IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
C.A. NO. 5498 OF 2011

IN THE MATTER OF :

FAROOQ AHMAD (D) THR. LRS ... APPELLANTS

VERSUS

PARAM HANS'RAM CHANDER SAS
(DEAD) BY LRS. & ORS. ...RESPONDENTS

WRITTEN SUBMISSIONS OF MR. SHEKHAR NAPHADE, SENIOR ADVOCATE ON BEHALF OF APPELLATE ABOVE NAMED

1. In the aforesaid suits one important question that arises for determination of this Hon'ble Court is the applicability of the principle of *Res Judicata*. This plea is based on the final judgment of the Judicial Commissioner's Court dated 02.09.1886 in Suit No. 61/280 of 1885 in Second Appeal No. 122/1886 arising out of First Appeal No. 27/1885 and Suit No. 61/280.

2. The issues framed in the all the aforesaid suits are as follows:-

I. ISSUES:-

A. SUIT NO. 1 (At Pg. xiii)

a) Issue No. 5(a)- Was the property in suit involved in original suit no. 61/280 of 1885 in the Court of Sub-Judge, Faizabad, Raghubar Dass Mahant v. Secretary of State for India and others?
b) Issue No 5(b)- Was it decided against the plaintiff?
c) Issue No. 5(c)- Was the suit within the knowledge of Hindus in general and were all Hindus interested in the same?
d) Issue No. 5(d)- Does the decision in the same bar the present suit by principles of *Res Judicata* and in any other way?

B. SUIT NO. 4 (Pg. x-xi)

a) Issue No. 7 (a)- Whether Mahant Raghubar Dass, Plaintiff of Suit no. 61/280 of 1885 had sued on behalf of Janmasthan and whole body of person interested in the Janmasthan?

b) Issue No. 7 (b)- Whether Mohammad Asghar was the Mutawali of alleged Babri Masjid and did he contest the suit for and on behalf of any such mosque?

c) Issue No. 7 (c)- Whether in view of judgment in the said suit, the members of the Hindu Community, including the contesting defendants, are estopped from denying the title of the Muslim Community, including the plaintiffs of the present suit, to the property in dispute? If so, its effect?

d) Issue No. 7 (d)- Whether in the aforesaid suit, title of the Muslims to the property in dispute or any portion thereof were admitted by the Plaintiff of that suit? Is so, its effect?

e) Issue No. 8- Does the Judgment of Case no. 61/280 of 1885, operate as *Res Judicata* against the defendants in suit?

C. SUIT NO. 5 (Pg. xvi)

a) Issue No. 23- Whether the Judgment of Suit no. 61/280 of 1885, filed by Mahant Raghubar Dass in the Court of Sub-Judge, Faizabad is binding upon the plaintiffs by application of principles of Estoppel and *Res Judicata* as alleged by the Defendants Nos. 4 and 5?

3. In order to support the plea of *Res Judicata*, it is necessary to examine the pleadings and the connected facts of the Suit No. 61/280 of 1885 (hereinafter referred to as "**1885 Suit**"). In the 1885 suit, only the Secretary of the State was the Defendant. The plaint in the said 1885 suit is Ex.A-22 being Annexure A-15. The plaint is to be found in **Vol. 11** at **Page 1576 to 1579**. The judgment of the Trial Court in the said 1885 suit is Ex.16 and is to be found at **Page 1587 to 1594** in **Vol. 11**. Mohd. Asghar Khatim who was the Mutawali of Jama Masjid got himself impleaded as the Defendant and filed his written statement. The same is Ex.14 and is to be found in Suit – 4 at **Pages 1580 to 1583, Vol. 11**.

4. In the said suit the Trial Court appointed a Court Commissioner to inspect the land claimed by the Plaintiff therein and submit the report. Accordingly, the Court Commissioner visited the site and submitted the report alongwith a plan showing the location of the Chabutara which was the subject matter of the suit. That Report and Plan were marked as Ex.15 **Pages 1584 to 1586** in **Vol. 11**. Mr. Justice Khan at **Page 31 of Volume I** has recorded a finding that plan prepared by the commissioner is same as the plan annexed to plaint.

5. The judgment of Hon'ble Mr. Justice Aggarwal of the Allahabad High Court has substantially reproduced the contents of the plaint of the 1885 Suit (See **Page 1426, Vol. II**) and the written statement (See **Pages 1433/Vol. 11**). It appears that the Government as represented by the Secretary of the State had filed the written reply to the suit, the reference to the same is to be found in the judgment of the Trial Court dated 24.12.1885. However, the said reply is not traceable and is not on the record of the present proceedings.

6. In order to support the plea of *Res Judicata* it is necessary to examine the contents of the plaint and the written statement and the judgment of the Trial Court. In the plaint it is *inter-alia* alleged as follows :-

   a. The Plaintiff seeks permission for construction of temple on a Chabutara (Platform) / Janmasthan situated at Ayodhya admeasuring 70 ft. in the North, 81 ft. in the East, 70 ft. in South and 21 ft. in West.

   b. The Defendant i.e. Secretary of State of India in Council had prohibited the construction of such temple.

   c. That the site is place of the birth and is a very old and holy place of worship of Hindu community and the plaintiff is the Mahant of the place of worship.

   d. In the Chabutara, Charan Paduka is affixed and there is a small temple which is being worshiped.

e. Chabutara is under the possession of the Plaintiff. There is no building / structure on the Chabutara and therefore, the plaintiff and mendicants faced great hardship in summer, monsoon and in winter. If a temple is constructed it will not cause harm to anyone. If it is constructed it will provide great relief to plaintiff and other mendicants and pilgrims. The Deputy Commissioner probably in March April, 1883 on the basis of objections of Muslims prohibited the construction of the temple. Aggrieved by the same, the plaintiff sent a petition to the Local Government and when no reply was received, the Plaintiff issued a Notice under Section 424 of CPC on 8.8.1884.

f. It was contended by the Plaintiff that he has the right to construct a building as the property was in his possession and ownership. It was also stated that it is the duty of the Government to protect its subjects and help them secure their rights. Plaintiff therefore prayed for decree for construction of temple.

g. The written reply of the Government although is not on record, its contents can be seen from the judgment of the Trial Court. The Trial Court has recorded that the Government pleader in his written reply in detail submitted that since the plaintiff is not evicted from the Chabutara therefore, there is no cause of action and the suits suffers from bar of jurisdiction and the remedies sought by the plaintiff are liable to be rejected.

h. The contents of the written statement filed by Mohd. Asgar can be summarized as follows :

i. Babar, the then King built this Masjid and on the door of the compound of the Masjid carved the word Allah on stone and also wrote rent free land for meeting the expenses of the Masjid. In view of this, the ownership of another person does not exist unless the king or representative or another Ruler gives any portion of the land on which Chabutara has been built. This, ownership of the said land cannot be claimed by the plaintiff and that he had not produced any

proof of ownership as plaintiff is not the owner of the land and as such has no right to construct the temple. The plaintiff cannot rely upon coming and going of Hindus in the compound of mosque as a proof of ownership. The Hindus visit the places of worship of Muslims and similarly Muslims visit the places of worship Hindus.

ii. That on the date of the construction of the Masjid till 1856, there was no chabutara on the site, the chabutara came in 1857.

7. The Trial Court framed six issues (see **Page 760, Vol. 1 of the Judgment**). For the purpose of *Res Judicata* we are concerned only with the two issues which are as follows :

"4. Whether the relief as sought is legal or contrary to law?

6. Who owns and possess the said Chabutara"?

8. The judgment of the Trial Court dated 24.12.1885 is to be found at **Pages 1587 to 1594, Vol. 11**. The Trial Court had *inter-alia* held as follows :

The order of the Deputy Commissioner prohibiting the construction of the temple cannot be cancelled. In the year 1855 after a quarrel between Hindus and Muslims, a wall in the form of the railings was erected so that the Muslims could worship inside and the Hindus could worship outside. Thus the outside land is Chabutara which is in possession of the plaintiff and belongs to Hindus. There can be no objection to Hindus worshiping at the place of the Chabutara. If the Hindus are permitted to construct a temple, most probably there will be riots, therefore, this court is of the opinion that permission for construction of Mandir / temple would lay a foundation of war and mischief and therefore it is in the interest of two communities not to give permission for construction of temple.

9. Being aggrieved by the judgment and decree of the Trial Court, the original plaintiff filed an Appeal in the District Court being Appeal No. 27 of 1885. The Appeal Court dismissed the appeal vide judgment dated 18/26.03.1886. The said Mohd. Asgar filed cross- objections as he was aggrieved by the trial court holding that the plaintiff is in possession and ownership of the portion of the land on which chabutara is located.

10. The Appeal Court by judgment dated 18.03.1886 (See **Page 1597, Vol. 11)** *inter-alia* held as follows:-

> That the Masjid built by Babar stands on the border of the town of Ayodhya and that it is built on the land held sacred by the Hindus but that event occurred 366 years ago and therefore it is too late to remedy the grievance. The Appellate Court describes the site. The Chabutara is said to indicate the birth place of Ramachandra. As regards jurisdiction, the District Judge held that the Court did have the jurisdiction citing a judgment wherein it was laid down that persons of whichever sect are at liberty to erect buildings and conduct public worship provided that neither rights of property enjoyed by their neighbors get affected nor it causes public nuisance and subject to such direction as Magistrate may give by order. The 1st Appellate Court also struck off the observation of trial court to the effect that plaintiff is owner of Chabutara and is in possession of the same.

11. The judgment of Justice Aggarwal in **Paras 834 and 835 at Pages 761 and 762, Volume I** holds that the finding of the Trial Court that the plaintiff is in possession and ownership of the chabutara is expunged by the 1st Appellate Court in the cross objection filed by the original defendant.

12. The plaintiff filed second appeal before the Judicial Commissioner, Oudh. The same appeal was dismissed. The judgment of the Judicial Commissioner dated 02.09.1886 is to be found in **Para 867 at Page 769, Volume I** of Justice Aggarwal's Judgment. The important finding of the Judicial Commissioner is that the Hindus have limited right to access certain spots within the precinct adjoining the mosque. That they have for

years tried to increase their rights and to erect buildings over two spots in the enclosure-

a. Sita ki Rasoi

b. Ram Chandar ki Janam Bhumi.

That the authorities have persistently repressed these encroachments and absolutely forbid any alteration of the status quo. The Civil Court has rightly dismissed the suit.

13. All the three judgments of the Allahabad High Court which are the subject matter of the present Civil Appeals have dealt with the plea of *Res Judicata.*

ANALYSIS OF HONBLE MR. JUSTICE KHAN'S JUDGMENT

14. The judgment of Mr. Justice Khan has not dealt with the issue in detail. The judgment of Justice Khan is in **Vol. I** and the relevant portion of the judgment is at **Pages 87 to 90** and his Lordship hold as follows :

i. The judgment of 1885 suit did not decide anything substantial. The only thing that was decided was that in view of peculiar topography i.e. place of worship of both communities within the same compound having common entrance, there is a strong likelihood of riots and therefore the plaintiff in 1885 suit could not be permitted to raise the construction on Chabutara and authorities had directed the parties to maintain status quo. As nothing was decided, the bar of *Res Judicata* contained in Section 11 is not attracted. His Lordship further held that neither the explanation IV to Section 11 nor Explanation VI Section 11 are attracted.

Note: It is settled law that the judgment of the Trial Court merges into the judgment of the Appeal Court and the judgment of the Appeal Court merges in Second appeal judgment of the Court of Judicial Commissioner. It is important to note that the Judicial Commissioner has categorically held that the Hindus have very limited right to access to certain spots within the precincts adjoining the mosque and they have for years trying to increase

their rights and erect the building over the two spots in the enclosure. The executive authorities have persistently repressed this encroachments and have absolutely forbid any alteration of the status quo. It is further observed that this was a wise and proper action on the part of the Executive Authority and that the civil courts have rightly dismissed the suit.

The judgment of the judicial commissioner records the following findings:-

i. The Hindus have limited right and they are attempting to increasing such rights.
ii. The authorities are justified in repressing such attempts.
iii. The civil Courts are justified in dismissing the suit.

The Judicial Commissioner thus confirms the judgment of the First Appellate Court which *inter alia* sets aside the finding of Trial Court that the plaintiff is the owner and is in possession of the portion of the land on which the Chabutara is located. The Judicial commissioner thus confirms that executive authority was justified in prohibiting the construction of temple.

It is respectfully submitted that the findings of Justice Khan that nothing was decided substantially is contrary to the record and therefore cannot be sustained.

ANALYSIS OF HONBLE MR. JUSTICE D.V. SHARMA'S JUDGMENT

15. Mr. Justice D.V. Sharma also rejected the plea of *Res Judicata* and his Lordship's finding can be summarized as under [**Page 3020 to 3035/Vol. III**]:

i. That the said Mahant Raghubar Das was the sole plaintiff and was not representative of the Hindu community. The suit was not filed in accordance with the provisions Section 539 of 1882 CPC which corresponds to Section 92 of CPC, 1908. The plaintiff in 1885 suit filed his suit in his personal capacity. **[Pages 3020-3021/Vol. III]**

ii. Similarly the said Mohd. Asgar was not the representative of the Masjid and did not contest the suit for and on behalf of the said mosque. The Lordship further refers the provisions of Section 539 of 1882 CPC and stated that the procedure contemplated by Section 539 was not followed. [**Page 3021/Vol. III**]

iii. On **Pages 3025 to 3035, Vol. III** his Lordship again discussed the plea of *Res Judicata* and His Lordship's findings can be summarized as follows:

a. The earlier 1885 suit was not a representative suit.

b. The plea of the defendants in the present proceedings based on Explanation VI to Section 11 CPC, is also rejected on the ground that the 1885 suit was not filed in accordance with Section 539 of the 1882 CPC, which corresponds with Section 92 of CPC, 1908.

c. On **Page 3026, Vol. III** his Lordship has reproduced Section 11 with all its explanations. From **Pages 3026 to 3035, Vol. III** has discussed the judgments on the principle of *Res Judicata* and has traced the origin of principle *Res Judicata*. It is respectfully submitted that while doing so his Lordship has not correlated the factual matrix to the propositions of law enunciated in the said pages. The only relevant portion which correlates the principle of *Res Judicata* with factual matrix is to be found on **Page 3035, Vol. III** and the same can be summarized as follows:-

i. That the parties in the present suit are different.

ii. The dispute in 1885 suit was only with respect to chabutara while in the present suit the plaintiff has sought different reliefs.

iii. There is no final decision on any particular issue in the 1885 suit which binds the parties and there is nothing on record to suggest that the matter involved in present suits might or ought to have been raised earlier.

Note:-

A. Mohd. Asgar got himself impleaded as the Mutawalli of the Mosque and in that capacity he represented the mosque and the Muslim community which prayed in the mosque. Mulla's book on ***Mahomedan Law (20th Edn. at Page 238)*** summarises the office of Mutawalli and his power and functions

"The functions of mutawalli are the same as those of a trustee but he is not a trustee either generally or under the Indian Trusts Act.

Although the wakf property is not vested in the mutawalli, he has the same rights of management as an individual owner. He is not bound to allow the use of the wakf property for objects which though laudable in themselves are not objects of the wakf. The Muslim community cannot compel the mutawalli of a mosque to allow a school building to be erected on a site attached to the mosque. Again although a mutawalli is not a trustee in the sense in which the expression is used in English law he has duties akin to those of a trustee and if he wrongfully deprives a beneficiary of the profits he is liable for interest in case in which, under s. 23 of the Trusts Act, a trustee would be liable. It has even been said that in the case of a private wakf (i.e. a wakf for the family of the founder where only the ultimate benefit is reserved to charity) the mutawalli is not a mere superintendent or manager but is "practically speaking the owner" – sed quare.

A de facto mutawalli is not unknown in Mohamedan law. A de facto mutawalli can sue for rents without establishing his de jure character. In this case the owner of a house created a wakf and appointed himself as a mutawalli. He then appointed certain persons as his agents and gave them a power of attorney which included powers of management and bringing suits to evict tenants and to recover rent. The agent brought the suit as agent. It was held that the suit was validly constituted."

B. The finding of the Ld. Judge that it was not a representative suit is contrary to record. In the plaint itself the plaintiff asserts that he is the Mahant and the construction of the temple is for the benefit of Hindu community. Even the court of Judicial Commissioner in the judgment dated 02.09.1886 has categorically held that the Hindus have limited rights and that the Hindus are trying to increase their rights and the executive has rightly repressed such attempts and the executive and the action of the executive was proper and justified. In short the judicial commissioner holds that the Hindus have no right to construct the temple and this finding constitutes *Res Judicata*. The finding is not merely qua the plaintiff but is qua the entire Hindu community.

ANALYSIS OF HONBLE MR. JUSTICE AGARWAL'S JUDGMENT

16. The judgment of Mr. Justice Agarwal deals with the plea of *Res Judicata* in detail. It is required to be analysed with reference to the following aspects:

i. Parties to the original suit of 1885 and the parties in the present suit to the property involved in the 1885 suit.

ii. The rights of the two communities vis-à-vis the main dispute relating to the temple/Janmasthan and the right of the Hindu to construct a temple.

17. Hon'ble Mr. Justice Aggarwal has dealt with the question of applicability of the principle of *Res Judicata* from **Paras 800 to 1066 at Pages 751 to 830/Vol. I**.

18. The Ld. Judge in **Paras 802 to 828 at Pages 751 to 760** has summarized the pleadings and submissions of all the parties. In **Para 830 at Pages 760-761**, the Ld. Judge sets out the issues framed in the 1885 suit. In **Paras 832 and 833,** the Ld. Judge has summarized the finding of the Trial Court on Issue No. 4. In **Para 834 on Page 761** and **Para 835 on Page 762**, the Ld. Judge has summarized the findings of the first Appellate Court. In **Paras 836 and 837 on Page 762**, the Ld. Judge has referred to the judgment of the Judicial Commissioner in the Second Appeal. In **Paras 838 to 848 on Pages 762 to 765**, the Ld. Judge has set out the contentions of the Muslim parties on the question of Res-judicata. In **Paras 849 to 852 at Pages 765 and 766** the Ld. Judge has dealt with the contentions of the Hindus on the question of Res-judicata.

I. ISSUE RELATING TO PROPERTY

19. In **Paras 853 to 860 on Pages 766 to 767**, the Ld. Judge dealt with the issue as to whether the property in dispute in the suits before the Hon'ble High Court was involved in the *original suit no. 61/280 of 1885 in the Court of Sub Judge, Faizabad, Raghuvardas Mahant Vs. Secretary of State & Ors.?"* ***[Issue No. 5(a) in Suit 1]***

20. In **Para 858 at Page 767,** the Ld. Judge records a finding that the earlier dispute in the suit of 1885 was only in respect of construction of temple sought to be made on the Chabutara and it was not in respect of the entire disputed site. The dispute in the present suit is in respect of the entire disputed site. The right of ownership or possessory right in respect of the entire land in dispute as is before the Court in the present suit was not involved in suit of 1885. The Ld. Judge in **Para**

860 at Page 767, in view of the aforesaid, answers the issue in the negative.

21. However, it may be noted that in **Para 951 at Page 792** the Ld. Judge holds that the parties must be litigating under the same title. The test is identification of the title in two litigations and not the identity of the actual property involved. The Ld. Judge relies on the judgment in ***Ram Gobinda Daw v. Smt. H. Bhakta Bala Dasi*** as held in **AIR 1971 SC 664.** This finding and the proposition of law stated support the case of Muslim party.

22. Further in **Paras 997 and 998 at Pages 808-809,** the Ld. Judge has referred to the property involved in the earlier suit of 1885. The Ld. Judge then refers to the judgment of this Hon'ble Court in ***K. Ethirajan (Dead) By Lrs vs Lakshmi And Ors*** reported in **AIR 2003 SC 4295** and accepts the proposition that in the earlier suit a part of the suit was involved and in the subsequent suit the whole of the property was involved, would not affect the applicability of the principles of Res Judicata. This finding and the proposition of law stated therein support the plea of Muslim party.

NOTE:- The true test for deciding whether the principle of Res-judicata would apply or not is not whether the whole property is claimed or a part of it is claimed. The correct test is that the title under which it is claimed is same irrespective of question whether part is claimed or whole property is claimed. In the present suit the title claimed by Hindu is same as in 1885 Suit.

23. In **Para 999 at Page 809**, the Ld. Judge accepts the proposition of law laid down by this Hon'ble Court in ***Ethirajan (Dead) By Lrs vs Lakshmi And Ors*** and holds that the said proposition is not applicable as the question of title was not decided in the 1885 suit. This is contrary to the judgment of Judicial commissioner dated 02.09.1886.

24. In **Para 1000 at Page 809** the Ld. Judge holds that as a result of the judgment of the First Appellate Court in Suit 1885 the issue pertaining to ownership remained undecided and that the Judicial Commissioner

Judgment shows that the plaintiff was found to have shown no material to prove his ownership but who owns the property was not decided and therefore the judgment in 1885 suit does not operate as Res-judicata.

NOTE: The Ld. Judge holds that in the earlier suit the question of title to the property in question was not decided against the plaintiff. This is contrary to the specific finding of the Judicial Commissioner.

II. THE DECISION IN 1885 SUIT

25. The Ld. Judge in **Paras 861 to 868 at Pages 767 to 769** deals with the issue as to whether the 1885 suit *was it decided against the plaintiff?"* ***[Issue No. 5 (b) in Suit 1]***

26. In **Para 863 at Page 768**, the Ld. Judge records that the 1885 suit was dismissed right upto the level of Judicial Commissioner and no relief as sought was granted to the Plaintiff. However, it cannot be held that the issue relating to possession and ownership in respect of Chabutara was decided against the plaintiff. There is no finding in the earlier judgments that the plaintiff in 1885 suit is not in possession or is not the owner of the said Chabutara.

27. In **Para 865 at Page 768,** the Ld. Judge refers to the finding of the Trial Court in 1885 suit that the plaintiff is in possession of the said Chabutara and that the possession shows the ownership. The Ld. Judge refers to the findings of the first Appellate Court to the effect that the finding on possession and ownership is redundant and therefore, the said finding is required to be expunged. In **Para 867 at Page 769**, the Ld. Judge has set out the substantial portion of the judgment of the Judicial Commissioner dated 02.09.1886 and in **Para 868 at Page 769** the Ld. Judge records the finding that the order of Judicial Commissioner clearly shows that it has specifically approved the final conclusion of the court below and also declined to interfere with the part of the order of the first Appellate Court modifying trial court's order since there was nothing to show that the plaintiff was the

proprietor of the land in question. However, in so far as the issue no. 6 in the suit of 1885 is concerned (who own and possesses the said Chabutara), the Ld. Single Judge held, no finding was recorded either by the first appellate court or judicial Court relating to ownership of the land.

Note:- It is submitted that the decision in 1885 suit is binding in respect of the following:-

i. Unqualified statement that inner courtyard is Masjid.
ii. Whatever Mahant Raghubar Das said was on behalf of entire Hindu community.
iii. Existence of the building of the mosque in the vicinity was the cause for prohibition of construction of temple, therefore, the very fact that any temple was in existence is not correct.
iv. The entire building was a mosque, is a finding which has attained finality in the litigation of 1885. [**See Paras 832, 839 and 848 at Pages 761, 762-763 and 765.**]

28. (i) In **Para 975 on Page 800**, the Ld. Judge holds that the Trial Court decided the issue no. 6, i.e., the ownership of the Chabutara in favour of Mahant Raghubar Dass while the first Appellate Court expunged that finding. The Ld. Judge further observed that the Judicial Commissioner while confirming the judgments of the lower court held that the plaintiff failed to prove its ownership over the Chabutara. However, the Judicial Commissioner did not decide as to who is the owner of the property. The issue of ownership of the inner courtyard premises or the entire courtyard premises was not involved in the suit and therefore it cannot be said that the issues involved in the present suit were directly and substantially involved in the previous suit. As such the contention that the present suit is barred by Res Judicata fails. In **Para 976, 977 at Pages 800-802,** the Ld. Judge refers to a judgment of this Hon'ble Court and holds that the judgment of the Appellate Court which has acquired finality is the only material for the purpose of finding out what is decided and what was the issue directly and substantially involved. The findings of the lower courts are irrelevant and cannot be cited for the purpose of what constitutes *Res*

Judicata. Further in **Para 978 at Pg. 802** the Ld. Judge holds that the issue which was involved in 1885 suit having not been decided by the courts, all the ingredients which are necessary to attract the plea of *Res Judicata* are missing.

ii. The learned has failed to appreciate that the judicial commissioner has said that Hindus have very limited rights and thereby rejected the claim of ownership and possession pleaded by Hindus. Thus it is established that Hindus have no title to the property.

iii. The learned judged records a finding that in the earlier suit only a portion of the property was involved and not the entire land and therefore no Res Judicata. This is contrary to the judgment of this Hon'ble in **Ethirajan (Dead) By Lrs Vs. Lakshmi**. This Hon'ble Court has clearly held that if title is same as in earlier suit then it makes no difference whether in the earlier suit only the portion of the property is involved and in the subsequent suit the entire property is involved.

iv. The finding of the learned judge that in the earlier suit the title to the inner courtyard premises was not decided is contrary to record. The trial court, 1st Appellate Court and Judicial Commissioner clearly recognize the existence of the mosque and that the chabutara is adjoining the mosque. The judicial authorities and the Executive authorities do not recognize that Hindus have a right to build a temple on the land on which the mosque stands. This is clearly a finding in favour of the Muslim party as regards the title to the property.

III. WHETHER THE 1885 SUIT WAS IN KNOWLEDGE OF ALL HINDUS

29. The Ld. Judge in **Paras 869 and 870 at Pages 769 and 770** deals with the question as to whether the 1885 suit was within the knowledge of the Hindus in general and were all Hindus interested in the same? ***[Issue No. 5(c) in Suit 1]***

30. In **Para 870 at Pg. 770,** the Ld. Judge records a finding that there is nothing on record to show that the Hindus in general had the knowledge about the 1885 suit.

31. In **Para 871 at Page 770**, the Ld. Judge has referred to the issue- *"Whether the plaintiff in 1885 suit had sued on behalf of Janmasthan and whole body of people interested in Janmasthan."* ***[Issue No. 7(a) in Suit 4]***

32. In **Para 872 at Pages 770,** the Ld. Judge has recorded the contention of the Muslims that in the plaint the plaintiff has described himself as the Mahant Janmasthan and raised the grievance of the whole body of persons having faith in the said Chaburtara and that no personal or individual interest has been averred.

33. In **Para 873 and Para 874 at Pages 770 and 771,** the Ld. Judge records a finding that although the plaintiff in the suit of 1885 asserts his capacity as a Mahant Janmasthan but there is not even a whisper in the entire plaint that he is filing the above suit for and on behalf of Hindus in general and in representative capacity. In **Para 874 at Page 771**, the Ld. Judge records a further finding that there is nothing on record to show that the plaintiff of 1885 suit represented Janmasthan as juristic personality or as whole body of persons interested in Janmasthan.

NOTE:- The aforesaid finding of the Ld. Judge is contrary to plain reading of the Plaint. The cause title of the plaint as also Para 3 of the Plaint clearly suggests that the Plaint was filed in a representative capacity.

If the plaint is read as a whole it clearly depicts that the plaintiff of 1885 suit was acting on behalf of and for the benefit of the entire Hindu Community. The finding of the learned judge that there is nothing on record to show that Hindu is general were not aware of the 1885 suit is contrary to record. The record clearly shows that the authorities were not permitting construction of temple due to possibility of riots. These circumstances is enough to raise of presumption that Hindu were aware of the suit. Such inference is

not permissible but it is the only conclusion possible having regard to principles contained in Section 16 and 114 of Evidence Act.

In view of explanation VI to Section 11 of CPC all Hindu are in the eyes of law parties to the 1885 suit.

IV. MATTERS DIRECTLY AND SUBSTANTIALLY IN ISSUE

34. In **Para 931 at Page 787** the Ld. Judge has referred to Order XIV CPC and has discussed as to how the issues arise in a suit. In **Paras 932 to 941 at Pages 787 to 790**, the Ld. Judge has dealt with concept of matter directly and substantially in issue in contradistinction to matters ancillary or collateral and *inter alia* held that the fundamental rule is that a judgment is conclusive only as regards the matter directly substantially in issue and not as regards any matter which came collaterally in question or if any matter is incidentally cognizable. In **Para 942 at Page 790** the Ld. Judge has referred to a judgment of this Hon'ble Court describing the test for deciding whether the matter is directly and substantially in issue. The test laid down by this Hon'ble Court according to the Ld. Judge is that issue is necessary to be decided and if it was decided then the issue can be said to be directly and substantially in issue and such decision on the said issue would be *Res Judicata* in a later case. In **Paras 943 and 944 at Pages 790 to 791**, the Ld. Judge has referred to some judgments which take the view, with reference to the factual matrix, of those cases that the issue was collateral and was not directly and substantially in issue. In **Para 945 at Page 791**, the Ld. Judge lays down that it is not necessary at this stage to deal with distinction between the matter substantially in issue and the matter incidentally and collaterally in issue.

NOTE:- The Ld. Judge has not dealt with the question as to which issues were directly and substantially in issue in the 1885 suit and which issues where collaterally or incidentally in issue in 1885 suit. The learned judge has failed to appreciate that in 1885 suit the question of title was very much involved.

V. SAME PARTY

35. In **Para 964 at Page 797**, the Ld. Judge has recorded that Nirmohi Akhara has admitted that in 1885, Raghubar Dass was the Mahant of Nirmohi Akhara. The Ld. Judge then examines the law relating to the rights of Mahant of suing and being sued. The Math is a juridical person and the ownership of property would rest in the Math. This juridical entity has Mahant as a human agent. He is the spiritual head as well as the administrator of its temporal affairs. He is the proper person to institute or defend the suit of the Math. It means that he is the proper person to institute or defend the Math. In ***Babaji Rao V. Laxman Das,*** it was held that when the property is vested in the Math, then litigation in respect of it has to be ordinarily conducted by and in the name of the manager, not because the property vests in him but because it is established practice that suit must be brought in that form. There could be exceptions to this principal like the case where he seeks to influence his private and personal rights, it would be an important question to be seen whether the litigation was the right of the Math and that of the Mahant and when it can be said to be for the benefit of the Math. The Ld. Judge thereafter referred to ***Biram Prakash v. Narendra Das*** reported in **AIR 1961 All 266**. In that case, the Mahant filed the suit to recover the property of the Math belonging to the math, the court held that the suit was not to establish the personal right of the plaintiff and therefore it was binding on the math. This supports the plea of *Res Judicata.*

36. In **Para 965 at Pages 797-798**, the ld. Judge refers to the description of the plaintiff as Raghubar Dass, Mahant Janmasthan Ayodhya. In **Para 966 at Page 798**, the Ld. Judge observes that in the entire plaint, the plaintiff had not mentioned even a word about endowment or Math. From the perusal of the plaint it cannot be discerned that the plaintiff had any connection with Nirmohi Akhara. What is evident and appears logical is that Mahant Raghubar Dass sought to treat Janmasthan Ayodhya as an independent endowment, claiming himself to be the Mahant thereof filed the aforesaid suit. The suit was not filed in representative capacity. Though Mahant gave justification for the construction of temple being useful for the visitors and worshippers in general, but the construction of the temple was for his own benefit and not for the benefit of the endowment of which he claims to be the

Mahant i.e., Janmasthan Ayodhya. It is not brought on record to show that Mahant Raghubar Dass was allowed to contest the aforesaid suit representing the entire Hindu Community. Admittedly, the present plaintiff in suit was neither a party in 1885 nor can it be said he was represented by Mahant Raghubar Dass. Similarly, the Plaintiff in suit No. 1 is not claiming any interest derived from the plaintiff is suit of 1885. There is nothing in the plaint or record to show that he filed the aforesaid suit on behalf of Nirmohi Akhara or for its benefit.

NOTE:- The Ld. Judge has failed to appreciate that in the earlier suit the plaintiff was the Mahant of Nirmohi Akhara. This position is accepted by the plaintiff in the present suit. According to the tenets of Hindu law the Matth is a juridical person and the Mahant is a human agent. He is a spiritual head as well as administrator of temporal affairs. He is proper person to institute the suit on behalf of the Matth or defend any suit on behalf of the Matth

37. In **Para 967 on Page 798**, the Ld. Judge held that it is difficult to hold that Ram Janmasthan was itself the plaintiff represented by Mahant Raghubar Dass and that the said suit was filed for the benefit of the deity. The words Janmasthan in the title of the suit of 1885, has been mentioned as referring to a pious place and like an address, but not treating as a deity or judicial person as its own. We would be entering into the realm of conjecture to hold that Mahant Raghubar Dass filed the suit for benefit of Nirmohi Akhara and therefore, the claims made by Mahant Raghubar Dass in the 1885 suit were his personal claims.

38. In **Para 968 at Page 798**, it is necessary to find out whether issue in the subsequent suit was the same which was directly and substantially an issue either actually or constructively in the former suit.

39. In **Para 969 and 970 at Page 799**, the Ld. Judge considered the contentions raised by the Muslim parties. In **Para 971 at Page 799**, the Ld. Judge has held that Mahant Raghubar Dass as individual was interested in making same construction on Chabutara, which was already having a small temple. In order to provide better facilities to Hindu worshippers, he wanted to make further construction over the Chabutara. Whether the building inside the courtyard was a Mosque, whether it was validly constructed or whether it was a valid Waqf were

not the questions involved in the said suit. From the plaint of 1885 suits it is evident that Mahant Raghubar Dass had no concerns with what was inside the courtyard and was concerned only with the construction of Chabutara, and therefore it would amount to stretching and reading too much in the suit of 1885 to say that it included the mosque.

VI. CAUSE OF ACTION

40. In **Para 919**, the Ld. Judge refers to the judgment of this Hon'ble Court and records a finding that in order to establish *Res Judicata*, it is necessary to show not only the cause of action was same but also the plaintiff had the opportunity of getting the relief in the former proceeding which he is now seeking in the present proceedings.

41. In **Paras 972, 973 and 974 at Page 799**, the Ld. Judge held that the right to construct a temple on land adjoining the mosque was denied and this submission has been made in much wider terms and travels beyond the pleadings. Ultimate decision of the Court is on the ground of lack of cause of action, law and order situation, but no issue whatsoever was decided by the court.

NOTE: The Ld. Judge has failed to appreciate that the Res-judicata is directly related to the cause of action. The earlier suit of 1885 was relating to the construction of temple at Janmasthan. In the present suit also the cause of action relates to the construction of temple at the Janmasthan.

VII. EXPLANATION IV TO SECTION 11

42. In **Paras 946 to 953 on Pages 791 and 792** the Ld. Judge deals with constructive *Res Judicata* as set out in explanation IV to Section 11. The Ld. Judge holds that the principle underlying the explanation IV is not confined to the issue which the Courts are actually asked to decide but cover the issues which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the proceeding of the court to allow a new proceeding

to be started. In **Para 948 at Page 792** the Ld. Judge holds that where right claimed in the subsequent suit is different than in the former suit *Res Judicata* principle is not applicable. In **Para 949 on Page 792** the Ld. Judge discusses the question of same parties or between the parties under whom they or any of them claim. It is necessary for the purpose of deciding the question of *Res Judicata.* The previous judgment binds only parties and privies. If the plaintiff in subsequent suit claims independent right over the suit property the principle of *Res Judicata* would not apply. A person merely interested to a litigation cannot be stated to be a party to the suit. In **Para 950 on Page 792** the Ld. Judge holds that a person in the subsequent suit claims independent right over the suit property, the principle of *Res Judicata* would not apply. In **Para 951** the Ld. Judge holds that the parties must be litigating under the same title. The test is identification of the title in two litigations and not the identity of the actual property involved as held in AIR 1971 SC 664. In **Para 952 on Page 792**, the Ld. Judge holds that a same title means same capacity and the test means whether the party litigating is in law the same or different persons. If the rights claimed are different the subsequent suit will not be *Res Judicata* simply because the property is same. The title refers not to the cause of action but to the interest or capacity of parties suing or being sued. In **Para 953 on Page 792** the Ld. Judge refers to AIR 1978 Patna 129 where a distinction was drawn between the original plaintiff filing a suit in his own name and subsequently filing in the name of the deity.

NOTE:- The Ld. Judge has misconstrued the true scope of explanation IV of Section 11 CPC which deals with the concept of constructive *Res judicata.*

The Ld. Judge has not followed tchabhe principle that even though an issue was not formally framed but it was material and essential for the decision of the case in the earlier proceedings and such issue has been decided which will operate as Res-judicata. Further, the Ld. Judge has failed to appreciate that in a given case more than one point is involved. The ultimate decision on all such points will operate Res-judicata

It is submitted that Explanation IV to S. 11 of CPC is clearly attracted. The Ld. Judge has failed to appreciate that in the earlier suit the plaintiff despite being aware of the existence of the mosque adjoining the chabutara did not claim any relief qua the mosque and confined its case only to chabutara. According to the Hindus, the place of birth of Lord Rama is the same land where the mosque and chabutara are located. The plaintiff in the earlier suit not claiming any relief *qua* the mosque leads to the applicability of constructive Res-judicata. In 1885 suit the plaintiff confined his claim only to the portion of the land in question. It was open to him to claim the entire land including the land beneath the mosque as according to the plaintiff the said site is the Janamsthan i.e., the birth place of Lord Ram Chandra. The failure to claim the entire property as the place of temple of Lord Ram, clearly attracts explanation IV to Section 11 and therefore, principle of constructive Res-judicata would apply.

VIII. EXPLANATION VI TO SECTION 11

43. In **Paras 954 and 955 at Page 793,** the Ld. Judge has discussed the explanation VI to Section 11. The Ld. Judge holds that the following conditions are necessary to attract the explanation VI to Section 11:-

i. There must be a right claimed by one or more persons in common for themselves and others not expressly named in the suit.

ii. The parties not expressly named in the suit must be interested in such right.

iii. The litigation must have been conducted bona fide on behalf of all the parties interested.

iv. If the suit is one under Order I Rule 8, all the conditions of that Section must have been strictly complied with.

In **Para 955**, the Ld. Judge has referred to some judgment on explanation VI and has referred to Section 30 of 1877 CPC which corresponds Order I Rule 8.

Note: So far as the suit No. 5 is concerned, Ram Janmasthan, which is one of the plaintiff is not an endowment in the 1885 suit. It is claiming itself to be the deity, a juridical personality in its own right.

44. Explanation IV to S. 11 of CPC is clearly attracted. In 1885 suit the plaintiff confined his claim only to the portion of the land in question. It was open to him to claim the entire land including the land beneath the mosque as according to the plaintiff the said site is the Janamsthan i.e., the birth place of Lord Ram Chandra. The failure to claim the entire property as the place of temple of Lord Ram, clearly attracts explanation IV to Section 11.

45. In the present case even explanation VI Section 11 is attracted. Explanation VI lays down that if persons claim a public right in any suit, the final decision in such suit would be binding on all persons who are interested in claiming such public right. The plaintiff in 1885 suit claimed a right to construct the temple on behalf of all Hindus. The earlier litigation indicates that the plaintiff was bona-fide litigating on behalf of Hindus and therefore all Hindus interested in the construction of temple of Lord Ram, are in eyes of law, parties to the 1885 suit.

46. The contention of the other side and the finding of the Allahabad High Court that as earlier suit of 1885 was not prosecuted after obtaining leave Under Section 30 of 1882 CPC, which corresponds to Order 1 Rule 8, principle of Res Judicata is not attracted. There is no merit in such a view.

47. If following rules of interpretation are applied the conclusion is inevitable that Explanation VI is not controlled by Order 1 Rule 8.

48. The Mischief Rule is attracted. If some persons file a suit to claim public right on behalf others also without leave under Order 1 Rule 8 and if

such a suit is dismissed, then some other persons may also file another suit to claim some public right. This would be endless as there is no Res Judicata as per the reasoning of High Court. This is contrary to the essence of principle of Res Judicata

49. Even the Rule of purposive interpretation is attracted. The purpose of explanation VI is to prevent repeated agitation of the same issue relating to public rights or any matter concerning public at large. The explanation VI is deigned to stop such repeated attempts to agitate the same issue again.

50. Even the test of literal construction is satisfied. Neither explanation VI nor Section 11 lays down that the applicability of Explanation VI is subject to the suit having been filed after obtaining leave under Order 1 Rule 8. Similarly, there is nothing in Order 1 Rule 8 which controls the applicability of Explanation VI. Explanation VI clearly widens the scope of the principle of Res-Judicata. It is not a mere explanation but is substantive provision. The reasoning of the High Court results in adding the words "subject to Order 1 Rule 8" in Explanation VI.

51. The reliance is placed on the judgment of this Hon'ble Court in case of ***Narayana Prabhu Venkateswara Prabhu vs. Narayan Prabhu Krishna Prabhu*, (1977) 2 SCC 181**. In this case, this Hon'ble Court held that Explanation VI to Section 11 of CPC is applicable even if a person is not actually a party to the proceedings. It was further held that Explanation VI is not confined to cases covered by Order I Rule 8, but extends to include cases in which the parties are entitled to represent interested persons other than themselves. **[See Para 19 on page 188]**. In **Para 20** on Pages 188, 189 this Hon'ble Court holds that Explanation VI is applicable because otherwise there would be inconsistent decree.

52. In the case of ***Srimati Raj Lakshmi Dasi v. Banamali Sen*, AIR 1953 SC 33**, this Hon'ble Court has held that the test of Res-Judicata is the identity of title in the two litigations and not the identity of the actual property involved in two cases. **[See paragraph 19 on page 39]**.

53. Similarly, in the case **of *K. Ethirajan Vs. Lakshmi*, AIR 2003 SC 4295**, this Hon'ble Court held in **Para 20** that if the title in both the suits is same, then it makes no difference whether in the earlier Suit only a portion of the property was involved and not the whole. The principle of Res-Judicata will apply.

54. In the case of ***Gurusiddappa Bhusanoor vs. Gurusiddappa*, AIR 1937 Bom 238**, the Hon'ble Bombay High Court held that it is possible for a Suit to be a representative Suit within the meaning of explanation VI to Section 11 although it did not come under Order 1, Rule 8 and therefore there is no need to obtain leave under Order 1, Rule 8. The judgment laid on following propositions:

i. If the Plaintiff sues the Defendant in a representative capacity without obtaining leave of the Order 1, Rule 8, then he cannot in the subsequent Suit contend that the earlier Suit was not filed after obtaining leave under Order 1, Rule 8. The Plaintiff would be bound by such representation.

ii. The second proposition is that where parties form voluntary association for public or private purposes and those who sue or defend may fairly be presumed to represent the rights and interest of the whole. Explanation VI supports such a view. The Bombay High Court holds that such a view has been held to be good in many earlier cases.

In the present case the Mahanth was the original Plaintiff in 1985 Suit and claimed to represent the interest of the Hindus and therefore Explanation VI is attracted as he prosecuted the Suit bona fide and therefore the final decision in the said proceedings is binding on Hindus.

55. Similar is the view is taken by this Hon'ble Court in ***N.K. Mohamad Sulaman Sahib Vs. N.C. Mohammad Ismail Saheb*** reported in **AIR 1966 SC 792**.

56. In view of the above it is submitted as follows:-

a. The parties are same. The plaintiff in 1885 suit represented all Hindus.

b. The Muslim were represented by Mohammad Asgar who was the Mutawali of the Mosque in which Muslims used to pray.
c. The title to the property claimed by Hindus in both the suits is same.
d. As same title is the basis it makes no difference whether in the earlier suit the whole property was not claimed but only a portion.
e. In the earlier proceedings the right of Hindus to construct temple at the site was not recognised. The same acquired finality.
f. The cause of action is same in both the suits.
g. Both explanations IV and VI to Section 11 are attracted. The present suits of Hindus are barred by *Res Judicata.*

IX. ESTOPPEL

57. The principle of estoppel bars the Hindus from claiming any right to construct any temple on the disputed site for following reasons:-

a. In the 1885 suit and appeals arising therefrom, it was clearly held that Hindus have no right to construct temple on the site in question.
b. In the earlier proceedings it was clearly held that a mosque exists on the site.
c. Hindus have limited rights and they are attempting to increase their rights. The authorities have rightly repressed such attempts.
d. The order of the Dy. Commissioner which was challenged in the 1885 suit was in rem and therefore all Hindus were bound by it. The said order was not set aside by any judicial or executive authority and therefore it binds all Hindus even today.
e. The plan annexed to the plaint of 1885 suit and the plan prepared by the commissioner in the said suit show the location of Chabutara and the Mosque. These documents form the record of the case and therefore it binds Hindus on account of principle of estoppel by record.

58. In view of the aforesaid, the principles of *Res Judicata* is attracted and the present suits are clearly barred. Similarly, the Hindus are stopped from claiming any right to construct any temple on the disputed site.

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