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Ayodhya Title Dispute

M Siddiq v. Mahant Suresh Das

Day 59 Arguments: 14 October 2019

Oral arguments in the Ayodhya title dispute have entered their final week. Chief Justice Ranjan Gogoi's Bench is hearing appeals to the 2010 Allahabad High Court judgment that divided the title among the Nirmohi Akhara, the Sunni Waqf Board and Shri Ram Virajman. The major parties are:

- Gopal Singh Visharad (labeled original suit number 1 by High Court): claims the right to worship at the disputed site
- Nirmohi Akhara (original suit number 3): claims shebaitship, which entails management and ownership of the disputed site
- Sunni Waqf Board (original suit number 4): claims ownership of the inner courtyard, where Babri Masjid sat
- Sri Ram Virajman (original suit number 5): claims that the entire site is a divine juristic entity (i.e. not subject to owernship claims).

Today, Sr. Adv. Dhavan appearing for the Sunni Waqf Board concluded his arguments. He substantiated his arguments from the previous hearing (https://www.scobserver.in/court-case/ayodhya-title-dispute/ayodhya-day-58-arguments) on title - Sunni Waqf Board claims exclusive possession of the disputed property. Then, he defended the Board's suit from the claim that it is barred by limitation, under the Limitation Act, 1908 (https://www.casemine.com/act/in/5a979dd64a93263ca60b74e0).

The court assembled at 11.17 AM.

Preliminary administrative issues

Sr. Adv. Dhavan opened by requesting more time to finish his arguments. He suggested that the hearings could continue beyond the 18 October deadline set by the court. The Bench asked him to finish his submission on the Sunni Waqf Board suit by the end of today.

Before commencing his arguments, Sr. Adv. Dhavan objected to 'unaccredited journalists' sitting in the front rows, amongst lawyers. The Chief Justice took note of his remark, but did not pass any orders.

7.86 Sunni Waqf Board in continuous possession

Sr. Adv. Dhavan argued that the Sunni Waqf Board held the title, evidence of which was its continuous possession of the site. Referring to his previous arguments, he said that not only had the British recognised Muslim ownership, but so had the Nawab of

Awadh.

Justice Chandrachud inquired about an 1858 plea of adverse possession by the Sunni Waqf Board. He asked Sr. Adv. Dhavan to clarify whether the Board had argued the following: If there was a Hindu temple at the site prior to the mosque, then continuous offering of namaz by Muslims granted them the title via adverse possession. Sr. Adv. Dhavan confirmed this argument, while stressing that the Board was not admitting a temple existed at the site.

Sr. Adv. Dhavan argued that Sr. Adv. Parasaran had cited case law out of context. He argued that Sr. Adv. Parasaran could not simply extract references to the *Bhagwat Geeta,* which is neither *ratio decidendi* nor *obiter dicta*. He stressed that precedent cannot be selectively chosen.

7.87 ASI report did not find that a temple was destroyed

Next, turning to the Archaeological Surve of India's (ASI) report, Sr. Adv. Dhavan disputed the conlcusion drawn from it by the counsels for Shri Ram Virajman. He asserted that there is no finding that a temple was destroyed to construct a mosque.

7.88 Possession was evidence of ownership

Sr. Adv. Dhavan argued that he had shown the Sunni Waqf Board possessed and managed the site. He submitted that from 1857 onwards recognition was given to the Sunnis by a British grant (see 4 October arguments). Further, he said that even prior to 1857, the Nawab of Awadh recognised Sunni possession.

He argued that the Sunni Waqf Board's continuous possession of the site was evidence of its ownership of the title. He asserted that continuous possession creates a presumption of title, if there is no better claim over a property. He submitted that no party had successfully adversely possessed the title and that hence it remains with the Sunni Waqf Board.

Justices Bobde and Chandrachud asked Sr. Adv. Dhavan whether the Board's claim to exclusive possession is diluted by the fact that Hindus enjoyed the right to enter and pray in the outer courtyard. Sr. Adv. Dhavan countered, saying that the Hindus only enjoyed a 'prescriptive' right (to pray), which did not transfer them possession. Justice Chandrachud observed that there are documents indicating some Hindus were living in the outer courtyard.

7.89 Hindus denied ownership of outer courtyard

Sr. Adv. Dhavan turned to the 1885 suit, wherein a Hindu Mahant was denied the right to construct a temple. He argued that this showed that Hindus were denied ownership of the outer courtyard. However, Justice Chandrachud observed that no declaratory relief for ownership was sought by the Mahant. Sr. Adv. Dhavan asserted that praying for permission to construct a temple, assumed ownership.

At this point, Justice Bobde intervened and asked whether it was possible for an owner to give prescriptive rights. Sr. Adv. Dhavan said that this was possible.

7.91 Right to prayer does not entail ownership and absence of prayer does not cause loss in title

Sr. Adv. Dhavan rhetorically asked whether the right to prayer entitles the Hindu parties to ownership. He asserted that belief and historical texts alone cannot confer the Hindu parties with the title.

Next, referring to the doctrine of lost grants (and appropriate case laws), Sr. Adv. Dhavan argued that the Sunnis had never lost the title. In particular, he submitted that the absence of prayer, does not result in loss of title. He said that a title can only be lost by adverse possession.

7.92 Sunni Waqf Board suit not barred by limitation

At this point, he began his arguments on limitation. He stated that the Sunni Waqf Board's suit is *not* barred by limitation under the Limitation Act, 1908 (https://www.casemine.com/act/in/5a979dd64a93263ca60b74e0) (Act). He submitted it fell under Article 144 of the Act, which prescribes a limitation period of 12 years. The land was placed under the receivership of the State in 1949 and the Board filed its suit in 1961.

First, he summarised the position of the Allahabad High Court, which in its majority opinion had held that the Sunni Waqf Board's suit was barred by limitation and that the Sunni Waqf Board had lost its title by adverse possession. Justice Khan, in his minority opinion, held that the suit was within limitation and that Hindus and Muslim were in joint possession.

Sr. Adv. Dhavan submitted that the events of 1992, wherein Kar Sevaks demolished Babri Masjid, resulted in a fresh cause of action.

The Bench rose at 12.58 PM and re-assembled at 2.15 PM.

Sr. Adv. Dhavan resumed arguments after lunch by asserting that Article 47 of the Act does not apply to the Board's suit. Article 47 only has a limitation period of 3 years. It applies to parties bound by '*order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898*'.

The Bench then inquired whether Article 142 or 144 of the Act applied to the Board's suit. Both apply to the possession of immovable property - Article 142 applies to dispossession or discontinuance, whereas Article 144 applies if no other provision of the Act applies. Sr. Adv. Dhavan responded that either could apply and that it dependend on what the Bench concluded.

The Bench observed that Justice Agarwal (Allahabad High Court) had held that Article 142 did *not* apply because the Sunni Waqf Board never suffered dispossession. Rather, he held that the mosque was merely desecrated. Sr. Adv. Dhavan asserted that as soon as the idols were placed inside the mosque in 1949, it was no longer possible for Muslims to offer namaz at the site. He clarified that he was claiming abandonment (discontinuance) to invoke Article 142, not dispossession.

Returning to the issue of adverse possession, Sr. Adv. Dhavan argued that the opposing parties had failed to show possession. In particular, he said that merely because they had the right to pray in the outer courtyard, does *not* show possession. He stated that 'permissive possession' does *not* result in adverse possession.

Sr. Adv. Dhavan briefly touched on the *custodia legis* (http://www.duhaime.org/LegalDictionary/C/CustodiaLegis.aspx) issue. He argued that *custodia legis* - the site being placed under the receivership of the State - did not prevent from limitation being applied.

7.93 Documentary evidence to be prioritised

He made a short submission on the weight of documentary evidence relative to oral evidence. Referring to the Indian Evidence Act, he stressed that the court must prioritise documentary evidence.

At this point, he proceeded to list out a series of alleged facts, which he argued was established beyond any reasonable doubt by the documentary evidence: (i) there was a mosque at the site, it was trespassed in 1934 and 1949, and finally demolished in 1992; (ii) the opposing counsels have failed to establish Lord Ram's precise birthplace; (iii) Hindus had accepted the prescriptive right to pray in the outer courtyard; (iv) only the idols were worshipped by Hindus - there was no general worship of the site; (v) the Ram Janmabhoomi Nyas was established to demolish the mosque.

7.94 Mosque dedicated as 'Waqf by use'

On the issue of whether the mosque was dedicated as a waqf (religious endowment), he said that he was adopting what Justice Khan had held in his High Court opinion. Justice Khan had held that the mosque was 'waqf by use', namely that it was a waqf by virtue of it being continuously used for a religious purpose.

Sr. Adv. Dhavan stressed that there are a wide range of sources of Islamic law and interpreting them requires special expertise. He suggested that the opposing counsels, who had argued that the site was not dedicated as a waqf, lack the pre-requisite expertise. He defined a waqf as an irrevocable dedication to Allah.

The Bench rose at 3.55 PM and reconvened at 4.17 PM.

After the break, Sr. Adv. Dhavan said that a property acquired through conquest could be dedicated as waqf. He stressed that holding that Babri Masjid was *not* waqf would set a bad precedent, in effect invalidating all mosques established through conquest.

7.95 Concluding points

Sr. Adv. Dhavan ended the day by summarising his arguments from today and the previous hearing. Further, he requested for additional time to address the court, to which the Bench offered no response.

He said that the Sunni Waqf Board had enjoyed unbroken possession since the construction of the mosque in the 17th century. He submitted that as of 1885 there is no instance of an adverse possession claim being made against the Sunni Waqf Board

on the record. He added that the cessation of Muslim prayer, did *not* amount to adverse possession.

He re-iterated that the Sunni Waqf Board's suit falls within the limitation period under Article 144 (or 142) of the Limitation Act, 1908. He asserted that Article 120 did not apply to the Board's suit, which only prescribes a limitation period of six years. Article 120 only applies to suits for which no other limitation period applies.

He asserted that Babri Masjid enjoyed waqf status. He argued that regardless of whether the site was dedicated, it is waqf by usage.

U.P. Sunni Central Waqf Board receiving threats

Before the Bench rose, it took note of a letter it had received from the Chairman of the Uttar Pradesh Sunni Central Waqf Board, which details threats the Board has been receiving. The Bench directed the State of Uttar Pradesh to provide 'adequate protection and security' to the Board.

The Bench finally rose at 5.03 PM.

(Court reporting by Sanya Talwar)

Case Documents

- 2010 Allahabad High Court Judgment (http://elegalix.allahabadhighcourt.in/elegalix/DisplayAyodhyaBenchLandingPage.do)