. At the same time, we would also like to mention that at the stage when supplementary counter affidavit was filed, Mr. Jain was continuing with his submissions. Thereafter in pursuance of the request made by respondent nos. 7, 8 and 9 they were permitted to inspect the original record as well. We would also like to record that in the end, on the request of Mr. Jain, he was once again given an opportunity to advance arguments, particularly, in reference to the documents filed alongwith the supplementary counter affidavit, and he once again argued for 3-4 hours. Accordingly, save and except for the observations and clarifications made above, we do not find any force in the prayer made in Civil Misc. Application No. 311223 of 2017.

212. On the last day of hearing on 20 September 2017, respondent no. 7 filed one more application, being Civil Misc. Application No. 31193 of 2017, in which the prayer made was to stay the hearing of the instant matter till SLP(Civil) No. 8519 of 2006 *Union of India* v. *State of Gujarat* is decided by the Supreme Court. It was vehemently contended by Mr. Ravi Kiran Jain, learned senior counsel that the Supreme Court is already seized of similar issues and is monitoring removal/re-location/re-allocation of illegal/unauthorised constructions of religious nature at public places on pan India basis, therefore this court should stay away from deciding similar issues.

213. In order to appreciate the submission made by Mr. Jain, we would allude to the dispute pending before the Supreme Court in some detail. The Special Leave Petition before the Supreme Court is directed against the order the Gujarat High Court taking *suo moto* cognizance of a news item published in Times of India, Ahmadabad Edition dated 2 May 2006 to the effect that 1200 temple and 260 Islamic shrines had encroached upon the public space. The High Court directed the State Authorities to take immediate steps to remove these encroachment without discrimination and submit a compliance report. During course of hearing of the Special Leave Petition on 25 March, 2008, the Assistant Solicitor General sought time to enable the Central Government to convene a meeting of all concerned Secretaries of the respective States to find out a solution to the problem on a consensual basis. On 31 July 2009, the Supreme Court granted further time to the Solicitor General to seek instructions and file an affidavit that thenceforth no church, mosque and gurudwara etc. shall be permitted on public street/public space.

214. On the next date of hearing on 29 September 2009, the Solicitor General placed on record a letter dated 19 September 2009/23 September 2009 by the Home Secretary, addressed to Solicitor General, informing him of the outcome of the meeting of the Chief Secretaries of the States held on 17 September 2009. It refers to the consensus arrived at in the said meeting, which was to the effect that:—

"(i) No unauthorized construction of any religious institution namely, temple, church, mosque or gurudwara, etc. shall be permitted on public street/public space.

(ii) In respect of unauthorized constructions of any religious nature which has taken place in the past, the State Government would review the same on a case by case basis and take appropriate steps. This will be done as expeditiously as

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possible."

215. The Supreme Court, looking to the far reaching implications and consequences of the orders which were likely to be passed in the said matter, permitted impleadment of all the State and the Union Territories and by way of an interim measure directed as under:—

"As an interim measure, we direct that henceforth no unauthorized construction shall be carried out or permitted in the name of Temple, Church, Mosque or Gurudwara etc. on public streets, public parks or other public places etc.

In respect of the unauthorized construction of religious nature which has already taken place, the State Governments and the Union Territories shall review the same on case to case basis and take appropriate steps as expeditiously as possible.

In order to ensure compliance of our directions, we direct all the District Collectors and Magistrates/Deputy Commissioners in charge of the Districts to ensure that there is total compliance of the order passed by us. They are directed to submit a report within four weeks to the concerned Chief Secretaries or the Administrators of the Union Territories who in turn will send a report to this Court within eight weeks from today."

216. On 7 December 2009, the Supreme Court issued the following directions:—

"The Chief Secretaries, in consultation with the respective Governments are directed to frame the policy in respect of existing unauthorized construction of religious nature, which had already taken place. This Court directed the respondents to review the same on case to case basis. Let the policies be formulated by all the States and the Union Territories within four weeks from today.

We are reiterating that the Chief Secretaries, the concerned District Magistrates and the Collectors/Deputy Commissioners in-charge of the Districts must ensure total compliance of our order. Any breach in this respect shall be viewed seriously by this Court.

We direct the Chief Secretaries/Administrators of all the States and Union Territories to circulate copies of the order dated 29th September, 2009 and this order to all the District Magistrates and Collectors/Deputy Commissioners, other public bodies and local bodies.

We direct the learned Standing counsel appearing for various States and the Union Territories to ensure that all copies of the affidavits are filed in this Court on or before 27th January, 2010 with an advance copy to the learned Solicitor General of India, who is requested to get all these affidavits tabulated and submit a report to this Court on or before 2nd February, 2010.

Place this petition for further directions on 4th February, 2010. Looking to the gravity of this matter, we direct that no order or direction inconsistent wot our orders, shall be passed by any other Court in the country."

217. Further on 16 February 2009, the Supreme Court observed/directed as under:

"The other part of the directions issued on 29th September, 2009, were that in respect of unauthorized construction of religious nature which has already taken place on public streets, public parks or other public places, the State Governments and the Union Territories were directed to review the same on case to case basis and take appropriate steps as expeditiously as possible. We do not find comprehensive and satisfactory affidavits as far as this direction of the order is concerned. Therefore, it has become imperative to direct all the States and the Union Territories to formulate comprehensive policy regarding the removal/relocation/regularisation of the unauthorized construction within six weeks' from today. The policy should clearly indicate within what period the States and the

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Union Territories are going to fully comply with its policy to remove/relocate/regularise the unauthorized construction.

We also direct all the States and the Union Territories to identify unauthorized construction of religious nature on public streets, public parks and public places within six weeks' from today.

We direct the Chief Secretary of the State of Uttarakhand to file an affidavit within two weeks from today. In case the affidavit is not filed, the Chief Secretary shall remain present in Court on the next date of hearing.

We also direct all the Chief Secretaries of the States and the Administrators of the Union Territories to file further comprehensive affidavits within six weeks' from today."

218. It is pointed out that this Court in Writ-C No. 26941 of 2013 *Abdul Kayyum* v. *State of U.P.* issued various directions and sought various informations and compliance report from the State Government regarding compliance of the directions issued by the Supreme Court in *Union of India* v. *State of Gujarat* and thereafter tried to monitor implementation of the directions issued in the said matter by the Supreme Court by directing as under by order dated 25.10.2013:—

"We are not satisfied with the affidavit inasmuch as the State Government has not framed any policy in compliance with the directions issued by the Supreme Court in its order dated 7.12.2009, in *Union of India* v. *State of Gujarat* [Special Leave to Appeal (Civil) No. 8519 of 2006]. The Supreme Court issued directions to the Chief Secretaries, in consultation with the respective Governments, to frame the policy in respect of existing unauthorized constructions of religious nature, which had already taken place, and to review the same on case to case basis. The policy was to be formulated by all the States and Union of Territories within four weeks.

There is nothing in the affidavit filed by the Principal Secretary (Home) that any such policy has been formulated. On the contrary, incomplete information has been forwarded, giving details of constructions of religious nature in 75 districts of U.P., which have been made prior to 29.09.2009.

We are surprised to find that out of 46,181 constructions of religious nature, made on public land prior to 29.09.2009, the State Government has removed only 88 constructions and 47 have been relocated, and that it proposes to regularize 42,381 constructions of religious nature made on the public land.

The information supplied in the affidavit is incomplete inasmuch as nature of constructions of religious nature; the nature of public land on which such constructions of religious nature have been raised; the area occupied by them and the person(s)/trusts/societies who have made these constructions and are managing these religious constructions.

We cannot countenance to the stand of the State Government that it proposes to regularize 42,381 constructions of religious nature made on the public land, without disclosing the area occupied by such constructions of religious nature, the nature of land, the persons who have raised such constructions and the policy by which these constructions are proposed to be regularized.

We find it difficult to accept any such policy contemplating regularization of constructions of religious nature raised on public land. The freedom of conscience and free profession, practice and propagation of religions and freedom to manage religious affairs under Articles 25 and 26 of the Constitution is subject to public order, morality and health. This freedom do not include to raise unauthorized constructions over public land, and to claim any protection or any right to regularize them.

To begin with, we direct the Principal Secretary (Home) to get a survey made of all the constructions of religious nature made prior to 29.09.2009, on public land.

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The details of the survey will include the nature of public land; the nature of constructions of religious nature made on such land; the area/extent of public land occupied by such constructions of religious nature; whether such constructions of religious nature on public land are situate nearby by school/hospital/public office and Court buildings; whether it is obstructing road traffic etc. The details will also include the person(s)/trust/societies/dharamshalas etc who have raised/managing such constructions with their names and addresses, registration number of Trust/Society. Each unauthorized constructions of religious nature on public land will be photographed from all sides and will be given a distinct number and category (religion) in district wise.

In the meantime, the policy, if it is not prepared so far in pursuance to the directions of the Hon'ble Supreme Court for regularization/relocation of such religious places, may be prepared, which may spell out the manner in which land is going to be settled.

In pursuance to the directions issued by the Apex Court as well as directions issued by us today, the State Government will remove all constructions of religious nature made on public land after 29.09.2009 and submit proof that such constructions have been removed within a month. We may make it clear that initially those constructions of religious nature will be removed, which are on public roads, parks, public crossing and those which have been constructed within 100 mtrs of school, hospital, public offices, and Court buildings.

The State Government will also give details of relocation of 47 constructions given in the note of chart (annexure-3 to the affidavit of Principal Secretary Home)."

219. It is pointed out that the State Government and its functionaries challenged the proceedings and the orders passed in writ petition no. 26941 of 2013 by filing SLP (Civil) No. CC 4766 of 2014. The Supreme Court by order dated 10 March 2014 stayed the proceedings of the Writ Court but with the rider that the authorities will proceed in terms of the orders passed by the Supreme Court. The order dated 10 March 2014 reads thus:—

"Post the matter alongwith SLP(C) No. 8519 of 2006 on 7th July, 2014.

In the meantime, the operation of the order dated 25th October, 2013 passed by the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 26941 of 2013 and order dated 6th December, 2013 passed by the High Court of Judicature at Allahabad in C.M. Review/Modification Application No. Nil of 2013 in Civil Misc. Writ Petition No. 26941 of 2013 shall remain stayed, but authorities will proceed in terms of the order passed by this Court."

220. It is urged that having regard to the fact that Supreme Court is monitoring the issue of unauthorised constructions of religious character over public land, the proceedings of the instant petition be stayed.

221. In writ petition no. 26941 of 2013 *Abdul Kayyum* v. *State of U.P.*, an affidavit of compliance was filed by the Principal Secretary (Home), Government of U.P., Lucknow. It is stated in the said affidavit that the State Government had made all attempt to implement the directions issued by the Supreme Court in SLP No. 8519 of 2006. The State Government had sought information from various districts and had thereafter compiled the data in form of a chart which was brought on record as Annexure to the counter affidavit. In paragraph 12 of the counter affidavit, it is stated thus:—

"12. That, so far as constructions which was raised prior to 29.09.2009 is concerned there are about 46181 and out of the same 88 constructions have been removed and 47 have been reallocated, steps are also under process for regularizing constructions which were raised prior to 29.09.2009."

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222. The chart annexed with the counter affidavit revealed that in Allahabad District, the State Government had identified 381 unauthroised constructions of religious character over public land that had been raised prior to 29 September 2009. Out of it, 19 were demolished, while the remaining structures were under consideration, on a case to case basis, for regularisation.

223. A specific query was posed by the Court to Mr. Jain as to whether the construction existing over the site in dispute was identified by the State Government while carrying out survey in compliance of the directions of the Supreme Court and whether it was included in the list. In response, he gave an evasive reply that it must have been included in the said list. However, in the supplementary affidavit, there is no such assertion. On the other hand, Mr. Manish Goyal, learned Additional Advocate General, submitted that the structure existing over the disputed site is not included in the said chart as according to him, the said structure was not within the scope of enquiry which is being held by the Supreme Court. In his submission, it is only unauthorised construction over public roads/public streets which was being monitored by the Supreme Court whereas in the instant matter, the unauthorised constructions were raised over the land, which was leased out to the ancestors of respondent no. 8 and now in possession of the High Court.

224. After considering the rival submissions, we do not find any substance in the application filed by respondent no. 7 on account of number of reasons. Firstly, as rightly pointed out, the unauthoised constructions in the instant case, though of religious nature, are over Nazul land which was in possession of the lessees. It cannot *stricto-sensu* be called public street/public space, the unauthorised constructions over which alone is being monitored by the Supreme Court. Second, there is no material on record to indicate that the structure in dispute was included in the list submitted by the State Government before the Supreme Court. Thirdly, the Supreme Court in its order dated 7 December 2009 did not refrain any Court from entertaining petitions raising issue of unauthorised construction of a religious character over public place. On the other hand, the Supreme Court has only observed that no Court in the country shall pass order or direction inconsistent with the orders of the Supreme Court. Fifthly, the application was moved on the last day of hearing, though the hearing had continued for more than a month, stretching on different dates.

225. We may at this state like to notice that writ petition no. 26941 of 2013 *Abdul Kayyum* v. *State of U.P.* was filed before this Court raising grievance that loudspeakers were being permitted in night hours over religious places despite restrictions placed in that regard by the Noise Pollution (Regulation and Control) Rules, 2000. In the said petition, there was no grievance raised in regard to any alleged unauthorised construction of a religious nature. However, the Bench entertaining the petition enlarged the scope of the petition and issued various directions to ensure implementation of the directions given by the Supreme Court notwithstanding the fact that the Supreme Court was seized of the matter and itself monitoring implementation of its directions. It seems that having regard to these facts, the proceedings before the Writ Court were stayed by the Supreme Court. However, while granting stay of the proceedings, the Supreme Court itself clarified that the authorities will proceed in terms of the order passed by that Court.

226. We are of the considered opinion that the disposal of the instant matter would in no manner interfere with the hearing of the SLP which is pending in the Supreme Court. The directions which we propose to issue would also, in no manner, be inconsistent with the orders and directions of the Supreme Court.

227. The Civil Misc. Application No. 31193 of 2017 accordingly has no force and is rejected.

228. Civil Misc. Impleadment Application No. 218568 of 2017 was filed by M/s

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APJR Properties Ltd., Kudos Mechandising Pvt. Ltd. and C & C Hotels Venture Pvt. Ltd. seeking impleadment as party respondents. These applicants claim that they are owners of the adjoining plot no. 66 having no concern with site no. 59, Civil Station, Allahabad. They claim that the passage is part of plot no. 66 and not plot no. 59 and consequently, the instant proceedings are likely to affect them adversely, therefore, they have applied for their impleadment. They apprehend that the construction of the boundary wall over site no. 59, on the western side, adjoining the passage, may adversely affect their rights in the adjoining land. However, in our considered opinion, the claim made by the applicants by means of instant application is not within the scope of enquiry or adjudication in the instant proceedings. In case the applicants apprehend that their interest is likely to be affected by construction of the boundary wall, it is always open to them to seek redressal of their grievance in appropriate proceedings before appropriate forum. The application accordingly stands rejected.

229. Civil Misc. Application No. 307465 of 2017 has been filed by 55 persons seeking intervention in the proceedings claiming right to offer Namaj in the Mosque in question. It is alleged that their right to offer prayer is going to be affected and hence they may be permitted to intervene in the matter. The application in question was filed on the last date of hearing on 20.9.2017. The right of the persons offering prayer in the Mosque was duly taken care of by respondent nos. 7 and 9 who had advanced all possible arguments. Still we allowed the application and heard counsel for the applicants in the intervener application.

230. We now move to the most crucial part of the judgment i.e the relief which is to be granted. It is a real conundrum, regard being had to the fact that we are dealing with a structure with which are attached the religious sentiments and beliefs of a section of society. It has made and compelled us to pause, ponder and confer anxious consideration upon the same. The memory of jam-packed Court in which the hearing proceeded, the presence of large number of senior and junior members of the Bar, cutting across religious beliefs and affiliations, still lingers in our mind. Be that as it may, we would clearly be failing in our duty if we were to forget that as guardians of the law, it is our moral duty and constitutional obligation to deal with a matter in accordance with law, removed and insulated from the clangour and tumult of individual opinions and sentiments. For the court must necessarily be concerned only with the fair and impartial application of the law. In the earlier part of our judgment, we have dealt with the concept of secularism as laid down by the Supreme Court while interpreting the provisions of the Constitution. However, all through the hearing of the case, we were left pondering of the meaning of secularism which an ordinary citizen ascribes to it. In our society, as soon as a child gains consciousness, he is subjected to a continuous onslaught of religious customs, practices, dogmas and beliefs. They get ingrained in him, consciously and at times, unconsciously. In the words of Sudhir Kakkar in his treatise the "Inner World" these "values, beliefs, prejudices, and injunctions as well as its distortions of reality, become part of the individual's psyche as the content of the ideologies of his conscious." As a result when, it comes to religion, it defies all logic. If his beliefs and/or ideologies are challenged or invaded, it arouses passions and emotions. At times, it leads to violence, arson, pyromania, little realizing that the religion which one profess to protect, eschew such acts. As mortal beings, our heart kept reminding us of the view point of a common man on the street, while our mind, reminded us of our commitment to the Constitution and the laws. It is this commitment which transforms a common human being to the exalted position of judging actions of his fellow beings. We are also conscious that law is best administered when it is backed by humane consideration and compassion.

231. The courts in India are often described as 'temple of justice', where litigants worship for justice and judges play a role of angel/agents of the Goddess of Justice. The role of lawyers is like a 'pujari' in temple, 'maulavi' in mosque, 'granthi' in

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gurudwara and clergymen in church, and when they perform their role, in the course of hearing of a case, they belong to only one religion called "Nyay Dharma", which can also be described as 'justicism', where they study science of law/justice and render assistance to do justice. As is the ecclesiastical law sacrosanct to the followers of a religion, cult or faith, so is the Constitution and the Laws to the judge, lawyers and litigants.

232. Keeping in mind the above and having regard to the findings and conclusions arrived at, we are of the considered opinion that the unauthorised possession as well as the unauthorised structures existing over the site in dispute cannot be permitted to continue any longer. At the same time, having regard to the fact that as of date, the offending structure is being used to offer prayers, we deem it fit and proper to grant reasonable time to respondents no. 7 to vacate and remove the same. We also permit respondents no. 7 and/or 9 to approach the District Administration for allotment of a piece of land of same size close to the High Court, to enable them to construct a masjid over the same. In that event and having regard to the peculiar facts of the instant case, we only observe that the District Administration/State Government may deal with such an application, sympathetically. In this backdrop, we observe that the members of the Managing Committee of respondent no. 7-Waqf, who are all eminent lawyers practicing in this Court, shall abide by the law and directions and voluntarily comply with the same, and also convince the members of their community to graciously accept and comply the directions and not to indulge in any wrong/untoward activity and to only pursue the matter with the State Government for seeking allotment of an alternative plot of land.

233. Before we issue directions, we take judicial notice of the fact that the High Court is facing an acute crunch of space. The construction and completion of the Administrative Annexe without further delay is a compelling necessity as of date as a number of offices/sections need to be shifted to this building to accommodate our judges in the main building and for meeting other necessities. Recently, 19 Additional Judges have been sworn in, but because of shortage of space, as many as 12 of them are sharing six chambers. The High Court could not arrange and allot them separate chambers. On one or two occasions, when the Division Benches, on Friday had to split and judges were required to sit singly, one judge had to sit in chamber and conduct hearing of the matters assigned to him. The High Court requires to shift some offices/sections with huge record to the Annexe so as to make more chambers/court halls available for judges. One new 30 court halls building is under construction and is likely to take another about 6-8 months to get ready. The High Court Annexe having nine floors, which is almost ready, cannot be used since the Fire Brigade has not issued NOC, in view of the encroachment. It is not in dispute that Fire Brigade vehicle cannot move around the building in view of the encroachment made by respondent no. 7. This is only being cited as an illustration, there being many more such instances.

234. Before parting we would like to place on record our deep appreciation for the cooperation extended by the learned counsel representing the parties as well as those appearing in person. In fact, this Court is beholdened by the able assistance provided to us by Mr. Navin Sinha, learned Senior Advocate appearing for the petitioner, Mr. Ravi Kiran Jain, learned Senior Advocate for respondent no. 7, Mr. Manish Goyal, learned counsel for respondent no. 1-High Court, also Additional Advocate General, Sri A K Goyal, learned Additional Chief Standing Counsel, Mr. S Safdar Ali Kazmi, learned counsel appearing for respondent no. 9, Sri W H Khan, learned Senior Advocate and other Advocates who are members of the Managing Committee of respondent no. 7 and remained present in the Court during the course of hearing to provide the missing links as and when needed by the Court. We wish to make a special reference to the vehemence and great ability with which Mr. Jain put forth the case of respondent no. 7.

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235. In the result, we allow the instant public interest litigation and issue the following directions:

(a) Respondent No. 7-Waqf, shall handover vacant and peaceful possession of the site in dispute to respondent no. 1-High Court, within a period of three months from today.

(b) Respondent no. 7, however, shall handover vacant possession of the portion of the site in dispute, to the extent of 6 meters from the corner of the last staircase on the rear side of the Annexe Building (shown as D G F E in the map accompanied their letter dated 1.9.2016, i.e. Annexure-15 to the counter affidavit dated 18.4.2017 filed by respondent no. 7 and as agreed by them, which is duly recorded in the order dated 20.7.2017), within two weeks from today; the said map being made part of this judgment.

(c) We also direct members of the Committee of Management (respondent no. 7-Waqf), most of whom are the lawyers practicing in this Court, to obey/abide by this order, and handover vacant and peaceful possession of the site in dispute within the stipulated time.

(d) It is needless to mention that while complying the directions (a), (b) and (c), as aforementioned, respondent no. 7/members of the Committee of Management, while handing over possession of the site in dispute, shall also remove all structures standing on the said portion.

(e) If respondent nos. 7 and 9, make an application to the State/District Administration, within four weeks from today, seeking allotment of an alternative site, we direct the State/District Administration to deal with the application sympathetically, in accordance with law, within eight weeks from the date of the application.

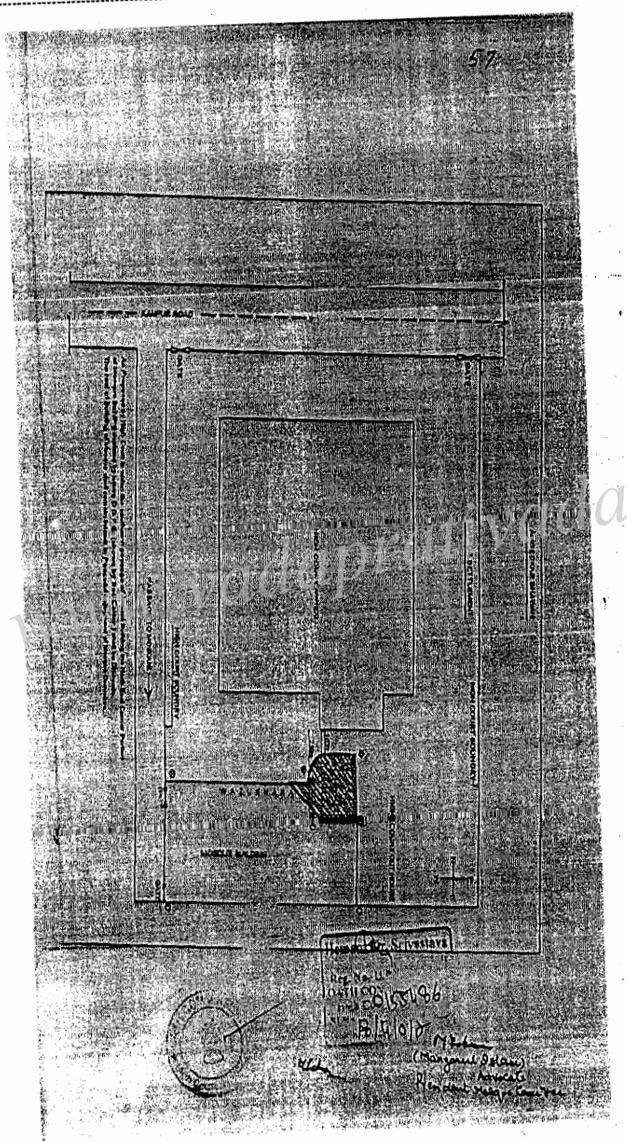
(f) In case respondent no. 7 and members of the Committee of Management fail to comply with any part of the directions (a) and (b) within the stipulated time, respondent nos. 2 to 5 shall take forcible possession of the entire site in dispute from respondent nos. 7 or anyone claiming through them or independently and for such purpose, it shall be open to them to seek police assistance or any other help as may be required for complying this order. Respondent nos. 2 and 3 are directed to provide all possible help to respondent nos. 4 and 5 and to ensure that the site in dispute is made free from all unauthorised encroachments and its possession is handed over to respondent no. 1 within one month therefrom.

(g) Respondent no. 9 shall forthwith delete the words 'High Court' from the registration certificate issued to respondent no. 7. Respondent no. 7 is injuncted forthwith from using the name of High Court in its name or in any manner representing before any authority or person that the alleged Waqf is in any manner connected with or has the patronage of the High Court.

(h) The Registrar General of this Court is directed to ensure that in future no part of the High Court premises, either at Allahabad or at Lucknow, is permitted to be used for practicing religion or offering prayers or to worship or to carry on any religious activity by any group of persons.

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1 1982 (2) SCR 365

2 2014 All. CJ 1574 (SC)

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[3] (2010) 3 SCC 402

[4] (2005) 1 SCC 590 : AIR 2005 SC 540

[5] (2010) 6 SCC 331

[6] (1999) 1 SCC 53

[7] The Waqf Act

[8] 2011 A CJ 989

[9] AIR 1966 SC 893

[10] (2010) 8 SCC 726

[11] 2015 (7) ADJ 460

[12] (1979) 2 SCC 468

[13] 1993 Supp (1) SCC 192 : AIR 1992 SC 1083,

[14] (2014) 16 SCC 51

[15] AIR 1996 Allahabad 355

[16] (1976) 4 SCC 780

[17] AIR 1932 BOMBAY 356

[18] AIR (35) 1948 Privy Council 168

[19] (1976) 4 SCC 780 : AIR 1976 SC 1569

[20] (1998) 2 SCC 642 : AIR 1998 SC 972

[21] AIR 1966 All 201

[22] 2004 All. CJ 2269

[23] AIR 1987 ALLAHABAD 56

[24] (2016) 2 SCC 757

[25] 1999 (2) AWC 1196

[26] 1918 (48) Indian Cases 39

[27] (1943) 45 BLR 275

[28] (1940) 42 BLR 1100

[29] AIR 1954 HYD. 45 (Vol. 41, C.N. 17)

[30] (2006) 5 SCC 353

[31] AIR 1964 SC 1006

[32] AIR 1996 Allahabad 355

[33] (1971) 2 SCC 860 : AIR 1972 SC 1935

[34] (1978) A Civ. J (Supreme Court) 239

[35] (2007) 6 SCC 59

[36] AIR 1935 PC 53 : 1935 (41) Law Weekly 242

[37] (1994) 6 SCC 591

[38] (2002) 3 SCC 258

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[39] (2010) 5 SCC 203

[40] 1989 Supp (1) SCC 487 : AIR 1989 SC 1834

[41] (2003) 2 SCC 355 : AIR 2003 SC 578

[42] (1979) 2 SCC 409 : AIR 1979 SC 621

[43] (2011) 5 SCC 394

[44] (2005) 3 SCC 91 : AIR 2005 SC 894

[45] (1976) 1 SCC 700

[46] 2012 (4) All 213

[47] (1994) 6 SCC 360 : AIR 1995 SC 605

[48] (1973) 4 SCC 225 : AIR 1973 SC 1461

[49] 1975 Supp SCC 1 : AIR 1975 SC 2299

[50] (1994) 3 SCC 1

[51] (1974) 1 SCC 717

[52] (2017) 2 SCC 629

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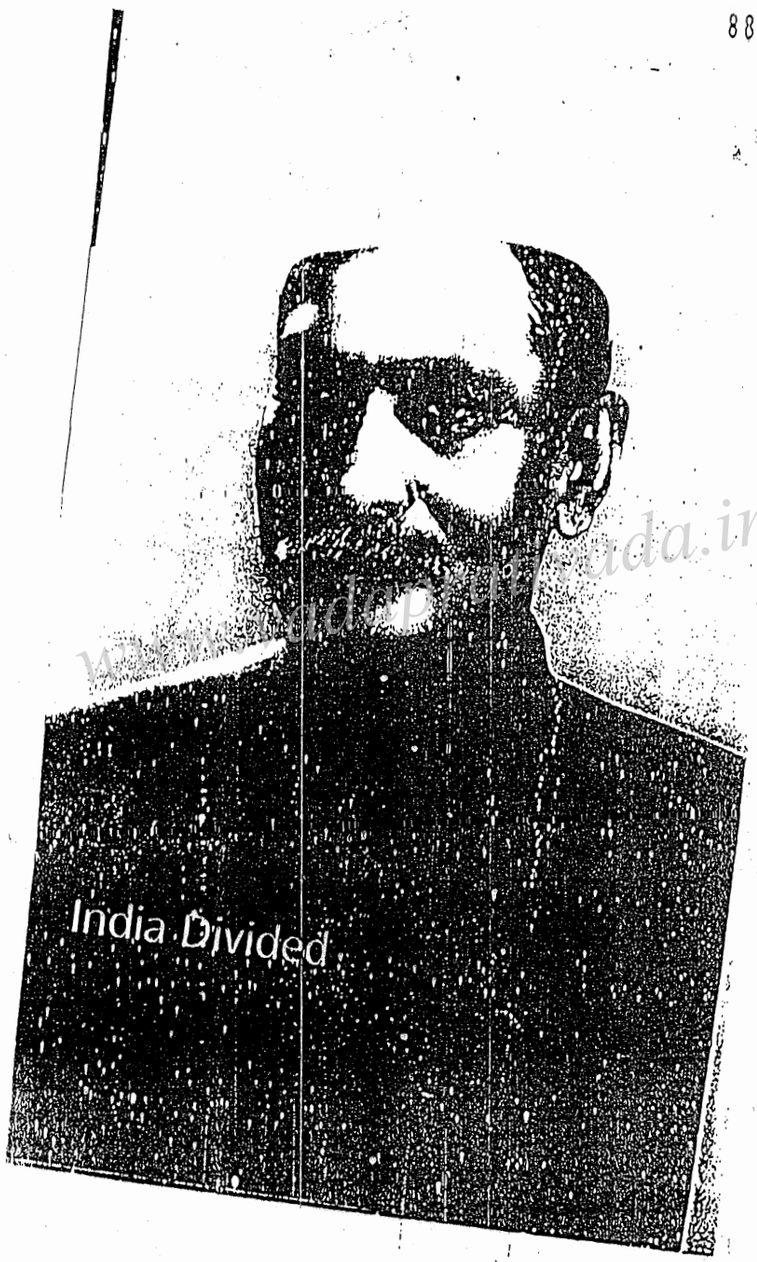
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ANNEXURE A-2

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Babar downwards laying stress on the desirability of respecting the Hindu feeling by not slaughtering cows, if not actually prohibiting cow-slaughter altogether, and there are innumerable respectable Muslim families among whom beef is never used out of regard for the feelings of Hindu neighbours. 'On the occasion of Id it appears the cow was not sacrificed, for we are told: "On that day [Id] everyone who is able will sacrifice a goat in his house, and keep the day as a great festival."'[16]

It is worthwhile reproducing the secret will of Zahiruddin Mohammed Badshah Ghazi (Babar) to Prince Nasiruddin Muhammad Humayun:

'Oh Son! the Kingdom of India is full of different religions. Praised be God that He bestowed upon thee its sovereignty. It is incumbent on thee to wipe all religious prejudices off the tablet of thy heart, administer justice according to the ways of every religion. Avoid especially the sacrifice of the cow by which thou canst capture the hearts of the people of India and subjects of this country may be bound up with royal obligations.

'Do not ruin the temples and shrines of any community which is obeying the laws of government. Administer justice in such a manner that the King be pleased with the subjects and the subjects with the King. The cause of Islam can be promoted more by the sword of obligation than by the sword of tyranny.

'Overlook the dissensions of the Shias and the Sunnis, else the weakness of Islam is manifest.

'And let the subjects of different beliefs harmonize in conformity with the four elements (of which the human body is harmoniously composed) so that the body of the Kingdom may be free from different dissensions. The memoirs of Timur, the master of conjunctions, (the fortunate,) should always be before thine eyes so that thou mayest become experienced in the affairs of administration. First Jamaidiuluwal 935 A.H.'[17]

Some instances of tolerance by Muslims may also be mentioned here, given to me by Dr Syed Mahmud:

The famous Portuguese historian Fari Souza writes in his *Dakkhan-Ki-Halat*: 'Hindus and Musalmans served one another

[16] Ishwari Prasad, *A Short History of Muslim Rule in India*, p. 738, quoting Pelsaert, p. 74.

[17] Translation of the will of Babar, a copy of which used to be in possession of the late Dr Balkrishna, Principal, Rajaram College, Kolhapur; published in *The Searchlight*, dated 30 May 1926.

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and Muslim kings used to appoint Hindus to high posts and confer on them high ranks.' In other words, there was no discrimination against Hindus, and they used to perform their religious rites and ceremonies without hindrance. The Musalmans used to show great consideration for the religious feelings of the Hindus.

Sir Alfred Lyall writes in *Asiatic Studies*, p. 289: 'But so far were they [Muslim rulers] from converting India, that among the Mohammadans themselves, their own faith never acquired an entire, exclusive monopoly of the high officers of administration.'

Aurangzeb recommended to Shah Jahan and his ministers many able Hindus for appointment. For example, when there was a vacancy in the post of Diwani of Ellichpur, he strongly recommended a Rajput officer named Ramkaran but for some reasons Shah Jahan did not accept the recommendation. Aurangzeb wrote a second time that a better man could not be found. (*Ruqaat-Alamgiri*, Vol. I, p. 114.) Many instances of such recommendations may be found in *Ruqaat-Alamgiri*, and *Adab-e-Alamgiri*.

It is generally believed that Aurangzeb forcibly converted Hindus to Islam. But a curious incident may be described here which shows his attitude. Shah Jahan had imprisoned the Raja Indraman of Wandhera for his repeated acts of disobedience of orders. When Aurangzeb was appointed Subedar of the Deccan he strongly recommended his release to Shah Jahan. But Shah Jahan was so displeased with Indraman that he turned down Aurangzeb's recommendation and wrote to him that Indraman had repeatedly caused him displeasure, but he might be set free if he became a Musalman. Aurangzeb strongly protested against this and wrote to Shah Jahan that this condition could not be acted upon and was impolitic and short-sighted, and that if he was to be released, he should be released on conditions offered by him. Aurangzeb's letter to Shafaullah Khan, the Prime Minister, on this subject is to be found in the *Adab-e-Alamgiri*.

II. SOCIAL LIFE

The influence exerted by the Hindu on Muslim social life and custom and vice versa was no less remarkable. This can be illustrated easily by reference to the rites and ceremonies connected with the three most important and significant incidents in human life—birth, marriage and death. I shall mention here some common

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