(पेज –73)

*"**Later on when I read my statement, I realized that it was not correct and in fact there was a partition by window shaped wall.** Since I got opportunity just today after December 12, I could not say earlier to rectify this mistake." (E.T.C.)*

2529. According to him he did not visit Fyzabad or Ayodhya after May, 1941.

"मई 41 के बाद मेरा फैजाबाद और अयोध्या जाना नहीं हुआ।" (पेज –80)

*"**After May 41, I had no occasion to visit Faizabad and Ayodhya**." (E.T.C.)*

2530. **PW-23 Mohd. Kasim Ansari** also said to have offered Namaz in the building for about 8-9 years before its attachment in 1949 and last Namaz on 22nd December, 1949. He says:

"आखरी मर्तबा वहां मैंने सन् 1949, 22 दिसम्बर को नमाज पढ़ी थी।"

"I last offered Namaz over there on 22 December, 1949." (E.T.C.)

2531. PW-23 is real brother of Mohd. Hashim i.e. PW-1. This he has stated and admitted on page 3 of the statement. Some part of his cross-examination may be noticed herein below to consider the reliability of his statement:

*"यह ठीक है कि 22 दिसम्बर 49 के कब्ल से विवादित स्थल से कुछ दूरी पर नेतागण आदि आते थे, मजमा लगता था जिसमें भाषण आदि भी होता था। . . . . . **उस रोज़ मैंने ईशा की नमाज सवा सात बजे पढ़ी थी।** . . . . . मैं नमाज पढ़ने उस मस्जिद में अपने घर से गया था और फिर वापस घर लौट आया था। मैं उस समय मस्जिद में लगभग आधा घंटा तक रहा था।" (पेज 4–5)*

"It is true that prior to 22nd December, 1949, leaders etc. used to visit upto a short distance of the disputed site,

and gathering used to take place in which speech etc. were also given. . . . . ***On that day, I had offered the Isha namaz at 7.15 PM****. . . . . I had gone from my house to that mosque to offer namaz and had returned thereafter. I remained in the mosque for about half an hour." (E.T.C)*

"जब मैं पहली मर्तबा विवादित ढाँचे में नमाज पढ़ने गया तो मेरी उम्र 12 वर्ष थी।" (पेज 43)

"When I, for the first time, went to offer namaz at the disputed structure, I was aged 12 years." (E.T.C.)

"विवादित मसजिद में 22 दिसम्बर, 1949 को इशा की नमाज शाम के करीब 7.30 बजे अदा की थी। . . . . . इशा की नमाज में मेरे साथ कितने और कौन लोग शामिल थे, इसकी अब गिनती याद नहीं है, न ही मैंने गिना था। नमाजियों की गिनती न करने की कोई खास वजह नहीं थी, बल्कि ***मन में दहशत होने की वजह से नमाज पढ़कर जल्दी घर लौट आया।"*** *(पेज 50–51)*

"I offered 'Isha' namaz at the disputed site on 22nd December, 1949 at around 7:30 PM. . . . . As regards how many and which persons participated with me in the 'Isha' namaz, I now do not remember their number nor did I count them. There was no particular reason for not counting the strength of namazists; as a matter of fact, ***I hurried back home after offering namaz, due to fear in mind****." (E.T.C.)*

"जब मैं आखिरी इशा की नमाज़ विवादित इमारत में पढ़ने गया था ***तब फारुक मेरे साथ थे।*** *. . . . . 22 दिसम्बर 1949 को अदा की गई इशा की नमाज़ में* ***मेरे साथ हशमत उल्लाह भी शरीक थे।"*** *(पेज 51–52)*

"Farooq was with me when I had gone to offer Isha namaz at the disputed structure for the last time. . . . . . I was also ***accompanied by Hashmat Ullah*** *at the 'Isha'*

namaz offered ***on 22nd December, 1949.*** *" (E.T.C.)*

Note: This statement is not corroborated by these two persons Farooq (PW-3) and Hashmat Ullah (PW-7).

2532. PW-3 on page 23 said:

"*22 दिसम्बर, 1949 की ईशा की नमाज़ में रहमान साहब और यूनुस साहब मेरे साथ थे।'' (पेज 23)*"

"Rahman Saheb and Unus Saheb were with me at the Isha namaz on 22nd December, 1949." (E.T.C.)

PW-3 therefore, did not corroborate the statement of PW-23.

2533. **PW-7 Hashmat Ullah** on page 60 said :

''हम मस्जिद मे बुत रखे जाने वाला हादसा से 2 दिन पहले मैने आखरी बार नमाज पढ़ी।''

"I had for the last time offered namaz at the mosque two days before the incident in which the idol was placed there." (E.T.C.)

Then on page 77, P.W.-7 categorically said:

''22 दिसम्बर,1949 को मैने इस मस्जिद मे नमाज नहीं पढ़ी थी।''

"I did not offer namaz at this mosque on 22nd December, 1949." (E.T.C.)

He (PW-7) at page 77 also denied offering of Namaz on 21.12.1949.

''21 दिस0 1949 को भी मैने वहां नमाज नहीं पढ़ी थी।''

"I did not offer namaz there on 22nd December, 1949 as well." (E.T.C.)

2534. PW-23 further said:

''मैं अब यह नहीं बता पाऊॅगा कि सन 49 में कुर्की होने के पहले मैं किस आखिरी जुमे में विवादित स्थल पर नमाज पढ़ने लगा। यह ठीक है कि कुर्की के पहले मैंने जुमे की नमाज पढ़ी थी लेकिन वह कौन सी तारीख थी और वह कौन सा जुमा था यह भी नहीं बता पाऊॅगा पर इतना जरूर याद है कि जिस महीने में कुर्की हुई थी उसमें एक या दो बार पहले

मैंने वहां जुमे की नमाज पढ़ी थी।'' (पेज 56–57)

"Now I am not in a position to tell on which Friday, prior to the 1949 attachment, I had started offering namaz at the disputed site. It is true that I had offered Friday namaz before the attachment but I am not in a position to tell what the date was and which Friday it was. However, I certainly remember that I had earlier offered Friday namaz there once or twice in the month the attachment had taken place."(E.T.C.)

''सबसे पहली बार विवादित ढॉचे में मैंने कौन सी नमाज और किस समय पढ़ी थी यह नहीं बता पाऊॅगा। शुरू में बचपन में मैं वहॉ खेलने भी जाया करता था पर जब बड़ा हो गया तो नमाज पढ़ने जाने लगा। . . . . . .जुमे की नमाज़ मैंने विवादित भवन के अंदर वाले भाग में पढ़ी थी। . . . . . .जुमे के अलावा जब मैं जमायत से वहां नमाज पढ़ने जाता था तो वहां दो चार छह से ज्यादा लोग होते थे मैंने कोई गिनती नहीं गिनी अंदाजन 10–15–20 रहते थे और कभी कभी उससे ज्यादा भी हो जाते थे। अर्थात पचास हो जाते थे।'' (पेज 58–62)

"I am not is a position to tell as to which namaz I offered at the disputed structure first of all and at what time. In the beginning, in my childhood, I used to go to play there but when I grew up I started going there to offer namaz. . . . . I had offered the Friday namaz in the inner part of the disputed structure. Besides on Fridays, whenever I lined up to offer namaz there used to be more than two or four or six people. I did not count their number. I guess their number to have been 10-15-20 and sometimes their number grew even greater, that is, up to fifty." (E.T.C.)

''विवादित ढॉचे में मैंने तरावी की नमाज भी पढ़ी है। मैं यह नहीं बता पाऊॅगा कि मैंने कै साल की उम्र में तरावी की नमाज पढ़ी थी। तरावी की नमाज रमजान शरीफ के महीने में पढ़ी जाती है। हमने जो नमाज

तरावी की पढ़ी थी उनमें कुरान पन्द्रह दिन में खत्म की गयी थी हाफिज़ नमाज़ पढ़ा रहे थे पर कौन पढ़ा रहे थे उनका नाम क्या था मैं यह भी नहीं बता पाऊॅगा। . . . . .उस समय अयोध्या में कोई हाफ़िज थे ही नहीं।"

(पेज 63–67)

"I have also offered Taravi namaz at the disputed structure. I am not in a position to tell at what age I offered Taravi namaz. Taravi namaz is offered in the holy month of Ramzan. In the Taravi namaz which I had read, we were through the Quran in 15 days. Hafiz was teaching namaz but I am also not in a position to tell the name of the person who was teaching it. . . . . There was no Hafiz at all in Ayodhya at that time."(E.T.C.)

2535. **PW-25 Sibtey Mohd. Nadvi** himself has not claimed to have offered Namaz in the disputed building but says that he had been visiting Ayodhya in 1948 and thereafter and had seen people going to Babri Maszid for offering Namaz. His statement reads as under:

*"1948 से ही मैंने नमाज़ियों को नमाज़ पढ़ने के लिए बाबरी मस्जिद जाते देखा है। **नमाज़ पढ़ते नहीं देखा।.....मैंने ऐसा सुना है** कि सन् 1948 के पहले भी बाबरी मस्जिद में नमाज हुआ करती थी।"*

*"Since 1948 I have seen Namazists going to Babri mosque to offer Namaz. **I had not seen them offer Namaz. ....I have heard** that Namaz was offered in Babri mosque even before year 1948." (E.T.C.)*

2536. The statement of PW-25 about offering of Namaz in the disputed building prior to 1948 is purely hearsay hence inadmissible. He is not personally aware of the same. His visit to Ayodhya was in election canvessing during which he roamed various localities at Ayodhya for about 4-6 days

"इस चुनाव प्रचार के सिलसिले में मैं चार छः दिन अयोध्या घूमा था। . . . . .मैं चुनाव प्रचार के दौरान फैजाबाद में ठहरा करता था।" (पेज

13–14)

"I had travelled in Ayodhya for four – six days in connection with the said election campaign. .. . . .. During the election campaign, I used to stay at Faizabad."

(E.T.C.)

2537. However, he did not visit any mosque during the said period.

"1948 में चुनाव के दौरान जाने से पहले मुझे इस बात की जानकारी थी कि विवादित ढॉचे के अलावा भी अयोध्या में दसियों मस्जिद हैं। मैं दसियों मस्जिदों में से किसी में नहीं गया।" (पेज 14–15)

"Before proceeding for election of 1948, I knew that apart from the disputed structure there were tens of mosques in Ayodhya. I did not visit any of the tens of mosques." (E.T.C.)

2538. He claims to have visited Ayodhya once or twice after the election campaign of 1948 but did not offer Namaz in any mosque.

"चुनाव प्रचार के बाद 1948 में एक दो बार फिर अयोध्या गया था। ***मैंने अयोध्या में कभी भी किसी मसिजद में नमाज अदा नहीं की।*** *" (पेज 15)*

"After the election campaign, I again visited Ayodhya on couple of occasions in 1948. ***I never offered Namaz in any mosque in Ayodhya****." (E.T.C.)*

2539. He, however, says that during election campaign Makbool Ahmad and Mukhtar Ahmad Kidwai went to offer Namaz and PW-25 stayed back in the vehicle. On page 16, however, he says:

*"****मैंने विवादित मस्जिद में मुख्य दरवाजे के अन्दर घुसते किसी को नहीं देखा।*** *" (पेज 16)*

*"****I did not see anybody entering the disputed mosque through the main gate.*** *" (E.T .C.)*

2540. Though he is well educated but did not give date of birth mentioned in his certificates and said that his real date of birth is 22nd September, 1926:

''मुझे याद नहीं है कि प्रमाण पत्रों में मेरी जन्मतिथि क्या है। परन्तु मेरी असली जन्मतिथि 22 सितम्बर 1926 है।'' (पेज 49)

*"**I do not remember what is my date of birth in the certificates. But my actual date of birth is 22nd September, 1926.**" (E.T.C.)*

2541. When asked as to whether he was present when Makbool Ahmad and Mukhtar Ahmad Kidwai went to offer Namaz, on page 50-51 he said:

''इतना निश्चित कि जहॉ मैं खड़ा व बैठा था वह स्थान विवादित भवन के पिछवाड़े था।'' (पेज 50–51)

"It is definite that the place where I stood and sat, was on the back side of the disputed building." (E.T.C.)

2542. This itself shows that with respect to Namaz in the disputed building, the witness has no personal knowledge and everything is hearse. Hence, on this aspect, his evidence is inadmissible.

2543. On behalf of plaintiff (Suit-3) i.e. defendant No.3 (Suit-4) number of witnesses have been produced to assert in general that they never saw any Muslim visiting the disputed place or offering Namaz therein. DW 2/1-2 Ram Saran Srivastava, who was posted as a District Magistrate, Fyzabad in July, 1987 and remained there for about three and a half years, in para 23 of his affidavit said that according to his studies and information, Namaz had not been offered in the disputed premises inside the disputed building since after 1934 and the same has not been used by Muslim community collectively or individually to offer Namaz. DW 2/1-2 appears to have born sometimes in 1937, his age being 68 years as per his affidavit

dated 20th January, 2005, the statement in the affidavit obviously is based on personal knowledge of the witnesses, therefore, hearse for this purpose and to this extent is inadmissible in evidence. However, since he had an occasion to remain in an official capacity at Faizabad and, therefore, could have an opportunity to go through the official records also. An extract of his statement which throw some light on the position as to how and what manner, Namaz, if any, was offered in the disputed building or not, we may refer the following extract from pages 158 and 175:

DW-2/1-2, Sri Ram Saran Srivastava

*''**यह रिपोर्ट 23.12.49 की है।** इस रिपोर्ट में विवादित भवन से संबंधित दिनांक – 22.12.49 व 23.12.1949 की स्थिति का उल्लेख है। **इस रिपोर्ट के पृष्ठ 2 की पांचवी तथा नवीं पंक्ति में यह लिखा हुआ है कि ताला जुमे के रोज़ महज़ दो–तीन घण्टे के लिए खोला जाता है और इसी दौरान मस्जिद की सफ़ाई वगैरह और जुमे की नमाज़ होती है।** अगले पृष्ठ पर यह लिखा हुआ है कि आज भी जुमा है तथा मुसलमान लोग जुमे की नमाज़ पढ़ने के लिए फैजाबाद से जरूर आवेंगे। न मालूम क्या हश्र हो। इसमें ''आज'' दिनांक 23.12.49 के लिए कहा गया है।'' (पेज 158)*

*''**This report is of 23.12.1949**. This report makes mention of the position of the disputed building as on 22.12.1949 and 23.12.1949. **In the fifth and ninth lines on page 2 of this report it is written that the lock is opened only for two to three hours on the day of 'Zuma' and during this period cleaning etc. of the mosque is done and the Zuma Namaj (congregational prayer of Friday) is performed.** It is written on the next page that it is also Friday today and Muslims will certainly come from Faizabad to offer congregational prayer of Friday. It cannot be said what will happen. Its 'today' stands for*

23.12.1949." (E.T.C)

"यह सही है कि उपरोक्त पत्र व्यवहार डिप्टी कमिश्पर फैजाबाद द्वारा किए गए हैं।

उपरोक्त संलग्नक–ए के पृष्ठ –3 की तीसरी तथा चौथी पंक्तियों में यह लिखा हुआ है कि मस्जिद शुक्रवार की नमाज़ को एक घण्टे को छोड़कर शेष अवधि में ''विरान'' डेजर्टेड रहती है। *'' (पेज 175)*

"It is true that the afore said correspondence has been done by Deputy Commissioner Faizabad.

In third and fourth lines on page 3 of the afore-said Annexure-A, it is written that the mosque wears a deserted look, except for one hour during which congregational prayer of Friday is offered." *(E.T.C)*

2544. To the same effect is the statement of DW 2/1-3 as per para 17 of his affidavit, though he was not even born in 1934, his year of birth being 1944 (he gave his age as 51 years in affidavit dated 16th February, 2005).

2545. DW 3/1 to DW 3/20 in general have denied user of disputed building as mosque by Muslims and offering of Namaz in the disputed building but their statement is confined to the fact that they did not see any Muslim visiting the disputed place or offering Namaz. The statements in this regard are extremely vague and throw no light on the specific question as to whether Friday prayer on 16th December, 1949 or 5 times prayer on 22nd December, 1949 were offered by any Muslims in the disputed premises or not.

2546. For the purpose of issues in hand regarding limitation under Article 142 L.A. 1908, the question is whether last prayer in the disputed building was offered on 16th December, 1949 or 22nd December, 1949. In our view, none of these witnesses could have thrown any light on this aspect. The

other witnesses produced are basically such who either have deposed about the belief and faith of birth of lord Rama at the disputed place, and/or the existence of temple, and that they and other had been visiting the disputed site and building for worship believing that it was the place of birth of lord Rama. Some of the witnesses are in the category of Expert Historian, Archeologist etc.

2547. Most of the witness have sought to give statement in respect to the events took place more than four and a half decades ago and even more than that. Most of them have also ultimately admitted of their weak memory. On one hand they were very precise to give the date, period and day when they visited the premises in dispute for offering namaz such long back but at the end of the day most of them admitted of their weak memory. Their statements are so contradictory also that erode the degree of trustworthiness thereof. In **State of Bihar Vs. Sri Radha Krishna (supra)** the Apex Court said;

> *"208. Indeed, as a mortal man is not infalliable so is human memory. It records facts and events seen with some amount of precision and accuracy, but with the lapse or distance of time, unless the facts or events are noted or recorded in writing, the facts or events fade, sequences get lost, consistency gives way to inconsistency, realities yield to imagination, coherence slowly disappears, memory starts becoming blurred, confusion becomes worse confounded, rememberance is substituted by forgetfulness resulting in an erosion of facts recorded by the memory earlier. This equally applies to facts merely heard by one from some other person. Thus, if a person having only heard certain facts or events repeats them after a long time*

with mathematical precision or adroit accuracy, it is unnatural and unbelievable and smacks of concoction and fabrication being against normal human conduct, unless he repeats some special or strikingly unusual incident of life which one can never forget or where a person is reminded of some conspicuous fact on the happening of a particular contingency which lights up the past such as marriage, death, divorce, accident disappointment, failure, wars, famine, earthquake, pestilence, (personally affecting the subject and the like) etc., and revives the memory in respect of the aforesaid incidents. Of course, if the person happens to be an inimitable genius or an intellectual giant possessing a very sharp and shocking memory, the matter may be different. But, such persons are not born every day. To say, in this case, that all the witness one after the other, were geniuses is to tell the impossible. Weakness and uncertainty of human memory is the rule. The witnesses of the plaintiffs examined in this case are normal human beings suffering from the usual defects and drawbacks of a common man."

"209. Describing the vagaries of human memory, Ugo Betti so aptly and correctly observes:

"Memories are like stones, time and distance erode them like acid."

(p. 395, The International Theasaurus of Quotations: Rhoda Thomas Tripp)"

210. . . . . :

"How strange are the tricks of memory, which, often hazy as a dream about the most important events of a man's life, religiously preserve the merest trifles."

"211. Similarly, Baltasar Gracian in 'The Art of Worldly Wisdom' very aptly puts the frailties of human memory thus:

"The things we remember best are those better forgotten."

"219. .....there is a tendency on the part of the villagers to support a case of this kind by overstating their age so as to introduce an element of personal knowledge in order to prove old genealogies. On the other hand, the Pleader-Commissioner, who recorded the evidence being a lawyer and an educated person, would be in a much better position to estimate the correct age of the witness. However, nothing much turns on this discrepancy and we shall presume that in view of the very old age of the witness, his evidence merits serious consideration. There is no doubt that this witness was closely connected with the family of Bhagwati Prasad Singh, father of the Plaintiff Radha Kirshan Singh as he has admitted to. have scribed many documents on behalf of the family of Bhagwati Prasad Singh. Mukherji, J. also found that the witness was intimately connected with the family of Bhagwati Prasad Singh as this witness and his ancestors have scribed numerous documents for different members of the family and on this ground the learned Judge thought that he would be a more competent witness to depose about the genealogy than any other witness. Assuming what Mukherji, J. says is correct, the fact remains that being intimately connected with the family of the plaintiffs the witness cannot be said to be an independent one and he was deeply interested in the success of their case.

Therefore, while this may not be a sole ground for rejecting his testimony his evidence has to be taken with great care and caution particularly when he is not deposing as an eye-witness but as a witness to the genealogy which he may have heard from his ancestors."

"226. Indeed, of this is the primordial and rudimentary reflex of his memory, then it is strongest possible circumstance to discredit his testimony and it leads to an irresistible inference that the story of repeated narration of the plaintiffs' genealogy is nothing but a pure figment of his imagination concocted to help and oblige his relation, friend, philosopher and guide (Bhagwati Prasad Singh). . . . . How can it be believed that if he could not even remembe r the names of his own near relations, he would remember the names in genealogies running into 12 degrees. . . . . we entirely agree with the conclusion of the dissenting Judge that it is impossible to place any reliance on the evidence of this witness."

"233. . . . . This important circumstance shows that his memory is very weak, in which case it is well-high impossible to believe that he would remember the genealogy narrated to him by his grand uncle though he could not give the names of the persons in whose presence the genealogy was narrated to him. He does not appear to have made any note of the genealogy on any paper when his grand uncle repeated the same, nor has he mentioned any particular occasion on which the genealogy was narrated to him . . . . Moreover, human memory, faint and vulnerable as it is not likely to reflect facts of 40-50 years back unless there is something in the shape of a particular

document, mode, occasion or something to remind him."

"234. ....his evidence is inadmissible under Section 35 of the Evidence Act on a point of law, viz., being hit by the doctrine of post litem motam. . . . . He relates the facts of the battle of Marui which took place as far back as 1719."

"239. . . . . It is not understandable how he could remember the genealogy narrated to him long before if he could not remember the facts which were directly within his personal knowledge, viz., either the year of his marriage or of the death of his mother. Another person from whom the witness is said to have acquired knowledge of the genealogy is, according to him, Vashist Singh. He admits that he does not remember the time, year or even the occasion for hearing the genealogy from Vashist Singh nor does he remember how many other persons were present when Vashist Singh narrated the genealogy."

"243. Having regard, therefore, to the glaring inconsistencies arid discrepancies in his statement, the shortcomings of his memory which has been demonstratively shown by his subsequent statements as referred to above, it seems that his evidence regarding the narration of the genealogy by various persons is nothing but a cock and bull story."

"244. . . . His evidence also, therefore, us a rule of prudence has to be examined with great care and caution because he is interested in making statements which may go to support his case."

"247. . . . he has been asked to depose parrot like just to support his case. .. . . and gives a most feeble and unconvincing explanation that the omission was due to the

fact that Ramruch Singh had gone away to Baraini."

"248. . . . .In this view of the matter, his statement is most unnatural and improbable and even if believed it does not prove the vital missing links."

2548. The stand taken by the Government authorities in their written statement filed in Suit-1 is that due to law and order situation the inner courtyard premises used to remain under lock and opened only for 2-3 hours on Fridays enabling Muslims to offer prayer thereat. No witness, however, has been produced on behalf of the State authorities.

2549. The evidence produced by the plaintiffs (Suit-4) is not creditworthy so as to believe what they have said. There is a report of Waqf Inspector of 10th December 1949 (**Exhibit A-63 (Suit-1) (Register 8, page 523-527)** wherein he has said:

نقل رپورٹ مسٹر محمد ابراہیم صاحب وقف الیکز مورخہ ۱۰ ۴۹ء مابنم
مسجد بابری مشمولہ مثل 26 یوسی بابری فیض آباد
مسجد بابری اجودھیا
سکرٹری صاحب۔ مسجد بابری اجودھیا کے متولیان پہلے یکے بعد دیگر میر اصغر صاحب۔ محمد رضی صاحب محمد ذکی صاحب۔ کلب حسین صاحب نق متولی کا انتقال ہو گیا ہے لہذا دوسرے سوال پیدا ہوا۔ مبلغ ستو ان مسجد مذکورہ لے وقف ہے مسجد مذکور کا متولی ہمیشہ مبلغ سوقان کا نمبردار ہوگا۔ چلایا ہے کہ جو نمبردار ہوتا ہے وہی مسجد مذکور کا متولی بھی ہوتا ہے۔ مبلغ میر دریافت سے اور تحقیات سے معلوم ہوا کہ مبلغ سوان کے موجودہ نمبردار جناب جواد حسین صاحب میر اور یہی وصول تحصیل کرتے ہیں اور مسجد مذکور کا انتظام بھی کرتے ہیں۔ سید انجر حسین صاحب بکھیا مبلغ سوان نے بیان دیا کہ موجودہ نمبردار جناب جواد حسین صاحب ہیں اور یہی وصول تحصیل کرتے ہیں اور مسجد مذکور کے متولی بھی ہیں۔ جناب جواد حسین صاحب کا بیان قلمبند کیاانہونے اقرار کیا کہ میں نمبردار ہوں اور متولی ہوں اور انہوں نے اپنابیان دیا کہ محنت سے تو بہت کا کام انجام دونگا اور مسجد کا ایک پیسہ بھی غبن نہ کردنگا

اور باقاعدہ حساب کتاب رکھونگا اور وقف بورڑ کے پر حکم کی تعمیل بھی کرونگا۔ اسی حالت میں مناسب سے معلوم ہوتا ہے کہ جناب جواد حسین صحب کا نام بطور متولی طے کر لیا جاوے۔ شہر فیض آباد میں سے معلوم ہوا کہ ہندوں اور سیکھوں کے خوف سے کوی شخص عشای کیوقت نماز مسجد مذکور میں نہیں پڑھتا ہے اور رات کو اگر کوء مسافر مسجد میں رہ جاتا ہے تو ارسکو ہندونمربہت تنگ کرتے ہیں۔ مسج تمن بابری ہندوں کا ایک سند ہے جہاں بہت سے نیڑا دارہتے ہیں اور جو مسجد میں مسلمان جاتا ہے اسے ہزار بھلا کہتے ہیں موقعہ پر گیا اور تحقیقات سے معلوم ہوا کہ مندرجہ بالا باتیں صحیح ہیں۔ لوگوں نے یہاں تک کیا کہ مسجد کو پیڑوں سے کافی خطرہ ہے کہ اسکی دیوار وغیرہ کمزور کریں مناسب یہ معلوم ہوتا ہے کہ ایک تحریر ڈپٹی کمسنر فیض آباد باس روانہ کر دیا جاوے کہ مسلمانوں کو جو مسجد میں نماز پڑھنے جاتے ہیں ان کو تنگ نہ کریں اور مسجد مذکور ایک شاہی عمارت ہے اسکے کا کافی حتال کیا جاوے۔

دستخط مسٹر محمد ابراہیم اسکر نت وسط اسگری ۱۰۔۱۲۔۴۹

"Copy of the report Mr. Mohammad Ibrahim Saheb waqf... (sic)..... dated 10-12-1949 with regard to Babri Masjid included in the file 26 U.C. Babri, Faizabad. Masjid Babri Ayodhya. To the secretary. The previous Mutawalli of Masjid Babri, respectively Mir Asghar Saheb, Mohammad Razi Saheb, Mohd Zaki Saheb and Kalbe Husain Naqvi ... (sic)..... have expired therefore there arises the question of the successor Mutawalli Rs. ... (sic)..... for the aforesaid Masjid which is a waqf. It is an old tradition that the Mutawalli of the Waqf Masjid will be ... (sic)..... the Numberdar of Mauza Sahanwa. As such the same tradition is still alive and the Numberdar of Sahanwa becomes the Mutawalli of the Masjid. From inquiries in the Mauza it was revealed that the present Numberdar of Sahanwa ... (sic)..... is Mr. Jawad Husain and he does Tahsil Wasool

and Manages the affairs of the Masjid. Syed Anjar Husain Saheb Bakhiya Mauza Narhwan stated that the present Numberdar Jawad Husain who does all the work of Tehsil wasool and is the Mutawalli of the said Masjid. The statement of Jawad Husain was recorded where in he stated that he was the Numberdar and also the Mutawalli. He further stated that he would work sincerely and honestly. I will not even touch imbezzle a single paisa of the Masjid and shall keep proper accounts. I will follow every instruction of the waqf Board. Under these conditions it seem proper that the name of Mr. Jawad Husain may be proposed and accepted as Mutawalli. On investigation in faizabad city it was revealed that because of the fear of Hindus and Sikhs ***no one goes into the Masjid to pray Namaz Isha*** *If by chance any passenger stay in the Masjid he is being threatened and teased by the Hindus ... (sic)..... There are number of Numberdars ... (sic)..... if any Muslim into the Masjid, he is harassed and abused. I made on the spot enquires which reveal that the said allegations are correct. Local people stated that the Masjid is in great danger because of Hindus ... (sic)..... Before they try to damage the wall of the Masjid, it seems proper the Deputy Commissioner Faizabad may be accordingly informed , so that no Muslim, going into the Masjid may be teased. The Masjid is a Shahi monument and it should be preserved . Sd/- Mr. Mohd. Ibrahim... (sic)....."*

2550. There is another report dated 23.12.1949 also (**Exhibit A-64 (Suit-1) (Register 8, page 529-535)** which says:

نقل رپورٹ مسٹر ابرا ہم صاحب ابولبکر مورخ ۴۹ ء مشمولہ وقف ۲۶

وقف مسجد بابری ضیلع فیض آباد

موجودیت مسجد بابری اجودھیا

سکریٹری صاحب۔ میں ۲۲ دسمبر ۴۹ء کو اجودھیا بعض تحقیات موجودیت مسجد بابری و قبرستان تحقیقات کرتا ہے جس سے مندرجہ ذیل حالات اور واقعات معلوم ہوے۔ عرصہ تین ماہ کا ہوتا ہے کہ بابری جنم استھان پر رام ین کا پاٹ ہوناچاہیے۔ اس بات کی شہرت تمام اطراف وجوات میں ہوگی۔ بابا راگھوداس کے چلے جانے پر اور ایک ماہ کے بعد راماین کے پاٹ کیلیے ہزاروں ہندو اور پوجاری اور پنڈت جمع ہوے۔ ہفتوں پاٹ رہا۔ اس درمیان میں سیراگیوں نے مسجد کے باہر سامنے اور دکھن والے قبرستان کا زیادہ تر حصہ ہودکر برابر کر دیا۔ اور جھونڑی لگا دیا اور چند قبروں کی جگہ پر پتھر رکھ دیا ہے۔ راماین کے پاٹ کیوقت بھی پولیس کا نتظام تھا مگر تب بھی قبروں کو کھود دیا گیا۔ پولیس نے چار ادمیوں کو پکڑا جو بعد کو ضمانت پر رہا ہوگے۔ خواجہ شہی رحمتہ اللہ علہ کا مزار جو ٹیلہ پر اس قبرستان کے قریب ہی ہے اس مزار کو کھود کر برابر کر دیے۔ اور وہاں ایک سیراگی جھونڑا لگا کر جنم ہو گیا ہے مسجد کے دروازہ صحن پر جو پختہ قبر ہے اسکو برابر کر سیراگی پتھر رکھکر بیٹھے ہیں۔ مسجد کے کنواں پاس ایک سیراگی چھپر ڈالکر بیٹھا ہے۔ پاٹ سے پیشتر کی اسپر مسجد کا گھڑا اورلوٹا توڑا گیا۔ موذن کو مارا۔ اسکے بعد مسجد کبھی کی کھودنیکی کوشش کی پھر دو پردیسی مسلمانوں کو مارا اور وہ کافی زخمی ہوے۔ اب مسجد کے باہر دو ضمیں ہے ایک میں پو ۳لیس کے سیلانی اور ایک میں بٹالین پولیس کے سیلانی اور ایک میں بٹالین کے سپاہی رہتے ہیں اور دونوں کی ملکر تعداد ۸،۹ہے۔ اب مسجد میں برابر تالا بند رہتا ہے یعنی بجز بروز جمعہ کے کسی وقت نماز اور اذان نہیں ہوی۔ مسجد کے تالا کی کنجی مسلمانوں کے پاس رہتی ہے۔ پولیس تالا نہیں کھولنے دیتی۔ تالا جمعہ کے روز محض ۳۔۴ گھنٹہ کے لیے کھولا جاتا ہے اور اسی دوران میں مسجد کی ضروتی وغیرہ اور جمعہ کی نماز ہوتی ہے پھر تالابدستور بند کر دیا جاتاتھا۔ جمعہ کی نماز ہوتے وقت بیراگی بہت شور کرتے ہیں اور سیٹی بھی سے جب نمازی نیچے جاتے ہیں تو متصل مکانات سے نمازیوں پر جوتا اور ڈھیلا اتا ہے۔ مسلمانان خوف کیوجہ سے کچھ نہیں بولتے۔ راکھوداس کے بعد مسٹر لوہیا بھی

اجودھیا اتے تھے اور لیکچر وغیرہ دیا اور کہا کہ قبروں کی جگہ پر پھول وغیرہ کے درختان لگادو۔ پھر حال میں لکھنؤ سے کوی مسٹرصاحب آے تھے ان سے بیراگی نے کہا کہ مسجد جنم بھوم ہے دلا دو انہیں نے زیادتی کرنے کو منع کیا اسپر بیراگی ان پر خفا ہوے اور وہ پولیس کی حفاظت میں فیض آباد واپس چلے گے۔ اسی دوران میں اجودھیا کے کنک بھون کے مقدر میں فتنہ بڑا استہان سبھی رگھویر مرے۔ ومانتی جی۔ دیونراین درسی۔ اچاری جی اشرنی بھون کے ان لوگوں نے مسلمانوں کو بلانا چاہا۔ پھر بخبر ظہور احمد کے کوءی نہیں گیا۔ ہندوں نے ظہور سے کہا کہ مسلمانوں سے مسجد ہمکو دلا دو اور تو بھای بھای ورنہ دشمن ۔ میں رات کو اجودھیا ٹہرگیا۔ صبح کو معلوم ہوا کہ بیراکی مسجد پر زبردستی قبضہ کر رہے ہیں۔ اج جمعہ بھی ہے۔ میں موقعہ پر گیا تو کیا دیکھتا ہوں کہ دس پندرہ بیراگی ڈنڈی اور بھوڑ وغیرہ لیکر مسجدکے صحن میں موجود ہیں بہت سے بیراگی مسجد کے دروازہ پر ڈنڈا وغیرہ لیکربیٹھے ہیں۔ اور اطراف و جو اپنے اندر جمع ہوے ہیں۔ سٹی مجسٹریٹ کوتوال شہر اور پولیس وغیرہ کا کافی انتظام ہے مسلمان جمعہ کی نماز ----ادا کر ۔ضرور اسکے نہ معلوم کیا حشر ہو۔ میں اب دریا پار کر کے لکڑی منڈی گونڈہ کہتے ہیں۔

"Copy of the report of Ibrahim Saheb Abul Bakra dated 23-12-1949 included in the waqf file no. 26 waqf Babri Masjid district Faizabad. The present condition of Babri Majid. To the secretary, on December 22, 1949 I visited Ayodhya to inquire into certain affairs of the Masjid Babri and Qabristan. It revealed the following facts: About 3 months back ...(sic).... a word was around that there should be organized path of Ramayan in the ***Babri Janam Sthan*** *After Baba Raghudas went back, for about a month back big number of Hindus, Pujaris and Pandits collected. The path continued for weeks. During this period the Bairagis damaged and levelled the land before the Masjid and Qabristan in south ward, they pitched a Jhandi over there and placed stones on certain graves. Sufficient police*

force was posted at the time of Ramayan Path, even the certain graves were demolished. The police arrested four persons who were later bailed out The Mazar of Khwaja Shabhi which is situated near the Qabristan, has been demolished and a Bairagi has erected Bairagi Jhanda. On the door of the lawn of the Majid there was a pucca grave which has been levelled and the Bairagis are sitting there placing stones. Near the well of the Masjid a Bairagi is living under a thatched roof. Before the path was held, the earthen pot and lota of the masjid was broken. The Moazzin was beaten up. They tried to dig the wall of the Masjid Two Muslim pilgrims were beaten up and as such they received serious injuries. Now there are two tents outside the Masjid. One of them is occupied by ...(sic).... police constable. In one of the other tents, constables of Batallion are living. They would be 8 to 9 in number. ***Now the door of the Masjid remains locked. That is to say that except for Fridays. There held no Namaz or Azaan. The keys of the Masjid are with the Muslims, but the police does not allow to open the lock, which is opened only on Friday for 3-4 hours. During this period dusting of the place is done and then Namaz is held. After this is over, the Masjid is again locked. During Friday prayer the Bairagis make hue and cry.*** *When the Namazis pass through the stairs, shoes and rubbish is thrown on them from the adjourning houses. The Muslims are so scared that they do not protest. After Raghu Das Mr. Lohia also visited Ayodhya and delivered a lecture in which he urged the people to grow flower trees in place of graves. After that some officer from lucknow visited this place. The*

Bairagis told him that the Masjid was the Janam Sthan which should be handed over to them. He warned them against any violence. On this, Bairagis became angry with him, so he returned back to Faizabad with police escorte. Meanwhile Kanak Bhawan Ayodhya ...(sic).... Mahant ... (sic).... Raghubir, Vedanti ...(sic).... Deo Narain Darsi, Acharyaji Ashrmi ...(sic).... Bhawan invited Muslims for a talk. But no Muslim except for Zahoor Ahmad, turned up. The Hindus told him that the Masjid should be handed over to them. Then they will be treated as brothers otherwise enemies. I did not go to Ayodhya in the night. In the morning I came to know that Bairagis are trying to take possession of the Masjid forcefully. Today is Friday I visited the place to see that 10-15 Bairagis armed with ... (sic).... and phaora ...(sic).... were collected in the lawn of the Masjid. Many of the Bairagis were collected outside the door of the Masjid. ...(sic).... City Magistrate Kotwal city and police force are posted there. What will happen to the Muslims who would come here for Friday prayers. Now I am proceeding to Lakar Mandi, Gonda....(sic)...."

2551. This also show that regular prayers could not have been held in the property in dispute. The overall situation, evidence etc. however, show that on some days, atleast weekly prayer on Friday held in the premises in dispute, and, at least, so far as 16th December, 1949 is concerned, it appears that on that date, Friday prayer was actually held in the inner courtyard but not thereafter.

2552. DW 2/1-2 Ram Saran Srivastava has stated on the basis of the official record that the premises of inner courtyard kept in lock and allowed to be opened only on Friday for Jumma

namaz for about 2-3 hours during which period cleaning and namaz used to be accomplished. This is also fortified from the document exhibit A-64 (Suit-1), which is a report of the Waqf Inspector. The other documents, which we have earlier referred to, also show that occasionally on certain days Adhan (ajjan) was called in the disputed building. On the contrary, no reliable evidence could be placed by the defendants that no Muslim ever entered building in dispute i.e. inner courtyard from 1934 or earlier till the night of 22nd/23rd December 1949. Therefore, while the visit of Hindu public in the inner courtyard and worship during the entire period has been proved, simultaneously it also cannot be said that the Muslims could never enter the disputed building for offering namaz at any point of time since 1934 and onwards.

2553. We, therefore, are inclined to believe that on 16th December, 1949, Friday prayer was held in the inner courtyard i.e. in the disputed building but the claim of the muslims that daily prayers used to be held therein cannot be believed. To this extent, Muslim parties have failed to prove. This does not mean that the entire premises in dispute shown by the letters 'ABCD' in the map appended with the plaint (Suit-4) was in the possession of the plaintiffs but it is only the inner Courtyard which remained open for all.

2554. The entire evidence however do not touch upon the area covered by the outer courtyard except of suggesting that only for entering inner Courtyard, right of passage was utilised and nothing more than that. It is evident that the plaintiffs were never in possession thereof. In the outer courtyard on the south-east side there was a Ram Chabootara which was in possession of persons other than plaintiffs and this has continued at least

from earlier to 1885 as is evident from the plaint where reference has been given to suit 1885 and the decision of the Court recognising existence of the said Chabootara in outer courtyard. On the north-west side, there is Sita Rasoi/Kaushalya Rasoi which is also being worshipped by Hindus continuously.

2555. At the best it may be said that the plaintiffs or other muslims were exercising right of egress and ingress for offering prayer in the respective part of the disputed building but otherwise in respect to the area covered by outer courtyard there is no averment in the entire suit that it was ever in the exclusive possession of the plaintiffs. It is not the case of the plaintiffs that they were dispossessed from the said part of the land at any point of time within preceding six years or 12 years from the date of filing of the suit. The possession of the area covered by Ram Chabutara and Sita Rasoi in outer courtyard, it appears, the plaintiffs have reconciled that it had been in possession of Hindus since long and, therefore, in respect to this part, we are of the view that Suit-4 is barred by limitation.

2556. The written statement of Mohd. Asgar para 3 and 4 filed in Suit-1885 makes it clear that *Chabutara* was constructed in the outer courtyard in 1857 and it was never interfered or obstructed by muslims at any point of time. After the enforcement of L.A. 1859, the period of limitation, in such a case, was 12 years and therefore, in 1869 limitation expired for claiming possession of the said part of the land.

2557. In 1885 suit, the map prepared by the Court Amin shows three non Islamic structures in the outer courtyard and against that no action, as permissible in law, was taken by the Muslims or the said Mutawalli. Assuming that the ownership lie elsewhere, after expiry of a period of 12 years, the title extinct

by virtue of Section 27 of the Limitation Act, 1877 and therefore, even before the enactment of L.A.1908, the right, if any, possessed by the plaintiffs or anyone else in respect to the premises in outer courtyard extinct and stood conferred upon the persons who were in possession thereof.

2558. So far as the inner courtyard is concerned, we have already held that atleast on Friday, if not regularly, then occasionally, muslims had visited disputed building and that visit obviously could be for offering namaz. The official documents, proved by the defendants witness DW 2/1-2 Sri Ram Saran Srivastava show that Friday namaz used to be observed therein. OPW-9 has also admitted that both communities used to worship in the inner courtyard. We find no reason to disbelieve it. But here is not a case of exclusive possession since the defendant Hindu parties and Hindus in general had also been visiting inner courtyard for darshan and worship according to their faith and belief, hence, it can be said that the inner courtyard was virtually used jointly by the members of both the communities, may be to a large extent by the Hindus since Ayodhya is one of the most prominent, sacred and reverend place for Hindus, being the city of Lord Rama, and the place in dispute, they believe to be the birthplace of Lord Rama, it cannot be doubted that must have been visited in a very large number everyday, swollen multi-fold on special occasions of fares that is Ramnavami etc. The importance of Ayodhya from the point of view of Hindus has fairly been accepted and admitted by many of the witnesses of even the plaintiffs (Suit-4) i.e. muslims parties though same thing is not applicable for others. If Hindu people were already visiting the inner courtyard and the disputed building for worship etc., we do not find any

occasion of dispossession of muslims from the premises in dispute or discontinuation of possession as a result whereof somebody else has taken possession in order to attract Art. 142. The only thing which is claimed to have occurred on 22/23 December, 1949, is the placement of idol which according to OPW 1 and some other witnesses is mere shifting of idols of Sri Ram Chandra from the outer courtyard (Ram Chabutara) to inner courtyard. This placement of idol by itself cannot be termed as dispossession of muslims from the inner courtyard or the disputed building in the light of the meaning of 'dispossession' as we have discussed above. This is also not covered by the phrase "discontinuation of possession". It is probably for this reason that in the entire plaint there is not even a whisper that the muslim parties or the muslims or the plaintiffs were dispossessed or discontinued of possession by anyone on any particular date. The averments are different. Most of the witnesses have admitted that since the idols were kept inside the building, the did not went to the disputed building on and after 23 December, 1949. In this view of the matter we do not find that Art. 142 even has any application in this case.

2559. There is another aspect of the matter from which angle this argument may be seen. Suit has been filed for a declaration in respect to the entire area of the disputed building which included inner courtyard as well as outer courtyard. For the purpose of cause of action, the placement of idols in the mosque on 23rd December, 1949 has been pleaded in para 23 of the plaint. Sri Mohd. Ayub, counsel for plaintiffs (Suit-4), who had appeared before the Civil Judge, Fyzabad made statement under Order X, Rule 2 on 28th August 1963 and said:

"Sri Mohd. Ayub states that the mosque lie in A B C D as

shown in the plaint map (sketch map) and the land around A B C D is graveyard of the Muslims as shown in it."

2560. He again made another statement on 20th January, 1964 to the following effect:

"The property in dispute includes Babri Masjid and appurtenant to its boundary graveyard towards east, north and south .... On the outer side of railing of Babri Masjid and inside the boundary of main gate towards east-south, there is a Chabutara measuring 17 x 21 feet over which a wooden temple of wooden structure is built. In it, neither there were any idols of Hindus in past nor are till now. That place is also a part of mosque of Muslims. He does not know that the place had ever been any use of Hindus or not. It is also not known that the place had ever been in use of Muslims or not. ...."

2561. Therefore, plaintiffs admitted the existence of a *Chabutara* measuring 21 x 17 feet in the outer courtyard, which has a wooden temple structure thereon. This is also admitted by PW-1 on page 24. Infact it is said in the plaint also. Its existence, as referred to, was the subject matter of suit 1885 meaning thereby the said Chabutara was existing at least since 1885 and always in the outer courtyard of the disputed building. Besides, in the north of the disputed building, there existed *Sita Rasoi/Kaushalya Rasoi* and on the east-north side, in the outer courtyard, there was a *Chappar* which is also called *Bhandar*.

2562. About the above three structures, statement of various witnesses of plaintiffs (Suit-4) are:

(a) **PW-1 (Mohd. Hashim)**

''पूरब के बाहरी दरवाजे से दक्षिण की तरफ जो चबूतरा है वह 17 x 21 फिट है। इसकी ऊॅचाई एक मीटर है। इसके ऊपर छपपर पड़ा है। . . . . . इस चबूतरे पर हिन्दू देवताओं की मूर्ति आने वालो को दिखायी नहीं

देती।'' (पेज 24)

"Towards the south of the outside gate in the east lies a chabutra measuring 17x24 feet. Its height is 1 metre. It has a thatched roofing. . . . . Idols of Hindu deities on this chabutra are not visible to visitors." (E.T.C.)

''जो पहले मैंने कहा था पुजारी चबूतरे पर बैठते थे वह गलत है वहॉ पर कुछ लोग बैठते थे ओर यह बात सही हैं यह आम आदमी हिन्दू थे पर पुजारी या साधु नहीं थे ये लोग अयोध्या के नहीं थे।'' (पेज 27)

"My earlier statement that priests used to sit on the chabutra, is wrong. Some people used to sit there, and this fact is true. These ordinary people were Hindus, but not priests or saints."(E.T.C.)

''सन् 1949 में सीतारसोई फर्श के बराबर थी सीतारसोई पर चूल्हा चौकी बेलना चूने गारे का बना था वर्ष 1949 में। . . . . . .शुरू में हम लोग भी उसको करीब से देखते थे उस समय कोई तनाव नहीं था। उसकी आम लोग सीता रसोई कहते थे। हमने यह नहीं देखा कि आम लोग सीता रसोई का दर्शन करने जाते थे।'' (पेज 27)

"In 1949, Sita Rasoi was on a level with the floor. The 'chulha' (hearth), 'chauki' and 'belna' (rolling pin) at Sita Rasoi, was made of lime and brick powder in the year 1949. . . . . In the beginning, we also looked at it from a close range. There was no tension at that time. People in general called it Sita Rasoi. We did not see general public going to have darshan of Sita Rasoi." (E.T.C.)

''पूर्वी फाटक से अन्दर आने पर बाहरी दीवाल के अन्दर उत्तर तरफ एक लम्बा सा छपपर था वह भण्डार पर था या नहीं यह नहीं बता सकता। . . . . . इस छपपर के नीचे हिन्दू लोग रहते थे मुसलमान लोग नहीं रहते थे। . . . . कुर्क शुदा जायदाद की बाहरी दीवाल के अन्दर दो छप्पर थे एक चबूतरा पर था और दूसरा पूर्वी दीवाल से सटकर नीम के पेड़ के नीचे था।''(पेज 31–32)

"On coming inside through the eastern gate there

was a spacious shed towards the north inside the outside wall. I cannot tell whether it was a store house or not. . . . Those who lived under this shed were Hindus, not Muslims. . . Inside the exterior wall of the attached property there were two sheds, of which one was on a chabutra (rectangular terrace) and the other one was under the Neem tree adjacent to the eastern wall." (E.T.C.)

". . .वह मुकदमा सिर्फ चबूतरा के बारे में था जिसे वह मंदिर बनाना चाहते थे।" (पेज 72)

". . . This case was only in respect of the chabutra which he wanted to change into a temple."(E.T.C.)

"जो जगह चबूतरा की सूरत में हिन्दू लोगों के कब्जे मे है फिर कहा वहॉ हिन्दुओं का कोई कब्जा नहीं है तमाम जगह मस्जिद की है।" (पेज 113)

"The place being in the shape of chabutra is in the possession of Hindus. (Then stated) Hindus have no possession over there; most of the place belongs to the mosque." (E.T.C.)

"अगर यह नक्शा अदालत द्वारा जारी किये गये कमीशन ने दाखिल किया है तो यह सही है। . . . मैं यह नहीं कह सकता कि जो इसमें सीता रसोई और चबूतरा दिखाये गये हैं वह 1949 में उसी तरह से थे। अगर शिवशंकर लाल सरकारी कमीशन थे तो उनका दिया गया नक्शा सही होगा लेकिन वह सन् 1949 के बाद की बात है। . . . . . .अगर यह नक्शा सरकारी कमीशन का है तो सही होगा।" (पेज 115)

"If this map has been filed by the commission appointed by the Court, it is correct. . . I cannot say that Sita Rasoi and chabutra existed in the same way in 1949 as they are shown in it. If Shivshankar Lal was on official commission, the map filed by him must be correct but it pertains to post-1949 position. . . . . If this map is of the official commission, it must be correct." (E.T.C.)

''मुझे मालूम नहीं कि सीता रसोई और चबूतरा जिस हालात में 1934 में था, उसी हालात में 1949 में कुर्की होने तक रहा।'' (पेज 116–117)

"I do not know that Sita Rasoi and the chabutra remained to be in the same position in 1949 as they existed in 1934." (E.T.C.)

(b) <u>PW-2 (Haji Mahboob Ahmad)</u>

''सीता रसोई का चुल्हा चौका बेलना हम लान में देखा करते थे जब हम मस्जिद में जाते थे। . . . . . .लोग कहते थे कि यह सीता रसोई है। मैंने वहॉ पर किसी को दर्शन करते जाते नहीं देखा। . . . . वह मस्जिद थी जिसे दूसरे लोग मंदिर कहते है।'' (पेज 55)

"When we went to the mosque, we saw chulha (hearth), chauka, belna (rolling pin) of Sita rasoi (Sita's kitchen). . . . . People said that it was Sita Rasoi. I did not see anybody going there for darshan. . . . . It was a mosque, which other people call temple." (E.T.C.)

''यह मालूम है मुझे कि बाहर का लान, चबूतरा और सीता रसोई का मुकदमा 1884 में चला था।''

(पेज 62)

"I know that a case went on in 1884 in connection with the outside lawn, chabutra and Sita Rasoi." (E.T.C.)

''. . हॉ, यह ठीक है कि बाहरी लॉन में कोई भी आ–जा सकता था।'' (पेज 104)

". . . Well, it is true that anybody could have to-and-fro movement to the outside lawn." (E.T.C.)

(c) <u>PW-3 (Farooq Ahmad)</u>

''अयोध्या में हिन्दू मेले होते हैं जैसे कि रामनवमी, परिक्रमा मेला और सावन मेला, इन मेलों पर हिन्दू लोग इकट्ठा होते हैं ये लोग मस्जिद भी देखने आया करते हैं। इस चबूतरे को देखने की गरज से बहुत से हिन्दू और मुस्लिम लोग सभी जाते हैं। ऊपर बताये गये मेलों के वक्ता इकट्ठा होने वाले हिन्दू लोग खाश तौर से इस चबूतरे पर नहीं जाते क्योंकि वहॉ

कोई चढ़ावा नहीं है। मेले के वक्त भी हर मजहब के लोग चबूतरा देखने आते थे।'' (पेज 29)

"Hindu fairs are held at Ayodhya such as Ramnavami, Parikrama Mela and Sawan Mela. Hindus gather in these fairs. They also come over to see the mosque. Many Hindus and Muslims used to come over to see this platform (Chabutara). The Hindus assembling at time of the said fairs, did not particularly visit this platform (Chabutara) because there was no offering (chadhawa). Even on occasion of the fairs, people of all religions used to come to see the platform (Chabutara)." (E.T.C)

(d) <u>PW-4 (Mohd. Yaseen)</u>

''मैंने किसी हिन्दू को न कभी चकला बेलना के पास देखा और न ही ऊपर बताये गये उत्तरी या दक्खिनी छप्पर के पास देखा।'' (पेज 19)

"I never saw any Hindu near the Chakla-Belna nor near the aforementioned northern or southern thatched roof." (E.T.C)

(e) <u>PW-6 (Mohd. Yunus Siddiqui)</u>

''जब रात को मैं वहां जाता था तो अक्सर लोग छप्पर में सोते हुए दिखाई देते थे। . . . . . .यह मैंने जान लिया था कि यह चबूतरा 1885 से चला आ रहा था।''(पेज 11)

"When I went there during nights, people were often seen sleeping in sheds. . . . . I came to know that this chabutra had been in existence since 1885." (E.T.C.)

(f) <u>PW-7 (Hasmatulla Ansari)</u>

''उत्तर की तरफ जो छप्पर था सुनते हैं कि उसमें इमाम रहा करता था। लेकिन मैंने कभी वहॉ इमाम को आते जाते या रहते नहीं देखा। इस बाहरी सहन में जहॉ ये चबूतरे थे कभी नमाज नहीं पढ़ने गया।''(पेज 30)

"It is heard that Imam used to reside in a shed located towards the north. But I never saw the Imam come, go or live there. I never went to offer namaz at the place

where these Chabutras (raised platforms) were built in this outer courtyard. "(E.T.C.)

(g) <u>PW-8 (Abdul Ajij)</u>

"दूसरी तरफ यानि उत्तर वाले छप्पर में मैंने कभी किसी को खाना बनाते या चूल्हा जलाते नहीं देखा। . . . . .उस छप्पर के नीचे लोग बैठते थे या मोअज्जिम रहते थे इसके अलावा वह और किसी के इस्तेमाल में नहीं आता था।" (पेज 36)

"I never saw anyone either preparing meals or lighting stove on the other side i.e. in the northern 'Chhapper' (thatched roof). . . . . Either people or 'Muajjim' used to sit under that 'Chhapper', and it was not used for any other purpose." (E.T.C)

". . . हमारी जानकारी में बाबरी मस्जिद के अन्दर सीता रसोई बनी हुई नहीं थी। न हम उधर गये न हमने ऐसा देखा कि वहॉ चूल्हा चकला बेलना और हुडसा बने हुए हों हमने वहॉ चरण चिन्ह भी नहीं देखें।" (पेज 43)

". . . In my knowledge, Sita Rasoi had not been built inside Babri mosque. Neither did I go in that direction nor did I see the 'Chulha', 'Chakla', 'Belna' and 'Hudsa' (all kitchen utensils) over there, nor did I see the footmarks over there." (E.T.C)

"वहॉ पर एक चबूतरा था जो दक्खिन की तरफ था उस पर कोई लकड़ी का सिंहासन नहीं था वह चबूतरा खाली था। पूर्वी फाटक से अन्दर दाखिल होने पर यह चबूतरा बाये हाथ की ओर आता था।" (पेज 43)

"There was a platform towards south. It did not have any wooden throne over it. The platform was vacant. On entering through the eastern gate, this platform fell on left side." (E.T.C)

2563. The site map prepared by Gopal Sahai Amin in Suit 1885 mention all these three structures in the outer courtyard and that map was never disputed. **Exhibit 14 (Suit-4) (Register**

10 Page 65) is the copy of the written statement filed by Mohd. Asgar claiming himself to be Mutwalli of Masjid Babari on 22nd December, 1885 and in para 3 thereof he himself said that the Chabutara was constructed in 1857. Para 5 of the written statement mention about the existence of *Sita Rasoi* and *Kuti* also. His further assertion is that orders were issued about their removal but the same was not removed which in effect admits the existence of these two structures also in 1885 and prior thereto. The same has continued till 1950, as is evident from the map prepared by the Court's Commissioner Sri Shiv Shankar Lal Advocate. That be so, it is evident that virtually the entire outer courtyard had remained in possession of Hindus who have regularly visited thereat and worshipped. This is also fortified from **Exhibit 15 (Suit -1),** the report of the Deputy Commissioner Faizabad pursuant to the Commissioner order dated 14th May 1877 which describes the outer courtyard as Janam Asthan and building as Babar's mosque. Justification given for providing a separate room is rush of people/visitors to the Janam Asthan on fair day. This order also refers to the existence of an image on the Janam Asthan platform for which one Baldeo Das was ordered by Deputy Commissioner on 10th November, 1873 to remove the same. The report, however, does not show that the same was removed at all.

2564. Therefore, in respect to the outer courtyard, claim of the plaintiffs is clearly barred by limitation. In fact it stood barred long back but without making any distinction and without specifying the area of outer courtyard, the suit has been filed to claim the entire premises which includes the area in respect whereto such claim is barred long back and has actually extinct. We find it difficult to separate it and hence, the suit in

its entirety has to be held barred by limitation. This is another reason.

2565. In view of the above discussion we have no option but to answer **Issue No. 3 (Suit-4) in negative i.e. against the plaintiffs. We hold that Suit-4 is barred by limitation**.

2566. **Issue 10 (Suit-1)** reads as under:

"Is the present suit barred by time?"

2567. Nobody pressed this issue before us. In respect to Suit-1 nobody advanced any argument even to suggest that Suit-1 is barred by limitation. The cause of action according to the plaintiffs arose on 5th January, 1950 when he visited, for offering worship, the disputed premises and allegedly obstructed. The suit having been filed within 10 days thereafter apparently it cannot be said to be beyond limitation. **It is accordingly answered in negative i.e. in favour of the plaintiff (Suit-1).**

2568. **Issue No. 9 (Suit-3)** reads as under:

"Is the suit within time?"

2569. The plaintiffs, in para 10 of the plaint dated 17.12.1959 (Suit-3) have pleaded that cause of action for the suit arose on 5th January, 1950 when defendant No. 4 (City Magistrate, Faizabad) illegally took over the management and charge of the temple with the articles kept therein and entrusted the same to the receiver- defendant No.1.

2570. In para 24 of the written statement dated 28.3.1960 filed on behalf of the defendants No. 6 to 8, it is pleaded that the suit in question is not within limitation.

2571. Defendant No. 9, Sunni Board, has not raised any separate objection with respect to limitation in Suit-3. In fact it had filed an application under Section 68 of U.P. Muslim Wakf

Act, 1916 on 17/18 March, 1986 for its impleadment as one of the defendant and the same was allowed by this Court vide order dated 23rd August, 1990 wherein the statement of the learned counsel for the defendant No. 9 was also recorded that he adopts the plaint of suit 4 as a written statement in this suit. Defendant No.11 Mohd. Farooq, S/o Paddur Ahmad was allowed to be impleaded by order dated 09.12.1991 passed on his own impleadment application No.179/Ka-1 dated 01.4.1989. This Court also recorded the statement of Sri Jilani, Advocate, appearing for defendant No.11 that he will not file separate written statement and adopts the written statements filed on behalf of defendants No.6 to 8 and Sunni Board i.e. defendant No.9. The Court's order dated 23rd August, 1990 is as under.

> "*No objections have been filed against this application. Apart from it, the applicant has statutory right to be impleaded under Section 68 of the U.P. Muslim Wakfs Act, 1960. Accordingly the application is allowed. The plaintiff shall amend the memorandum of plaint so as to implead U.P. Sunni Central Board of Waqfs as defendant No.9. Learned counsel for the plaintiff shall carry out the amendment in the plaint within twenty four hours.*
>
> *Sri Jilani, learned counsel for the newly added defendant has stated that* ***he adopts the plaint of Suit No.4 of 1989 as a written statement of this suit.*** *He states that no separate written statement shall be filed in this Court."*

2572. In the replication dated 13th May, 1963, the plaintiffs, in para 24, while denying para 24 of the written statement has said as under :

> *"24. The contents of para 24 of the written statement are denied.* ***The plaintiffs have ever been in possession of the***

temple in suit and no question of expiry of the period of limitation arises."

2573. The defendant No.10-Umesh Chandra Pandey in his written statement dated 21st October, 1991 has also pleaded bar of limitation in para 10, 16 and 17 as under:

"10. That the contents of para 10 of the plaint are not admitted. On the own showing of the plaintiffs, the cause of action arose in their favour on 5.1.1950, whereas the suit was filed by them in the year 1959. Thus the suit has been ***filed beyond the prescribed period of limitation.*** *Further the* ***plaintiffs, being not the Manager or the next friend, of the Deity, are not entitled to file the suit."***

"16. That the plaintiffs' suit is barred by the provisions of Indian Limitation Act, as the same is much beyond the period of limitation prescribed by law."

"17. That the plaintiffs had adequate remedies under the provisions of the Code of Criminal Procedure (as it then stood) against the order, passed by the Additional City Magistrate, Faizabad under Section 145 of the Cr.P.C. The plaintiffs, having not availed of the said remedy within the time prescribed therefor and having not filed the suit within limitation prescribed therefor, their suit is liable to be dismissed on that score"

2574. Here also learned counsel for the plaintiffs could not dispute during the course of the argument that the suit in question would not be covered by Article 142 and 144 L.A. 1908 and therefore, it is Article 120 L.A. 1908 which would be applicable in the case in hand. He sought to rely on Article 47 also. In the light of own averments of plaintiffs (Suit-3) the cause of action arose on 5th January, 1950, the suit having been

filed in 1959, it also suffers the vice of limitation and has to be held barred by time for the reasons we have considered above while deciding Issue No. 3 (Suit-4). Article 47 has no application at all. The learned Counsel Sri Verma also could not show as to how it would cover this case.

2575. Learned counsel for the plaintiffs, however, submitted that for the purpose of limitation, the order dated 30.07.1953 of the City Magistrate Fyzabad deferring the proceedings, should be taken to be the commencement of period for limitation, but from that also we find that the limitation expired on 31st July, 1959. The suit was filed in October, 1959 and in that circumstance also it is barred by limitation prescribed under Article 120 L.A. 1908. We, however, would like to point out some more and different aspects in the matter.

2576. Suit-3 is confined to the premises covered by inner courtyard. The plaintiffs are neither seeking any declaration about the title nor claim that they have been dispossessed by anyone wrongly or illegally. What they actually plead is that the defendant no. 4 City Magistrate, Faizabad, has illegally taken over management and charge of the temple with articles kept therein and entrusted the same to Receiver defendant no. 1.

2577. The City Magistrate, Faizabad, had passed a statutory order in exercise of his powers under Section 145 Cr.P.C. 1898. Neither any declaration has been against the said order that it is illegal or bad, nor, in our view, such order could have been challenged in a suit. Enough remedy was available to the plaintiffs if aggrieved by the said order, by taking recourse to the provisions under Cr.P.C. 1898 itself. The plaintiffs did not avail any such remedy.

2578. We have discussed in detail that possession taken by

a Receiver pursuant to an attachment order u/s 145/146 Cr.P.C. does not amount to deprivation of possession to the real owner but the Receiver holds property on behalf of the true owner. Assuming that any cause of action the plaintiffs had, the same could have been enforced firstly by showing their title or seeking a declaration about title, particularly when the title dispute had arisen, inasmuch as, the Muslim parties had already filed their objections claiming that the entire premises, i.e., inner and outer courtyard was a mosque and this was also being contested in another suit, i.e., suit no.1. The plaintiffs have not shown anything as to how they got title on the property in dispute. The prayer in effect made by the plaintiffs is nothing but a circuitous way of wriggling out of the real question of title and possession knowing it well that the declaration of title has already met the fate i.e. stand barred by limitation. There is no dispossession of plaintiffs by any person, either unauthorisedly or otherwise. Also there is no question of discontinuation of possession. The question of adverse possession does not arise. Therefore, Arts. 142 and 144 rightly have been conceded inapplicable. In the absence thereof the only provision which would be applicable in suit-3 is Art. 120.

2579. The question of continuing wrong also would not apply in the case in hand, inasmuch as, the law laid down by the Calcutta High Court in **Panna Lal (Supra)** could have been applicable if the plaintiffs could have shown to be the **true owner** of the property in dispute (i.e. inner courtyard) and not otherwise.

2580. Sri Verma stated that in the revenue entries, the name of the Mahant of Nirmohi Akhara was directed to be entered in 1941 and this shows the title of the plaintiffs over the

entire property in dispute. We find no reason to agree. An entry in revenue record does not confer any title. When the dispute of title was already raised, the plaintiffs had to get this dispute settled in one or the other way failing which they would not succeed in claiming possession of the property in dispute (i.e. inner Courtyard). In any case, since Arts. 144, 142 and 47 are inapplicable and the counsel for the plaintiffs has also not been able to show any continuing wrong in the matter, we find that the suit is barred by limitation vide Art. 120 of the Limitation Act. **Issue No. 9 (Suit-3) is accordingly answered in negative and against the plaintiffs 41(Suit-3)**.

2581. **Issue No. 13 (Suit 5)** reads as under:

"Whether the suit is barred by limitation?"

2582. In Suit-5, the plaintiffs in para 36 of the plaint have asserted that the cause of action for filing the suit has been accruing from day to day. It reads as under :

"36. That the cause of action for this suit has been accruing from day to day, particularly since recently when the plans of Temple reconstruction are being sought to be obstructed by violent action from the side of certain Muslim communalist."

2583. The defendant No.3 in para 36 of written statement dated 14th August, 1989 has denied the contents of para 36 of the plaint. However, specifically no plea with respect to limitation has been taken in the written statement. In the additional written statement dated 20th April, 1992 , the defendant No.3 in para 46 has said that the suit is heavily time barred. The defendant No.4 in paras 36 and 42 of written statement dated 26/29 August 1989 has averred, that the suit is barred by limitation:

"36. That the contents of para 36 of the Plaint are also

incorrect and hence denied as stated. No cause of action ever accrued to the plaintiffs to file the instant suit as they have never remained associated with the management or administration of the property in question. In any case if any cause of action in respect of the property in suit can be said to have accrued to the plaintiff No.3, the same must be deemed to have accrued in December, 1949 when the property in question was attached and when the muslims had categorically denied the alleged ***claim of the Hindus to perform Pooja in the mosque in question*** *and that being so the instant suit is highly time barred. It is also relevant to mention here that the plaintiff no.3 was required to give the specific date, month and year since when the alleged cause of action is said to have accrued and no such description having been given, the averments of the cause of action are incomplete and defective and the plaint is liable to be rejected on account of there being* ***no cause of action as per averments of the Plaint."***

"42. That the instant suit is highly belated and the same is barred by the Law of Limitation and as such the same is liable to be dismissed on this account alone."

2584. Defendant No.23- Javvad Husain in para 49 of the written statement dated 18.9.1989 has said that the suit is barred by limitation and similar is the plea of defendant No.24 in para 32 of written statement dated 4th September, 1989.

2585. Sri M.M. Pandey, learned counsel for the plaintiffs (Suit-5), however, sought to over come the difficulty which has arisen on account of objection about limitation by relying on Oudh Laws Act 1876 and contended that it shall override and have precedence over the statute of limitation. He submitted that

the Hindu Law since ancient time as it stood remain unchanged either by any Emperor or by any Legislature, hence the law as found originally in India relating to Hindu Deity must be applied. In the case of **S. Darshan Lal Vs. Dr. R.S.S. Dalliwall, 1952 All 825 (DB)**, it is stated in para 16: "In an inhabited country, obtained by conquest or cessation, law already prevailing therein continues to prevail except to the extent English Law has been introduced, and also except to the extent to which such law is not civilised law at all……." The Court reiterated that view in para 18.

2586. This dictum which was laid down in the context of applicability of English Law in Indian territories conquered/ceded, constitutes a reasonable premise for application of then prevailing Hindu law at the time of conquest by Babar. Indeed, Privy Council held in **Mosque known as Masjid Shahid Ganj Vs. Shiromani Gurdwara Prabandhak Committee , Amritsar, 1940 PC 116** at page 120 Col. 2, that "There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property". It is nobody's case nor any evidence is led that during the Muslim rule commencing from late 12th/early 13th Century (Mohd Ghauri/Qutubbin Aibak who established 'Slave Dynasty' from 1206 AD) modified any of these laws. Similarly, it is nobody's case nor any evidence that during Mughal rule from Babar till the advent of governance by East India Company (from 1757 with the Battle of Plassey) or that of British rule from 1858 (with Queen's Proclamation), any modification in these provisions of Hindu Law was made. The British had established regular COURTS to administer justice; Oudh ceded to East India Company in 1856 only. OUDH LAWS ACT (18 of

1876) provided what laws were to be administered in OUDH which includes Ayodhya and Faizabad. This Statute holds good even today by virtue of Article 372(1) of Constitution of India. A number of Acts were enacted governing relationships and situations in the Hindu Society, like Hindu Women's Right to Property Act, Hindu Succession Act, Hindu Marriage Act, Hindu Minority & Guardianship Act etc., both during the British times and post-independence of India, but none was framed to set out the rights, obligations and antecedents of Hindu Deity; **hence Hindu Law as known to Dharma Shastras continue to apply to Hindu Deities.**

2587. The Code of Civil Procedure covers a variety of Suits, e.g. relating to persons of Unsound Mind, Minors, Corporations, State Agencies but is totally silent on Hindu Deities. The general provisions of Limitation Act would not over-ride the special and clear Hindu Law found in Dharma Shastras which had ensured the rights of Deity to hold good in perpetuity, without interference by the State (King). Only those provisions of period of limitation laid down by Dharma Shastras could be affected by Limitation Act which were modified by any statute on specific subjects of Dharma Shastra provisions. There has never been any statute law governing Hindu Deity & Deity's property including the Temple which is 'His house'. The rights of Deities, Ram Janam Bhumi and Bhagwan Shri Ramlala, have to be determined exclusively/solely on the basis of the Hindu Law as known to Dharma Shastras and not imperfect analogies drawn from imperfect comparisons. He relied on **Bhyah Ram Singh Vs. Bhyah Ujagar Singh, 13 MIA 373, PC** which ruled firmly, where a text of Hindu Law is directly on a point, nothing from any foreign source should be

introduced into it, nor should Court interpret the text by application to the language of strained analogies.

2588. It is pointed out that at pages 67 to 69 of **Mulla's "Principles of Hindu Law"** that in a very early decision (4 MIA 97-98) Privy Council conceded that 'it is quite impossible for us to feel any confidence in our opinion…….founded upon authorities (Hindu Dharmashastras) to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported or impugned, are drawn from religious traditions, ancient usages and more modern habits of Hindoos, with which we cannot be familiar". He contended that these suits are very different from any litigation which figured in the past; they are admittedly of National importance and must be dealt with on a thorough scrutiny of what the true law is. With the adoption of Constitution of India with promises contained in Articles 13, 14 and Preamble, the decisions of Privy Council have only 'persuasive' rather than 'binding' effect: (See **1968 SC 1165, Nair Service Society Vs. K.C.Alexandar)**. Full effect must be given to Hindu Dharmashastras in these cases specially in the light of Oudh Laws Act.

2589. Preamble to Oudh Laws Act of 1876, "declares and amends the laws to be administered in Oudh" and only in Oudh. It is exhaustive of the Laws which the Courts of Oudh must apply in matters covered by the Act. This position continues even today by virtue of Article 372(1) of the Constitution of India. Section 3(b)(1) lays down what laws are to be applied in questions regarding 'any religious usage or institution, and requires the Courts to apply "custom applicable to the parties concerned which is not contrary to justice, equity_or good

conscience, or has not been by this or any other enactment, altered or abolished and has not been declared to be void by any competent authority". Section 3(b)(2) requires to apply "the Muhammadan law in cases where parties are Muhammadans, and the Hindu law in cases where parties are Hindus, except in so far as such law has been, by this or any other enactment, altered or abolished, or has been modified by any such custom as is above referred to". Reading the two clauses together, the Section sets out the laws which must be applied to 'parties concerned'. In rights/obligations concerning Muhammadans, the Muslim law must be applied; in those concerning Hindus, the Hindu Law must be applied and after determination of those rights/obligations, if rights/equities have to be judged between Muhammedans and Hindus, then Equity, Justice and Good Conscience have to be applied for determination of 'Relief'. Section 3(f) requires to apply ".…….all enactments for the time being in force and expressly, or by necessary implication, applying to ……. Oudh or some part of Oudh". This demands that the Statute Law in force for the time being must be applied. It would be appreciate that this provision itself is Statutory so that the provision makes the Hindu/Mohammedan Law, so to say, to be a Statutory Law akin to 'referential legislation'. Instead of incorporating specific provisions of Hindu/Mohammedan Law into the Oudh Laws Act, it simply require those laws to be applied, wherever they may be found.

2590. Sri Pandey argued that in **Bajya Vs. Gopikabai, 1978 SC 793**, two categories of referential incorporation are recognised: (1) provision of another Statute is incorporated and (2) the 'law concerning a particular subject as a genus' is incorporated. In later case, the legislative intent is to include all

subsequent amendments made from time to time in the general law on the adopted subject. Oudh Laws Act belongs to second category; the important point is that there has never been any legislation on Hindu Deities, hence the original Dharmashastra law continues to apply.

2591. Section 3(g) requires that "in cases not provided for by the former part of this section, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience". Section 4 says that "all local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience……." Simply put, the provision accords primacy to 'personal law' (subject to any other law for the time being in force) and applies justice, equity and good conscience only when there is no personal law and that although local custom shall be deemed to be valid, yet Custom will have to stand the test of justice, equity and good conscience. Fundamentally, therefore, Hindu Law has to be applied on the rights/property and incidental matters concerning Hindu Deity and Temples unless such law has been modified by any statute or Custom; no such statute was ever enacted and no case of any modifying Custom ever arose in these cases.

2592. He further argued that, Section 16 of Oudh Laws Act lays down "Rule of Limitation" and applies Act XIV of 1859 to Oudh with effect from 4.7.1862. Act XIV of 1859 provided for one uniform law of limitation for all Courts in British India, but had not provided for extinction or acquisition of rights/title on the basis of possession. Section 16 of Oudh Laws Act goes no further. Even so, Section 3(f) mentioned that "all enactments for the time being in force and expressly or by

necessary implication applying to the territories…….of Oudh or some part of Oudh" will be applied by the Courts; Limitation Act of 1871 could fall within this category but for its exclusion as shall appear shortly. Extinction/acquisition of rights came to be provided for the first time by Sections 27 to 29 of Limitation Act IX of 1871 (vide page 8 of Vol. 1 of "Obhrai's Limitation and Prescription" on Limitation Act IX of 1908 published by Eastern Law House, Lahore and page 7 of Vol. 1 of Sanjiva Row's "Limitation Act 1963" Edn 1987 published by Law Book Co, Allahabad). Since the substantive rights of Deity under Hindu Law clearly provided that its rights are perpetual and cannot be extinguished under any circumstance, it must be treated to be a Statute Law under the Oudh Laws Act; it has only to be found out whether the provision for extinction under Act IX of 1871 is such as falls within the restrictive clauses of Section 3(b)(2) of the Oudh Laws Act. The only restrictive stipulation in that clause is: "except insofar as such law has been, by this or any other enactment, altered or abolished". Firstly, an Act of 1871 cannot alter or abolish any provision of 1876 Act. It is also significant that although Limitation Act 1871, which had provided for extinction/acquisition of ownership right on the basis of possession, was already on the Statute Book when Oudh Laws Act was enacted four years later and gave Statutory status to Hindu Law by 'referential legislation', Oudh Laws Act did not make a specific provision to curtail the substantive right of the Deity under Hindu Law. Secondly, the provision of 'altering/abolishing' enactment must alter or abolish the Hindu Law, it is not enough to provide for alteration/abolition of rights 'generally.' Limitation Acts of 1877 and 1908 similarly contained provision for extinction of rights

similar to Act of 1871, which is not enough to alter or abolish the Hindu Law regarding Hindu Deities. The Hindu Law of Deities and law of limitation under these enactments need to be harmoniously construed. In this exercise, the procedure provided in a Statute for enforcement of substantive rights conferred thereby should be construed as far as possible so as to give effect to and not nullify those rights (**1941 Mad 158, Palani Goundan Vs. Peria Gounden)**. Procedural enactments should be construed in such a manner as to render the enforcement of substantive rights effective: (**1959 SC 422 (426), Velluswami Vs. Raj Nainar; 1989 SC 2206, M.V.Vali Press Vs. Fernandee Lopez)**. Finally, stipulations of Hindu Law regarding Deity, recognised by Section 3(b)(2) of Oudh Laws Act are 'particular' and 'special'; they shall over-ride the 'general' stipulation of Limitation Acts. There is no essential Jurisprudential or Constitutional requirement that for every right/remedy a period of limitation must be enacted; more so in respect of Hindu Deity which is conceived of by Hindu Dharmashastra Law as Immortal, Indefeasible, Timeless, Omnipresent & Eternal. After all, Transfer of Property Act or Indian Trusts Act admittedly does not apply to Hindu Deity. Hence, provisions of extinction of rights under any of the Limitation Acts would be ineffective over the perpetual rights of Deity under Hindu Law. Here, notice may be taken of Manu's edict no. 200 of Chapter 8 (at page 174 of "**The Laws of Manu", Penguin Classics, Edn 2000**) which lays down: 'If a man is seen to be making use of something, but no title at all is to be seen, then the title is the proof (of ownership), not the use; this is a fixed rule'. Thus, according to Hindu Law, 'title' not 'possession' establishes ownership and that concept cannot be

disturbed summarily through vague interpretations of general provisions relating to Limitation.

2593. Sri Pandey continued to submit vociferously that same result seems to flow from the principle of Reading Down a general provision in the context of the law as a whole, vide **All Saints High School Vs. Govt of A.P. (1980) 2 SCC 478** para 112. Since the plain meaning of Section 3(b)(2) of Oudh Laws Act specifically confines the laws of Hindu religious institutions to the Hindu Personal Law, i.e., the Dharmashastra Law, which unmistakably confers absolute perpetual and indefeasible rights on Deity and His property, a mere general provision that the law of limitation would apply to any suit instituted in respect of 'any' property which may also include Deity and/or His property, thereby denying right of suit after expiry of a certain period of limitation will have to be 'Read Down' to prevent deprivation of Deity's clear perpetual rights.

2594. From the angle of Limitation Act, since the Deity who is the owner of the property, suffers from physical disability, its interests have to be looked after in perpetuity. Reliance is placed on **Manathu Naitha Desikar Vs. Sundarlingam 1971 Mad 1**(FB – para 20).

2595. In a bunch of WPs, decided by a DB of Rajasthan High Court, **Ram Lal & another Vs. Board of Revenue & Others, 1990 (1) RLR 161,** the DB held in para 8: 'It will not be out of place here to mention that there are series of judgments of Hon'ble Supreme Court and the Hon'ble Supreme Court has held that the Deity or Idol should ordinarily be considered as minor in perpetuity'. In para 10, the High Court again said: "For the reasons mentioned above, we are of the view that the deity/idol should be treated as a minor in perpetuity……" When

the offerings are made to the deity, they become property of the deity and not of the temple. Deity owns the offerings and the Pujari or the Shebait shall not be the owner of the offerings and the property of the deity'. This decision was followed in **Temple of Thakurji Vs. State of Rajasthan & others, 1998 Raj 85** (para 11). These decisions also laid emphasis on the obligation of the State to protect the interests of the Deity as a perpetual minor. In **Sri Banamali Neogi & others Vs. Sri Asoke Kumar Chattopadhyayay & others, 96 CWN 886** (para 10), Calcutta High Court held Deity to be a perpetual minor. Similarly, in **Trilochan Das Adhikari & another Vs. Simanchal Rath & others, 1994(II) OLR 602**, Orissa High Court held Deity to be perpetual minor. In foot-note (j) at page 12 of **Mulla's Principles of Hindu Law**, it is stated that grounds of disability were recognised in Hindu Law, for instance there was exemption from limitation in case of minors, property of King and deposits involving the element of Trust; obviously, dedication to Deity involves "Trust"; Indian Trusts Act does not apply, vide Section 1 of the Act. In **Bishwanath Vs. Radha Ballabh ji, 1967 SC 1044**, it was held that an Idol is in the position of a minor and when the person representing it leaves it in a lurch, a person interested in the worship can certainly be clothed with an adhoc power of representation to protect its interests.

2596. According to Katyayana, Temple property is never lost even if it is enjoyed by strangers for hundreds of years (**P.V.Kane Volume III page 327-328**); even the king cannot deprive temples of their properties. In **Ramareddy Vs. Ranga (1925 ILR 49 Mad 543)** it is held that managers and even purchasers from them for consideration could never hold the

endowed properties adversely to the Deity and there could be never adverse possession leading to acquisition of title in such cases. The Idol/Deity which is an embodiment of Supreme God and is a Juristic Person, represents the 'Infinite – the Timeless' cannot be confined by the shackles of Time. **Brihadaranakya Upanishad** (referred to in **Mulla's Principles of Hindu Law** at page 8) lays down: Om Purnam adah, purnam idam, purnat purnam udachyate; purnasaya purnam adaya, purnam evavasisyate ['That is Full, this is Full. From the Full does the Full proceed. After the coming of the Full from the Full, the Full alone remains' – at page (v) of **Brihadaranyaka Upanishad by Krishnanand, pubished by the Divine Life Society, P.O. Shivananadanagar, District Tehri-Garhwal UP- 1984 Edn.**] In **Mahant Ram Saroop Das Ji Vs. S.P.Sahi, Special Officer-in-charge of Hindu Religious Trusts, 1959 SC 951** (para10), it recognised that "a Deity is immortal and it is difficult to visualise that a Hindu private debutter will fail …… Even if the Idol gets broken, or is lost or is stolen, another image may be consecrated, and it cannot be said that the original object has ceased to exist". In Idol of **Thakurji Govind Deoji Maharaj Jaipur Vs. Board of Revenue Rajasthan, Jaipur, 1965 SC 906** (para 6), it is laid down: "An Idol which is juridical person is not subject to death because the Hindu concept is that the Idol lives for ever ……" Timelessness, thus, abounding in the Hindu Deity, there cannot be any question of the Deity losing its rights by lapse of time. Jurisprudentially also, there seems to be no essential impediment in a provision which protects the property rights of disabled persons, like a Deity, to remain outside the vicissitudes of human frailties for ensuring permanent sustenance to it and therefore to keep it out of reach of human

beings, including the King. Every law is designed to serve some social purpose; the vesting of rights in Deity, which serve the social purpose indicated above since ancient times, is quite in order to serve social good.

2597. Oudh Laws Act has laid emphasis on application of principles of equity, justice and good conscience; but it is necessary to appreciate in what fields or areas, the Act requires those principles to be applied. Clause (g) of Section 3, lays down the broad principle that "in cases not provided for by the former part of this section or by any other law for the time being in force", Court has to act in accordance with justice, equity and good conscience. Section 3(b)(2) clearly stipulates that in matters relating to Hindu religious institutions, the Hindu Law shall apply; hence Clause (g) will not apply. Justice, equity and good conscience is made applicable to 'Custom' under Section 3(b)(1), but the law regarding Deity is part of 'personal law' under Section 3(b)(2) as distinguished from 'customary law'. Mulla mentions at page 65, that principles of Equity, Justice & Good Conscience were invoked only in cases for which no specific rules existed. In **Gurunath Vs.Kamalabai 1955 S.C. 206**, it has been held that in the absence of any clear Shastric text, Courts have authority to decide on principles of justice, equity and good conscience.

2598. It is a settled principle that 'Equity' follows 'Law', i.e. where Law is applicable, considerations of Equity do not come into play (vide, **Halsbury's Laws of England 4th Edn, Vol 16, para 1204**). Since Hindu Law specifically prescribes that the rights of Deity are not destroyed by another's possession howsoever long, 'equity' cannot be applied to deprive the rights of Deity on the basis of possession.

2599. Since the deities themselves are the Plaintiffs No. 1 and 2, being akin to a perpetual minor, no limitation runs, and any bona fide group of worshippers or even a single worshipper, which the Plaintiff No.3 is and represents, can act in the name of the deity/ deities to defend it's/their rights.

2600. In **Acharya Maharishi Narendra Prasad ji Vs. State of Gujarat, (1975) 1 SCC 2098** (para 26), while upholding the right of State to acquire property of Deity under Article 31 of the Constitution, laid down an exception by holding: "If on the other hand, acquisition of property of religious denominations by the State can be proved to be such as to destroy or completely negative its right to own or acquire movable and immovable property **for even the survival of a religious institution**, the question may have to be examined in a different light". This dictum was reaffirmed by Apex Court in **Dr. M. Ismail Faruqui's case, 1995 SC 605** (para 79); it was further held in para 77: "The protection under Article 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion"; the law stated in para 78 is: "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 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 the religion, stand on a different footing and have to be treated differently and more reverentially". This decision is in this very case and has to be respected fully. In the summary contained in para 82, the Court observed: "Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations

for a larger public purpose keeping in view **that such acquisition should not result in extinction of the right to practice the religion, if the significance of that be such"**. Undoubtedly, Asthan Ram Janma Bhumi , Plaintiff No. 2 of OOS 5 of 1989, belongs to this very category of Deity – Class entirely by itself; hence the State can not acquire either the Deity or its property.

2601. As an independent special Class of person, there is no constitutional impropriety or illegality in having laws exclusively applicable to the Plaintiff-Deities of OOS 5 of 1989. A recent analogy is provided by The Public Waqfs (Extension) of Limitation Act, 1959 which accords a privilege to all the Muslim Public Waqfs in the period of limitation for certain types of civil suits upto 31st day of December 1970 for the only reason that in the wake of the partition of India Mutawallis of certain properties had migrated to Pakistan or those who stayed behind could not institute civil proceedings for recovery of possession of these properties. On this basis limitation has been extended in respect of all Public Waqfs. Similarly, laws exclusively applicable to Hindu deities could be had and read in the light of Oudh Laws Act, 1876, could apply the Hindu Dharma Shastra Law, which contains substantive as well as provisions relating to Limitation qua Hindu Deities. The legal position under the Hindu Dharma Shastra Law being as the one indicated above, destruction of Hindu Temple at the site of disputed structure or erection of Babri Masjid over it could never deprive the two Deities, Ram Janma Bhumi & Bhagwan Shri Ramlala of their ownership of the disputed property/area; the Indian Law of Limitation is not applicable at all. Decision of Supreme Court in Shah Bano's case was upset by the Parliament

on the ground of sensitivities of Muslim Community for Muslim Personal Law. Muslim Personal Law (Shariat) Application Act, 1937 was framed to apply personal law to Muslims. Sensitivities of Muslims stand even today in the way of adoption of a Common Civil Code for India envisaged by Article 44 of Directive Principles of State Policy in our Constitution. The Constitutional protection, if any, for such laws should also support special laws in the case of Hindu Deity, on principles of equality, particularly in view of Oudh Laws Act 1876 and Article 372(1) of the Constitution, he submitted.

2602. He relied on **"The Hindu Law of Religious and Charitable Trusts" by B.K. Mukherjea** para 4.10, page 158 which says:

> *"A Hindu idol is, according to long-established authority, founded upon the religious customs of the Hindus, and the recognition thereof by courts of law, a 'juristic entity.' It has a juridical status, with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who in law is its manager, with all the powers which would, in such circumstances, on analogy, be given to the manger of the estate of an infant heir. It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established."*

2603. He refers to the **"History of Dharma Shastra" by P.V. Kane, Vol. III Page 327-328–Narad IV, Page-83**, where it states that women's property (Streedhana) and state property (land) is not lost even after hundreds of years when it is enjoyed without title. **Katyayana (330)** adds to the above list Temple Property and what is inherited from the father or mother.

2604. Akin to an infant, in law the rights of the deity

cannot be extinguished by limitation and he fortified this proposition referring to **Pramatha Nath Mullick Vs. Pradyumna Kumar Mullick (supra),** (Page 140) and **Bimal Krishna Ghosh Vs. Shebaits of Sree Sree Ishwar Radha Ballav Jiu (supra)** (Page 340).

2605. Referring to **K. Manathunaitha Desikar Vs. Sundaralingam, AIR 1971 Madras 1 (FB)** Sri Pandey submitted that since deity who is the owner of property suffers from physical disability, its interests have to be looked after in perpetuity.

2606. Sri Pandey also referred to Chapter 7 of the "**Laws of Manu**" (Penguin Classics, Edn 2000) at page 149, Manu's edicts nos. 201 to 203 lay down that on conquest, the King-conqueror "should make authoritative their own laws (i.e. of the vanquished) as they have been declared……"

2607. Ram Janmabhumi continued to exist as a Swayambhu Deity, owning Itself and the Temple, hence no question of extinction of title by Limitation or dispossession could arise. The important aspect of Hindu Law relating to Deities, thus, is that the Deity is never divested of its rights in its property; in the case of self-revealed Idol, coupled with the faith of its followers, there is no independent consecration and the real owner of the property dedicated to a Temple, is deemed to be God Himself represented through a particular Idol or Deity which is merely a symbol.

2608. Sri K.N. Bhat, Senior Advocate sought to argue that the deity being a minor, is entitled to have the protection under Section 6 of the Limitation Act and hence Suit-5 in the case in hand cannot be said barred by limitation.

2609. Sri Bhat contended that Suit-5 was filed seeking a

declaration for the entire premises described and delineated in Annexures 1, 2, and 3 of Sri Ramjanambhumi at Ayodhya as belong to plaintiff-deities but after the decision of the Apex Court in **Dr. M. Ismail Faruqui (supra)**, the land in dispute would automatically confine to that which is occupied by the disputed stricture, i.e., inner and outer courtyard. Suit was filed in July 1989 and, hence, for the purpose of limitation it would be governed by LA 1963. Article 58 thereof is relevant which deals where a suit is filed to obtain any other declaration and limitation prescribed therefor is three years from which the period begins to run, i.e., **right to sue first accrues**. He submits that this period prescribed is subject to Section 4 to 24 of LA 1963. Section 6 (1) deals with legal disability and reads as under:

> *"Where a person entitled to institute a suit ...at the time from which the prescribed period is to be reckoned is a minor...he may institute the suit...within the same period after* ***the disability*** *has ceased".*

2610. For the purpose of attracting Article 58, the relevant date is when the right to sue first accrues. In this regard Sri Bhat submits that in the long history of this case on what date according to the defendants the period began to run is the moot question. Unless the defendants prove otherwise the plaint averments as to the cause of action should be the basis for applying the provisions about limitation. Plaint paragraph 18 explains why the present suit was filed despite the pendency of several other suits. In paragraph 30, it is pleaded, among others, that the Hindus were publicly agitating for the construction of a grand temple in the Nagar style. "Plans and a model of the proposed Temple have already been prepared by the same

family of architect who built the Somnath temple. The active movement is planned to commence from September 30, 1989 and foundation stone of the new temple building, it has been declared, shall be laid on November 9, 1989." The plaint also sets out the details of the pending proceedings under Sec.145 Cr.P.C. and before any of the steps mentioned in paragraph 30 could be taken like laying of the foundation stone, the title of the plaintiffs had to be declared. That is why on July 1, 1989, the suit was filed. Paragraph 36 of the plaint has to be read along with the other relevant averments. The defendant No.4 in response to the above paragraphs have asserted that the whole Rama temple was imaginary. It is no longer imaginary. It is a matter of public knowledge that the agitation for building a temple at the disputed area had gathered momentum throughout India, particularly from about the year 1989 culminating in the destruction of the structure on December 6, 1992. The averment that in 1989, there was a particular reason why the suit had to be filed is properly pleaded and justified. Therefore the suit is within the prescribed period of limitation."

2611. Per contra learned counsels for pro mosque parties submitted that it has been held by a Division Bench of this Court in **Chitar Mal Vs. Panchu Lal (supra)** that an idol is not a perpetual minor hence Section 7 of the Limitation Act (now Section 6) has no application and this view has also been followed by a Division Bench of Orissa High Court in **Radhakrishna Das Vs. Radha Ramana Swami (supra)**, there is no question of giving benefit of Section 6 to the plaintiffs 1 and 2 (Suit-5). They further submit that the building in dispute having been constructed several hundred years ago, the suit in question is ex facie barred by limitation.

2612. Sri Siddiqui, learned counsel appearing for the Muslim Parties, whose submission on the question of limitation has been adopted by Sri Jilani, contended that the entire reading of the plaint of Suit-5 **does not show any accrual of right to sue within the period of limitation** and, therefore, firstly there is no cause of action, whatsoever, and secondly in any case, the suit is ex facie barred by limitation. He submits that even if there existed any temple at site in dispute and as claimed by the plaintiffs (Suit-5) that it was demolished in 1528 so as to construct the disputed structure, a mosque, is taken to be correct, that shows that **the right to sue accrued in 1528**. The building had continued to exist at the site in dispute till Suit-5 was filed and when for the last four hundred years no remedy, as permissible in law, was availed by the plaintiffs, the same could not have been availed by the plaintiffs in 1989. He further submits that the latest cause of action, if any, at the best accrued on 29th December 1949 when the premises constituting inner courtyard was attached by the Magistrate in the proceedings initiated under Section 145 Cr.P.C. and if that be so, the point of commencement of limitation is the date of order passed under Section 145 Cr.P.C., i.e., 29th December, 1949. The suit having not been filed within the period of limitation of six years, as provided at that time under Article 120 of LA 1908, the present suit is ex facie barred by limitation particularly in the absence of any fresh cause of action having accrued to the plaintiffs as no such fresh cause of action has been demonstrated or specified in the plaint.

2613. Whether Suit-5 is barred by limitation or not is really a vexed question in the peculiar facts and circumstances of this case. We have already held that the two plaintiffs no. 1

and 2 are juridical persons and have decided the concerned issues accordingly. The question as to whether the disputed structure was constructed in 1528 by Babar or any of his agent has also been decided by us holding that the parties concerned have failed to prove the said issues.

2614. Be that as it may, it cannot be disputed that by the time Father Joseph Tieffenthaler visited the area of Avadh between 1766 to 1771, the disputed structure had already come into existence. As per local belief, it was caused by Aurangzeb after demolishing the then existing temple of Lord Rama at that very place. Though we have not expressed any final opinion as to whether it was actually constructed during the reign of Aurangzeb or not, but once it is certain that the disputed structure had come into existence by the time Father Joseph Tieffenthaler visited Ayodhya i.e. before 1766, even from that date more than two hundred years have passed. The question would be, can an issue be raked up after more than two centuries particularly when nothing governed at that time by any codified law but it was the rule of the King and his command was law of the land.

2615. Lots of authorities have been cited before us to suggest as to what is said in law of Shariyat when a Ruler conquer a territory vis a vis the subject of that territory. Similarly, what is said in Hindu laws in similar circumstances has also been placed before use. In the context of the modern International law also, various charters of United Nations dealing with the rights of the two sovereign authorities, dealing with the matter of transfer of power etc. have been cited. It is said that by mere change of King, the laws by which the subject governed or was being governed would not automatically

change and shall continue to be governed by the then existing personal laws. On behalf of plaintiffs (Suit-5), it is pointed out that under Hindu law the rights and privileges of the deity are well protected and it is also the obligation of the King to extend such protection since a deity is treated to be a minor and, therefore, the obligation of protection of minor's right has been imposed upon the King. The law of Shariyat also does not make any change. Further at that time there was no period of limitation prescribed under the statute, hence, the present suit cannot be said to be barred by limitation.

2616. First of all, let us examine the occasion and the purpose for which Suit-5 has been filed. Paragraphs 3 to 10 refer to various suits filed regarding to the property in dispute between 16.1.1950 to 18.12.1961 in the Court of Civil Judge, Faizabad and the interim injunction orders passed therein. Paras 11, 12, 13 and 14 complain about non disposal of those matters despite passage of more than 25 years since the first suit was filed. It also says that the plaintiffs deities and their devotees are unhappy with the prolonged delay in disposal of those cases and distorted affairs of temple in the hands of Receiver. A large amount of money offered by worshippers is being misappropriated by Pujaries and other temple staff uncontrolled by Receiver. The devotees of plaintiffs deities desire to construct a new temple at the disputed site after removing the old structure. Then para 15 to 17 relates to creation of a Trust, its object and purpose. In para 18, it says that in pending suits, the deities who are juridical persons have not been impleaded though they have a distinct personality of their own, separate from their worshipers and servers etc. Considering the events of previous four decades, the plaintiff-deities feel that the point of

view of the plaintiffs deities also need be placed before the Court for a just determination of the dispute relating to Sri Ramjanambhumi, Ayodhya and the land and building and other things appurtenant thereto. It is in these circumstances that the plaintiffs are advised to file a fresh suit of their own. Then in paras 19 to 23 certain historical facts have been averred which we have already given, thus not repeating. In para 24, it is said that building constructed in the shape of mosque could not have been so for the reason that it did not conform to tenets of Islam in various ways. Para 25 and 26 deny the averments that despite construction of the building and called as Mosque, prayer was never offered therein by the Muslims and on the contrary, the plaintiffs deities continued to be worshipped thereat by Hindus. Para 27 and 18 relates to the incidence of 22nd/23rd December, 1949 when the idol of Bhagwan Sri Ram was installed under the central dome of the building and there was no obstruction by the Muslims since neither any one resided near the place in dispute nor otherwise they offered any resistance. The facts regarding attachment proceedings under Section 145 Cr.P.C., handing over premises within the inner courtyard to the Receiver are also mentioned. Para 29 says that the deities being legal persons own the property in dispute also and having been placed in inner courtyard from 22nd/23rd December, 1949 have perfected their title by all means since they are not party to any of the proceedings. It is also said that in the absence of impleadment of deities, if somebody otherwise is claiming title, the possession of plaintiffs is adverse since 22nd/23rd December, 1949 and they have perfected title as the others' title, if any, extinguished after twelve years from 22nd/23rd December, 1949. Having said so, para 30 and 31 say that Hindu public and devotees of plaintiff-

deities having decided to proceed for construction of a new temple and since the plaintiff-deities are not party in the litigation pending in the Court, they are not bound by those proceedings in any manner, but in order to remove any doubt or obstruction in the path of fulfillment of desire of the construction of a new temple, the present suit has been advised to be filed. Thereafter, it is said that the defendants 4, 5 and 6, i.e. the Muslims parties and Sunni Board, have confined their claim in Suit-4 to the building and area encroached in the inner courtyard. It is also said that the right of management of a Mosque, Muslim waqf, is within Mutwalli and the defendant no. 23, Late Javvad Husain was disclosed to be Mutwalli of the so claimed Mosque upto 1940 and hence he has been impleaded in the present suit, but he did not file any suit or joined as plaintiff seeking possession of the property in dispute being its Mutwalli. This also shows that there existed no Mosque according to Shariyat law. Thereafter, History from 1990 to 1995 including the enactment of Act, 1933 and the Apex Court's decision in **Dr. M. Ismail Faruqui (supra)** is mentioned. Then in para 36, it is said that cause of action for suit is accruing from day to day, particularly, since recently when the plan for re-construction of temple is sought to be obstructed by violent action from the side of Muslim community. Based on the above pleadings, the two reliefs have been sought; one is for declaration and another for perpetual injunction.

2617. The facts, as are pleaded, in fact, are a bit puzzle-some and make it very difficult at first flush to understand as to what really cause of action was which the plaintiffs claim to have accrued day to day and how the suit is protected from the clutches of the statute of limitation.

2618. To understand the things, let us first summarize the facts as pleaded, mostly whereof, we have already referred and some of which already considered in the earlier part of this judgement.

(a) The place in dispute is believed by Hindus as the birthplace of Lord Rama. Since time immemorial continuously being visited and worshipped by Hindus.

(b) At the place in dispute a non-Hindu structure was raised by or on behalf of or at the command of a Muslim Ruler before the visit of Tieffenthaler, i.e., 1766-71 AD in Oudh. This structure was treated and called as 'Mosque' by the local people throughout and others also.

(c) Despite construction of a building by Muslim Ruler, called and understood by the local people as 'Mosque', Hindu people continued to visit and offer worship according to their faith and belief that the place is where Lord Rama was born and, therefore, sacred and pious.

(d) Construction of the building, which though treated as Mosque, caused no impact on the belief of Hindus about the sacredness or piety in any manner.

(e) Within the premises of the undivided Mosque, there existed a non Islamic structure, i.e. a Bedi which was noticed by Tieffenthaler in his Traveller's Account when he visited Avadh area between 1766 to 1771 and the travel account published in 1786.

(f) This place of worship and non Islamic structures added with the passage of time, i.e., Sita Rasoi/ Kaushalya Rasoi/ Chhati Pujan Sthal, Chhappar/ Kuti/ Bhandar and Ram Chabutara.

(g) These structures were noticed in 1858, 1873, 1885,

1949, 1950 and continued till demolition of the entire disputed structure on 6th December 1992. (This is as per the record of this case.)

(h) Despite the entire disputed structure called Mosque, the British Government also recognised the rival claims of two communities; inasmuch, to pacify violent dispute among the two communities, they divided the disputed area in two parts so that two sections may separately offer their prayer/ worship and may not have any occasion to clash with each other.

(i) Despite this division, on one hand Hindus kept possession of the portion for which Britishers allowed them to continue their worship i.e. outer courtyard, but also continued to enter the portion meant for Muslims for their religious activities (i.e. inner courtyard). Entry of Hindus in that area (inner courtyard) continued unabashed despite repeated complaints, removal orders, actions etc. (Record from 1858 to 1885 fortify it.)

(j) The disputed structure, treating a Mosque, the Britishers, allowed a Nankar/ grant to two Muslim persons, namely, Mir Razzab Ali and Mohd. Asghar, who claimed to be the fourth/fifth in succession of the alleged founder Mutwalli of the building in dispute, i.e. Syed Abdul Baki and pursuant to that grant the said persons claimed to have incurred expenses on the maintenance of building in dispute such as white washing, cleaning repairing etc.

(k) On 22nd/23rd December, 1949, the idols of Ram Lala were kept by Hindus in the inner courtyard i.e. the premises meant to be used by Muslims by the Britishers

after dividing premises sometimes in 1856-57.

(l) Thereafter, on 29rd December 1949 though the internal part of the disputed premises, i.e. inner courtyard was attached by the Magistrate by an order under Section 145 Cr.P.C. yet the fact remains that he also ensured worship of the idols kept under the central dome in the inner courtyard according to Hindu Shastrik laws and to the same effect an injunction order was also passed by Civil Court on 16.1.1950 clarified on 19.1.1950, confirmed on 3.3.1951, which attained finality after dismissal of F.A.F.O. No. 154 of 1951 by this Court on 26th April 1955.

(m) Worship, as permitted, has continued by Hindu people and admittedly since 23rd December 1949 no Muslim either has entered the entire premises in dispute or offered Namaz thereat.

(n) However, worship by Hindus in general since 29.12.1949 also had continued from the iron grilled door of the dividing wall and only priests/ Pujaries were allowed to enter the premises for worship in accordance with Shastrik procedure.

(o) In 1986, the District Judge Faizabad by order dated 1.2.1986 directed for removal of locks, to open the doors so that the Hindu public may worship the idols under the inner courtyard by entering the site.

2619. The above facts show that despite several litigations, in one or the other way, so far as the plaintiffs in the present suit are concerned, their status or their worship continued to be observed and followed in one or the other manner. No action or inaction in the meantime was such whereagainst the plaintiffs

could claim a grievance and a right to sue which ought to have been availed by them within a particular period of limitation. It is an admitted position that under Islamic laws, no concept of limitation is recognised while in Hindu laws, the rights earned by prescription on certain matters are provided which excludes deity.

2620. In this entire episode, taking it back to a few hundred years, the only occasion which to some extent could have been said to be adverse to the plaintiffs was when the disputed structure was raised. Neither at that time the concept of legal principles, as we have today under the codified laws of British India and thereafter, was recognised and/or known, nor the plaintiffs, in view of the subsequent events, had any cause of action. Moreover, as a matter of fact, the place in dispute continued to be visited by the Hindus for the purpose of worship, Darshan etc. The religious status of plaintiff-deities remained intact. We do find mention of the factum that despite construction of the building as Mosque, the Hindus visited there and offered worship continuously, but we find no mention, whatsoever, that the Muslims also simultaneously offered Namaz at the disputed site from the date it was constructed and thereafter till 1856-57. At least till 1860 we find no material at all supporting the claim of the Muslim parties in this regard. On the contrary, so far as the worship of Hindus in the disputed structure is concerned, there are at least two documents wherein this fact has been noticed and acknowledged. There is nothing contradictory thereto.

2621. Father Joseph Tieffenthaler in his book **"Description : Historique Et Geographique : Del'inde"** has written:

"Emperor Aurengzebe got the fortress called Ramcot demolished and got a Muslim temple, with triple domes, constructed at the same place. Others say that is was constructed by 'Babor'. (Page 253)

"On the left is seen a square box raised 5 inches above the ground, with borders made of lime, with a length of more than 5 ells and a maximum width of about 4 ells. The Hindus call it Bedi i.e. 'the cradle. The reason for this is that once upon a time, here was a house where Beschan was born in the form of Ram. It is said that his three brothers too were born here. Subsequently, Aurengzebe or Babor, according to others, ***got this place razed in order to deny the noble people,*** *the opportunity of practising their superstitions.* ***However, there still exists some superstitious cult in some place or other. For example, in the place where the native house of Ram existed, they go around 3 times and prostrate on the floor.*** *The two spots are surrounded by a low wall constructed with battlements. One enters the front hall through a low semi-circular door."*

(Page 253-254)

2622. Same thing has been said in the **Edward Thornton's Gazetteer (supra)** published in 1858. It also said as under:

"A quadrangular coffer of stone, whitewashed, five ells long, four broad, and protruding five or six inches above ground, is pointed out as the cradle in which Rama was born, as the seventh avatar of Vishnu; and is accordingly ***abundantly honoured by the pilgrimages and devotions of the Hindoos."***

2623. The factum that in the premises within the inner courtyard, Hindus used to worship for hundred of years has been admitted by the alleged keeper of the disputed structure namely, Mohammad Asgar who in his complaint application dated 30th November 1858 (Exhibit No. 20, Suit 1) has said:

بمقام جنم استھان کا صدہا برس کے نشان پڑا رہتا تھا و اہل ہنود پوجا کرتے تھے

''मुक़ाम जनम स्थान का सदहा बरस के निशान पड़ा रहता था व अहले हुनूद पूजा करते थे'' (Hindi Transliteration by the Parties)

"Previously the symbol of Janam had been there for hundreds of years and Hindus did puja." (E.T.C)

2624. The first document, which mention about the worship in the disputed structure by Muslims also is **P. Carnegi's Historical Sketch (supra**) published in 1970 where he has mentioned:

> *"It is said that **up to that time the Hindus and Mahomedans alike used to worship in the mosque-temple.** Since British rule a railing has been put up to prevent disputes, within which in the mosque the Mahomedans pray, while outside the fence the Hindus have raised a platform on which they make their offerings."*

2625. In **"Gazetteer of Oudh" by Mr. W.C. Benett (1877) (Book No. 11) (Supra)** what was observed by Carnegy has been repeated verbatim as is evident from the following:

> *"It is said that **up to that time the Hindus and Muhammadans alike used to worship** in the mosque-temple. Since British rule a railing has been put up to prevent disputes, within which, **in the mosque, the***

Muhammadans pray; *while* ***outside the fence the Hindus have raised a platform on which they make their offerings."***

2626. Same thing was repeated in A.F. Millitt's **"Report on Settlement of Land Revenue of the Faizabad" (supra)** (para 669); "**Fyzabad A Gazetteer being Vol. XLIII of the District Gazetteers of the United Provinces of Agra and Oudh" (supra)** (at page 174); **Fyzabad-A Gazetteer being Volume XLIII of the District Gazetteers of the United Provinces of Agra & Oudh" (1928) (supra)** (at page 180)

2627. In "**Uttar Pradesh District Gazetteers-Faizabad" (1960) (supra)**, however, there is slight difference and it says as under:

"Attacks and counter-attacks continued, culminating in the bloodshed of 1855 under the leadership of Maulvi Amir Ali. As a result, ***in 1858 an outer enclosure was put up in front of the mosque and the Hindus, who were forbidden access to the inner yard, had to perform their puja on a platform outside.*** *Since 1949 the position has changed and the Hindus have succeeded in installing the images of Rama and Sita in the mosque owing to which the spot has become the object of much litigation. Now the inner yard is protected by an armed guard and only a few Hindu pujaris (priests) are allowed access to the inner sanctum."*

2628. The facts mentioned by P. Carnegy recognise this fact that so far as the Hindus are concerned, their visit and worship at the disputed site and disputed structure continued unabated and uninterrupted despite having been raised threat a structure which was known and treated by the local people as Mosque. Even the new structure did not in any manner

influenced the belief and faith of Hindus on the disputed area. This continued to constitute core of their belief and faith about birthplace of Lord Rama, its continued sanctity, status and piety and that it had not lost merely on account of that construction. That is how their worship continued throughout.

2629. After 1956-57, when partition wall was raised, the administrative intention was that Hindus should stay in outer courtyard and not enter in the inner courtyard but in fact that could not accomplish as is evident from several complaints made by Mohammad Asgher, self claimed Mutwalli of the Mosque in dispute.

2630. If we look the entire issue in the light of the above facts, we find that there was no occasion for the plaintiffs to feel aggrieved that on a particular date, any right has accrued to sue. Article 58 of LA 1963 provides the period of limitation, which is to commence from the date right to sue first accrued. Unless it is shown as to when right to sue first accrued, the suit in question cannot be thrown on the ground of limitation. While considering Issue No. 3 (Suit-4), we have already discussed that right to sue does not mean a mere fanciful apprehension but it ought to be a substantive threat to the very sustenance of the plaintiff concerned leaving with him no option but to approach the Court, failing which he is bound to loose all kind of his interest. It may happen that in a particular case, unsubstantial occasions may arise frequently pursuance whereto if a person files a suit asserting that the same has given him an occasion to sue, the suit may not be dismissed on the ground that apprehension or the possible injury is so negligible that he/she ought not to have filed the suit. That is the choice of the plaintiff, but, in our view, the "right to sue" accrued for the first

time would be when there is a substantial threat necessitating the person concerned to seek remedy and only then it can be said that the limitation would start running which shall not stop thereafter. In the present case, the defendants have not been able to show any such occasion. Therefore, we are of the view that the plaintiffs cannot be non suited on the ground of limitation. In these circumstances, to avoid any misconception in the mind of others and to place the record straight, if they approach a Court of law seeking a declaration of their rights which are continuously, unabatedly have continued, it cannot be said that the suit is impermissible by attracting any particular provision of the limitation. It cannot be said that the Suit-5, in the above facts and circumstances, is bad on account of the statute of limitation and any provision thereunder.

2631. There are some more angles. The first, the Gods are described in view of the hymns and meaning, human attributes – in necessity of the human mind and language but it does not necessarily follow therefrom that images of these Gods clothe in such human attributes were artificially prepared and worshipped. It is to the Puranik age that we owe their existence.

2632. In the ancient Hindu scriptures, temples or idol's property is said not to be lost even if enjoyed by strangers for hundreds of years. Katyayan says that temple's property is never lost even if it is enjoyed by strangers for hundreds of years. In P.V.Kane's History of Hindu Shastra Vol.3 it is said that even the king cannot deprive temples or their properties. Under Hindu laws though right based on prescription to some extent are provided but they are not applicable in the case of women, minor and king's property.

2633. "**Manusmrti"**, Discourse VIII, Verse CXLIX (149)

says:

"A pledge, a boundary, minor's property, a deposit, a property enjoyed by favour, women, King's property, and the property of a Vedic scholar are not lost by adverse possession."

2634. In **"Brihaspati Smriti"** says, *"Female slaves can never be acquired by possession, without a written title; nor does possession create ownership in the case of property belonging to a King, or to a learned Brahman, or to an idiot, or infant.*

2635. **"The Naradasmrti"**, says:

"73. A pledge, a boundary, the property of children, unsealed and sealed deposits, women, the King's property, and a learned brahman's property are not lost through possession."

"75. The property of women and kings is never lost, even if it is, possessed without title for hundreds of years."

2636. ***"Yagyavalkyasmritih"***, says:

''आधिसोमोपनिक्षेपजडबालघनैर्विना।
तथोपनिधिराजस्त्रीश्रोत्रियाणां धनैरपि।।25।।

''भाषा– आधि (बन्धक), सीमा, उपनिक्षेप, **जड़ (मंदबुद्धि), बालक का धन**, उपनिधि, राजधन, **स्त्रीधन**, श्रोत्रिय का धन दूसरे द्वारा दस या बीस वर्ष तक भोगे जाने पर भी अपने स्वामी के अधिकार से हीन नहीं होते हैं।।25।।

2637. "Shukranitih"Chapter IV, Part 5, Verse 225 says:

''आधिः सीमा बालधनं निक्षेपोपनिधिस्तथा।
राजस्वं श्रोत्रियस्वं च न भोगेन प्रणश्यति।।''

''हिन्दी– बंधक रखी गई वस्तु, गॉव की सीमान्त भूमि, **नाबालिग का धन**, धरोहर, **स्त्रीधन**, राजधन तथा **वेदपाठी ब्राह्मण के धन** पर कब्जा कर लेने से ही कोई उसे पा नहीं सकता।''

2638. It may be noticed that the Sanskrit word 'बाल' has been defined in Sanskrit-English Dictionary of Sir Monier

Monier Williams, first published in 1899, corrected Edn. 2002, reprint Delhi 2005 by Motilal Banarsidass Publishers, Delhi at page 728 and reads as under:

> बाल- young, childish, infantine, not full-grown or developed (of persons and things); simple, foolish, child, boy (esp. one under 5 years); a minor (minors are classified as Kumara or boys under 5 years of age; Sisu under 8, poganda from the 5th to the end of the 9th or till the 16th year, and kishora from the 10th to the 16th year); a fool, simpleton …

2639. The first meaning which is applicable on persons and things includes within its ambit a "deity" also.

2640. In the area of Oudh, British Rule came into force in 1856 and not prior thereto. During Muslims Rulers, Governors were appointed but no material has been brought to our notice that in the matter of Hindu Laws, any interference was made by the Islamic Rulers. It is mostly in the administration of criminal justice, to some extent, there was an interference and control by Islamic Rulers otherwise the people used to approach the locally constituted bodies like Gram Panchayat etc. for resolving their disputes in accordance with their personal laws. It do not appear to be interfered or altered by the command of the king.

2641. When Subedar of Oudh declared himself an independent ruler and conferred Nawab Wazir in the second half of 18th Century, then also with respect to the dispute redressal system there was no major change and the personal laws and tenets continued to occupy high position as it was. In 1801, East India Company entered into a treaty with the Nawab of Lucknow but even that treaty did not cause any impact upon the personal laws of Hindus within the territorial area of Oudh

province with which we are concerned. It is only in 1856 AD, when the area of Oudh or the Oudh province was annexed to the East India Company, the Britisher's Laws came to be imposed upon the citizens of Ayodhya and Faizabad. But then also so long as the matters were not caused by statutory laws, the two communities continued to be governed by their personal laws.

2642. The first Limitation Act was enacted in 1859 AD which did not contain any provision regarding prescription or extinction of right which was introduced vide Limitation Act 1871. In 1876, in the peculiar nature of the territory of Oudh as also considering different circumstances prevailed thereat, Oudh Laws Act, 1876 was enacted which was applicable only to Oudh. Section 3 thereof talks of the statutory law to be administered in Oudh and says as under:

> ***"Statutory law to be administered in Oudh.-*** *The law to be administered by the Courts of Oudh shall be as follows:--*
>
> *(a) the laws for the time being in force regulating the assessment and collection of land- revenue;*
>
> *(b) in questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or* ***any religious usage or institution****, the rule of decision shall be-- (1) any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience, and* ***has not been, by this or any other enactment, altered or abolished,*** *and has not been declared to be void by any competent authority;*
>
> *(2) the Muhammadan law in cases where the parties are*

Muhammadans, and the Hindu law in cases where the parties are Hindus, except in so far as such law has been, by this or ***any other enactment, altered or abolished****, or has been modified by any such custom as is above referred to:*

(c) the rules contained in this Act:

(d) the rules published in the Official Gazette as provided by section 40, or made under any other Act for the time being in force in Oudh:

(e) the Regulations and Acts specified in the second schedule hereto annexed, subject to the provisions of section 4, and to the modifications mentioned in the third column of the same schedule:

(f) subject to the modifications hereinafter mentioned, all enactments for the time being in force and expressly, or by necessary implication, applying to the territories which, immediately before the 1st November, 1956, were comprised in Part A States and Part C States or Oudh, or some part of Oudh:

(g) in cases not provided for by the former part of this section, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience."

2643. Section 16 thereof provides for Rule of Limitation and reads as under:

"16. Rule of limitation.- *The Judicial Commissioner's Circular No.* ***104 of July, 1860,*** *shall be held to have been a notification within the meaning of section 24 of Act 14 of 1859, and such Act shall be deemed to have been in force* ***in Oudh from the fourth day of July, 1862****; and all*

orders and decrees passed under the rules contained in the said Circular, or under the said Act, shall be deemed to have been passed under a law in force for the time being. Nothing in this section affects the provisions of section 102, 104, 105, 106, 107 and 108 of the Oudh Rent Act (19 of 1868) with regard to the limitation of suits under that Act."

2644. Thus the personal Laws in the matter of religious usage of institution and also in the matter of minority etc. were to continue. Hindu idol or the deity was always treated as a person to be protected by the king like a minor or women and that legal position has not been shown to us having gone under change by any authority by any point of time. We have some earliest judgments on this aspect and do find nothing contrary.

2645. In **Prosunno Kumari Debya & Anr. Vs. Golab Chand Baboo 1875 L.R. 2 I.A. 145,** a decision of Privy Council dated 3rd February, 1875 in para 18 said:

"The authority of the sebait of an idol's estate would appear to be in this respect analogous to that of the manager for ***an infant heir****, ..."*

2646. It also held in para 14 that the debuttor property in Hindu Law is unalienable:

"There is no doubt that, as a general rule of Hindu law, property ***given for the maintenance of religious worship*** *and of charities connected with* ***it is inalienable****."*

2647. However, in the interest of the idol, for its maintenance etc. it found that if the Shebait, the person responsible for managing the affairs of the idol, is not given power to deal with the property to the extent it is required for meeting necessities of the deities, that would be against the interest of the deity and its sustenance. In para 19 of the

judgment, accordingly, it says:

> *"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as sebait, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them."*

2648. The Privy Council relied on an earlier decision in **Hunooman Persaud Panday Vs. Mmsumat Bdbooee Manraj Koonweree 6 Moore's Ind. App. Ca. 243** in observing the idol as 'infant heir'.

2649. Then Division Bench of Calcutta High Court in **Girijanund Datta Jha & Anr. Vs. Sailajanund Datta Jha 1896 ILR 23 Ca1. 645** considered the question as to whether 'Charao' to the idol would be the property of the priest or shebait or not. It was noticed that about the religious endowment virtually nothing has been said in the religious scriptures, may be for the reason that it was sought to be managed by the person who had highest respect and belief that they shall deal with the situation effectively. The court rejected argument that an idol is only an emblem of God, and offerings made to the God, not for use of the idol but for the use of the God's creatures and by priests in particular and said *"it cannot, we think, prevail in its broad generality in a Court of law at the present day. Decisions too clear and authoritative to be doubted or disregarded have*

repeatedly laid down that ***an idol in Hindu law is capable of holding property, and that property dedicated to an idol belongs to an idol****."*

2650. Again in **Palaniappa Chetty and Anr. Vs. Deivasikamony Pandara 1917 L.R. 44 I.A. 147** in para 7 the Court said:

> *"In Prosunno Kumari Debya v. Golah Chand Baboo L.R. 2 Ind. Ap. 145, 151 the Rajah Baboo, the shebait of an idol, a man of profligate habits, having spent the income of the debottar property on his own pleasures, borrowed a sum of Rs. 4000 from the respondent, and, by a bond and rahinama, pledged the debottar property for the payment of this sum. In both these securities it was stated that the money was borrowed for the services of the idol and the expenses of the temple. The Zillah Judge before whom the case was tried held as a fact that the money had been borrowed and expended for these purposes. Two decrees were obtained by the respondent, the lender, against the shebait, each directing that the debt should be paid by the shebait personally, or else be realized out of the profits of the debottar land. The appellant, the successor in office of Rajah Baboo, instituted a suit to set aside these decrees and have the debottar property released from an attachment issued in execution of them. The point decided was that the decrees, being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, had the force of judgments of a competent Court and were binding on the appellant, the succeeding shebait, who was a continuing representative of the idol's property. Though the question*

was not raised whether the debottar lands themselves could be sold under the above-mentioned decrees, the passage from the judgment of Knight Bruce L.J., above extracted, was quoted, and some observations were made by Sir Montague E. Smith, who delivered the judgment of the Board, touching the alienability of debottar land which have been relied upon. First, the learned judge said : "There is no doubt that ***as a general rule of Hindu law property given for the maintenance of religious worship and of charities connected with it is inalienable,"*** *and then, after quoting a passage from the judgment of Lord Chelmsford in a case to be presently referred to, he proceeds thus: "But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the shebait of property dedicated to the worship of an idol, in the capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power however to incur such debts must be measured by the existing necessity for incurring them. The authority of the shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as denned in a judgment of this Committee delivered by Knight Bruce L.J." On the next page he adds : "It is only in an ideal sense that property can be said to belong to an idol;* ***the possession and management of it must, in the nature of things, be entrusted to some person as shebait or manager****. It would*

seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and ***for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir.*** *If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."*

2651. The status of idol as a minor has not been disputed or challenged in any authority whether of High Court or judicial committee/Privy Council in the pre-independent period or thereafter in the Apex Court. It is only with respect to Section 7 or Section 6, as the case may be, in various statutes of limitation where special provision in respect to legal disability have been made, some of the authorities have said that for the purpose of the aforesaid statutory provision idol cannot be considered 'a minor' for all the purposes i.e. in perpetuity.

2652. In **Kuarmani Singha Vs. Wasif Ali Murza 1915(28) I.C. 818; Rami Kuar Mani Singh Vs. Nawab of Murshidabad AIR 1918 PC 180; Sarat Kamini Dasi Vs. Nagendra Nath Pal AIR 1926 Cal. 65** and **Deutsch Asiatische Bank Vs. Hiralal Burdhan & Sons 1918 (47) I.C. 122** it was observed that Section 6 of the Limitation Act recognises only three classes of persons being under legal disability namely minor, insane and idiot and thus it cannot be extended any more. A Division Bench of Patna High Court in **Naurangi Lal & Others Vs. Ram Charan Das AIR 1930 Patna 455** noticing the above decisions and also that there appears to be some deficiency in the existing law of limitation, held that the Court is bound by the said decisions and therefore, benefit of section 6

cannot be made available to a minor. This decision of Patna High Court was set aside in appeal by the Privy Council in **Mahanth Ram Charan Das. Vs. Naurangi Lal (1933) L.R. 60 I.A. 124**.

2653. What we find is that three kinds of legal disability provided in the Limitation Act do not talk of the nature of person whether legal or natural. We have referred to some of ancient Hindu scriptures to throw some light on the concept, status and position of idol in Hindu religion for the purpose that the idol was treated to be in the position of a minor not because of the recognition or declaration by British Indian Courts about its being a legal person or juridical person but because of the then existing and continuing position of the idol in Hindu law being treated as minor and capable of holding and acquiring property and in furtherance thereof, its recognition as legal person was granted. Therefore, the idol enjoyed the status of a minor not by virtue of subsequent declaration of law but on account of the recognition of its pre-existing status before the application of the codified laws during British regime whether it was prior to the take over by the British Government or subsequent thereto.

2654. No decision has doubted the status of idol as a minor or infant. Then the next question comes up if it enjoys the status of minor or infant, can it be said that this status is good for a few purposes and not for others, and, if so, what is the logic or rationality of this differentiation and the basis thereof.

2655. It is true where an idol's property is being looked after by a Shebait, the law expected him to discharge duties effectively and honestly. Similarly, beneficiaries of the deity i.e. the worshippers can also take appropriate action for protection

of idol and its property, as and when they found something wrong. But in a case where both do not act to the degree of expectation, or where there is no Shebait at all, and the worshippers simply confine their attention to the benefits and not to the moral duties of protecting the idol's property etc., can it be said for that reason, the idol shall suffer though it is an admitted position that it being a legal person or a juridical person in law cannot act on its own. The maxim **contra non valentem agere non currit praescriptio** (Prescription does not run against a person who is unable to act) comes into effect and should be made applicable in the case of idol. We find no reason as to why in such a case it should not be observed. Here we are not concerned with all the juridical persons or legal person and it is not necessary for us to consider whether every juridical person or legal person would enjoy the status of minor or infant or not. Suffice it for us to concentrate only to the case of idol or deity in respect to Hindu law where its status is well recognised under the ancient Hindu scriptures which had continued and recognised as such by the British Indian Courts also. The only exception is that a restricted alienability of the debuttor's property has been allowed and that too for the benefit of the idol so that the necessary expenses and funds for maintenance of deity may be available without any obstruction. In fact this restricted alienability of debuttor's property is consistent with the rights of minor.

2656. This is how in various authorities, status of 'deity' as minor has been considered. In **K. Manathunainatha Desikar Vs. Sundaralingam AIR 1971 Madras 1,** a Full Bench of Madras High Court in para 20 of the judgment, observed:

"The deity, a juristic entity, is the proprietor who never

dies but labours under physical disability which renders it necessary that its interests should be looked after in perpetuity. ...."

2657. Following the decision of the Apex Court in **Bishwanath Vs. Sri Thakur Radha Ballabhji, AIR 1967 SC 1044,** a Single Judge of Rajasthan High Court (Hon'ble Dr.B.S.Chauhan as His Lorship then) in **Temple of Thakurji Vs. State of Rajasthan & Ors. AIR 1998 Rajasthan 85** in para 10, said:

"there is no doubt that by fiction, the deity/idol is to be treated as minor and physically disabled person. It has been recognised by the Court from time and again ....."

2658. The Court followed an earlier decision of Rajasthan High Court in **Ram Lal (Supra).**

2659. A Single Judge in **Trilochan Das Adhikari & Anr. Vs. Simanchal Rath & Ors. 1994 (11) Orissa Law Reviews 602** has also said:

"Defendant No.9 (Sri Madan Mohan Swamy Bije) is a deity who is a perpetual minor."

2660. The plaintiffs 1 and 2 are deities and juridical persons, as we have already held. A juridical person cannot act in the materialistic world on its own but has to be represented by a natural person. In the context of a Hindu deity, normally it is represented and managed by a Shebait who has the right to manage the affairs of the deity and in furtherance thereof take all such actions, as are needed for discharge of its obligations of maintenance of a deity, which includes right to file suit or be sued also. This, however, does not mean that the basic right vested in the deity stands disappeared or extinguished and the deity becomes, in its status, subordinate to Shebait as if right of

protection which every owner possess stands transferred to a person who has authority to manage and possess on behalf of deity. These two things are different and on this aspect some of the authorities we have already discussed while considering Issue No. 3 (Suit-4) and issues relating to juridical personality of plaintiffs 1 and 2 (Suit-5). Though it may be a bit repetition at this stage also but we find no escape therefrom in order to avoid any confusion in the matter and also realising the importance and wide ramifications. It is rather more important as the learned counsels for the Muslim parties have raised serious doubt. Thus also, it needs to be dealt with carefully in detail hereat despite bearing criticism of repetition which normally a Court of law avoid.

2661. An idol or deity in Hindu law enjoys a different status and class in itself. As we have already noticed, the Apex Court In **Jogendra Nath Naskar (supra)** and **Deoki Nandan Vs. Murlidhar (supra)** recognised that an idol is a juridical person capable of holding property. A Full Bench of this Court in **Jodhi Rai Vs. Basdeo Prasad (supra)** held that a suit respecting the property in which the idol is interested is properly brought and defended in the name of the idol, although *ex-necessitate resi* the proceedings in the suit must be carried on by some person who represents the idol usually the manager or shebait.

2662. To be more precise, it is not disputed before us that an idol/deity is like an infant or minor and, therefore, has to be acted through a guardian but what is contended is that the provisions specially made for minor like Order XXXII Rule 1 C.P.C. and Section 6 LA 1963 would not apply to the case of an idol/deity since it is not a minor in perpetuity.

2663. Let us consider first the authorities cited against the proposition that a deity is not a minor in perpetuity as to what reasons have been assigned therein. We intend to proceed with Division Bench decision of this Court in **Chitar Mal Vs. Panchu Lal (supra)**. This has been relied on in support of the contention that an idol is not under disability under Section 7 of the Limitation Act (Section 6 in the existing Act) since it cannot be deemed to be a perpetual minor for the purpose of limitation. This Court relied on two decisions of Privy Council in **Jagadindra Vs. Hemanta (supra)** and **Damodar Vs. Lakhan Das (supra)**. The former is a decision rendered in 1904 and later was handed down in 1910. These two decisions have been followed in some other cases subsequently also. Therefore, it would be necessary to consider them also in detail.

2664. In **Chitar Mal Vs. Panchu Lal (supra)** one Ram Narain brother of Jai Narain made gift of his share in a joint house property to the idol of Shri Chaturbhujji Maharaj installed in a temple in Ajmere. This gift was executed on 9th January, 1903. The Manager of the temple sold the gifted portion to Smt. Bishni, widow of a son of Ram Narain. On 5th December 1908 Chitar Mal, son of Jai Narain sued for a declaration that the property in suit consisting of half the house formerly owned by his father was trust property and transfer of the said property to Smt. Bishni was null and void and that the property be made over to the trustees of the temple of Shri Chaturbhujji after dispossessing the defendant. The suit was filed after 12 years from the date the Manager of the temple sold the gifted portion to Smt. Bishni. It was pleaded in para 11 of the plaint that bar of limitation is saved by virtue of Section 10 of the Limitation Act. This plea was decided against the plaintiff and Section 10 of the

Limitation Act was held inapplicable. The matter came up before this Court in a reference made by the District Judge formulating three questions under Section 17 of Regulation No. 1 of 1877 Regulations. The applicability of Section 10 was not subject matter of reference, as is evident from following:

> *"The suit was instituted more than 12 years after the date of sale, so it was pleaded in para. 11 of the plaint that under the provisions of Section 10 of the Limitation Act the bar of limitation was saved. This plea was decided against the plaintiff and the ence to us does not cover that point."*

2665. Three questions formulated by the lower Appellate Court in **Chitar Mal (supra)** where as follows:

> *"(1) Whether the deed, dated the 17th April, 1905, could constitute an alienation of the dedicated property (*318T*waqf) which was under the management of the Marwari faction of the Biradri of Agarwals at Ajmere and thereby give rise to adverse possession.*
>
> *(2) Whether Respondent No, 1 could acquire any title to the said property.*
>
> *(3) Whether in the circumstances of the present case Respondent No. 1 could claim the benefit of the law of limitation especially in view of paras. 1 and 2 of he written statement."*

2666. In respect to issue no. 2, the argument put forth on behalf of the plaintiff, Chitar Mal, before the Court was that idol suffered the disability of perpetual minority, so any suit by idol at any period of time after the date of transfer would be saved from bar of limitation under Section 7 of LA 1908. It is this argument which was to be dealt with by this Court in the facts of that case.

2667. Reliance was placed on the comments of a learned author in **Sastri's Hindu Law**, 5th Edn., Chapter XIV on page 726 which says:

> *"As regards limitation it should be considered whether S. 7 of the Limitation Act is not applicable to a suit to set aside an improper alienation by a shebait of the property belonging to a Hindu god. As the god is incapable of managing his property he should be deemed a perpetual minor for the purpose of limitation."*

2668. It was not disputed before the Court that idol enjoyed the status of a minor. This Court also noticed that a transfer by minor is void ab-initio and in that case the question of proper or improper alienation would not arise. For this purpose reference was made to **Mohori Bibee Vs. Dharmodas Ghose (1902) 30 I.A. 114 (P.C.)**. **T**hereafter, the Court proceeded to consider two judgments of the Privy Council in **Jagadindra Vs. Hemanta (supra)** and **Damodar Vs. Lakhan Das (supra)** so as to refute the argument of the plaintiff's counsel on the applicability of Section 7 of the Limitation Act in that case.

2669. In the first case, i.e., **Jagadindra Vs. Hemanta (supra)**, what we find is, at the time of wrong alienation of property, the person entitled to manage the dedicated property of the idol, i.e., Shebait himself was a minor. After attaining majority, he brought a suit for restoration of the property and this suit was filed within three years from the date of attaining majority by the Shebait. Privy Council held the suit within time by referring to Section 7 of Limitation Act observing that it is in ideal sense the property is owned by the idol but in effect the right to sue and be sued vests in Shebait or Manager of the

property and, therefore, if he was minor at the time when cause of action with respect to dedicated property arose, on attaining majority, he could have filed suit. It appears that in some of the later cases, these words that "it is only in ideal sense that the property vests in the idol and being a juridical person, he can sue or be sued but in effect the right is vested in Shebait have been read by as if the Shebait has snatched away the vested right and status of the idol and everything would only be governed by the status of Shebait with respect to the property in debuttar. In fact, in subsequent authorities, where the above decision was relied, the Court read it by saying that the right is vested in shebait and not in idol. This negative declaration of the right of a idol to file a suit or not in its own name was neither in consideration before the Privy Council in **Jagadindra Vs. Hemanta (supra)** nor any such declaration was made but it appears that the above sentence was read as a natural corollary that the idol loses any right, whatsoever, to sue or be sued. With great respect, we find that it is this addition of the words which has resulted in some authorities denying something to idol which otherwise probably never intended by the Privy Council.

2670. We find it difficult to chew this decision for more than one reason. The observations are in respect to the practicability of the thing since by its very nature, the idol neither can move nor can act in a particular manner nor can think or understand as to what is good or bad, being a legal person and not a natural person. The faith of the people on the power and status of idol is well known and is beyond the pale of judicial review. It is the spirit and the existence of the Supreme Being which is worshipped in the symbolic form of image but otherwise the existence of Supreme Being is not dependent on

the existence of the images or idols. The worshippers believe in existence of such Supreme Being which is capable of providing all kind of happiness, salvation etc. to the worshipper but then in respect to the worldly affairs, the rights, obligations, privileges whatever may be of the idol, they have to be looked after by some natural person. To this extent, the position is same in respect to all legal persons. Their right of sue or be sued is always looked after and acted upon by an individual or group of individuals of natural persons. It does not mean that every thing which is vested in the legal person, can be deemed to be actually vested in the individual natural person to the effect of excluding the legal person to any extent or divesting him of his own right. Besides every legal person or juridical person whether is a minor or not, is a matter which is yet to be considered but qua a Hindu idol, it can not be disputed that in Hindu Laws, it has always been treated a minor, and this has neither ever been doubted nor found otherwise. Earlier British India Courts normally used the word 'Infant'.

2671. In the matter of idol, one can presume a situation where there is no Shebait or Manager or an identified person for managing the affairs. By its very nature, the people on their own go and worship and the procedural aspect of worship is looked after by a section of people on their own. For example where Hindus go for worship at a place where there is no individual who work as Shebait but a section of the people called “Pandas” etc., who, on their own take care of the procedural aspects of worship and for that purpose get remuneration called *Dakkshina* or *Dan.* If a property dedicated to such place in the name of the idol or deity exist thereat and there is no identified Shebait or Manager, would it mean that the property shall not vest in

anyone and that if somebody occupy the dedicated property of idol unauthorizedly, the plea of adverse possession can be taken against the idol which being not a person cannot take care of property of its own.

2672. Similarly, even where a Shebait or Manager is there, but if he or she itself indulge in some unauthorized act or mismanagement of the property of the idol and wrongly alienate or allow a possession to continue in collusion with a third party, can it be said that the idol is bound by such act of the Shebait and after lapse of certain period, a well wisher of the idol or the idol itself though a bonafide worshipper cannot take action on account of the application of provisions of limitation.

2673. In both the two cases of Privy Council which were relied on in **Chitar Mal (supra)**, we find that there was a Shebait for managing the affairs of the property of the idol. He entered into certain transactions of dedicated property of idol with third person. It was not a case where the Court found that the act of Shebait was unauthorized in the sense that it was not initiated for the benefit of the idol. No case of fraud, collusion etc. found. The attempt on the part of the parties, who initiated litigation later on, was to wriggle out of such transaction of property which was entered by earlier Shebait within their own rights on behalf of idol.

2674. To our mind, a contract with minor is void but where the guardian of a minor or guardian of an infant has dealt with the property of minor/infant and alienate some part of the same for the benefit of the minor or infant, such transaction of guardian has always been upheld otherwise very purpose of having a guardian or caretaker would stand frustrated and may result in serious consequences to the very existence and

subsistence of the minor. In none of the two cases of the Privy Council which were relied on by the Division Bench in **Chitar Mal (supra)**, these questions were involved and as a matter of proposition of law, the Privy Council in none of these two cases has said that an idol cannot be treated to be a perpetual minor. To us it appears that this inference has been read in by the Court in the above decisions considering the provisions of limitation relied by the Privy Council in the two cases but that was in the context of the facts of those cases and not as a matter of legal proposition as to whether idol is a perpetual minor or not.

2675. Though we are not doubting the correctness of the decision of the Privy Council nor it is necessary for us to suggest that the judgments of the Privy Council are not binding upon us in the absence of otherwise law declared by the Apex Court, but it would be necessary to consider as to what was the issue before the Privy Council and what has been decided by it and whether it constitute a binding precedent upon this Court.

2676. In **Jagadindra Vs. Hemanta (supra)**, the Calcutta High Court held that the idol being a juridical person is capable of holding property. Limitation, therefore, would start running against it from the date of transfer and a suit filed beyond the period of limitation from that date is barred by limitation. It does not appear that the question as to whether idol is a minor or not was considered by the Calcutta High Court. The Privy Council in absence of any such issue before it, obviously had no occasion to look into this question but then from the facts of that case it found that the Shebait himself was a minor at the time when the property in suit of idol was transferred. He had filed suit on attaining majority within the period of three years as contemplated under Section 7 of the Limitation Act. Privy

Council held that since the person who was managing the affairs of the idol himself was minor, considering the peculiar circumstances that a legal person itself cannot take action but has to be acted by a natural person who also was under disability, Section 7 would apply to such natural person and held the suit within time.

2677. The matter in effect was decided in favour of the idol though the reason may be different. But a strange question arises. Can there be a guardian of a minor who himself is a minor. The law of the land on the date, as applicable to minor, does not contemplate a guardian or a care taker of a minor who himself is minor. In other words, it is inconceivable that a minor can be assigned duties to take care and manage the affairs of another minor. Such a situation may have arisen more than hundred years back and what were the reason behind it, we need not to go into that. We are satisfied that such a situaiton cannot arise in law of independent India governed by the Constitution where such right of management can be exercised by a guardian who has to be, by necessity, a major and not a minor. Secondly, the judgment in **Jagadindra Vs. Hemanta (supra)** nowhere says that an idol is not minor, what to say of perpetual minor or not.

2678. Now we come to the second case of **Damodar Das Vs. Lakhan Das (supra)**. There it appears that the idol again was being looked after and managed by a Shebait, i.e., Senior Chela or Mahant of the Math. Under an agreement with another, who has been termed as Junior Chela, half of the property of the Math was transferred to him. The successor in the office of Senior Chela/Mahant of the Math, filed a suit against Junior Chela for recovery of the transferred half of the property. This

suit was filed after twelve years from the date of transfer. Privy Council held it barred by limitation on the ground that from the date of agreement, the possession of the property by Junior Chela, by virtue of terms of agreement, was adverse to the right of the idols and that of the Senior Chela representing that idol. Therefore, the suit is barred by limitation. Here again what we find is that the property was transferred to Junior Chela by Senior Chela, i.e., Shebait of the idol under an agreement. While observing that the possession became adverse from the date of transfer under the agreement, with great respect we find that the very ingredients of adverse possession were not being in issue before the Court hence the same were not addressed inasmuch whether such transfer can constitute adverse possession or not, it does not appears to be an issue raised, argued and decided before the Privy Council. The Apex Court in a catena of decisions, which we have considered in detail, while discussing the issues relating to possession/adverse possession, has held as to what constitute adverse possession in law. It is a well settled dictum that in order to constitute adverse possession there has to be a hostile possession with the *animus possidendi,* open, peaceful and continuous. An intention to possess the property against the owner against his interest is one of the necessary ingredient held by the Apex Court in a catena of decisions to constitute adverse possession. In **Damodar Vs. Lakhan Das (supra)**, the property was transferred to Junior Chela under an agreement by a person who was competent and duly authorized to manage the property of the idol, a minor. The intention on the part of the transferee to hold the property adverse against the owner obviously was lacking. Junior Chela got possession under an agreement that was a permissive possession. This aspect has

not been raised, argued and decided. It appears that proceeding on the assumption that there existed an adverse possession on that date, the matter has been decided. In the matter of adverse possession, we are bound by the law laid down by the Apex Court in view of Article 145 of the Constitution and in such a case, the judgment of Privy Council is not binding on this Court.

2679. Moreover, it does not appear that the questions as to whether the idol is a minor or whether Section 7 has any application in the matter were at all raised and decided. On the contrary, the Court has upheld the finding of the High Court that in law, the property is vested not in Mahant, but in the legal entity, i.e., the idol and the Mahant is only its representative and manager. Once this finding is accepted, the transfer of a property unauthorizedly or possession of a property by another even otherwise can not be treated to be adverse to the idol, a minor, when it cannot act on its own and protect itself from such unauthorized act. In any case, it need not be necessary to go into this aspect for the reason that if a transaction has been made by a proper and validly appointed Shebait or a person about whose status there is no dispute, on behalf of minor, one may not wriggle out of the transaction on the ground that the contract was on behalf of minor and, therefore, void for the reason that the guardian of a minor can enter into certain transactions for the benefit of minor. The said proposition has nothing to do where it is not shown that the minor or the idol has any Shebait at all to look after its interest.

2680. In our view, the decisions of this Court in **Chitar Mal Vs. Panchu Lal (supra)** has extended the two decisions of the Privy Council in **Jagadindra Vs. Hemanta (supra)** and **Damodar Vs. Lakhan Das (supra)** to the extent of a

proposition in so many words which do not appear to have been laid down therein and, therefore, with respect to the Hon'ble Judges, we find ourselves unable to agree with the same.

2681. Relying on **Jagadindra Vs. Hemanta (supra)** an argument was raised in **Shree Mahadoba Devasthan Vs. Mahadba Romaji Bidkar and others, AIR 1953 Bombay 38** that since the right to file suit is vested in the shebait or manager as observed by the Privy Council in **Jagadindra Vs. Hemanta (supra)** hence a suit by idol is not maintainable. This was exactly what has been read by some of the High Courts in the above two judgements which was sought to be argued before the Bombay High Court also. The Division Bench, however, rejected the submission. It said that it is only an extension of the principle of responsibility from the image or idol of the manager, or to use the other words, from the principal to the agent to vest the right of protection of the property which is incidental to the right of possession and management thereof by way of filing a suit in connection with the same, in the shebait. The extension of the right in the shebait however does not mean that the right which the image or the idol as a juridical person has by virtue of its holding the property to file a suit in regard thereto is by any process eliminated.

2682. Be that as it may, in our view, reference to Section 6 of LA 1963 need not at all be necessary. It is not required in this case to go into the question whether a deity suffers a "legal disability" to attract the aforesaid provision or not. The matter can be decided without going into this aspect and without considering the question as to whether the judgements taking the contrary view, which one thereof is correct and ought to be followed by us. The nature of the Hindu idol/deity and its

various facets have been considered by us while dealing the issue pertaining to juridical personality and above also. What we are now going to discuss may at times reflects on repetition to what we have already said but in this case we have not much bothered about it for the reason that the issue involved is of extraordinary nature and we do not want to leave any occasion or doubt or confusion particularly when the judgement in this case is already so voluminous.

2683. We may crystalise hereat what are settled notions qua an idol/deity, its property as also the rights powers and duties of a Shebait as argued by the other side also. They are:

(i) A Hindu idol duly consecrated is a juridical person, can acquire property, sue and be sued and enter into transactions with others like a natural person;

(ii) By its very nature since an idol or deity is a fictitious person cannot act on its own. It has to work on being represented by a natural person. In the case of Hindu idol, it is the Shebait who has right to possess and manage property of the idol and also to discharge duties of daily services to be rendered to the idol. Its position is that of a custodian of a property and the idol itself but it does not mean that he is the owner. In case of necessity, i.e., for the benefit of the idol i.e. for necessity, the property of the idol can be alienated by the Shebait but no more no less. The Shebait is a peculiar kind of office with which attach duties and obligations. Only in a very restricted sense it can be transferred;

(iii) Qua the property of the idol, the position of Shebait is that of a manager or guardian of an infant or minor;

(iv) The position of idol as a minor though recognised for

some purposes but not for all purposes since they are considered to be a major from the date of its consecration but for entering into transactions with natural persons it needs to be represented by a natural person, i.e., Shebait and none else; (5) The right to file suit for the benefit or on behalf of the idol vests in a Shebait but with certain exceptions namely, where the Shebait is guilty of maladministration etc. or where there is no Shebait, in such a case a worshipper as a next friend may bring a cause representing the idol but not otherwise; (6) The difference between Shebait and next friend is that a Shebait is under an obligation to take such steps as are necessary for the protection of an idol but a worshipper may be permitted to represent idol for its benefit but has no legal obligations as such to do so. Moreover, a worshipper must be such who is a beneficiary and not more benevolent.

2684. It is in the context of these principles we may consider the question of limitation vis a vis Section 6 of LA 1963 but before doing so we feel it expedient to have a glance over some of the relevant well considered authorities throwing light on the above propositions.

2685. Deity is conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. In **Rambrahma Chatterjee Vs. Kedar Nath Banerjee (supra)** Mookerjee, J. recognised the above concept of Hindus and observed that the normal type of continued worship of a consecrated image includes the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful

oblation of rice with flowers and water, and other like practices. It also observed that the daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest. The religious customs of Hindus in respect to Hindu idol have been recognised by the Court of Law life a juristic person under the English system. A juristic person under English system has no body or sole. It has no rights except those which are attributed to it on behalf of some human beings. But in the concept of Hindus belief the lump of metal, stone, wood or clay forming the image of Hindu idol is not a mere moveable chattel. As already observed it is conceived by Hindus as a living being having its own interest apart from the interest of its worshippers. The observations of Mookerjee, J. in **Rambrahma Chatterjee Vs. Kedar Nath Banerjee (supra)** were approved by the Judicial Committee in **Pramath Nath Mullick Vs. Pradhyumna Kumar Mullick (supra).** It can thus be said that a Hindu idol/deity is a juristic person of a peculiar type.

2686. The various services of a deity, some of which we have referred above, cannot be performed or observed by deity itself for the simple reason that it is not a natural person. Besides, the daily services of the deity in a case where the deity has been dedicated with some property moveable or immoveable, its possession, management and protection is also needed to be cared by a natural person. After dedication of the property to the deity the proprietary title to the property is vested in the idol. But because of its very nature it may not actually possess or manage the said property hence the need of

Shebait arises. It is also a well recognised custom amongst Hindus.

2687. Sheba (i.e., in Hindi 'Sewa') means 'service' and the person who render it is called 'Shebait' (i.e., in Hindi 'Sewaiat'), i.e., "one who render service".

2688. It is true that the ancient Hindu scripture is mainly silent on the subject of Shebaity rights and duties but in the last almost one and half century and more, a lot of judicial precedents have come throwing light on the subject and many of the propositions laid down therein have also got approval of the Apex Court in the post independent era. In normal course whenever an image or idol is set up and consecrated, there must, needs be a Shebait to serve and sustain the deity whose tabernacle the image is.

2689. Duties and privileges of a Shebait primarily are those of one who feels it sacred. He must take the image into his charge and custody; he must see that it is washed, fed, clothed and tended and that due provision for its worship is made. The main concern of a Shebait appears to be to carry out duly the sacred duties of its office which he may perform personally or if permitted by the customs may appoint a qualified assistant to help in his stead. As already observed when an image is consecrated, usually property is also dedicated to its use. This is a common practice. Such property vest in the idol but the right to possess and the duty to manage the property vests in the Shebait. It would be important to mention the distinction that the right to possess and duty to manage does not cloth the Shebait with the right of ownership or title over the property but what we have said should be taken no more and no less. It is only the right to possess and duty to manage and nothing else. With

regard to such property the position of Shebait is that of a trustee though in true sense he cannot be said to be a trustee as per the provisions of the Indian Trust Act or like.

2690. But then there has to be seen distinction between the property owned by a deity and the deity itself. With regard to the service of deity and duties appertained to it a Shebait is in the position of the holder of an office in the dignity.

2691. In **Maharanee Shibessouree Debia Vs. Mothornath Acharjo (1869) 13 M.I.A. 270** an issue was raised whether a Shebait entitled to sell certain Jammas connected with a Taluk. The Judicial Committee held that Taluk itself, with which these Jammas were connected by tenure, was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The Shebait had no legal property, but only the title of a manager of a religious endowment. In the exercise of that office, it could not alienate the property, though it might create proper derivative tenure and estates comfortable to usage.

2692. Then came in 1875 another decision in **Prosanna Kumari Debya Vs. Gulab Chand (supra).** In this case the powers of Shebait were considered qua debutter property and the Judicial Committee observed that the Shebait had no title to the legal property but has a title of manager of a religious endowment. In the exercise of that power, it may not alienate the property, but may create proper derivative tenures and estates conformable to usage. It said that it is competent for the Shebait in the capacity of Shebait and Manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and

other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. Judicial Committee referred to a judgment of Lord Justice Knight Bruce in **Hunooman Persaud Pandey Vs. Mussumat Babooee Munraj Koonweree 6 Moore's Ind.App. Ca. 243** observing:

> *"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he is shewn to have acted mala fide, will not be affected, though it be shewn that with better management the estate might have been kept free from debt."*

2693. In this context, the Judicial Committee in **Prosanna Kumari Debya (supra)** said:

> *"there is no doubt that, as a general rule of Hindu Law, property given for the maintenance of religious worship and of charities connected with it is inalienable. . .*

> *. . . . But, notwithstanding that property devoted to religious purposes, is as a rule, inalienable, it is, in their Lordships' opinion, competent for the shebait of property dedicated to the worship of the idol, in his capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them."*

2694. The disputes which have arisen before the Courts time and again are mostly in two context, i.e., (1) Relating to the transfer of property of idol; and, (2) Relating to the assignment/transfer/ alienation of the rights, duties, obligations or tests with the Shebait. The various authorities, therefore, from time and again have dealt with these issues in the context thereof differently for the simple reason that they did not find any specific answer on these questions in Hindu religious scriptures and, therefore, mostly rely on the common law of the land as well as principle of equity, justice and good conscience. We would refer hereafter both the sets of authorities to give a clear idea of the distinguishing features of the two.

2695. There is a third aspect also on which some authorities have come, i.e., the alienation of the deity or its temple itself. In **Pramath Nath Mullick Vs. Pradhyumna Kumar Mullick (supra)** the Privy Council held that the idol cannot be regarded a mere chattel. It is not property in true sense and their destruction, degradation or injury is not within the power of their custodian. An idol is extra commercium. It can

never be the subject matter of commerce as also held in **Khetter Chunder Ghose Vs. Hari Das Bundopadhya (supra).**

2696. In **Smt. Panna Banerjee and Ors. Vs. Kali Kinkor Ganguli (supra)** Justice Deb in his concurring judgement observed that a deity is not a chattel but a juridical person. No custom can ever validate sale of any deity. Even legal necessity of the deity cannot destroy the very existence of the deity by selling it in open market. His Lordship said that the very thought of it is opposed to the fundamental concept of Hindu jurisprudence. It is against public policy. It is wholly unreasonable. It is absolutely repugnant to Hindu law. It is so repulsive to the judicial mind that every court is bound to strike it down in limine. In para 66 of the judgment His Lordship observed:

> *"66. **No one has ever heard that a deity can be served or be sold by hits and bits. The deity is indivisible. It is the Supreme Being. The deity is not a property and no one can be its owner not even its founder**. The shebaits are the managers of the deities though in reality they are its glorified servants. **No shebait can ever be the owner of any deity. He is the custodian of the idol** but this custody does not nor can it ever confer any right on him to sell the deity."*

2697. This judgment was confirmed by the Apex Court in appeal and is reported in AIR 1974 SC 1932 holding that the transfer of Shebaity rights was illegal for the principal reason that neither the temple nor the deity nor the Shebaity right can be transferred by sell in pecuniary consideration. The transfer by sell is void in its inception. We may mention hereat that various reasons were assigned in the concurrent judgment but they have

not been approved by the Apex Court except the reason that the transfer of Shebaity rights of temple of deity by way of sell is illegal.

2698. What was observed with respect to deity, the same sanctity was extended to the abode of deity, i.e., the temple in which deity live and it has been distinguished from other endowed property of the deity. This we find, recognised by this Court in **Mukundji Mahraj Vs. Persotam Lalji Mahraj (supra).** Therein the plaintiff deity was installed in a temple at Mathura. Defendant purchase half of the temple in execution sell and took its possession. Deity brought action for recovery of possession of the said part of temple from the defendants. The Division Bench of this Court observed:

> *"Whatever may be said about a permanent alienation of endowed property other than a temple, in the very nature of things, having regard to the duties of a Manager or a Shebait towards the idol or institution, there can be no necessity of alienating the temple or any portion of it in which the idol is installed. The maintenance of the entire building is the prime concern of the Manager or the Shebait.*
>
> *The temple has a special sanctity distinct from other endowed property. To alienate the temple itself is to cut at the root of the very existence of the idol in the habitation intended by the founder. Hindu Sentiment views the alienation of a temple as a sacrilege. Not until the idol has been removed from the temple in accordance with shastric rites and has assumed a new habitation and the temple abandoned as a place of worship may the temple be alienated or sold in execution of a decree...."*

2699. To the same effect is another decision in **Madan Mohan Saha Banik and Ors. Vs. Rakhal Chandra Saha Banik and Ors., AIR 1930 Calcutta 173.**

2700. Here we may understand the meaning of the term temple. The meaning of the word "temple" vide "**Concise Oxford Dictionary",** page 1261 is *"edifice dedicated to service of God; or place in which God resides."* The "**New English Dictionary, Vo. IX, Part II"** says, "*an edifice or place regarded primarily as the dwelling place or 'hose' of a deity; hence an edifice devoted to divine worship. Historically, the word is applied to a sacred building of Egyptians, Greeks, Romans, etc. but now to those of Hinduism, Budhism, Confucianism, Todism, Shudasm, etc."*

2701. The legal principle which are applicable to the endowed property have to be distinguished from the case where such power of alienability is sought to be conceived or pleaded in respect to the very deity itself or its temple in which it is consecrated or which is the permanent abode of the deity. The preservation and not destruction of the deity and its property is the paramount and highest duty of each and every Shebait is the general law laid down by the Judicial Committee in pre-Indian constitutional era and thereafter to the same effect is the law laid down by the Apex Court also. The legal necessity of a deity cannot be so unruly that it can rule over the deity. The alienation of the endowment as a whole is not bounded by Hindu Law. The endowment as a whole can never be the subject matter of alienation even for the legal necessity of a deity for it would destroy the very purpose and the object for which the endowment is created. It will not only destroy the endowment but will devour the deity too. The temple is the residential house

of a deity. The deity is entitled to be worshipped in its permanent abode. Its permanent residence cannot be disturbed. The idol cannot be removed like a chattel. The temple cannot be vivisected. It is impartible. No part of it can be sold even for the deity's legal necessity. It is res extra commercium. Every Hindu regards it as a sacred place. To sell a part of the temple is to endanger the very existence of the consecrated idol and to put an end to the sanctity attached to it.

2702. This is how the distinction of the property owned by deity and its temple where it is consecrated needs to be considered and seen.

2703. The Apex Court also in **Shiromani Gurdwara Prabandhak Committee, Amritsar Vs. Som Nath Dass (supra)** recognised the relationship between an idol and Shebait and said:

> *"When an idol was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian.* ***As a minor cannot express himself, so the idol, but like a guardian,*** *the Shebait and manager have limitations under which they have to act."*

2704. In **Jogendra Nath Naskar (supra)** while recognising the juridical personality of an idol consecrated in a Hindu temple the Apex Court quoted with approval the following extract amongst others of West J. in **Manohar Ganesh Tambekar & Ors. Vs. Lakhmiram Govindram (supra):**

> *"A Hindu who wishes to establish a religious or charitable*

institution may according to his law express his purpose and endow it and ***the ruler will give effect to the bounty or at least, protect it so far at any rate as is consistent with his own Dharma or conception or morality."***

2705. An idol is a juridical person because it is adored after its consecration in a temple. The followers recognise an idol to be symbol for God.

2706. Here we may also keep in mind that all these cases are in the context of a Pratisthit idol and not Swayambhu. In the context of Swayambhu its juridical personality and concept of juridical person would remain the same but therein the concept of appointment of Shebait etc. may be a little bit different. In the case of a Swayambhu, i.e., self created deity since there is no founder or creator of endowment the question of appointment of Shebait by founder does not arise. Either by custom or otherwise by intervention of the Court, as the case may be, a Shebait may be appointed or that a Swayambhu deity if continued to be worshipped by believers without having any identified Shebait, there may be a section of persons performing duties of Shebait without any formal appointment or undertaking such job and in such a case it cannot be said that the idol cannot be dedicated any property but whenever a property is dedicated for the purpose of possession and management someone has to be appointed and if necessary by the Court also. Non appointment of Shebait, however, in case of Swayambhu deity will not either destroy the deity itself or will nullify or make ineffective the very existence of such deity. Deity will continue since it is the belief of the followers of the worshippers who come with the believe that there exist a Supreme Being which is bodiless and shapeless and is capable of fulfilling all their wishes and to

provide them happiness and salvation. It is a deity which the worshippers discover. Therefore, in order to consider a case where the deity is in the form of a Swayambhu more particularly in the form of a place, the concept of alienability whether under the statutory law or otherwise is to be seen in the light whether it pertains to some property constituting part of the endowment or the very existence of the deity. When something relates to the very existence of a deity, since it is a juridical person the question of alienability does not arise as a juristic person like Hindu deity cannot be alienated though in respect to several other judicial person like commercial etc. the position may be different but that will not apply to a case of deity governed by Hindu Laws.

2707. Now we proceed to consider, in this context, the law vesting right to sue or be sued upon the Shebait. The Shebait since was entitled to possess and manage the property of the deity, it was observed that normally the debutter's property is inalianable but for the benefit of the deity the Shebait may transfer the property, create charge thereupon. In **Jagadindra Nath Vs. Hemanta Kumari (supra)** the Judicial Committee observed that the only person competent to act or sue on behalf of the idol is the Shebait or in the case of Math the manager. This observation has been approved subsequently by the Apex Court in **Bishwanath Vs. Sri Thakur Radha Ballabhji (supra).**

2708. The right to sue on behalf of idol, therefore, is conferred on a natural person and if that is so the question would be whether the provisions of limitation would apply to a case where there is no such person who possess right to sue or be sued. It is true that this decision of Privy Council in **Jagadindra Nath Vs. Hemanta Kumari (supra)** has been

doubted by a Single Judge of Calcutta High Court in **Nagendra Nath Palit Vs. Robindra Narain Deb, AIR 1926 Cal. 490** and this has also been noticed by the Apex Court in **Sarangadeva Periya Matam Vs. Ramaswami Goundar (supra)** but the Apex Court has not expressed any final opinion either way.

2709. We also mention at this stage another decision in **Damodar Das Vs. Adhikari Lakhan Das (supra)** wherein the Privy Council gave benefit of Section 6 though otherwise the limitation had expired on the ground that on the date when the cause of action accrued the Shebait was minor and as soon as he attained majority he file suit within the period of limitation provided under Section 6 hence the suit was not barred by limitation. If it is presumed that whether there existed Shebait or not but once the property is alienated or cause of action has accrued the limitation must be held to commence and shall not stop, it would be difficult to understand the legal proposition laid down in **Damodar Das Vs. Adhikari Lakhan Das (supra)** by taking recourse to Section 6 of the Limitation Act when it held that the Shebait on attending the majority can file the suit. We find that the decision of the Patna High Court in **Naurangi Lal & Others Vs. Ram Charan Das (supra)** was reversed by Privy Council in appeal in **Mahanthram Charan Das Vs. Naurangi Lal and others, (1933) LR 60 IA 124.** The Patna High Court took the view that Article 144 of the Limitation Act shall attract from the date of alienation of property which was illegal and, therefore, the possession became adverse from that very date. But the Privy Council reversing the judgment held that the Mahant was at liberty to dispense the property of a Math during the period of his life and, therefore, it was good to the extent of Mahant's life interest and the possession would

become adverse thereafter since for the subsequent period the alienation was bad. We have no doubt in our mind that whenever a suit is filed for and on behalf of an idol or deity it is the idol or deity which is normally a party though represented through a Shebait. But in a case where no Shebait is available, the deity or idol being in a position of minor since the right to sue vests in the Shebait, as such may not go unless some beneficiary comes forward to undertake to file a suit as next friend. The difference between Shebait and next friend is that the Shebait is under a kind of obligation to protect the interest of the idol or the deity but the worshipper is not under any such obligation though if he comes to the Court and show his bonafide i.e. approach to the Court for filing a suit for the benefit of an idol, his suit cannot be dismissed as not maintainable.

2710. Basically we have got two sets of decisions. Though on our own we do not find much difficulty in reconciling them but it appears that sometimes due to non raising of the relevant issues in the matter and sometimes as obiter the decisions have gone in wider terms creating a difficult situation in a given case.

2711. In the case of **Jagadindra Nath Vs. Hemanta Kumari (supra)** and its follow up are those where right to sue were held vested in the manager alone or in other words it is the manager who is entitled to represent the juristic person and can speak or act on its behalf. The second set of decisions where the temple or math are juridical personality, and said that the property is not vested in the manager but in the idols or institutions, i.e. **Jodhi Rai Vs. Basdeo Prasad (Supra), Pramath Nath Mullick Vs. Pradhyumna Kumar Mullick (Supra), etc.**

2712. In the second set of cases it is quite obvious that an argument could have been raised that the limitation must be held to start from the date of alienation irrespective of the non-existent or incapacity of the Shebait or manager. The reason is that in **Jagadindra Nath Vs. Hemanta Kumari (supra)** the Privy Council says that the possession and management of the dedicated property belong to Shebait and this carries with it the right to bring whatever suit are necessary for the protection of the property. Every such right is vested in the Shebait not in the idol. The declaration is quite clear. This decision has been referred to with approval **Bishwanath Vs. Sri Thakur Radha Ballabhji (supra). Dwijendra Narain Roy Vs. Joges Chandra De (Supra)** in the matter of application of limitation the Court held:

> *"The substance of the matter is that time runs when the cause of action accrues, and a cause of action accrues when there is in existence a person who can sue and another who can be sued. . . . . The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief. . . . The statute (of limitation) does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained."*

2713. These observations receive approval of the Apex Court **P. Lakshmi Reddy Vs. L. Lakshmi Reddy (Supra).**

2714. Be that as it may, all these authorities which make observations in one or the other way relates either with the property of the idol/deity or a math or the rights of the office of Shebait but in no case the question arose as to what would

happen when it is a case pertaining to the very existence of the deity and no natural person in the form of Shebait is available. Now it is beyond doubt that in order to be a temple or deity, test of public religious worship on that place as a matter of right needs to be satisfied and nothing more than that. In **Ram Jankijee Deities (supra)** the Apex Court has observed:

> *"It is further to be noticed that while usually an idol is consecrated in temple, it does not appear to be an essential condition."*
>
> *"If the people believe in the temples' religious efficacy no other requirement exists as regards other areas."*
>
> *"It is a human concept of a particular divine existence which gives it the shape, the size and the colour."*

2715. While considering the applicability of limitation in the case of the deity and its property a distinction has to be seen in a case where the endowment's property is involved and where the very deity or the corpus of the deity itself is involved. Where the corpus of the deity is involved it being a juridical person, the Limitation Act as such would have no application. It applies to the rights and obligations of the parties concerned but not to the very person and its personality. If a dispute arose whether a person is alive or dead, it cannot be said that the dispute arose 10 years or 20 years back but he is seeking a declaration after expiry of the period of 6 years or three years, therefore, the suit is barred by limitation or he cannot seek declaration. Such a case, in our view, would be a case of continuous wrong and, therefore, no limitation will stand in his way. Similarly, where the very existence of a juridical person like deity or idol comes into picture or that it seeks declaration about itself from a Court of Law, the position would be different.

2716. We may point out that earlier when the suit was filed it was in respect to a much wider area which included not only the place which we have held as deity, but also appurtenant land which was claimed by the deity as property belong to it. But now the matter is confined only to the place which is being claimed by Hindus that according to their belief and faith, it is the most revered, sacred and pious place being birthplace of Lord Rama over which they have been visiting since time immemorial, offering their worship continuously despite change of structure or no structure, as the case may, over the said land. Here the nature of the deity is different as it is in the form of a place, can never be destroyed nor could be destructed, therefore, if the deity claims a declaration from the Court, the plea of limitation, in our view cannot be made applicable. There is thus no question of taking recourse to Section 6 or 7 of the Limitation Act. In **Bishwanath Vs. Sri Thakur Radha Ballabhji (supra**), the Court in respect to the capacity in which a deity can act observed that it is in the position of minor but there is nothing to suggest that the Apex Court sought to undo all judgments otherwise wherein to certain other aspects the statutory provisions had been made applicable observing that it cannot be treated to be a minor in perpetuity for the purpose of those provisions only.

2717. It would be useful to refer a Division Bench decision in **Tarit Bhusan Rai (supra)** where the point of similarity and dissimilarity between a natural minor and a Hindu idol had been noticed in para 12 and 13 as under:

> *"12. The points of similarity between a minor and a Hindu idol are : (1) Both have the capacity of owning property. (2) Both are incapable of managing their*

properties and protecting their own interests, (a) The properties of both are managed and protected by another human being. The manager of a minor is his legal guardian and the manager of an idol is its shebait. (4) The powers of their managers are similar. (5) Both have got the right to sue. (6) The bar of Section 11 and Order 9, Rule 9, Civil P.C, applies to both of them.

13. The points of difference between the two are : (1) A Hindu idol is a juristic or artificial person but a minor is a natural person. (2) A Hindu idol exists for its own interest as well as for the interests of its worshippers but a minor does not exist for the interests of anybody else. (3) The Contract Act (Subs-tantive law) has taken away the legal capacity of a minor to contract but the legal capacity of a Hindu idol to contract has not been affected by this Act or by any other statute. (4) The Limitation Act (an adjective law) has exempted a minor from the operation of the bar of limitation but this protection has not been extended to a Hindu idol."

2718. But this decision also makes it clear that the physical capacity is lacking in an idol to sue as it is vested in Shebait. The Court also referred to an earlier decision in **Bimal Krishna Ghose and Ors. Vs. Shebaits of Sree Sree Iswar Radha Ballav Jiu (supra)** stating:

"In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant. . . "

2719. Drawing parity with infant Calcutta High Court in **Tarit Bhusan Rai (supra)** held:

"The case of an idol is similar to that of an infant only to

this extent that both must act through some agents. But the analogy does not seem to extend beyond this. An idol from its very nature is a perpetual dependent and its incapacity in this respect is perpetual. It would therefore be reasonable to expect that the law which recognised its personality must have made some provision for supplementing this perpetual incapacity. As has been pointed out above, the law recognises the shebaits for this purpose and appoints them, as it were, to be the persons who are to represent the idol for all juridical purposes. In fact, though the idol is recognised as the owner, it is owner only in an ideal sense. The right of suit is really in the shebait." (para 49)

2720. If further said in para 50 of the judgement referring to the Judicial Committee in **Masjid Shahid Ganj v. Shiromani Gurudwira Parbandhak Committee (supra):**

"50. As has recently been observed by the Judicial Committee in Masjid Shahidganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar, the procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait. No doubt an idol is recognized as a, juridical person capable of having interests demanding legal protection. But this is so only in an ideal sense. Strictly speaking, the law of the present age at least does not concern itself with anything outside human interest and all the recognitions and protections accorded to the idol must have been thought necessary because of the existence of some ultimate human interests."

2721. To some extent the care in this context has been taken by making provisions like Section 92 in the Code of Civil

Procedure. The fact remains where the question of deity or the idol itself comes and it seeks a declaration for itself, the provisions of Limitation Act, in our due consideration, would not be attracted.

2722. The Fourth angle: It is a deity which has filed the present suit for enforcement of its rights. The religious endowment in the case in hand so far as Hindus are concerned, as they have pleaded in general, is a place of a peculiar and unique significance for them and there cannot be any other place like this. In case this place is allowed to extinguish/extinct by application of a provision of statutes, may be of limitation or otherwise, the fundamental right of practicing religion shall stand denied to the Hindus permanently since the very endowment or the place of religion will disappear for all times to come and this kind of place cannot be created elsewhere.

2723. In **Ismail Farooqui (supra),** Supreme court has considered the plea of validity of acquisition of land under Land Acquisition Act that once a waqf of mosque is created, the property vest in almighty and it always remain a waqf hence such a property cannot be acquired. While negativing this plea, the Apex Court said that a plea in regard to general religious purposes cannot be said to be an integral part of religion which will deprive the worshippers of the right of worship at any other place and therefore, such a property can be acquired by the State. However, the position would be otherwise if the religious property would have been of **special significance** and cannot be one of several such kind of properties. It will be useful to reproduce the relevant observation in this regard:

> *"78. It appears from various decisions rendered by this Court, referred later, that subject to the protection under*

Articles 25 and 26 of the Constitution, places of religious worship like mosques, churches, temples etc. can be acquired under the State's sovereign power of acquisition. Such acquisition per se does not violate either Article 25 or Article 26 of the Constitution. The decisions relating to taking over of the management have no bearing on the sovereign power of the State to acquire property."

"82. 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."*

2724. The above observations show if the religious endowment is of such nature, which is of specific significance or peculiar in nature, could not have been found elsewhere, the acquisition of such property by the Government will have the effect of depriving the worshippers their right of worship under Article 25 of the Constitution and such an acquisition even under the statutory provision, cannot be permitted. We find sufficient justification to extend this plea to the statute of limitation also, inasmuch as, if the statute pertaining to acquisition cannot be extended to a religious place of special significance which may have the effect of destroying the right of worship at a particular place altogether, otherwise the provision will be ultra vires, the same would apply to the statute of

limitation also and that be so, it has to be read that the statute of limitation to this extent may not be availed where the debutter's property is of such a nature that it may have the effect of extinction of the very right of worship on that place which is of peculiar nature and specific significance. This will be infringing the fundamental right under Article 25 of the Constitution.

2725. In fact this reason could have been available to the plaintiffs (Suit-4) also had it been shown by them that the mosque in question for them was a place of special significance but this has already been observed by the Apex Court in respect to this particular mosque that like others it is one of the several mosques and by acquisition of the place it will not have the effect of depriving such fundamental right of Muslims. It is always open to them to offer prayer at any other place like they could have done here but Hindus are not placed on similar footing. According to Hindus, this is a place of birth of lord Rama and that be so, there cannot be any other place for which such belief persists since time immemorial. Once this land is allowed to be lost due to the acts of persons other than Hindus, the very right of this section of people, as protected by Article 25, shall stand destroyed. This is another reason for not attracting the provisions of limitation in the present case.

2726. **The fifth angle:** Last aspect is also an important one. The suggestion is that the first cause of action arose when at the disputed site the structure was raised but no action for redressal of grievance was taken within reasonable time. Thereafter the cause of action must have arisen when the property in dispute was attached and the suit for declaration having not been filed within six years thereafter. Hence the suit is barred by limitation. If we take as if the disputed structure

was raised in 1528 AD, whether any remedy was available to the plaintiffs 1 and 2 and whether inaction on their part cause any irreparable loss to the extent of preventing from raising the dispute after a long time. The reign of Babar in India was only for four years i.e. from April, 1526 to 1530. We have not been informed as to what changes he made in the judicial system and in what way a dispute could have been raised by the idol at that time. The king, normally, enjoyed all powers whether legislative, judicial or administrative except only to the extent he authorises somebody to exercise his power otherwise. His command was supreme and constituted law. Even the religious law could have prevailed at that time only to the extent the king would have permitted it. None could have sought justification of the king's action before any authority. At least nothing has been brought before us to show otherwise. Some light has been thrown on this aspect in **"India During Muslim Rule"** by **Maulana Hakim Syed Abdul Hai** translated by Mohiuddin Ahmad published by Academy of Islamic Research and Publications, Lucknow first edition in English in 1977 (Series No.111) Chapter II page 77 which deals with the "Administrative System" of Muslim Monarchs.

2727. About the political system, it says that the muslim kings follow the rule governed by 'Shariah' and also policies guided by political exigency. For the period of Chingiz Khan, it says that he himself formulated a code of laws:

> *"Chingiz Khan had also formulated a code of laws, called Yassa—from which Siyasah meaning politics is derived-which continued to be the supreme law of the lands ruled by his progeny. They scrupulously adhered to the Yassa until they captured the sough eastern lands of*

Kirghiz steppe, Iran, Iraq and other countries. But by the time Mangols entered India they had accepted Islam and had become conversant with the Shariah, the teachings of the Quran and Islamic way of life. Nevertheless, instead of accepting the Shariah as the only rule of conduct governing both public and private life, they contrived an amalgam of laws, some divinely ordained and others upheld by their national conventions. On the one hand, they allowed the Qazis to guide them in religious matters, to administer the trusts and settle personal affairs having a direct bearing on religion, such as, marriages, inheritance, etc. But, on the other hand, they continued to follow the Yassa in political affairs and other matters taken out of the purview of Shariah as, for example, interdiction of quarrels amongst them. The Mongols used to appoint another dignitary known as Hajib for the administration of these customary usages.

Theft, adultery, wilful lies, lying or giving of false evidence, sorcery, spying were punishable by death under the Yassa. It dealt with in a similar manner with those who caused loss to their business partners thrice or did not restore the runaway slave to his owner. If the arms left behind or dropped by a soldier were not restored to him by the man following him, he too was to be put to death.

The code of Chingiz Khan treated matters of religion indulgently. Religious teachers, mendicants, physicians, criers of the mosque and persons performing burial ceremonies were exempt from taxes and all religions were equally respected."

2728. The muslim dynasties of India can be termed as

Slaves, Khiljis, Tughlaqs, Saiyids, Afghans and Moghuls. The administrative system followed by them, which included the dispute settling forum, is mentioned as follows:

"(1) Slave and Khilji Dynasties

The Slave and Khilji kings followed more or less the same type of administrative system with a fairly extensive official hierarchy, of which the important offices are mentioned here.

Wazir*-As the head of the imperial secretariat, he held the highest post and was next only to the King. His functions included administration of the realm, supervision of the state revenues and expenditure and all other important matters related to these. The Wazirs were assisted by Mushrif (accountant) and Mustaufi (auditors) who used to keep him posted with the necessary details of income and expenditure. The Wazirs were also known as Khwaja-i-Jahan.*

Arz-ul-Mam-lik-*The post was equivalent to Chief of the Staff of modern times. Being responsible for the maintenance and administration of armed forces, he also inspected the troops and approved the appointment to all ranks. Anybody desiring recruitment as an archer had to bend the different types of bows kept by the 'Arz-ul-Mamalik. The rank of the candidates depended on his ability and prowess to bend these bows. Similarly, an intending horsemen had to strike a drum while riding a galloping horse. The candidate for archer horseman had to shoot an arrow into a ball lying on the ground from the galloping horseback. The more expertise one showed in taking the correct aim, the higher one rank was given.*

Hajib-*There were different grades of Hajibs. Under the Chief Hajib were his deputies call Naib Hajib, and then Sharaf-ul-Hujjab, Saiyid-ul-Hujab and their assistants.*

Quazi-*The Qazis were required to enforce the rules of the Sharian and decide the civil and criminal suits of the people. A Qazi was appointed in every pargana while the Chief Justice or Qazi-ul-Quzat had his headquarters in the imperial capital. He was a member of the imperial court and was known as Sadr-i-Jahan.*

Amir Dad-*The officer was charged with the responsibility of deciding the disputes between the grandees of the king. The expenditure on this office, paid as remuneration to the officer, was 50,000 dinars annually.*

Kotwal-*Combining the duties of committing magistrate and police, the officer was required to maintain law and order as well as to punish the criminals.*

Amir Kalid-dar-*A noble was appointed for the safe custody of the keys of royal apartments. It was his duty to open the gates, when required, and keep a watch over imperial Haram and its officers.*

Amir-Wakil-dar-*As the Chief dignitary of the royal household, he supervised the royal kitchen, managed the supplies and held the charge over the imperial household servants.*

Amir Jamdar- *The officer was responsible for the preparation of royal dresses and all purchases relating to it.*

Amir Salahdar-*The officer held the charge of royal armoury as well as commanded the royal bodyguards during public and private audience of the king.*

Amir Tuzak-*Amir Tuzak was the master of ceremonies. It was his duty to notify the royal audience, make arrangements for functions and ceremonies and allocate seats to the dignitaries according to the ranks held by them.*

Diwan-i-Arz-*He presented the incoming despatches before the king and acted as an intermediary through whom the king communicated with his officials and the grandees.*

Dabir-A*ll the edicts, proclamations and books on which royal seal had to be affixed were presented to the king by Dabir. He also dictated letters on behalf of the king in accordance with the directions given to him.*

Mushrif-*He were charged with the duty of keeping an account of all State expenditure.*

Al-Mustaufi or Mustaufi-ul-Mamalik *was the Accountant General who checked all accounts and kept a record of State expenditure.*

Majmua'dar-*The officer was the book-keeper responsible for maintaining accounts of both the incomings and outgoings of the State exchequer.*

Aqt adar-*was the governor or deputy of the king in the provinces. He held the command of the troops stationed in the provinces and supervised the collection of revenues.*

Muqatta *was the administrative head of the parganas.*

Akhor Begi*. Was the dignitary who headed the officers and servants attached to royal stables and grazing grounds reserved for the royal animals.*

Shahna-e-il*. was the superintendent of royal*

elephants who controlled the expenses on elephant stables, mahawants, etc.

***Shahna-e-marat**. The officer equivalent to Engineer-in-Chief was responsible for the execution of public works specially, the castles and palaces.*

(ii) The Moghuls

The administrative set-up of the Moghuls practically remained unchanged during the long period of their rule. They, too, had a long list of dignitaries which has been given here under two categories.

In the first category were included those nobles and dignitaries who always accompanied the emperor in camps and cantonments, and counselled him in the management of the State affairs.

***Wakil-i-Mutlaq.** He was the prime-minister, and one of the highest grandees, who was the custodian of the royal seal. The importance of his office placed him only next to the emperor, above all other nobles and dignitaries.*

***Wakil-i-Mutlaq** normally held one of the ranks between Panj-hazari and Nuh-Hazari.*

***Madar-ul-Muham** held the rank of a Wazir and his business was to keep a watch over State expenses. The officer could be deemed as the Chief Secretary of the emperor, He was assisted by a number of Mustafis.*

Nobles holding the rank of Chahar-hazari to Haft-hazari were appointed as Madar-ul-Muham.

***Ddiwan-i-Ala** was the auditor of State revenues and expenditure. An officer holding the rank of a Hazari was appointed to this post.*

***Mir-Bakshi** supervised the administration of armed*

forces, approved the appointment of new recruits, presented them before the emperor and fixed their ranks and pay. The Mir-Bakshi had three more Bakshis under him, one each for the horsemen, archers and artillery. The Mir bakshi was also appointed from amongst the nobles holding the rank of the commanders of a few thousand troops.

***Sadr-us-Sudur**. The function of the Sadar-us-Sudur was to look after the welfare of religious teachers, men of piety, orphans, widows and other poor and needy persons, to sanction stipens for them and to appoint the Qazis. He had also to be a grandee holding the rank of the commander of a few thousand troops.*

***Qazi-ul-Quzat** was required to enforce the rules of the sharian and ensure their observance by the people in their daily lives. He also decided cases relating to dissolution of marriages, payment of loans etc. Qazi-ul-Quzat was also a dignitary of the State holding a high rank.*

***Mufti-ul-Askar.** Appointed from amongst the grandees of rank and authority, his function was to pronounce juristic opinion in accordance with the Hanafite school of jurisprudence.*

***Muhtasib** acted as the censor of public morals. It was his duty to check the use of intoxicants like liquor, opium and hashish, to suppress immoral practices and to interdict the entry of women of dissolute character in public gatherings and fairs. He was also required to control the market and put down hoarding, fraud and other malpractices.*

***Daroga-i-Adalat**. Acting as a special court of appeal*

for those who could not gain access to the king, he held the court daily from morning till noon and decided the law-suite in accordance with the rules of the Shariah or the customary usages, as the case required. Such cases as he thought fit to be decided personally by the king, were referred to the latter for hearing in the imperial court held on each Wednesday.

Dabir was the royal amanuensis who took down the royal orders and edicts which were later copied by calligraphers. Such letters or orders bore king's titles as the top in golden letters and the royal seal was affixed by the Amir-ul-Umra before being despatched.

***Mir Tuzak** was the Lord Chamberlain responsible for enforcing court etiquettes and making arrangements for the royal functions. It was his duty to obtain the orders of the emperor and notify the holding or cancellation of such functions.*

***Mir Atish-**As the lord of Artillery, he supervised all the affairs relating to the established of the imperial heavy and light artillery.*

***Mir Saman** looked after the royal wardrobe, jewellery and ornaments.*

***Khan-i-Saman**, a trusted grandee; had the charge of the imperial kitchen.*

***Darogha-i-Ibtiya**. The officer was responsible for the purchases required for the royal household.*

***Darogha-i-Jawahirkhana** A Darogha was appointed for the imperial treasury of precious stones. The officer had to be a skilful jeweller capable of classifying the jewels and other precious stones.*

Darogha-i-Kutub Khana. *It was his duty to properly maintain the royal library.*

Darogha-i-Ghusalkhana. *This officer was charged with the responsibility of informing the emperor about the presence or absence of dignitaries entitled to attend the Diwan-i-Khas (court of private audience).*

Darogha Arz-i-Mukarrar. *The cases relating to revenue affairs and grant of jagirs requiring a revision of the earlier orders were brought to the notice of the emperor by Darogha Arz-i-Mukarrar.*

Darogha Dak Chauki. *He read out all letters and communications to the emperor received from outlying areas and subas.*

Darogha-i-Khawasan. *He was the superintendent of all the menial and maid servants attached to the royal household.*

Akhor Begi *was responsible to the emperor for proper maintenance of royal stables, grazing grounds reserved for them and the establishment required for these.*

Shahna-i-Fil *was responsible for the royal stables of elephants and all matters relating thereto.*

Kotwal *was the custodian of law and order with extensive powers to protect the life and property of the citizens and to root out theft and brigandage.*

The provincial set-up of the Moghul administration consisted of the following officers:

Subedar *was head of the civil administration as well as the armed forces stationed in a suba. Holding a mansab between she-Hazar and Haft-Hazari, he had the overall charge of provincial administration ranging from*

maintenance of law and order and collection of revenues to the maintenance of imperial forces. Normally the Subedars were paid 24 lakh rupiahs annually but they were also granted a Jagir and were occasionally rewarded for meritorious work. The Subedars had their headquarters in the capital of the provinces or in some important and central town of the Suba.

Bakshi was also a mansabdar, appointed by the Emperor. His duties comprised selection and posting of military personnel, superintendence of the mustering for branding and verifying the troopers' horses and similar other matters connected with the armed forces.

***Diwan**. Being the book-keeper of the provincial government, he was responsible for keeping the accounts of income and expenditure of the suba. The Diwan was appointed by the emperor but the order for his appointment was issued under the seal of the prime-minster. He was assisted by a Peshkar (Personal Assistant), Darogha Kachehri (Court Inspector), Mushrif Daftar (Accountant) and Tahwildar (Treasurer). These officers were provided with a contingent of subordinate staff consisting of Munshi Kachehri, Huzur Nawis, Suba Nawis, Muharir Khalsa, Muharir Daftartan, Muharir Daftar-pai-baqi and Muharir sar-rishta.*

***Faujdar**. He was the officer, at the provincial level, charged with the responsibility for maintaining law and order, imposing punishment on the criminals and gangs of the robbers and putting down rebellions.*

***Sadar**. He was an officer appointed by the emperor on the recommendation of the Sadr-us-Sadur, and was*

attached to the Subedar to look after the welfare of theologians, mystics and the poor. He was authorised to grant stipends to such persons.

Qazi. *A Qazi was appointed in every pargana for the administration of Justice. His office consisted of a Mufti (Legist), Wakil Shara'I (expounder of the SharI'ah laws), Muharir Munaskha (registrar of law suits) and Mushrif (accountant).*

Muhtasib*. Like the Muhtasib of the imperial capital, one was appointed in each city or a Mohal, by the Sadr-us-Sudur. His monthly remuneration was one hundred and fifty rupiahs in addition to a horse allowance of ten rupiahs.*

Darogha-i-Adalat *was required to hold his court from early morning till afternoon for the hearing of cases instituted against nobles and dignitaries so that the persons who could not approach the king or the governor should not be deprived of justice. The plaintiffs were allowed to present their cases in person or through their attornies. The Darogha tried to compound the cases through mutual agreement of the parties but if his efforts failed, he asked the witnesses to be produced and communicated his decision to the civil authorities for execution of his judgement. The civil authorities were also required to devote two days in a week for this purpose.*

Waqa-i-Nigar*. Reporters were appointed in each suba, sakar and pargana to inform the centre about every event, big or small. They sent two despatches every day; in the evening covering the news of the day and in the morning covering the happening during the night. These*

despatches were delivered to Darogha Dak Chauki who immediately sent them to the capital for the perusal of the monarch. Thus the emperor kept himself informed of all happenings from Qandahar to Bengal. Since the Waqa-i-Nigars could distort or misrepresent any event, four other officials holding different ranks viz. Special Waqa i Nigars, Sawaneh Nigars (biographers), Khufia Nawais (Secret agents) and Karkaras (postmen) were also required to send their reports. If any discrepancy was found in the reports received from different sources, the emperor instituted enquiries through other agencies.

Kotwal was posted in a each city by the Mir Atish. His duties were analogous to the Kotwal in the Capital.

Thanakar performed the duties of the Kotwal in the parganas.

***Amal Guzar**. It was his duty to collect Ushr and Khiraj as well as to adopt measures for the improvement of the quality of land and bringing waste land under cultivation.*

***Khazanadar**. The officer was the local custodian of state income and was responsible for remitting it to the imperial treasury.*

***Qanungo**. A qanungo or registrar of cultivated lands was appointed in every pargana to supervise the measurement of area sown and to maintain necessary records in this connection.*

***Tipakchi**. A junior official was charged with the responsibility of recording the units of cultivated area, quality of land, name of cultivators, the yield harvested and the revenues assessed thereon. One tipakchi was appointed*

for each big village or a group of villages."

2729. Then on page 100, in the aforesaid book, he has mentioned about the judicial policies which reads as under:

"As stated elsewhere, the administrative policy of the Muslim monarchs, from the very beginning, was based on the canons of the Shraiah and what they called Siyasat, the principles devised by them from usage for running the administration. Accordingly, they gave over the administration of religious matters to the Qazis but kept their own grip over temporal affairs like punishment of the criminals, social justice and fair deal to their subjects. The sultans of the Slave dynasty as well as the kings succeeding them allowed the Qazis only to enforce the five fundamental religious duties enjoined by Islam, to look after the trusts and welfare of orphans and to try cases relating to marriages, inheritance and loans. Qazi-ul-quzat, holding charge of the Qazis at lower levels was a grandee of the king. Similarly, an Amir-ul-Umra was appointed over the grandees of the State. He had to be a man of piety with commanding personality, for, acting as Amir-i-Dad, he was empowered to hear the cases against persons of rank and authority. Kotwal was responsible for enforcing social security and maintenance of peace in the realm. Another officer, known as Muhtasib, kept in check the unsocial practices like gambling, drunkeness, promiscuousness, supervised wieghts and measures and took action against short weighing and fraudulent practices in business affairs. All such cases were also brought to the notice of the king or the Subedar in the province.

Reform By Sher Shah

In addition to the Qazis, Muftis and Kotwals, Sher Shah appointed another officer, known by the name of Amin, to decide the revenue and criminal cases and also to see that the populace was not oppressed by the administrative wing. Such Amins, appointed in each pargana, had a Sadar Munsif in the district to supervise over them. If any such case was brought before the Sadar Munsif, he decided the matter and then sent a report to the King.

Reforms of the Moghuls

During the Moghul period, a Qazi was appointed in every city, big or small. At the top was Qazi-ul-Quzat, a dignitary of the state and counsellor of the emperor. Since he always accompanied the king, he was also called Qazi-ul-Askar. All religious matters were entrusted to his charge and he was assisted by a Mufti, Wakil Shara-i, Muharir Manakhsha, Mushrif and few other officers.

In the provinces the Sadar Qazi was the superintendent of the Qazis in the districts, parganas and cities, Similarly, the provincial Kotwal had the charge of Thanedars in the parganas. Another officer, normally a man known for his piety and wisdom, was appointed by the Central Government to supervise the working of the religious courts of the Qzais. Known as Darogha-i-Adalat, he held his court daily from morning till afternoon so that all those persons who could not approach the king or a grnadee could appear before him. Darogha-i-Adalat, either himself decided the cases in accordance with the Shari'ah law or customary usage or referred them to the Subedars

or Faujdars. The last mentioned officers were also required to devote one or two days in every week for deciding all cases referred to them after making due enquiries.

Imperial Court

The mughal emperors held a court of justice once in a week. Wednesday was earmarked for the purpose when they sat in the Diwani-i'Am attended by a group of Qazis, Muftis and religious doctors. Nazir-i'Adlia or Mir'Adl, a special officer appointed for the purpose, presented the complainants one by one before the emperor who sympathetically listened to the grievances of the subjects and decided the cases on the advice of theologians.

If the case produced before the emperor pertained to a far off place, and edict was issued to the Subedar to restore justice to the plaintiff or produce both the parties before the emperor.

The French traveller Bernier writes that 'the emperor (Alamgir) used to hold a court of justice once in every week when Nazir ' Adlia presented the petitions before him one by one'.

Aurangzeb's sense of Justice

Aurangzeb gave the highest priority to the dispensation of justice. In addition to holding the Imperial Durbar daily, he sat in a special court known as Daulat Khana, every day after the afternoon prayers where Nazir-i'Adlia presented the petitions of complainants before him. Thereafter the emperor held courts in the Diwan-i-'Am and Diwan-i-Khas, where again Nazir-i-Adlia produced the plaintiffs deserving a personal hearing before the emperor.

The emperor gave a patient hearing to them and either wrote the orders with his own hand or dictated the orders passed by him. His industry in administration of justice was marvellous; for he often devoted the entire period between the afternoon prayers and the 'asr to decide the cases brought to him, and then attended to other official matters with a smiling and cheerful countenance.

Wakalat-i-Shari'ah

Aurangzeb was the first monarch of India who appointed Wakil-i-Share'is in all suba courts with a wide jurisdiction over the subordinate courts in the districts and parganas. He always selected just and pious men for this post and charged them with the responsibility of making enquiries in all cases including even those brought against his own Imperial majesty. He had also allowed the populace, through an imperial proclamation, the permission to lodge cases in the courts of Qazis against the Emperor. He improved and systematised the practice followed in the appointment of Muhtasibs."

2730. We do not find any system in the above which empower at that time, subject to challenge a Firman of the king or an order of the king particularly in the matter of desecration of religious place of idolaters by the king himself or under his command or with his approval. In any case, it is nobody's suggestion that at that time there existed any provision of limitation. The Nawab Subedar of Oudh separated sometimes in the later half of 18th century from Mughal kingdom but so far as the policy towards religious matters qua Muslim and Hindus are concerned, there does not appear to be any change. Moreso, in the meantime, as we have already shown, the Hindus continued

to enter the disputed structure, offer worship and Darshan thereat and therefore, vis a vis plaintiffs, the piety and sacredness as also the belief of Hindus continued along with worship.

2731. The Hindu worshippers tried to enforce their right to the exclusion of Muslims some times in 1853-55 but with the intervention of the British Government, sometimes in 1856-57, a partition wall said to have been raised dividing the area between the two communities. However, this arrangement could not detain Hindus as we have noticed from several documents. They continued to enter the arena provided for Muslims (i.e., inner Courtyard) and it appears therefrom that Hindus continuously worshipped in the inner courtyard also though at time the Muslims Friday prayers were also held thereat, may be under the safety provided by the administration. In 1949, though it is true that the property was attached, but simultaneously it is also true that the worship of deities in the disputed structure has continued not only in the outer courtyard but also in the inner courtyard.

2732. Thus for all practical purposes, since the worshippers continued to be benefited by worship and darshan for which the public temple is meant, it cannot be said any cause of action accrued to the plaintiffs to file a suit at any stage earlier.

2733. The benefit of a temple or deity is not for the idols but the real beneficiaries are the worshippers and the purpose of endowment is the maintenance of that worship for the benefit of the worshippers. We have already referred to the relevant authorities on this aspect and add one more i.e. **Kapoor Chand & Others Vs. Ganesh Dutt and others 1993 (Supp.) 4 SCC**

432 where following the earlier decision in **Deoki Nandan Vs. Murlidhar 1956 (1) SCR 756,** the Court said as under:

> *"The temple has been found to be a public temple. In respect of a public temple, the law is well-settled that the true beneficiaries of religious endowments are not the idols but the worshippers and that* ***the purpose of the endowment is the maintenance of that worship for the benefit of the worshippers.*** *The worshippers have a right to file a suit to set aside a transfer of immovable property comprised in a Hindu religious or charitable endowment made by a manager thereof for valuable consideration."*

2734. The pleading in the suit for filing the same is that a decision was taken by majority of the worshippers to construct a new temple but apprehending some dispute thereupon, to have clarity in the matter, the present suit has been filed.

2735. A person can always approach a Court seeking declaration whenever there is some doubt though in true sense it may not be said that any of his right has been infringed by the other side giving a cause of action to file a suit. From the pleadings of the defendant also we have not been able to find out as to how and in what manner they claim that the limitation arises for the purposes of the present suit on a particular date and commencing therefrom the suit is barred by limitation.

2736. Coming to the submission of Sri M.M.Pandey that on account of the Oudh Laws Act, the limitation statute would not be applicable to the present matter we find difficult to agree for the reason that a bare reading of Section 3 shows that if the matter is covered by the statute, that will prevail. Where the personal laws and statute operate in the same field, it is the statute which shall prevail as also held by the Privy Council in

Mosque known as Masjid Shahid Ganj (supra) which has been approved by the Apex Court in **Ismail Farooqui (supra)**.

2737. In this particular and peculiar case, one most important aspect is that the disputed place is believed to be the birth place of Lord Rama by Hindus. We have already held that it is a deity and therefore, a legal person. Thus the position of the place in this case is in dual capacity. This constitute a legal person and simultaneously it is also the property of the legal persons i.e. a deity. The possession can be on a property and not the person. Regarding the declaration, which the plaintiffs 1 and 2 have sought before us, we have not been shown the exact date from which such period would have commenced so as to non-suit the plaintiffs on the ground of limitation. Neither the plaintiffs 1 and 2 were disturbed at any point of time in 1949 or even prior thereto. The only one occasion which at the best could have been there of disturbance is the structure of the temple which is said to have been disturbed sometimes in the late 17th century or early 18th century. However, that disturbance does not appear to have caused any interference in the maintenance of worship of the place in dispute and that is how the worshippers continued to be benefited. This has continued even when the property was attached on 29th December, 1949 but it was ensured that the worship by Hindus shall continue. We, therefore, find no period of commencement wherefrom it can be said that the suit stand barred by limitation. Mere filing of some other suit by some other persons, in which the deity is not impleaded, cannot necessarily give a cause of action to the deity necessarily to file a suit or to suffer the cause of limitation.

2738. In the entirety of the matter, we are of the view that suit in question cannot be dismissed on the ground of limitation.

The Issue No.13 (Suit-5) is answered in negative i.e. in favour of the plaintiffs. The suit is not barred by limitation.

(I) Issues relating to Possession/Adverse Possession:

2739. Issues no. 7 (Suit-1); 3 and 8 (Suit-3); 2, 4, 10, 15 and 28 (Suit-4); and 16 (Suit-5) fall in this category.

2740. The **issues no. 7 (Suit-1)** reads as under:

"*Have the Muslims been in possession of the property in suit from 1528 A.D. continuously, openly and to the knowledge of plff and Hindus in general? If so, its effect?"*

2741. The related pleadings are in paras 9, 10, 16 and 17 of the written statement filed by defendants no. 1 to 5, which read as under:

"दफा 9. यह कि जिस जायदाद का मुद्दई ने दावा किया है वह शहन्शाह हिन्द बाबर शाह की तामीर करदा मस्जिद मौसूमा बाबरी मस्जिद है. जिसको शहन्शाह मज़कूर ने बाद फतेहआबी हिन्दुस्तान दौरान कयाम अयोध्या अपने वजीर व मुदारुल मोहाम मीर बाकी के यह तमाम से सन् 1528 ई0 में तामीर कराया और तामीर करके तमाम ***मुसलमान के लिए वक़्फ आम कर दिया. जिसमें तमाम मुसलमान का हक इबादत है.****"*

"Para 9. That the property which has been claimed by the plaintiff is the Babri Mosque built by Babar Shah, Emperor of India in his name, who got it built through his Minister and Commander Mir Baqi in 1528 AD on his arrival at Ayodhya during his expedition of conquering India and thereafter ***he made a waqf*** *and* ***consecrated to Muslims wherein Muslims have right of worship****."*

(ETC)

"दफा 10– यह कि बाद तामीर मसजिद मजकूर शहन्शाह बाबर ने मसजिद मजकूर की खिताबत व मरम्मत व दीगर इखराजात के लिए मु0 60 रू0 सालाना का अतिया अपने खजाना शाही से मुकरर किया। जो

दौरान कयाम सलतनत मुगलिया मस्जिद मजकूर को बराबर मिलता रहा। और जमाना जवाल सलतनत मुगलिया नवाबीन अवध ने भी इस अतिया को कायम रक्खा और अपने जमाना हकूमत में रकम अतिया मजकूर को इजाफा करके मु0 302 रू0 3 आना 6 पा0 सालाना अता करना मन्जूर किया जो रकम बाद इंतजाय सलतनत अवध ब्रिटिश गवर्नमेन्ट ने भी जारी रक्खा और जमाना बन्दोबस्त अव्वल में गवर्नमेन्ट बर्तानिया ने मुतवल्लियान को बजाय नकद अतिया मजकूर के मवाजियात सोलापुरी व बहोरनपुर मुतखिल अयोध्या बतौर माफी बिनावर मुसारिफ मसजिद बाबरी अता किया।''

''Para-10 That after construction of the disputed mosque, emperor Babar made a grant of Rupees 60/- per annum from his royal treasury towards 'Khitabat' (recitation of Khutb), repair and miscellaneous expenses of the disputed mosque, which was continuously paid to the disputed mosque during the Mughal regime and even after the Mughal regime, this grant was maintained by the Nawabs of Awadh and in their period this amount of grant was enhanced to Rupees-302, Anna-3, Paisa-6 per annum, which was maintained by the British Government even after the Awadh regime, and at the time of the First Settlement, the land of Villages-Sholapur and Bahuranpur, 'Mutkhil' (situated) at Ayodhya, were 'Mafi' (exempted) for the expenses of the Babri mosque." (E.T.C)

''दफा 16– यह कि ***कब्जा मुसलमानान बतौर वक्फ मसजिद बाबरी पर सन् 1528 ई0 से आज तक मुसलसल चला आता है।*** *इस वजह से अगर किसी जमाने में* ***मुद्दई या कोई और हिन्दू यह साबित भी करे कि मसजिद बाबरी की तामीर के पहले कोई मन्दिर मुकाम मस्जिद मजकूर पर था जिससे मुद्दालेहुम मुजीब को कतअन इन्कार है।*** *तो उस हालत में भी कब्जा मुसलमानान जायद अज 400 साल और बहरसूरत जायद अज 12 साल से बइल्म व आगाही मुद्दई बदजुमला अहेले हिनूद बतौर मस्जिद*

*वक्फआम चला आता है। **इस वजह से अहले हिन्दू व नीज मुद्दई का कोई हक बाकी नहीं रहा।**''*

*"Para-16 That the **possession of Muslims over the Babri mosque as a Waqf, has been continuous till date since the year 1528 AD**. As such, even if the **plaintiff or any other Hindu establishes that there was any temple at the site of the disputed mosque prior to construction of Babri mosque, which is wholly denied by the answering opposite party.** Then in that situation also the possession of Muslims has been existing over the property for 400 hundred years and for 12 years in the knowledge of plaintiff and other Hindus, as a universal Waqf mosque. **Due to this, no right of the Hindus or personal right of the plaintiff subsists**."(E.T.C)*

*''दफा 17– यह कि **मुद्दई का कब्जा या कोई हक इमारत मुतदाविया में न कभी था और न है।** इस वजह से दावा इस्तकरारिया हसब दफा 42 कानून दादरसी खास नाकाबिल पजीराई अदालत है।''*

*"Para-17 That **no right or possession of the plaintiff ever existed nor exists over the disputed property**. Due to this the suit is barred under section 42 and is not fit to be allowed by the court." (E.T.C)*

2742. In the replication filed by the plaintiff, para 10 of the aforesaid written statement has been replied as irrelevant. Para 16 has been denied and para 17, as pleaded, has been denied. It is said that Section 42 of the Specific Relief Act has no application in the matter. In para 31, possession of Muslims of the disputed premises atleast since 1934 has been denied stating:

*''धारा 31– जैसा कि प्रतिवादीगण कहते हैं कि यह बाबरी मस्जिद है। इसे प्रमाणित करने में यदि वह सफल भी हों तो भी क्योंकि **सन 1934 ई0 से कभी कोई मुसलमान इस मन्दिर के भीतर जाने नहीं***

पाया। *और हिन्दुओं का ही तबसे अविराम रूप से स्पटतः प्रत्येक व्यक्ति के ज्ञान में अधिकार बना रहा। इसलिए* ***प्रतिवादीगण अथवा अन्य किसी मुसलमान का यदि कोई हक रहा भी हो तो उस सब का अन्त हो गया और वह हक निराकृत हो गया। इस स्थान को मन्दिर मानकर हिन्दू होने के नाते प्रत्येक हिन्दू उस में बराबर आता जाता रहा है। जिस से मन्दिर का होना निश्चित रूप से परिपक्व हो गया है।*** *यदि कभी किसी मुसलमान ने कुछ भी हक प्रदर्शित करने का प्रयत्न किया तो उसके हक को अस्वीकार करते हुए हिन्दुओं ने विशेषतः उस स्थान में रहने वालों ने उनको मार भगाया। पता चला है कि मुसलमानों ने परस्तपर एक जाली तथा फर्जी व षडयन्त्री अभियोग किसी सिविल जज के इजलास में योजित करके कुछ फर्जी कार्रवाइयां कराई है। जिस से वादी को इन्कार है। और उसका कोई प्रभाव इस व्यवहार पर नहीं पड़ सकता है। विशेषतः जब कि किसी हिन्दू को उसका पता भी न था। सब कार्यवाही व फर्जी की गई है। उस अभियोग के कागजात बिल्कुल अप्रासंगिक है। किसी प्रकार भी इस व्यवहार में मानने योग्य नहीं है।''*

"Para-31 That the defendants claim that it is Babari mosque, and even if they succeed in establishing the same, then also in view of ***failure of Muslims to enter this temple after the year 1934 AD*** *and in view of continuance of the right of Hindus in the knowledge of all,* ***the rights of the defendants or any other Muslim, if any, stood extinguished. Every Hindu has been regularly visiting the said place as a Hindu by taking it to be a temple, which has certainly made it a temple****. If any Muslim ever tried to exert his right then by denying the same, the Hindus, particularly the locals, drove them away. It has come to knowledge that the Muslims have got some fake proceedings carried out from the court of Civil Judge by filing a farzi and collusive suit, which is denied by the plaintiff and it has no bearing over him particularly so*

when the Hindus had no knowledge of the same. The entire proceeding is fake. The papers of that case are irrelevant and not acceptable under any circumstance." (E.T.C)

2743. The defendant no. 6, in para 12 of his written statement has said that the disputed premises was known as "Babari mosque" and for a long period has been used as mosque for the purpose of worship by Muslims. It has not been used as a temple of Sri Ram Chandraji. The defendant no. 8 has not said anything in the written statement on this aspect while defendant no. 9 in para 12 has taken the same stand as that of defendant no. 6. The defendant no. 10 in its written statement has taken a stand similar to that of defendant no. 1 to 5 and in paras 11, 15, 17 and 18 has further pleaded:

"11. That the Emperor Babar had given a grant of Rs. 60/- per annum for the maintenance and annual repairs and other expenses relating to the said mosque which had remained being paid during the Moghal regime, and during the regime of Nawabs of Avadh the said grant was enhanced and the British Government had also continued the said grant and at the time of the First Settlement, the land of Mauza Sholapur and Bahuranpur was settled as Mafi for the expenses of the said mosque.

15. That ***muslims had all along remained in possession of the said mosque right from 1528 upto the date of attachment of the said mosque under section 145 Cr.P.C.*** *made in December, 1949.*

17. That as the ***plaintiff has never remained in possession or occupation of the building in suit, he has no right, title or claim over the said property*** *and as such the suit is even barred by the provisions of Section 42 of the*

Specific Relief Act.

18. That the ***plaintiff's suit is even barred by the Law of Limitation*** *as the* ***muslims have remained enjoying the possession over the property in suit at least from 1528 A.D.****"*

2744. The **issues no. 3 and 8 (Suit-3)** read as under:

"*Have plaintiffs acquired title by adverse possession for over 12 years?" (Issue 3)*

"Have the ***rights of the plaintiffs extinguished for want of possession for over 12 years prior to the suit****?"*

(Issue 8)

2745. Paras 2, 4 and 5 of the plaint says:

"2. . . . . plaintiff no. 1 who through its reigning Mahant and Sarbrahkar has ***ever since been managing it*** *and receiving offerings made there at in form of money, sweets, flowers and fruits and other articles and things.*

4. That the said temple has ***ever since been in the possession of the plaintiff no. 1*** *and none others but Hindus have ever since been allowed to enter or worship therein and offerings made there which have been in form of money, sweets, flowers and fruits and other articles and things have always been received by the plaintiffs through their pujaris.*

5. That ***no Mohammadan could or ever did enter in the said temple building****. But even if it be attempted to be proved that any Mohammadan ever entered it, which would be totally wrong and is denied by the plaintiffs,* ***no Mohammadan*** *has ever been* ***allowed*** *to enter it or has even attempted to enter it* ***at least ever since the year 1934****.*

2746. The defendants no. 6 to 8 have denied the above paragraphs of the plaint and in paras 15, 16, 22 and 23 have pleaded:

''धारा 15– यह कि जायदाद का मुदैयान ने दावा किया है वह शहनशाह हिन्द बाबर बादशाह के तामीर करदा मसजीद मासूमें बाबरी मसजिद है जिसको शहनशाह मजकूर ने अपने बजीर व मदारूल मोहाम मीरबाकी के सहतनाम से 1528 ई0 में तामीर कराया। और मुसलमानान के लिये ***वक्फ आम कर दिया*** *जिसमें तमाम मुसलमानान का हक हबायत है।''*

''Section 15 – That the plaintiffs claiming the property have contended that it is the Babri Masjid, which was built by Emperor Babur. The said emperor got it constructed through his secretary and commander, Mir Baqi, in 1528 and ***it was given as a public waqf to the*** *Muslims in which the right of Muslims in general is vested.'' (E.T.C.)*

धारा 16– यह कि बाद तामीर मसजिद मजकूर शहनशाह बाबर रहमुतल्ला अलैह ने मसजिद मजकूर की हिफाजत व मरम्मत व दीगर अखराजात के लिए मु0 60 रुपया सालाना का अतिया अपने खजाने शाही से मुकरर किया। जो दौरान कयाम सलतनत मुगलिया मसजिद मजकूर को बराबर मिलता रहा। बाद जमाने जबाल सलतनतमुगलिया नौआबीन अवध ने भी इस अतीये को कायम रखा और अपने जमाने हुकुमत में रकम अतिये मजकूर को इजाफा करके मु0 302 रुपये 3 आना 6 पाई सालाना कर दिया। जो रकम बाद रखते ताम सलतनत अवध ब्रिटिश गवर्नमेन्ट ने भी जारी रखा। और उस जमाने में बनेबस्त अव्वल में गवर्नमेन्ट बतानिया ने मुतबलियान को बजाए नकद अतिया मजकूर के मुआबिजियात सोलापुरी व घूरनपुर व बहोरनपुर मुतसीर अयोध्या बतौर माफी बिना बरमसारित मसजिद बाबरी अता किया।''

''Section 16 – That Emperor Babur had granted Rs. 60 per annum, from his Royal Treasury, for safety and maintenance of the said mosque and to meet other expenses incurred on it. The said grant continued to flow in to the said mosque during the Mughal rule. Even after the

Mughal Rule, Nawabs of Awadh also continued this grant and during their regime they enhanced the said grant to three hundred two rupees three annas six paise per annum. The British government also continued the grant of the said amount. At the time of the First settlement, the British government, instead of giving the said grant in cash, settled the land of Ayodhya-situated villages, namely, Sholapuri, Ghooranpuri and Bahoranpur as Mafi, to meet the expenses of the said mosque." (E.T.C.)

*धारा 22– यह कि कब्जा मुसलमानान बतौर बक्फ मसजिद बाबरी पर सन् 1528 ई0 से आज तक मुसलसल चला आता है। **बजहसे अगर किसी जमाने में मुद्दैयान या कोई और हिन्दू यह साबित भी करे कि मसजिद बाबरी की तामीर के पहले कोई मंदिर मुकाम मसजिद मजकूर पर था जिससे मुद्दालुेहम मुजेबको कतान इनकार है सो इस सूरत में भी कब्जा मुसलमाना न जायद अज 400 साल और बहर सूरन जायज अज 12 साल से बहल्म आगाही मुद्दैयान जुमला आहले हिनदू बतौर मसजिद बकफ आम चला आया है इस बजहसे अहले हिनदू व नीज मुद्देयान का कोई हक बाकी नहीं रहा।''***

*"Section 22 – That the Muslims have continued to have possession in the shape of waqf over the Babri mosque from 1528 up to the present. **If at any time plaintiffs to the suit or any other Hindus prove that prior to the construction of Babri mosque there existed any temple on the site of the said mosque, which contention the defendants deny, even in that case Muslims have been in possession of the said property for 400 years, and their possession in the shape of public waqf over the mosque, has been in the knowledge of plaintiffs to the suit or other Hindus. For this reason, Hindus and the plaintiffs to the suit do not have any right over it.**" (E.T.C.)*

धारा 23– यह कि मुद्दैयान का कबजा या कोई हक इमारत मुतदाबिया में न कभी थी और न है। इस बजहसे दावा नाकाबिल पिजेराई अदालत है।''

"Section 23 – The plaintiffs never had possession or title over the disputed building nor do they have such possession or title. For this reason, the claim is not fit to be allowed by the Court." (E.T.C.)

2747. In the replication filed by the plaintiff, para 16 of the written statement of defendants 6 to 8 has been denied and in paras 22, 23, 24, 30 and 34, it further pleads as under:

"22. The contents of para 22 of the written statement are totally false and are denied. The Muslims were never in possession of the building in suit and the allegation regarding the perfecting of the right of the muslims over the building in question by adverse possession is a pure fiction, concocted for the purposes of the suit.

23. The contents of para 23 of the written statement are totally false. ***The plaintiffs have always been in peaceful possession of the building in suit****.*

24. The contents of para 24 of the written statement are denied. The plaintiffs have ever been in possession of the temple in suit ***and no question of expiry of the period of limitation arises****.*

30. In reply to para 30 of the written statement the plaintiffs contend that they have been in possession and management of the temple of Janma Bhumi ever since the living memory of man. ***The said temple always belonged to the plaintiff*** *used and was managed through his Sarbarahkar the plaintiff no. 2 being the present Sarbarahkar.*

34. The contents of para 34 of the written statement are denied. The plaintiffs claim is perfectly justified. The

plaintiffs *have been* ***in possession of the temple in suit for an immemorial time*** *and even through the evidence of the construction of the temple by the plaintiff no.1 through his Mahant and Sarbarahkar may not be traced due to the lapse of immemorial age and want of written records* ***the plaintiffs have acquired title to it by open and adverse possession for a period of time which is longer than the living memory of man.****"*

2748. The defendant no. 9 has filed an additional written statement but in respect to the above issues there is no specific pleading.

2749. The defendant no. 10 in its written statement has denied paras 2, 4 and 5 and says:

"2. That the contents of para 2 of the plaint are denied. However, it is submitted that the JANMA ASTHAN is a holy place of worship and belongs to the deity of Bhagwan SHRI RAM LALLA VIRAJMAN there. It never belonged to and could not have belonged to the plaintiff no. 1. It is denied that the plaintiff no. 1 ever managed it.

4. That the contents of para 4 of the plaint are not admitted. ***A Hindu Temple is deemed to be possessed and owned by a deity. The principal deity of SHRI RAM JANMA BHUMI is BHAGWAN SHRI RAM****. Any offerings must have been received by the Manager of the same from time to time.*

5. That the contents of para 5 of the plaint are not admitted in the form they have been pleaded. Although it is made to appear that in the first war of independence in the year 1857 A.D., the British, to divide the Hindus and Muslims, mala fide ***acted by dividing the said ASTHAN***

by creating an inner enclosure and describing the boundary within the inner enclosure as a mosque but no Muslim who was a true Muslim, would appear to have frequented it for offerring his prayer as the same is prohibited by the SHARIYAT*. Moreover even ALAMGIR (EMPEROR AURANGZEB) issued a mandate, known as FATWA-E-ALAMGIRI which clearly prohibits the offering of prayer by Muslim at such places. More so the KASAUTI pillars and the carvings of gods and Goddesses thereon will clearly show that this place could not be used by a true Muslim for offerring his prayers therein. It will also be seen that the place wrongly alleged as mosque* ***virtually stood land-locked by Hindu Temple****, wherein there was the worship of the deity going on. Entry to this inner enclosure was also obstructed.*

The British tried to set up the descendents of MIR BAQI, a Shiya Muslim, as the MUTWALLI, but he denied the TAULAAT and never looked after the disputed place in any capacity, what to say of looking after as as MUTWALLI thereof."

2750. In replication, while replying written statement of defendant no. 10, the plaintiffs have said that Nirmohi Akhara through its Pujaris has always been managing the disputed premises. However, in para 16 it has made averments regarding "ownership" and "management of only outer enclosure" and says as under:

"16. That ***outer enclosure was owned and managed by Nirmohi Akhara, plaintiff****. . . . . Since 1982 the outer enclosure is in possession of Receiver appointed by Court in Reg. Suit No. 39/82 pending in the Court of Civil Judge*

III Faizabad."

2751. The **issues no. 2, 4, 10, 15 and 28 (Suit-4)** read as under:

"Whether the plaintiffs were in possession of the property in suit upto 1949 and were dispossessed from the same in 1949 as alleged in the plaint?" (Issue 2)

"Whether the Hindus in general and the devotees of Bhagwan Sri Ram in particular have ***perfected right of prayers at the site by adverse and continuous possession*** *as of right for more than the statutory period of time* ***by way of prescription as alleged by the defendants****?" (Issue 4)*

"Whether the plaintiffs have perfected their rights by adverse possession ***as alleged in the plaint****?" (Issue 10)*

"Have the Muslims been in possession of the property in suit from 1528 A.D. continuously, openly and to the knowledge of the defendants and Hindus in general? If so, its effect?" (Issue 15)

"Whether the defendant no.3 has ever been in ***possession of the disputed site*** *and the plaintiffs were never in its possession?" (Issue 28)*

2752. The relevant pleadings are in paras 2, 11 and 11(a) of the plaint which read as under:

"2. . . . . The ***mosque and the graveyard is vested in the Almighty****. The said mosque has since the time of its construction been used by the Muslims for offering prayers and the graveyard has been used as graveyard. . . .*

11. That the ***Muslims have been in peaceful possession*** *of the aforesaid mosque and used to recite prayer in it,* ***till 23.12.1949 when*** *a large crowd of* ***Hindus****, with the*

mischievous intention of destroying, damaging or defiling the said mosque and thereby insulting the Muslim religion and the religious feelings of the Muslims, ***entered the mosque and desecrated the mosque by placing idols inside the mosque****. The conduct of Hindus amounted to an offence punishable under sections 147, 295 and 448 of the Indian Penal Code.*

11(a) That assuming, though not admitting, that at one time there existed a Hindu temple as alleged by the defendants representatives of the Hindus on the site of which emperor Babar built the mosque, some 433 years ago, the Muslims, by virtue of their long exclusive and continuous possession beginning from the time the mosque was built and continuing right upto the time some mischievous persons entered the mosque and desecrated the mosque as alleged in the preceding paragraphs of the plaint, the Muslims perfected their title by adverse possession and the right, title or interest of the temple and of the Hindu public if any extinguished."

2753. The defendant no. 1 while denying paras 2 and 11 of the plaint in paras 23 and 25 of his written statement have said:

"23. That para 23 of the plaint is wrong. The suit is hopelessly time barred. ***The Muslims have not been in possession*** *of the property in dispute* ***since 1934 and earlier****.*

25. That ***the Muslims*** *were* ***never in possession*** *of the temple called Ram Janam Bhumi. If ever they were in possession of the so-called Babri mosque,* ***there possession ceased thereon in 1934****, and since then* ***Hindus are holding that temple in their possession*** *and their*

possession has ***ripened into statutory adverse possession thereon since 1934****. Prior to 1934 continuous daily Hindu puja is being done in that temple and the Muslims have never said their prayers since 1934 in the temple falsely described as Babri Mosque."*

2754. Similar is the stand taken in the written statement of defendant no. 2. Paras 23, 25 and 28 are not quoted being almost verbatim.

2755. In the common replication filed in reply to the written statement of defendants no. 1 and 2, plaintiffs in paras 25, 28, 34 and 35 have pleaded:

"25. The allegations contained in para 25 of the written statement are denied. The ***Hindu Public never held the*** *mosque and Ganje-Shahidan in their* ***possession*** *nor* ***did puja therein since 1934*** *as alleged by them.*

28. Denied. The Muslim public has been in ***possession*** *of* ***the property in suit as mosque for the last 450 years when the mosque was constructed****.*

34. That it is absolutely wrong that the Hindu Public took possession of the property in dispute in 1934 and is holding possession of it as temple since then and have thus completed title by adverse possession. The ***possession of the Muslims community continued as ever*** *and they have been saying their prayers in the mosque as such. The Hindu public of course in 1934, did some mischief to destroy the mosque and damage was caused to some extent, which was got repaired by the Government at the cost of the Government and the Hindu public was charged with punitive tax. It is absolutely baseless that the Hindu public came in possession much less peaceful possession of the*

property in suit.

35. That the ***Muslim public as representative of the wakf has been in continuous possession of the property in suit for last 450 years, i.e., since the time the mosque was constructed and even if the Hindu public had any interest whatsoever in the property in suit before that period the Muslim public representing the wakf perfected his title to the property in suit by their long undisturbed open possession against the interest of the Hindu public which amounts to adverse possession of the wakf and thus title or interest if any, of Hindu public has extinguished.***

2756. The defendants no. 3 and 4 in their written statement in paras 11, 13(C), 29, 30, 34 and 35 have said as under:

"11. . . . . the question of any Muslim or the Muslim community having been in peaceful possession of the same and having recited prayers till 23-12-49 does not arise. . . .

13(C). . . . . The said Temple Ram Chabutra had an history of judicial scanning since 1885 A.D. and it existence and possession over temple Ram Chabutra was ever since in possession of Nirmohi Akhara and no other but Hindus allowed to enter and worship there and put offering in form of money, sweets, fruits, flowers etc. which has always been received by Panches of Nirmohi Akhara.

29. That the said temple has ever since been in the possession of the defendant no. 3 and none other but Hindus have ever since been allowed to enter or worship therein and offerings made there, which have been in form of money, sweets, flowers and fruits and other articles and things, have always been received by the defendants 3 and

4 through their Pujaris.

30. That no Mohamedan could or ever did enter in the said temple buildings. But even if it be attempted to be proved that any Mohamedan ever entered it which would be totally wrong and is denied by the answering defendants, no Mohamedan has ever been allowed to enter or has ever attempted to enter it atleast ever since the year 1934.

34. . . . . plffs for the Muslim community or any of its members have not been in possession within limitation over the property in dispute.

35. That even if the plaintiffs succeed in showing that any Muslim ever said prayers in the building in question or used the same as a Mosque, or that the possession of the answering defendant and the Deity (Shri Thakur Ram Janki) was for any period of time disturbed by the Muslims or any of them, the answering defendant and the Deity, have again matured their title by continuous and adverse possession, open and hostile to the plaintiff and their community by remaining in continuous possession of the said building, that is, the temple of Janam Bhoomi for more than 12 years and in any case ever since 1934, during which period the Hindus have been continuously doing worship and making offerings to the deity installed therein and the answering defendant have been managing the said temple and taking offerings made thereat."

2757. In the additional written statement dated 28/29 November, 1963, the defendants no. 3 and 4 in paras 38 and 39 have said:

"38. The ***building in question was always a temple*** *as*

shown in the written statement of the answering defendants. ***Emperor Babar never built a mosque*** *as alleged by the plaintiffs and* ***Muslims were never in possession*** *of the building in question.*

39. The allegation of the plaintiffs in their amended paragraph 11(a) of the plaint that "some mischievous persons entered the mosque and desecrated" it is only the mischievous concoction. No question of the Muslims perfecting their title by adverse possession or of the extinction of the right, title or interest of the temple and of the Hindu public at all arises as the Muslims were never in possession."

2758. In the replication the plaintiffs in paras 27, 30, 32, 34, 35, 37, 38 and 39 have said:

"27. Denied. The ***property in suit is not a temple*** *as alleged and* ***has never been in possession of the defendants*** *as alleged.*

30. Denied. The ***Muslim public has always been saying prayers*** *and* ***visiting the Mosque*** *and Ganje-Shahidan which is the property in suit* ***for last 450 years when the mosque was built****.*

32. Denied. The defendants have never been in possession or in-charge of the property in suit as alleged. The filing of the suit mentioned in this para is admitted. Rest is denied.

34. Denied. ***The plaintiffs and Muslims public have been in possession for last 450 years****.*

35. Denied. The plaintiffs have been in possession of the property in suit as Mosque and Ganje-Shahidan for last 450 years and it is absolutely wrong that the Hindu public

ever had possession of any sort over the property in suit as temple, as alleged by the defendants in this para.

37. That the Muslim public had been in continuous and open possession of the mosque and Ganje-Shahidan for last 450 years, i.e., the time when the mosque was built. In 1934 of course the Hindu public out of mischief attempted to destroy the mosque and in their attempt they damaged the mosque at places which damage was repaired by the Government at the expense of the Government and Hindu public was penalised by punitive tax for their unlawful actions.

38. That the ***possession of the Muslim public was not disturbed*** *and they remained in possession of the property as mosque and saying their usual prayers continuously upto December 1949 when Hindu public by force entered the mosque, by breaking open the lock of the mosque and* ***desecrated the mosque by placing idols inside the mosque*** *which being made by the police proceedings under section 145 Cr.P.C. were started and to avoid apprehension of breach of peace the mosque was placed in custody of a Receiver.* ***The Receiver is still holding the property for the benefit of Muslim public****.*

39. That the Muslim public as representative of wakf has been in continuous possession of the property in suit for last 450 years i.e. since the mosque was built and even ***if the Hindu public had any interest whatsoever in the property in suit before that period of 450 years*** *the Muslim public as representative of wakf* ***has perfected title to the property in suit by their long undisturbed open possession*** *against the interest of Hindu public to their*

knowledge which amounts to ***adverse possession of the wakf*** *and thus the title or interest, if any, of the Hindu public has been extinguished."*

2759. The additional written statement dated 21st August, 1995 of defendant no. 3, para 2 and 3(i) says:

"2. That the contents of para 20 of the plaint is evasive and plaintiffs who are not in possession ***nor they were in possession ever over the disputed inner or outer site****. The narration of* ***Receiver's possession*** *in this para by plaintiffs* ***can only be clubbed with the inner disputed site*** *i.e. the main temple bounded* ***by letters B, B1, B2, B3, D2, D1*** *and letters D.C.B. Shown in annexure. A map of this additional W.S.* ***The outer part of disputed sites comprises with Sri Ram Chabutara temple, Chhatti Pujan Sthal, Panch Mukhi Shankar Ganesh Ji Kirtan Mandap, Bhandar House of Panches of Nirmohi Akhara. All belonging to Nirmohi Akhara*** *and has ever been in the possession of Nirmohi Akhara through Panches of Nirmohi Akhara from before the human memory. Even on the date of attachment under the order of Additional City Magistrate, Faizabad dated 29.12.1949 an attachment Fard was prepared. A true copy is being attached as Annexure 'C' to this Additional Written statement.*

3(1) . . . . . The ***Chabutara is in possession of the defendant no. 3****, Nirmohi Akhara."*

2760. The defendant no. 10 while denying the above mentioned paragraphs of the plaint has said in paras 25 and 26 as under:

"25. That the plaintiffs have never been in possession of the property in dispute, nor they have any right to take

possession thereof or make any constructions thereon, under the law of the country as aforesaid.

26. That the land and property in dispute has been throughout in uninterrupted possession of the Hindu community as a whole and in the ownership of Lord Sri Ram, and the plaintiffs never had or have any concern with the land and property in dispute."

2761. In the additional written statement dated 12th September, 1995 the defendant no. 10 in para 1 says:

"1. . . . . The Hindus have all along been in possession over the entire area of Shri Ram Janma Bhoomi. The land in question has all along been in possession of Hindus and devotees of Lord Shri Ram."

2762. Defendant no. 13, Baba Abhiram Das and defendant no. 14, Pundarik Mishra have contested the claim of plaintiffs, stating in paras 23, 25 and 28 as under:

"23. . . . . The Muslims have not been in possession of the property in dispute since 1934 and earlier.

25. That the members of the Hindu Community have from time immemorial been worshipping the site of Janam Bhum upto this time by virtue of their right and the Muslims were never in possession of the temple called as "Ram Janam Bhawan". If ever they were in uninterrupted possession of the falsely called "Babri Mosque" their possession ceased there on in 1934 and since then Hindus are holding that temple in their possession and their possession has ripened into statutory adverse possession therein since 1934. Even prior to 1934 continuous daily Hindu Puja is being done in that temple and the Muslims have never offered their prayers since 1934 in the temple

falsely described as 'Babri Mosque'.

28. . . . . the plaintiffs were never in possession over the temple in dispute since 1934 and the Hindus were holding it adversely to them to their knowledge."

2763. The defendant no. 13/1 in its written statement in paras 11, 11A and 31 says as under:

"11. That the contents of paragraph 11 of the plaint are denied. The ***Muslims were never in possession of the alleged 'mosque'****. They* ***never could recited prayers therein****, and never recited any prayers therein till 23.12.1949, or any date even remotely within 12 years of the institution of the suit. Correct facts are stated in the Additional Pleas.*

11A. . . . . There was and there could be no question of any exclusive or continuous possession by the Muslims ***over the site of the ancient Hindu Temple or any part or portion of Sri Rama Janma Bhumi, which was by itself an object of worship by the Hindus and as such a Deity having the status of a juridical person in the eye of law****. . . . . The act of Mir Baqi was a fleeting act of trespass and not an act of entering into adverse possession by a person claiming ownership against the true owner, and no Muslim could by any such act of trespass or its repetition, confer any right, title or interest in the nature of a Waqf in favour of ALLAH for the purposes of a 'mosque'. According to Muslim law, ALLAH alone is the owner in possession of all Waqf property. A Mutwalli is a mere manager, and neither the Mutwalli nor the beneficiaries of a Muslim Waqf, can claim or have any right of ownership or possession as an owner for, or on behalf of ALLAH.* ***Title by way of a Muslim***

Waqf, cannot, therefore, be acquired by adverse possession*, for Allah does not accept the Waqf of property by a wrongful act of adverse possession. The Deity of BHAGWAN SRI RAMA VIRAJMAN in the ancient Temple at Sri Rama Janma Bhumi, and the ASTHAN SRI RAMA JANMA BHUMI* ***which was by itself a Deity and worshiped as such since ever*** *and* ***had a juristic personality of its own****, continued to own and possess the property rights of ownership and possession of the space of Sri Rama Janma Bhumi at Ayodhya, without any dent on them by any such acts of trespass as the demolition of the Temple or the attempt to raise mosque—like structure thereat. . . . . The Muslims did not get any title by adverse possession, and the* ***pre-existing right, title and interest of the Deities continued to exist uninterrupted****, by any such act of Mir Baqi as is said to have been committed during Babar's time over 400 years ago. . . . . that the Muslims having lost whatever fleeting possession they might have had by trespass over a part of the area of Sri Rama Janma Bhumi, that was finally and effectively brought to an end, and they have no right, title or interest whatsoever in the land or the mosque-like structure at Sri Rama Janma Bhumi, Ayodhya."*

31. That after the annexation of Avadh and the first war of independence, miscalled the Sepoy Mutiny by the British, ***an inner enclosure for the three-domed structure was created by raising a boundary wall*** *with iron gratings in the courtyard of the building, which separated and Rama Chabutra and the Charans and the Sita Rasoi, from the building and divided the courtyard into two parts.* ***The***

inner part in which the three-domed structure was situated, was land-locked from all sides by the outer part in which the Rama Chabutra, the Charan and the Sita Rasoi were situate*. The British thus tried to confine the Hindus to worship their Deities in the outer part of the courtyard, but* ***no Muslim could enter the inner part of the courtyard or the three-domed structure within it****, except by passing through the outer courtyard, which had Hindu places of worship in it and was in their exclusive and constant occupation.* ***This laid the seeds of trouble off and on whenever any Muslims wanted to go inside****. The result was that no Namaz was offered inside the three-domed structure, inspite of the attempt of the British Government to induce the Muslims to do so by raising the inner boundary wall.* ***This was a calculated attempt by the Britishers to encourage the Muslims to use the abandoned place as a 'mosque' and create differences between their Hindu and Muslim subjects****, with the object of maintaining their power, particularly in the context of the First War of Independence in which the Hindus and the Muslims had fought the British power shoulder to shoulder like brothers. However, the attempt to induce the Muslims to use the building inside the inner enclosure as a 'mosque' did not succeed. There was an over-helming number of Hindus living all round the place, and the local Muslim population knew that the place was not a proper place for offering Namaz, as it was not a "mosque" according to the true tenets of Islam.* ***The Hindus never left the place and continued to worship the ASTHAN through such symbols of*** *the DIVINE SPIRIT as the CHARANS, the*

SITA-RASOI and the Idol of BHAGWAN SRI RAMA LALA VIRAJMAN on the Rama Chabutra within its precincts."

2764. In the additional written statement the defendants no. 13/1, Mahant Dharam Das in para 48 says:

"48. . . . . site always was and continues to be a place of worship for the Hindus and owned and possessed by Shir Ramalala Virajman at Sri Ram Janma Bhumi.. . . . ."

2765. The defendant no. 17 in his additional written statement dated 14.09.1995 has averred in paras 1 and 23 as under:

"1. . . . . The Hindus have all along been in possession over the entire area of Shri Ram Janambhoomi. ***The land in question has all along been in possession of Hindus and devotees of Lord Shri Ram****. . . . ."*

23. That it is pertinent to mention that no suit has been brought by any person or body of persons from the Muslim side claiming dispossession of the deity. Thus the possession of the deity is hostile to the interest of the plaintiffs which is in their knowledge, but no suit has been filed against the deity i.e. Shri Ram Lala Virajman. Thus the deity has perfected his title by remaining in adverse possession and the plaintiffs are stopped from challenging the existence of deity now and claiming possession which has become time barred."

2766. The defendant no. 18 in his written statement in para 29 said:

"29. That contesting defendant does not take even a drop of water without the darshan of the said Lord Rama installed in the disputed place known as Janam Bhumi Lord Rama is a stadio of the answering defendants. The

answering defendant is doing such darshan of the said Lord Rama continuously for 30-32 years. And thus accrued a right of Darshan of the said Lord Rama by prescription and long user which the answering defdt. have enjoined peacefully and without any interruption for more 30-32 years."

2767. The defendant no. 20 in para 44 and 48 of his written statement said:

"44. That before the middle of the 19th century, as mentioned above, Ayodhya was regarded as a stronghold of Hindus and the Ram Janma Bhumi was at all material time accessible to Hindus. Since then Hindus are in peaceful possession of the place and the temple in dispute and are performing the worship therein peacefully and uninterruptedly.

48. That, in the above circumstances, ***the ouster of Hindu community from Ram Janma Bhumi did not ever take place****. The Hindus have always been and are still today in lawful possession and shall always be deemed to be in lawful possession of the site in dispute. In the alternative, even supposing without admitting that the Hindus were ousted, yet they have thereafter regained possession and have been exercising their rights of worship peacefully and to the knowledge of the plaintiffs for more than twelve years and thus perfected their title in the eyes of law. The suit is barred by limitation."*

2768. The **issue no. 16 (Suit-5)** read as under:

"*Whether the title of plaintiffs 1 & 2, if any, was extinguished as alleged in paragraph 25 of the written statement of defendant no.4? If yes, have plaintiffs 1 and 2*

reacquired title by adverse possession as alleged in paragraph 29 of the plaint?"

2769. The above issue has been framed with reference to para 29 of the plaint and para 25 of the written statement of defendant no. 4 which (relevant extract) read as under:

(Plaint)

"29. The Receiver was not authorised to remove any person from the possession or the custody of the premises, and in fact the ***Receiver never interfered with the possession of the Plaintiff Deities****. No party to a proceeding could dispossess a third party, nor could the Receiver interfere with the possession of a person who is not a party to the proceedings. At the highest, the Receiver acted like a Shebait. He did not disturb the possession of the plaintiff Deities. Their possession over the building premises in dispute ever since the installation of the first Plaintiff's Idol on the night between the 22nd and 23rd December, 1949, is admitted by all the concerned parties. Thus,* ***independently of the original title of the Plaintiff Deities which continued all along, the admitted position of their possession places the matter of their title beyond any doubt or dispute****. Even if there had been any person claiming title to the property adversely to the Plaintiff Deities, that would have been extinguished by their open and long adverse possession, which created positively and affirmatively and proprietary title to the premises in the Plaintiff Deities."*

(Written statement of defendant no. 4)

"25. That the contents of para 25 of the plaint are also incorrect and hence denied as stated and in reply thereto it

is submitted that ***there never remained any deity in the mosque in question****. It is also incorrect to say that no valid waqf of the mosque was ever created and the reference of command of law made in the para under reply is also incorrect and misleading.*

It further submitted that the ***muslims' possession has remained uninterrupted and continuous of the mosque in question since its construction*** *and upto 22-12-1949 (and as such the alleged right or title, if any, of anyone else over the same has ceased to exist and the alleged right and title shall be deemed to have extinguished) on account of the uninterrupted and adverse possession of the muslims over the mosque in question for more than 420 years."*

2770. From the above pleadings it is evident that on one hand the Muslim parties claim to possess the disputed building since the date of its construction and offering prayer (Namaz) thereat but simultaneously have taken the plea of adverse possession and have claimed the right of ownership on the basis of expiry of limitation for re-entering into possession by the alleged Hindu owner in case they are able to prove their case of ownership. The Hindus similarly have staked their claim otherwise.

2771. The pleadings and evidence in support of the above issues divide the period of dispute since 1528 AD into four, (1) prior to 1528 AD; (2) prior to 1855 AD; (3) from 1855 AD to 1934 AD; and (4) from 1934 AD to 22/23 December 1949.

2772. Sri Jilani, learned counsel for the plaintiff has drew our attention to some documents, namely, (1) Exhibit 19, Suit-1 (Vol. 5 page 61) which is a report dated 28.11.1858 submitted by one Sri Sheetal Dube, Thanedar Awadh removing the

unauthorised construction made in the inner courtyard; (2) Exhibit 20, Suit-1 (Vol. 5 page 65) letter dated 30.11.1858 of Mohd. Khateen Moazim abour encroachment by the aesthetic in the inner courtyard; (3) Exhibit A-70, Suit-1 (Vol. 8 page 573) dated 05.12.1858; (4) Exhibit 21, Suit-1 (Vol. 5 page 69) dated 15.12.1858 the report of Sheetal Dube, Thaendar Awadh; (5) Exhibit 22, Suit-1 (Vol. 5 page 73) dated 15.12.1858; (6) Exhibit A-69, Suit-1 (Vol. 8 page 569) dated 15.12.1858; (7) Exhibit 23, Suit-4 (Vol. 10 page 135) dated 9.4.1860; (8) Exhibit 4, Suit-4 (Vol. 10 page 35) dated 1861; (9) Exhibit 54, Suit-4 (Vol. 12 page 359) dated 12.03.1861; (10) Exhibit 55, Suit-4 (Vol. 12 page 365) dated 16.3.1861; (11) Exhibit A-15, Suit-4 dated 5/6.9.1863; (12) Exhibit 6, Suit-4 (Vol. 10 page 39) dated 30.10.1865; (13) Exhibit 7, Suit-4 (Vol. 10 page 41) dated 30.10.1865; (14) Exhibit A-13, Suit-1 (Vol. 6 page 173) dated 25.09.1866; (15) Exhibit 29, Suit-1 (Vol. 5 page 105) dated 12.10.1866; (16) Exhibit 8, Suit-4 (Vol. 10 page 43) dated 22.08.1871; (17) Exhibit 26, Suit-1 (Vol. 5 page 91) dated 22.08.1871; (18) Exhibit A-20, Suit-1 (Vol. 7 page 231) dated 22.8.1871; (19) Exhibit 15, Suit-1 (Vol. 5 page 43) dated 14.05.1877; (20) Exhibit 16, Suit-4 (Vol. 10) dated 13.12.1877; (21) Exhibit 16, Suit-1 (Vol. 5 page 45) dated 13.12.1877; (22) Exhibit 30, Suit-1 (Vol. 5 page 107) dated 13.12.1877; (23) Exhibit 17, Suit-5 (Vol. 20 page 187) dated 18.6.1883; (24) Exhibit-17, Suit-4 (Vol. 10 page 87) dated 18.6.1883; (25) Exhibit 24, Suit-1 (Vol. 5 page 83) dated 18.06.1883; (26) Exhibit 18, Suit-1 (Vol. 5 page 57) dated 02.11.1883; (27) Exhibit 34, Suit-1 (Vol. 5 page 131) dated 12.01.1884; (28) Exhibit 27, Suit-1 (Vol. 5 page 95) dated 22.01.1884; (29) Exhibit 28, Suit-1 (Vol. 5 page 99) dated 27.06.1884; (30)

Exhibit A-22, Suit-1 (Vol. 7 page 237) dated 19.1.1885; (31) Exhibit 26, Suit-5 dated 19.01.1885; (32) Exhibit A-24 and 25, Suit-1 (Vol. 7 page 271 and 277 dated 06.12.1885; (33) Exhibit A-23, Suit-1 (Vol. 7 page 257) dated 22.12.1885; (34) Exhibit A-26, Suit-1 (Vol. 7 page 283) dated 24.12.1885; (35) Exhibit A-27, Suit-1 (Vol. 7 page 319) dated 18/26.3.1886; (36) Exhibit A-49, Suit-1 (Vol. 8 page 477) dated 12.05.1934; (37) Exhibit A-6, Suit-1 (Vol. 6 page 556) dated 5.6.1934; (38) Exhibit A-43, Suit-1 (Vol. 8 page 459) dated 06.10.1934; (39) Exhibit A-51, Suit-1 (Vol. 8 page 483) dated 25.02.1935; (40) Exhibit A-50, Suit-1 (Vol. 8 page 479) dated 16.04.1935; (41) Exhibit A-48, Suit-1 (Vol. 8 page 473) dated 21.11.1935; (42) Exhibit A-53, Suit-1 (Vol. 8 page 493) dated 02.01.1936; (43) Exhibit A-46, Suit-1 (Vol. 8 page 471) dated 27.1.1936; (44) Exhibit A-52, Suit-1 (Vol. 8 page 489) dated 30.4.1936; (45) Exhibit 53, Suit-4 (Vol. 12 page 355) dated 26.3.1946; (46) FIR dated 23rd December, 1949, Exhibit 51, Suit-4 (Vol. 12 page 337); (47) Exhibit 13, Suit-4 dated 14.2.1950; (48) Exhibit 9, Suit-4 (Vol. 10 page 45) dated 16.2.1950; (49) Exhibit 25, Suit-4 (Vol. 10 page 141) dated 30.7.1953; (50) Exhibit A-44 and A-45, Suit-1 (Vol. 8 page 461 and 467); (51) Exhibit A-21, Suit-1 (Vol. 7 page 233); (52) Exhibit 49 and 50, Suit-4. Besides, he referred to the statement of PWs 1-9, 14, 21, 23 and 25 to show that there was continuous prayer (Namaz) in the disputed building.

2773. On the contrary, Hindu parties have claimed their continuous possession on the property in dispute since time immemorial and in any case since 1934 AD. They say that no prayer (Namaz) has been offered in the disputed building earlier and in any case since 1934 AD and, therefore, possession of Hindus on the disputed site cannot be disturbed after expiry of

the period of limitation within which they could have been dispossessed by the Muslim parties. Plaintiff (Suit-3) has also got examined a number of witnesses deposing about worship prior and since 1934 till 1949 and thereafter and the possession of Nirmohi Akhara throughout.

2774. Sri P.N.Mishra, assisted by Miss Ranjana Agnihotri, Advocates appearing on behalf of defendant No.20 (Suit-4) submitted that the defence taken by defendant No.20 is that there was no mosque at all at any point of time and it was throughout a temple wherein Lord Ram was being worshipped by Hindus, being his birth place. However, in any case, the plea of "adverse possession" on the part of plaintiffs (Suit-4) is wholly misconceived. He pointed out that the basic ingredients to prove a case of "adverse possession" are that there should be hostile, open, continuous possession against the "rightful owner". The possession should be peaceful, uninterrupted and must have continued for 12 years. There should be *animus possidendi* with the person claiming adverse possession against rightful owner. He submits that the plaintiffs (Suit-4) have not pleaded anywhere in the plaint as to who was the owner of the disputed property whereagainst the plaintiffs (Suit 4) held property in dispute and that too open, hostile and peaceful. There is no date of possession on which the same became adverse to the real owner and in any case the possession was never peaceful since throughout interruption and interference of Hindus had continued. He contends submits that in fact the evidence on record show that the disputed property continued to be in possession of the Hindus, if not in entirety the substantial part thereof, and it cannot be said that the plaintiffs (Suit-4) have matured their right thereat. He further submits that on one

hand the plaintiffs have claimed themselves to be the owner of the property in question but simultaneously the plea of adverse possession continuing for 12 years and more, maturing in title, has been taken though the law is well settled that inconsistent and mutually destructive pleas cannot be taken. He submits that if the plaintiffs (Suit-4) intended to raise the plea of adverse possession maturing in title, it was incumbent upon them to give up the title, which is not the case and therefore, the case set up by the plaintiffs (Suit-4) in respect to adverse possession is liable to be rejected. On the various aspects, connected with the plea of adverse possession, he cited and relied on the following authorities: **Qadir Bux Vs. Ramchand (supra)**; **Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan & Others AIR 2009 SC 103**; **Ejas Ali Qidwai & Ors. Vs. Special Manager, Court of Wards, Balrampur Estate & Ors. AIR 1935 Privy Council 53; Mosque known as Masjid Shahid Ganj & Ors. Vs. Shiromani Gurdwara Parbandhan Committee (supra)**; **P.T. Munichikkanna Reddy Vs. Revamma (supra)**; **T. Anjanappa and others Vs. Somalingappa and another 2006 (7) SCC 570**; **Amrendra Pratap Singh Vs. Tej Bahadur Prajapati & Ors. AIR 2004 SC 3782**; **Abubakar Abdul Inamdar & Ors. Vs. Harun Abdul Inamdar & Ors. AIR 1996 SC 112**; **Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumari Sharma & Ors. AIR 1996 SC 869**; **Hari Chand Vs. Daulat Ram, AIR 1987 SC 94**; **Sm. Bibhabati Devi Vs. Ramendra Narayan Roy & others AIR 1947 Privy Council 19**; **Raja Rajgan Maharaja Jagatjit Singh (supra)**; **Maharaja Sir Kesho Prasad Singh Bahadur Vs. Bahuria Mt. Bhagjogna Kuer and others AIR 1937 Privy Council 69**; **Nair Service Society Limited Vs. K. C. Alexander**

(supra); **Ram Charan Das Vs. Naurangi Lal & Ors. AIR 1933 Privy Council 75**; **Bhupendra Narayan Sinha Vs. Rajeswar Prosad Bhakat & Ors. AIR 1931 Privy Council 162**; **P.Lakshmi Reddy Vs. L.Lakshmi Reddy (supra)**, **Ramzan & Ors. Vs. Smt. Gafooran Ors. AIR 2008 All 37**, **Prabhu Narain Singh Vs. Ram Niranjan & Ors. AIR 1983 All 223**; **Smt. Bitola Kuer Vs. Sri Ram Charan & Ors. AIR 1978 All 555**; **Shyam Sunder Prasad (supra)**; **D. N. Venkatarayappa & Anr. Vs. State of Karnataka & Ors. 1997 (7) SCC 567**; **Babu Lal Sharma Vs. State of Madhya Pradesh 2009 (7) SCC 161**; **S.M. Karim Vs. Mst. Bibi Sakina AIR 1964 SC 1254**; **B. Leelavathi Vs. Honnamma and another, (2005) 11 SCC 115**; **Dharamarajan & Ors. Vs. Valliammal & Ors., 2008 (2) SCC 741**; **A.S. Vidyasagar Vs. S. Karunanandam 1995 Supp (4) SCC 570**; **P.Periasami Vs. P.Periathambi & Ors., 1995 (6) SCC 523**.

2775. Sri Mishra also submitted that in the case of adverse possession, if continued for 12 years maturing in title extinguishing the title of the rightful owner, no equity lie in favour of the person who has raised the plea of adverse possession. The claim of adverse possession needs to be examined strictly and if there is any gap, the plea must have to fail. Time creates title and therefore animus, who possess the property adversely against true owner to his knowledge, is the essence of the matter. It is said that in Mohammedan Law, the concept of limitation is not recognised. Nor that of adverse possession. The suit, as pleaded in the plaint, does not prove the case of adverse possession. It is said that the doctrine of 'election' is also applicable here since the plea with respect to ownership as well as adverse possession maturing in ownership

simultaneously cannot be taken.

2776. It is contended that, in law, if a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of others and reliance is placed on **National Insurance Co. Ltd. Vs. Mastan and another 2006 (2) SCC 641, R.N. Gosain Vs. Yashpal Dhir 1992 (4) SCC 683**, **Nagubai Ammal and others Vs. B. Shama Rao and others AIR 1956 SC 593** and **C. Beepathumma (supra)**.

2777. In order to show that there was no possession of Muslims and in any case, since 1934, the Muslims have never visited the disputed site and it was continuously in possession of the Hindus, he referred to certain statements and affidavits filed before the City Magistrate, Faizabad in proceedings under Section 145 Cr.P.C. He referred to the statements of Peeru dated 11th February, 1950 which is on record of the proceedings under Sections 145 Cr.P.C. (Register Vol.1, page 99) and the written statement of Anisurrahman (Vol. 2 Page 215) which has been adopted by Mohd. Hasim, one of the plaintiff of Suit-4. Placing reliance on **M/s Kamakshi Builders Vs. M/s Ambedkar Educational Society and others AIR 2007 SC 2191; Dinomoni Chowdharani (supra)**, **Baroda Prosad Roy Chaudhry Vs. Rai Manmath Nath Mitra 41 Indian Cases 456** and **State of T.N. Vs. T. Thulasingam and others 1994 Supp. (2) SCC 405**, he submitted that the statements before the Magistrate in proceedings under Section 145 Cr.P.C. can be taken and considered in evidence in a civil suit.

2778. Sri M.M. Pandey, learned counsel for the plaintiffs (Suit-5) in the context of Issue No. 16 (Suit-5) has submitted:

(A) Apart from the indefeasible rights of the Deity as

mentioned by Katyayana (see para 54 supra), and King's duty to protect the Deity (see para 43 supra) the fundamental claim of Plaintiffs of OOS 5 of 1989 is that under Hindu Law, neither the Deity nor Deity's property is 'alienable', hence alienation thereof is void; consequently no right or title thereto can be prescribed by 'Adverse Possession'. This claim is supported by very recent decision of Supreme Court in the case of **Amarendra Pratap Singh Vs. Tej Bahadur Prajapati and others, 2004 SC 3782 = (2004) 10 SCC 65**. The matter related to sale of certain lands by aboriginal tribal to a certain non-tribal purchaser without the statutory permission of the Competent Authority under Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation 1956; Para 3 of the Regulation provided that any transfer of immovable property by a member of a Scheduled Tribe to a non-tribal shall be absolutely null and void and of no force or effect unless made in favour of another member of a Scheduled Tribe "or with the previous consent in writing of the Competent Authority". Previous permission not having been obtained, the purchaser claimed to have perfected title to transferred land by Adverse Possession for over 12 years under Limitation Act. In para 22, dealing with Article 65 and Section 27 of Limitation Act, the SC emphasised a distinction between acquisition of title 'as of own right' and due to 'default or inaction of the true owner to protect the property', and held the person in adverse possession "acquires title not on his own but on account of default or inaction on the part of the real owner, which stretched

over a period of 12 years results into extinguishing of the latter's title. It is that extinguished title of the real owner which comes to vest in the wrong-doer. The law does not intend to confer any premium on the wrong doing of a person in wrongful possession; it pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrong-doer and re-enter into possession, has defaulted and remained inactive for a period of 12 years, which the law considers to be reasonable for attracting the penalty." In para 23, the SC held: "The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognised by doctrine of adverse possession……." Reliance was placed, in para 24, on **Mahdav Rao Waman Vs Raghunath Venkatesh, AIR 1923 PC 205** holding that it was somewhat difficult to see how a stranger to a Watan can acquire a title by adverse possession for 12 years, the alienation of which is, in the interests of the State, inalienable; the SC noticed that this decision of PC was followed in Karimullah Khan Vs. Bhanu Pratap Singh, AIR 1949 Nag 265 holding that "title by adverse possession on Inam land, Watan land **and Debutter was incapable of acquisition**". Debutter is 'dedicated' property, like property of Deity. Rejecting the claim of adverse possession, SC held in para 25: "It is clear that the law does not permit a right in immovable property vesting in a tribal to be transferred in favour of or acquired by a

non-tribal unless permitted by the previous sanction of the Competent Authority …… It is so because a tribal is considered by the Legislature not to be capable of protecting his own immovable property …….. The State is the custodian and trustee of the immovable property of Tribal and is enjoined to see that the Tribal remains in possession of such property. No period of limitation is prescribed by Para 3A of the Regulation of 1956. The prescription of period of 12 years in Article 65 of Limitation Act becomes irrelevant so far as the immovable property of a Tribal is concerned. The Tribal need not file a Civil Suit which is governed by the law of limitation. It is enough if he, or anyone on his behalf moves the State, or the State itself moves into action to protect him and restores the property to him. To such an action, neither Article 65 of Limitation Act nor Section 27 thereof would be attracted." This ruling of the Supreme Court applies fully to these Suits. The antecedents of a Tribal, under the Orissa Regulation, strongly resemble those of a Hindu Deity. Manu's edict no. 163 of Chapter 8 says: 'an act done by a person……wholly dependant …… is invalid' ("**The Laws of Manu" Penguin Classics, Edn 2000** page 170). Similar proposition is set out in Verse 35 of Chapter 1 in Part 2 (English page 288-89; Sanskrit page 106) of **Naradsmriti** ("Critical Edition and Translation" 1st Edn 2003 by Richard W. Larviere – Shri Jainendra Press, New Delhi): "Those who know the teaching of Shastra say that anything done by a minor or by one who is not independent is invalid." Protection of disabled persons rights in Hindu Law is mentioned in Yajnavalkya

Smriti in verse 25 of 2nd Prakarnam of 2nd Chapter at page 94 (Translated by M.N.Dutta, First Edn 2005, Parimal Publications, Delhi) as follows: "But these limitations of 20 & 10 years respectively do not hold good in the case of …….. properties of invalid and minor……."**Deity is 'wholly dependant' and 'perpetual minor', hence Deity's immovable property is inalienable**; the Deity is unable to manage it's affairs which are managed by a Shebait, and if the Shebait mismanages or fails to protect its interests, a 'next friend' or 'worshipper' is competent to move the machinery of law and the State, too, is under an obligation to protect its rights/interests. Since Hindu Law alone contains the provisions applicable to Hindu Deity – in the absence of any Statute setting out the rights/obligations/antecedents of a Hindu Deity – and contains the law that rights of the Deity are not lost by adverse possession for any length of time, Indian Limitation Act (including Article 65 or Section 27) cannot be applied to the Deity, hence its rights cannot be lost by adverse possession. In this connection a very significant observation by PC may be noticed in the case of Mosque known as **Masjid Shahidganj Vs. Shiromani Gurdwara Prabandhak Committee 1940 PC 116** on the possible effect of the Mosque being treated to be a 'juristic person', the suit having been filed in the name of the Mosque as Plaintiff. At page 119, Col. 2, Sir George Rankin observed as follows: "The choice of this curious form of suit was motivated apparently by a notion that if the Mosque could be made out to be a juristic person, this would assist in establishing that a mosque

remains a mosque for ever, that Limitation cannot be applied to it, that it is not property but owner of the property." This is precisely what the Plaintiffs of OOS 5 of 1989 claim; Plaintiffs 1 & 2 are Hindu Deities/Juristic Entities in their own right in accordance with the Hindu Law, are Owners of Themselves, are everlasting incapable of being destroyed, are not mere properties, hence law of Limitation cannot be applied to them. Another significant observation by the PC, in the context of application of Limitation Act to suits relating to Muslim or Hindu religious institutions, at page 122 col. 1 is: "At the same time, the procedure of the Courts in applying Hindu or Mahomedan Law has to be appropriate to the law which they apply. Thus the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognises certain doctrines of Hindu Law as an essential thereto, e.g. **that an Idol may be the owner of property**". This necessarily called for application of the principles of Hindu Dharmashastra Law to the question of limitation in respect of the Hindu Deity, but in stead of doing so, the PC simply made a broad observation at page 122 col. 1, that 'there has never been any doubt that the property of a Hindu religious endowment – including a thakurbari – is subject to the law of limitation'. Citations noted by PC are: **37 I.A. 147, Damodar Das Vs. Lakhan Das** and **64 I.A. 203 (= AIR 1937 PC 185), Ishwari Bhubanshwari Thakurani Vs. Brojo Nath Dey**. The expression, 'there has never been any doubt…….' only indicates that PC was simply relying upon previous decisions which, did not really

examine the Hindu Dharmashastras or the **Oudh Laws Act pointed out by us above. Indeed in Ishwar** Bhuvaneswari's case, the property had ceased to be 'dedicated' by virtue of a 'consent decree of 1904', hence point of adverse possession over Deity's property did not survive (see page 188-89); even so, the PC held (at page 187 col. 2) that the efffect of a valid deed of dedication is to place the property comprised in the endowment extra commercium and beyond the reach of creditors. The decision, therefore, is not an authority on the point of 'adverse possession/Limitation Act'. Rulings holding that Limitation Act applies to Hindu Deity or that Deity is not a perpetual minor or does not suffer from disability, suffer from a common deficiency, viz., they do not deal with Hindu Dharmashastra Law or Oudh Laws Act or effect of Referential Legislation contained in Oudh Laws Act or the doctrine of "Reading Down" a statutory provision; they were rendered 'per Incuriam', hence are not binding precedents: **State of UP & another Vs. Synthetics & Chemicals Ltd, (1991) 4 SCC 139** (paras 40 & 41), **Sunita Devi Vs. State of Bihar, (2005) 1 SCC 608** (para 19) and **Mayuram Subramanian Vs. CBI, (2006) 5 SCC 752** (para 11).

(B) Referring to an English decision, the SC has noticed in paras 30 and 31 of **2007 (25) LCD 1374 (SC), RT. Munichikanna Reddy Vs. Revamma** that in Adverse Possession, 'Force' is excluded (so forcible demolition of Hindu Temple and erection of Babari Mosque, would not qualify for adverse possession' – indeed, such place is Ankah, taken Ghasbi, i.e. by force where saying of Namaz

is held to be illegal by Islamic scriptures. Manu's edict no. 168 in Chapter 8, on use of force is as follows: "What is given by force, enjoyed by force, and also what is written by force, indeed all matters that are done by force Manu has declared to be undone" ("The Laws of Manu", Penguin Classics Edn 2000, page 170). That is what must be done to DS.

(C) Katyayana Smriti clearly lays down that mere wrongful possession for any length of time of Temple property would not confer ownership on anybody. 'Temple' takes within its ambit, both the Deity and the structure within which it resides; Temple is the Home of the Deity. Since Hindu Deity is a juristic person, it enjoys right of 'constructive possession'. There can be no 'ouster' of Swyambhu Deity; trespass by an outsider, adversely to the Deity, only constitutes temporary suspension of user of the property by Deity which stands automatically restored when the trespass terminates or is sought to be terminated through Court process. Since Law of Limitation does not apply to a Hindu Deity, termination of trespass at any point of time revives Deities' actual possession supplementing its constructive possession. This concept of 'revival' is not to be confused with a case where title/right to property is lost under Section 27 of Limitation Act or by adverse possession – there is no 'revival of right'; the title/right of a Hindu Deity is never lost, what is revived is actual possession only.

(D) The record of these suits establish that members of Muslim Community of Ayodhya could not enjoy peaceful or uninterrupted possession over DA so as to enable them

to acquire title by adverse possession. The law of Adverse possession was created by Statute for the first time in 1871; but between 1608-11, William Finche found Hindus treating DA/DS to be the birthplace of Ram, in 1786 Tieffenthaler found Hindu devotees worshipping DA/DS as birthplace of Ram and in 1853 itself, Muslims ceased to enjoy exclusive possession of DS, as DA including DS – i.e. the building itself – within the boundary walls of disputed area, were forcibly taken possession of by Hindus, leading to fierce fighting in which Muslims were killed of whom 75 (or so) were buried outside the disputed premises (called Ganj Shaheedan), that although in 1855, the British administrators erected a wall through the platform in front of DS to separate the areas of possession of Hindus & Muslims, a determined group of Sikhs re-occupied DS in 1858 and could not be dislodged despite Administration's intervention and that worship was done by Hindus inside the DS. Ext. 2 of SB Suit dated 29.6.1880, the Register of Muafi clearly record that this is the Masjid in Ayodhya for possession of which Hindus and Muslims fight and are rival claimants. This proves that throughout the period from 1853 to 1880 Muslims could never be in continuous peaceful possession of DS/DA. In application dated 02.11.1883, Ext. 18, Md. Asghar admitted possession of Mahant Raghubar Das not only on the Chabutra Janmasthan but also on Sita Rasoi abutting towards North of DS which is mentioned by Tieffenthaler too. In 1885 came the Suit of Mahant Raghubar Das. Md. Asghar/Md. Javed as Mutawalli of Babri Basjid stated in their written statement Ext. A-23

that the Ram Chabutra was constructed in 1857 which the Muslims had complained of and applied for demolition and orders were passed for its demolition and that the plaintiffs and other Hindus used to have ingress/egress into the campus of the Masjid, had been assembling/dispersing, coming/going and making offerings as they do at other religious places like Imambaras/Masjids for their spiritual benefit. This proves that the Hindu devotees had access to DS and were worshipping and making offerings inside the DS. Thus SB have failed to establish continuous peaceful possession for any specific period of 12 years to acquire title by adverse possession.

(E) It is admitted that in the year 1934 during communal riots caused by cow slaughter by some Muslims at Ayodhya the domes of DS and substantial part thereof were destroyed by the Hindus. The damage was repaired by the government and not by SB or the Muslim community on their own. In Para 22 of written statement dated 21.2.1950 (In reply to Plaint of Gopal Singh Visharad's Suit OOS 1 of 1989), Defendant Nos. 1 to 5 (all local Muslims including Zahoor Ahmad D-1, Haji Pheku D-2 and Md. Faiq D-3) stated that Namaz had been offered in DS till 16.12.1949. The truth of this statement is challenged on behalf of the Plaintiff, particularly in view of important contradictions appearing in evidence on behalf of SB, and the significant position is that SB filed the Suit OOS 4 of 1989 on 18.12.1961, i.e., at least two days after the expiry of 12 years from the date (16.12.1949) when the last Namaz was allegedly offered.

Indeed two reports dated 10.12.1949 (**Ext. A-63**) and dated 23.12.1949 (**Ext. A-64**) of Waqf Inspector Md. Ebrahim addressed to the Secretary of SB establish that at least from September 1949 no Namaz or Azan was being offered in DS except on Fridays and that too under great stress and fear of Hindus, Sikhs and Bairagis. Considering all the material on record it is established that DS was not used by Muslims peacefully and regularly for any specific period of 12 years during any time at least from 1853 to 22.12.1949 and that, on the contrary, Hindu devotees had continued to offer their prayers throughout that period and specifically from 1934 Plaintiffs 1 and 2 had been in possession of DS to the exclusion of Muslims.

2779. Except Suit No.1, ownership of the disputed property has been claimed in all the remaining suits. The plaintiffs (Suit-3) have claimed disputed site and the building as property of Nirmohi Akhara. In Suit-4 the plaintiffs' claim that the disputed building being a mosque is a waqf and therefore, it belongs to Almighty. In Suit-5, the plaintiffs No.1 and 2 claimed to be the Deity (a juristic personality) and therefore, owner of the disputed site.

2780. Since some of the parties have claimed their title matured due to inaction on the part of true owner for the last more than twelve years despite possession, hostile to them, therefore, the title of the true owner having extinguished, they have become owner by virtue of adverse possession and for this reason, the aforesaid nine issues have been framed to consider the above pleas.

2781. To understand the concept of "adverse possession" it would be necessary to have a clear idea about the concept of

"possession" and "ownership" in respect to immovable property and also the law, if any, before the codification of law during British regime, i.e., on and after 1857 AD, and also during the period of East India Company when the matter used to be governed by the Regulations framed by the East India Company. Here we propose to consider the above concept also in the context of laws followed by Hindus and Muslims prevailing at the relevant time.

2782. First we come to the English Law on the subject.

2783. **"Ihering"** defines possession, "*whenever a person looks like an onwer in relation to a thing he has possession, unless possession is denied to him by rules of law based on convenience"*. Apparently this definition does not give any explicit idea on the subject. It only states that the concept of possession is an ever changing concept having different meaning for different purposes and different frames of law.

2784. **"Pollock"** says, "*In common speech a man is said to be in possession of anything of which he has the* ***apparent control*** *or from the use of which he has the* ***apparent powers of excluding others****"*. The stress laid by Pollock on possession is not on *animus* but on *de facto* control.

2785. **"Savigny"** defines possession, *"****intention*** *coupled with* ***physical power to exclude others*** *from the use of material object."* Apparently this definition involves both the elements namely, *corpus possesssion is* and *animus domini*.

2786. The German Jurist 'Savigny' laid down that all property is founded on adverse possession ripened by prescription. The concept of ownership accordingly as observed by him involve three elements-Possession, Adverseness of Possession, (that is a holding not permissive or subordinate, but

exclusive against the world), and Prescription, or a period of time during which the Adverse Possession has uninterruptedly continued.

2787. **"Holmes"** opined that possession is a conception which is only less important than contract.

2788. According to **Salmond on "Jurisprudence"**, 12th Edition (1966) (First Edition published in 1902) by P.J. Fitzgerald, Indian Economy Reprint 2006 published by Universal Law Publishing Co. Pvt. Ltd. Delhi *(hereinafter referred to as "Salmond's Jurisprudence")*. On page 51, it say that the concept of "possession" is as difficult to define as it is essential to protect. It is an abstract notion and is not purely a legal concept. It is both a legal and a non-legal or a pre-legal concept. He tried to explain the concept of possession with reference to different factual and legal concepts.

2789. The first one is "possession in fact". It is a relationship between a person and a thing. The things one possesses in his hand or which one has in his control like clothes he is wearing, objects he is keeping in his pocket etc. For such things it can be said that he is in possession of the things in fact. To possess one would have to have a thing under his physical control. If one captures a wild animal, he get possession of it but if the animal escapes from his control, he looses possession. It implies that things not amenable in any manner to human control cannot form the subject matter of possession like one cannot possess sun, moon or the stars etc. Extending the above concept, "Salmond" says that one can have a thing in his control without actually holding or using it at every given moment of time like possession of a coat even if one has taken it off and put down or kept in the cupboard. Even if one fall asleep, the

possession of the coat would remain with him. If one is in such a position, has to be able in the normal course of events to resume actual control when one desires, the possession in fact of the thing is there. Another factor relevant to the assessment of control is the power of excluding other people. The amount of power that is necessary varies according to the nature of the object.

2790. The possession consisted of a "*corpus possessionis"* and "*animus possidendi"*. The former comprised both, the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

2791. Then comes "possession in law". A man, in law, would possess only those things which in ordinary language he would be said to possess. But then the possessor can be given certain legal rights such as a right to continue in possession free from interference by others. This primary right in rem can be supported by various sanctioning rights in personam against those who violates the possessor's primary right; can be given a right for compensation for interference and a dispossession and the right to have his possession restored from the encroacher.

2792. Another facet of possession is "immediate" or "mediate possession". The possession held by one through another is termed "mediate" while that acquired or retained directly or personally can be said to be "immediate or direct". There is a maxim of civil law that two persons could not be in possession of the same thing at the same time. (*Plures eandem rem in solidum possidere non possunt).* As a general proposition exclusiveness is of the essence of possession. Two adverse

claims of exclusive use cannot both be effectually realised at the same time. There are, however, certain exceptions, namely, in the case of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. Two or more persons may possess the same thing in common just as they may own it in common.

2793. Then comes "incorporeal possession". It is commonly called the possession of a right and is distinct from the "corporeal possession" which is a possession of the thing.

2794. In **"The Elementary Principles of Jurisprudence"** by **G.W. Keeton**, II Edition (1949) published by Sir Isaac Pitman and Sons Ltd. London (First published in 1930), "possession" has been dealt in Chapter XV. It says:

> "'*Possession,' says an old proverb, "is nine points of law." Put in another way, this implies that he who has conscious control of an object need only surrender his control to one who can establish a superior claim in law."*

2795. The essentials of possession in the first instance includes a fact to be established like any other fact. Whether it exists in a particular case or not will depend on the degree of control exercised by the person designated as possessor. If his control is such that he effectively excludes interference by others then he has possession. Thus the possession in order to show its existences must show "*corpus possessionis"* and an "*animus possidendi"*.

2796. *Corpus possessionis* means that there exists such physical contact of the thing by the possessor as to give rise to the reasonable assumption that other persons will not interfere with it. Existence of corpus broadly depend on (1) upon the

nature of the thing itself, and the probability that others will refrain from interfering with the enjoyment of it; (2) possession of real property, i.e., when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exist no factors negativing his control, for example the continuance in occupation of one who denies his right; and (3) acquisition of physical control over the objects it encloses. Corpus, therefore, depends more upon the general expectations that others will not interfere with an individual control over a thing, then upon the physical capacity of an individual to exclude others.

2797. The *animus possidendi* is the conscious intention of an individual to exclude others from the control of an object.

2798. Possession confers on the possessor all the rights of the owner except as against the owner and prior possessors. "Possession in law" has the advantage of being a root of title.

2799. There is also a concept of "constructive possession" which is depicted by a symbolic act. It has been narrated with an illustration that delivery of keys of a building may give right to constructive possession all the contents to the transferee of the key.

2800. It would also be useful to have meaning of "possession" in the context of different dictionaries.

2801. In **"Oxford English-English-Hindi Dictionary"** published by Oxford University Press, first published in 2008, 11th Impression January 2010, at page 920:

> *"**possession-**1. the state of having or owning something. 2. Something that you have or own"*

2802. In "**The New Lexicon Webster's Dictionary of the English Language**" (1987), published by Lexicon Publications,

Inc. at page 784:

> *"**pos-ses-sion-**a possessing or being possessed II that which is possessed II (pl.) property II a territory under the political and economic control of another country II (law) actual enjoyment of property not founded on any title of ownership **to take possession of** to begin to occupy as owner II to affect so as to dominate."*

2803. In "**Chambers Dictionary"** (Deluxe Edition), first published in India in 1993, reprint 1996 by Allied Publishers Limited, New Delhi at page 1333 defines 'possess' and 'possession' as under :

> ***"possess** poz-es', vt to inhabit, occupy (obs.); to have or hold as owner, or as if owner; to have as a quality; to seize; to obtain; to attain (Spenser); to maintain; to control; to be master of; to occupy and dominate the mind of; to put in possession (with of, formerly with in); to inform, acquaint; to imbue; to impress with the notion of feeling; to prepossess (obs)."*
>
> ***"possession** the act, state or fact of possession or being possessed, a thing possessed; a subject foreign territory"*

2804. In **"Corpus Juris Secundum",** A Complete Restatement of the Entire American Law as developed by All Reported Cases (1951), Vol. LXXII, published by Brooklyn, N.Y., The American Law Book Co., at pages 233-235:

> *"Possession expresses the closest relation of fact which can exist between a corporeal thing and the person who possesses it, implying an **actual physical contact**, as by sitting or standing upon a thing; denoting custody **coupled with a right or interest of proprietorship**; and "possession" is inclusive of "custody." although*

"custody" is not tantamount to "possession." In its full significance, "possession" connotes domination or supremacy of authority. It implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of thing which would be in the hands of a master or of another for him. It also implies a right to deal with property at pleasure ***and to exclude other persons from meddling with it****. Possession involves power of control and intent to control, and all the definitions contained in recognized law dictionaries indicate that the element of custody and control is involved in the term "possession."*

The word "possession" is also defined as meaning the thing possessed; that which anyone occupies, owns, or controls; and in this sense, as applied to the thing possessed, the word is frequently employed in the plural, denoting property in the aggregate; wealth; and it may include real estate where such is the intention, although this is not the technical signification.

It is also defined as meaning dominion; as, foreign possessions; and, while in this sense the term is not a word of art descriptive of a recognised geographical or governmental entity, it is employed in a number of federal statues to describe the area to which various congressional statutes apply.

"Possession" in the sense of ownership, and as a degree of title, and as indicating the holding or retaining of property in one's power or control, is treated in Property."

2805. In **"Black's Law Dictionary"** Seventh Edition (1999), published by West Group, St. Paul, Minn., 1999, at page

1183:

> *"**possession. 1.** The fact of having or holding property in one's power; the exercise of dominion over property. **2**. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. **3**. (usu. pl.) Something that a person owns or controls; PROPERTY (2). **4**. A territorial dominion of a state or nation."*

2806. In **Black's Law Dictionary (supra)** the following categories of possession have also been referred and explained:

> *"Actual possession, adverse possession, bona fide possession, civil possession, constructive possession, corporeal possession, derivative possession, direct possession, effective possession, exclusive possession, hostile possession, immediate possession, incorporeal possession, indirect possession, insular possession, mediate possession, naked possession, natural possession, notorious possession, peaceable possession, pedal possession, possession in fact, possession in law, possession of right, precarious possession, quasi possession and scrambling possession."*

2807. Since the nature of possession, its various ingredients and effect etc. in the peculiar kind of this case may be required to be considered at the appropriate state, we find it necessary to see the manner in which the above kinds of categories of possession have been described in **Black's Law Dictionary (supra)**:

> ***actual possession.*** *Physical occupancy or control over property.*
>
> ***adverse possession.*** *A method of acquiring title to real*

property by possession for a statutory period under certain conditions, esp. ***a non-permissive use of the land with a claim of right when that use is continuous, exclusive, hostile, open, and notorious****.*

constructive adverse possession. *Adverse possession in which the claim arises from the claimant's payment of taxes under color of right rather than by actual possession of the land.*

bona fide possession. *Possession of property by a person who in good faith does not know that the property's ownership is disputed.*

civil possession. *Civil law. Possession existing by virtue of a person's intent to own a property even though the person no longer occupies or has physical control of it.*

constructive possession. *Control or dominion over a property without actual possession or custody of it. - Also termed effective possession; possessio fictitia.*

corporal possession. *Possession of a material object, such as a farm or a coin. - Also termed natural possession; possissio corporis.*

derivative possession. *Lawful possession by one (such as a tenant) who does not hold title.*

direct possession. *Something that a person owns or controls.*

effective possession. *See constructive possession.*

exclusive possession. *The exercise of exclusive dominion over property, including the use and benefit of the property.*

hostile possession. *Possession asserted against the claims of all others, including the record owner. See Adverse*

Possession.

immediate possession. *Possession that is acquired or retained directly or personally. - Also termed direct possession.*

incorporeal possession. *Possession of something other than a material object, such as an easement over a neighbour's land, or the access of light to the windows of a house. - Also termed possessio juris; quasi-possession.*

indirect possession. *See mediate possession.*

mediate possession. *Possession of a thing through someone else, such as an agent. - Also termed indirect possession.*

naked possession. *The mere possession of something, esp. real estate without any apparent right or colorable title to it.*

natural possession. *Civil law. The exercise of physical detention or control over a thing, as by occupying a building or cultivating farmland.*

notorious possession. *Possession or control that is evident to others; possession of property that, because it is generally known by people in the area where the property is located, gives rise to a presumption that the actual owner has notice of it. - Also termed open possession; open and notorious possession.*

peaceable possession*. Possession (as of real property) not disturbed by another's hostile or legal attempts to recover possession.*

pedal possession. *Actual possession, as by living on the land or by improving it.*

possession in fact. *Actual possession that may or may not*

be recognized by law. - Also termed possessio naturalis.

possession in law. 1. *possession that is recognized by the law either because it is a specific type of possession in fact or because the law or some special reason attributes the advantages and results of possession to someone who does not in fact possess.* ***2.*** *see constructive possession. - Also termed possessio civilis.*

possession of a right. *The de facto relation of continuing exercise and enjoyment of a right as oppose to the de jure relation of ownership. - Also termed possession juris.*

precarious possession. *Civil law. Possession of property by someone other than the owner on behalf of or with permission of the owner.*

quasi possession. *See incorporeal possession.*

scrambling possession. *Possession that is uncertain because it is in dispute.*

2808. In **"Words and Phrases"** Permanent Edition, Vol. 33 (1971), published by St. Paul, Minn. West Publishing Co., at pages 91-92:

"'Possession' as used in statute is not synonymous with physical bodily presence of adverse claimant; continuous bodily presence is not required, but ***rather question is one of fact which must be determined from circumstances of each case****.*

"Possession" is a common term used in every day conversation that has not acquired any artful meaning.

"Possession", in any sense of term, ***must imply, first, some actual power over the object possessed, and, secondly, some amount of will to avail oneself of that power****.*

"Possession" is one of the most vague of all vague terms, and shifts its meaning according to the subject-matter to which it is applied,--varying very much in its sense, as it is introduced either into civil or into criminal proceedings.

Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others.

To constitute possession, there must be such appropriation of the land to the individual as will apprise the community in its vicinity ***that the land is in his exclusive use and enjoyment****, and* ***notice of possession to be sufficient must be of the open and visible character****, which from its nature will apprise the world that* ***the land is occupied****, and* ***who the occupant is****."*

2809. In **"Jowitt's Dictionary of English Law"** Vol. 2 Second Edition-1977, Second Impression-1990, published by London Sweet & Maxwell Limited, at pages 1387-1389:

*"****Possession,*** *the* ***visible possibility of exercising physical control over a thing, coupled with the intention of doing so****, either against all the world, or against all the world except certain persons. There are, therefore,* ***three requisites of possession. First****, there must be actual or potential physical control.* ***Secondly****, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it.* ***Thirdly****, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed; hence, if a piece of land is deserted and left*

without fences or other signs of occupation, it is not in the possession of anyone, and the possession is said to be vacant. The question ***whether possession of land is vacant is of importance in actions for recovering possession***.

Possession is actual, where a person enters into lands or tenements conveyed to him; apparent, which is a species of presumptive title, as where land descended to the heir of an abator, intruder, or disseisor, who died seised; in law, when lands had descended to a man and he had not actually entered into them, or naked, that is, mere possession, without colour of right.

The primary meaning is physical control. A secondary meaning is physical control by an agent or servant, or by relation back, e.g., by the owner having entered without remaining in physical possession (Ocean Accident etc., Corporation v. Ilford Gas Co. [1905] 2 K.B. 493).

Possession may also extend over a thing in itself uncontrolled within an inclosure which is controlled, such as horses, sheep or cattle within a fenced field. See Animals Ferae Naturae.

Possession may connote different kinds of control according to the nature of the thing or right over which it is being exercised. A man may possess an estate of land; if he leases it he will be in possession of the rents and profits and the reversion, but not of the land which is in the lessee who may being an action of trespass against the lessor. In regard to real property a mere right without possession is not sufficient to found an action of trespass; for instance, until 1926 a lessee before entry having a mere interesse

termini could not bring an action for trespass on the land demised (Wallis v. Hands [1893] 2 Ch. 75). See Possessio Fratris.

The adage, ***possession is nine parts of the law, means that the person in possession can only be ousted by one whose title is better than his****; every claimant must succeed by the strength of his own title and not by the weakness of his antagonist's.*

Possession does not necessarily imply use or enjoyment.

Possession gives rise to peculiar rights and consequences. The principal is that a possessor has a presumptive title, that is to say, is presumed to be absolute owner until the contrary is shown, and is protected by law in his possession against all who cannot show a better title to the possession than he has.

With reference to its origin, possession is either with or without right.

Rightful possession is where a person has the right to the possession of (that is, the right to possess) property, and is in the possession of it with the intention of exercising his right. This kind of possession necessarily varies with the nature of the right from which it arises; a person may be in possession of a thing by virtue of his right of ownership, or as lessee, bailee, etc.; or his possession may be merely permissive, as in the case of a licensee; or it may be a possession coupled with an interest, as in the case of an auctioneer (Woolfe v. Horne (1867) 2 Q.B.D. 358). So the right may be absolute, that is, good against all persons: or relative, that is, good against all with certain

exceptions; thus a carrier or borrower of goods has a right to their possession against all the world except the owner.

In jurisprudence, the possession of a lessee, bailee, licensee, etc., is sometimes called derivative possession, while in English law the possessory interest of such a person, considered with reference to his rights against third persons who interfere with his possession, is usually called a special or qualified property, meaning a limited right of ownership.

Possession without right is called wrongful or adverse, according to the rights of the owner or those of the possessor are considered. Wrongful possession is where a person takes possession of property to which he is not entitled, so that the possession and the right of possession are in one person, and the right to possession in another. Where an owner is wrongfully dispossessed, he has a right of action to recover his property, or, if he has an opportunity, he can exercise the remedy of recaption in the case of goods, or of entry in the case of land."

2810. In **"Legal Thesaurus"** Regular Edition-William C. Burton (1981), published by Macmillan Publishing Co., Inc. New York., at page 391:

*"**POSSESSION** (Ownership), **noun***

authority, custody, demesne, domination, dominion, exclusive, right, lordship, occupancy, possessio, proprietorship, right, right of retention, seisin, supremacy, tenancy, title

***ASSOCIATED CONCEPTS:** action to recover possession, actual possession, adverse possession, chain of possession, constructive possession, continuity of*

possession, continuous possession, debtor in possession, estate in possession, holder in possession, hostile possession, lawful possession, mortgagee in possession, naked possession, notorious possession, open and notorious possession, party in possession, peaceable possession, person in possession, physical possession, purchaser in possession, quiet possession, right of possession, tenant in possession, undisturbed possession, uninterrupted possession, unlawful possession, wrongful possession.

FOREIGN PHRASES: ***Traditio nihil amplius transferre debet vel potest, adeum qui accipit, quam est apud eum qui tradit.*** *Delivery ought to, and can, transfer nothing more to him who receives than is in possession of him who makes the delivery.* ***Jus triplex est,-propietatis, possessionis, et possibilitatis.*** *Right is threefold,-of property, of possession, and of possibility.* ***In aequali jure melior est conditio possidentis.*** *In a case of equal right the condition of the party in possession is the better.* ***Pro possessione praesumitur de jure.*** *A presumption of law arises from possession.* ***Nihil praescribitur nisi quod possidetur. There is no prescription for that which is not possessed***. ***Privatio praesupponit habitum.*** *A deprivation presupposes something held or possessed.* ***Duorum in solidum dominium vel possessio esse non potest.*** *Sole ownership or possession cannot be in two persons.* ***Cum de lucro duorum quaeritur, melior est causa possidentis.*** *When the question of gain lies between two persons, the cause of the possessor is the better.* ***Longa possessio parit jus possidendi, et tollit actionem vero domino.-****Long*

possession creates the right of possession, and deprives the true owner of his right of action. ***Aliud est possidere, aliud esse in possessione. It is one thing to possess; it is another to be in possession***. ***Quod meum est sine facto meo vel defactu meo amitti vel in alium transferri non potest.*** *That which is mine cannot be transferred to another without my act or my default.* ***Quod meum est sine me auferri non potest.*** *What is mine cannot be taken away without my consent.* ***Nul charter, nul vente, ne nul done vault perpetualment, si le donor n'est seise al temps de contracts de deux droits, sc. Del droit de possession et del droit de propertie.*** *No grant, no sale, no gift, is valid forever, unless the donor, at the time of the contract, has two rights, namely, the right of possession, and the right of property.* ***Donatio perficitur possessione accipientis.*** *A gist is perfected by the possession of the receiver.* ***Melior est conditio possidentis, et rei quam actoris.*** *The condition of the possessor and that of the defendant is better than that of the plaintiff.* ***In pari delicto melior est conditio possidentis.*** *When the parties are equally in wrong, the condition of the possessor is the preferable one.* ***Longa possessio jus parit.*** *Long possession begets right.* ***Donator nunquam desinit possidere, antequam donatorius incipiat possidere.*** *A donor never ceases to possess until the donee begins to possess.* ***Non valet donatio nisi subsequatur traditio.*** *A gift is invalid unless accompanied by possession.* ***Nemo dare potest quod non habet.*** *No one is able to give that which he has not.* ***Terra manens vacua occupanti conceditur. Land remaining vacant is given to the occupant***. ***Non potest videri desisse***

habere qui nunquam habuit. *A person who has never had cannot be deemed to have ceased to have it.* ***In pari causa possessor potior haberi debet.*** *In an equal cause he who has the possession has the advantage.* ***Cum par delictum est duorum, semper oneratur petitor et melior habetur possessoris cause. When there is equal fault on both sides, the burden is always placed on the plaintiff, and the cause of the possessor is preferred****.*

POSSESSION *(Property),* ***noun***

asset, belonging, bona, chattel effect, goods, holding, item, item of personalty, money, movable, possessio, res, resource, treasure, valuable.

FOREIGN PHRASES: Non possessori incumbit necessitas probandi possessiones ad se pertinere. It is not incumbent on the possessor of property to prove that his possessions belong to him*.*

POSSESSIONS, noun

assets, belongings, bonorum, capital, chattels, colonies, domain, dominions, earnings, effects, equity, estate, fortune, funds, goods, holdings, items of personalty, material wealth, movables, pecuniary resources, personal property, personalty, possessio, private property, property, res, resources, stock, stock in trade, territory, treasure, wealth, worldly belongings."

2811. In **"Mitra's Legal & Commercial Dictionary"** 5th Edition (1990) by A.N. Saha, published by Eastern Law House Pvt. Ltd., at pages 558-559:

Possession, *the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except*

certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed.

Possession is a polymorphous term which may have different meanings in different contents. It is impossible to work out a completely logical and precise definition of "Possession" uniformly applicable to all situations in the context of all statutes. Suptd. And Legal Rememberancer v. Anil Kumar AIR 1980 SC 52:1979 Cr LJ 1390: (1979) 2 SCWR 334: 1979 Cr App R (SC) 282. ***Possession must be conscious possession****. S.D.O., Shiv Sagar v Goapl Chandra AIR 1971 SC 1190. Possession must be de facto possession as also precarious possession. Bishambhar v State of Bihar 1979 Cr LJ (NOC) 197: 1979 BLJ 319.*

Possession or occupation may take various forms and even keeping the household affects by the owner in the premises is act of occupation. Bimal Devi v Kailash Nandan AIR 1984 SC 1376.

There are two varieties of possession--(a) real or actual possession, and (b) constructive or symbolical possession.

The meaning of ***possession depends on the context in which it is used****. English law has never worked out a completely logical and exhaustive definition of possession. Towers & Co. Ltd. v Gray (1961) 2 All ER 68: (1961) 2 QB*

351.

Possession need not be physical possession, but can be constructive, having power and control over the gun. Gunwantlal v State AIR 1972 SC 1756."

2812. In **P Ramanatha Aiyar's "The Law Lexicon" with Legal Maxims**, Latin Terms and Words & Phrases, Second Edition 1997), published by Wadhwa and Company Law Publishers, at pages 1481-1483:

"1. Physical control, whether actual or in the eyes of law, over property; the condition of holding at one's disposal (S. 66, T.P. Act); 2. the area in one's possession (S. 37, Indian Evidence Act).

Possession is a detention or enjoyment of a thing which a man holds or exercise by himself or by another, who keeps or exercise it in his name.

"Possession is said to be in two ways-either actual possession or possession in law.

"Actual Possession," is, when a man entreth into lands or tenements to him descended, or otherwise.

"Possession in Law, is when lands of tenements are descended to a man, and he hath not as yet really, actually, and in deed entered into them: And it is called possession in law because that in the eye and consideration of the law, he is deemed to be in possession, inasmuch as he is liable to every mans action that will sue concerning the same lands or tenements."

The term has been defined as follows: Simply the owning or having a thing in one's power; the present right and power to control a thing; the detention and control of the manual or ideal custody of anything which may be the subject of

property, for one's use of enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name; the detention or enjoyment of a thing which a man holds or exercise by himself or by another who keeps or exercises it in his name; the act of possession a having and holding or retaining of property in one's power or control; the sole control of the property or of some physical attachment to it; that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons. 171 IC 159=1937 ALJ 951=1937 ALR 913=1937 AWR 823=AIR 1937 All 735; 12 Bom LR 316=5 IC 457; 6 Bom LR 887; 16 CPLR 13; 4 NLR 78=8 Cr LJ 18.

There can be no possession without intention or consciousness or will. ***Norendranath Masumdar, v. The State, AIR 1951 Cal 140.*** *(S. 19(f) Arms Act. 1878).*

Possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power or control. ***Gunwantlal v. The State of M.P., AIR 1972 SC 1756, 1759****.*

Possession is a polymorphous term which may have different meanings in different contents. The possession of a fire arm must have the element of consciousness or knowledge of that possession and when there is no actual physical possession a control or dominion over it, there is no possession.

The word "possession" naturally signifies lawful possession. The possession of a trespasser could not be a

possession of a tenant so as to attract Sec. 14(1). ***Bhagat Ram v. Smt. Lilawati Galib, AIR 1972 HP 125, 130****.*

The word 'possessed' means the state of owning or having in one's hand or power but even this broad meaning will not apply in the case of a share or a woman when there has been no partition by metes and bounds. ***Modi Nathubai Motilal v. Chhotubhai Manibhai Besai, AIR 1962 Guj. 68, 77****.*

Obtaining a symbolic possession is in law equivalent to obtain actual physical possession and has the effect of terminating the legal possession of the person bound by the decree and order. ***Umrao Singh v. Union of India; AIR 1975 Del. 188, 191****.*

The word 'possession' implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. In ***Re Pachiripalli Satyanarayanan, AIR 1953 Mad 534****.*

Where an estate or interest in realty is spoken of as being "in possession", that does not, primarily, mean the actual occupation of the property; but means, the present right thereto or to the enjoyment thereof.

*The word "****possession" in S. 28 of the Limitation Act*** *XV of 1877,* ***embraces both actual possession and possession in law****, 6 CWN 601.*

The word "possession" in C.P. Code, includes constructive possession, such as possession by a tenant. 25 B. 478(491).

Possession in Specific Relief Act (I of 1877), S. 9 does not include joint possession, but refers to exclusive possession. 23 IC 618 (619).

The word "possession" means the legal right to possession. ***Health v. Drown, (1972) 2 All ER 561, 573 (HL)****."*

2813. There is a distinction between the terms "possession", "occupation" and "control". The distinction between "possession" and "occupation" was considered in **Seth Narainbhai Ichharam Kurmi and another Vs. Narbada Prasad Sheosahai Pande and others, AIR 1941 Nagpur 357** and the Court held:

*"****Bare occupation and possession are two different things****. The concept of possession, at any rate as it is understood in legal terminology, is a complex one which need not include actual occupation. It comprises rather the right to possess, and the right and ability to exclude others from possession and control coupled with a mental element, namely, the animus possidendi, that is to say, knowledge of these rights and the desire and intention of exercising them if need be. The adverse possession of which the law speaks does not necessarily denote actual physical ouster from occupation but an ouster from all those rights which constitute possession in law. It is true that physical occupation is ordinarily the best and the most conclusive proof of possession in this sense* ***but the two are not the same. It is also true that there must always be physical ouster from these rights but that does not necessarily import physical ouster from occupation especially when this is of just a small room or two in a house and when this occupation is shared with others. The nature of the ouster and the quantum necessary naturally varies in each case****."*

2814. The distinction between "possession", "occupation" or "control" was also considered in **Sumatibai Wasudeo Bachuwar Vs. Emperor, AIR (31) 1944 Bom. 125** and the Court held:

> *"Some documents containing perjudicial reports were found in a box in the house occupied by the applicant and her husband. When the house was raided by the police, the husband was out and the applicant (wife) produced the keys with one of which the box could be opened. In addition to perjudicial reports, there were some letters in the box addressed to the applicant. Held,. (1) that, prima facie, the box containing the documents would be in the possession of the husband and the mere fact that in his absence he had left the keys with the applicant (wife) would not make her in joint possession with himself; nor did the fact that there were letters in the box addressed to the wife mean that she was in joint possession of all the contents of the box; (2) that the wife was in the circumstances in possession of the box within the meaning of R. 39(1) of the Defence of India Rules; (3) that occupation in R. 39 (2) of the Defence of India Rules meant legal occupation, and the applicant could not be held to be in occupation or control of the house so as to render her guilty under R. 39 of the Defence of India Rules."*

2815. In "**Mitra's Law of Possession and Ownership of Property"** reprint 2010 published by Sodhi Publication, Allahabad, certain kinds of possession in the light of Courts' verdict have been provided as under :

> ***Continuous possession.-*** *The meaning of the word "continue" means to keep existing or happening without*

stopping and the word "continuous" describes something that continues without stopping. In a case where the plaintiff was in possession for a period of five years at a time on the basis of a lease, the moment the period of lease expired, the Court held in ***Kartik Mandal Vs. State of Bihar AIR 2009 Pat. 33*** *that he was bound to restore before the possession of the settler and cannot claim to be in continuous possession.*

Effective possession.- *Where* ***the plaintiff did not get*** *the possession of the land as to control it* ***as per his desire means that he is not having effective possession of the land*** *as held in* ***Alkapuri Co-operative Housing Society Ltd. Vs. Jayantibhai Naginbhai AIR 2009 SC 1948****.*

De jure possession.- *A possession deemed in law though actually it is in possession of another is de jure possession as held in* ***Kottakkal Co-operative Urban Bank Vs. Balakrishna AIR 2008 Ker. 179****.*

Exclusive possession.- *In* ***Nirmal Kanta (Smt.) Vs. Ashok Kumar 2008 (7) SCC 722****, the respondent no. 2 was accommodated by respondent no. 1 to assist him in his cloth business by helping customers to assess the amount of cloth required for their particular purposes. The said activity did not give respondent no. 2 exclusive possession for that part of the shop room from where he was operating and where his sewing machine had been affixed. This view taken by the Court below was upheld by the Apex Court.*

Hostile possession A possession against the real owner within his knowledge constitute hostile possession. *Where a person is* ***not sure who is the true owner, the question of his being in hostile possession does not arise***

and it would also not result in assuming that he was denying title of true owner. This is what was held by this Court in ***Ramzan Vs. Smt. Gafooran (supra)****. When a person claims possession over a property showing himself to be the owner, the question of showing hostile possession would not arise. Similarly, in* ***Gopendra Goswami Vs. Haradhan Das AIR 2009 Gau 41****, it was held that* ***mere possession over a land cannot be treated hostile to the title of the real owner unless it is shown that the real owner has the knowledge and thereupon the possession of the stranger continued****.*

Physical possession.*- It is the actual possession over the land. (See :* ***Dhara Singh Vs. Fateh Singh AIR 2009 Raj. 132)***

Wrongful possession*.- Possession contrary to law is the wrongful possession.*

2816. Possession can also be classified as under:

(a) De facto possession (b) De jure possession (c) Symbolic possession (d) Joint possession (e) Concurrent possession. Besides, some more categories are forcible possession, independent possession, lawful possession, permissive possession and settled possession.

2817. A retrospect of ancient post, the concept of possession in ancient laws in different civilizations was known to the mankind. A comparative study we find, in the work of "Sir Henry Summer Maine" (in short 'Maine'). He is considered to be the founder of comparative jurisprudence of ancient laws. Much earlier in 1861 AD, comparative jurisprudence under the heading **"Ancient Law"-Its connection with the Early History of Society and its Relation to Modern Ideas**, was written by

“Sir Henry Sumner Maine”. The edition before the Court is one published by Dorset Press in 1986 at United States of America.

2818. "Sir Maine" was highly influenced by Roman Law. He observed in Chapter-I under the heading “Ancient Codes”:

> *“The most celebrated system of jurisprudence known to the world begins, as it ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law. . . .”*
>
> *“The ancient Roman code belongs to a class of which almost every civilized nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another.” (Page 1)*

2819. In respect to the **Laws in East** and in particular **Hindus,** he observed:

> *“But in the East, as I have before mentioned, the ruling aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power; while in some instances the physical conformation of Asiatic countries had the effect of making individual communities larger and more numerous than in the West; and it is a known social law that the larger the space over which a particular set of institutions is diffused, the greater is its tenacity and vitality. From whatever cause, the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and wore*

a very different character. The religious oligarchies of Asia, either for their own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal learning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted. Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed. The Hindoo code, called the Laws of Menu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law. It is consistent with human nature and with the special motives of their authors, that codes like that of Menu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity. Menu, according to Hindoo mythology, is an emanation from the supreme God; ***but the compilation which bears his name, though its exact date is not easily discovered****, is, in point of the relative progress of Hindoo jurisprudence,* ***a recent production****." (Page 14)*

2820. Further he says:

"*The fate of the Hindoo law is, in fact, the measure of the value of the Roman code. Ethnology shows us that the Romans and the Hindoos sprang from the same original*

stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindoo jurisprudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these corruptions the Romans were protected by their code. It was compiled while the usage was still wholesome, and a hundred years afterwards it might have been too late. The ***Hindoo law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done****." (Page 16-17)*

2821. The concept of possession has been discussed by "Sir Maine" in Chapter-VIII under the heading "The Early History of Property". Referring to the natural modes of acquiring property known in Roman law he observed:

"The wild animal which is snared or killed by the hunter, the soil which is added to our field by the imperceptible deposits of a river, the tree which strikes its roots into our ground, are each said by the Roman lawyers to be acquired by us naturally." (Page 203)

2822. Therefore, one of the **mode of possession** is **occupation** or occupancy.

2823. "Sir Maine" further says :

"Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view (adds the technical definition) of acquiring property in it for yourself. The objects which the Roman lawyers called ***res nullius—things which have not or***

have never had an owner*—can only be ascertained by enumerating them. Among things which never had an owner are wild animals, fishes, wild fowl, jewels disinterred for the first time, and lands newly discovered or never before cultivated. Among things which have not an owner are moveables which have been abandoned, lands which have been deserted, and (an anomalous but most formidable item) the property of an enemy. In all these objects the full rights of dominion were acquired by the Occupant, who first took possession of them with the intention of keeping them as his own—an intention which, in certain cases, had to be manifested by specific acts." (Page 203)*

"If the Roman law of Occupancy is to be taxed with having had permicious influence on any part of the modern Law of Nations, there is another chapter in it which may be said, with some reason, to have been injuriously affected. In applying to the discovery of new countries the same principles which the Romans had applied to the finding of a jewel, the Publicists forced into their service a doctrine altogether unequal to the task expected from it. Elevated into extreme importance by the discoveries of the great navigators of the 15th and 16th centuries, it raised more disputes than it solved. The greatest uncertainty was very shortly found to exist on the very two points on which certainty was most required, ***the extent of the territory which was acquired for his sovereign by the discoverer, and the nature of the acts which were necessary to complete the adprehensio or assumption of sovereign possession****. Moreover, the principle itself, conferring as it*

did such enormous advantages as the consequence of a piece of good luck, was instinctively mutinied against by some of the most adventurous nations in Europe, the Dutch, the English, and the Portuguese. Our own countrymen, without expressly denying the rule of International Law, never did, in practice, admit the claim of the Spaniards to engross the whole of America south of the Gulf of Maxico, or that of the King of France to monopolise the valleys of the Ohio and the Mississippi. From the accession of Elizabeth to the accession of Charles the Second, it cannot be said that there was at any time thorough peace in the American waters, and the encroachments of the New England Colonists on the territory of the French King continued for almost a century longer. Bentham was so struck with the confusion attending the application of the legal principle, that he went out of his way of eulogise the famous Bull of Pope Alexander the Sixth, dividing the undiscovered countries of the world between the Spaniards and Portuguese by a line drawn one hundred leagues West of the Azores; and, grotesque as his praises may appear at first sight, it may be doubted whether the arrangement of Pope Alexander is absurder in principle than the rule of Public Law, which gave half a continent to the monarch whose servants had fulfilled the conditions required by Roman jurisprudence for the acquisition of property in a valuable object which could be covered by the hand." (Page 206-207)

"To all who pursue the inquiries which are the subject of this volume Occupancy is pre-eminently interesting on the score of the service it has been made to

perform for speculative jurisprudence, in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in Occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. The course of thought which led to this assumption is not difficult to understand, if we seize the shade of difference which separates the ancient from the modern conception of Natural Law. The Roman lawyers had laid down that Occupancy was one of the Natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of Nature, Occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of Nature. Since then it had received the position that the earth and its fruits were once res nullius, and since its peculiar view of Nature led it to assume without hesitation that the human race had actually practised the Occupancy of res nullius long before the organisation of civil societies, the inference immediately suggested itself that Occupancy was the process by which the 'no man's goods' of the primitive world became the

private property of individuals in the world of history." (Page 207-208)

2824. **"Maine"** has quoted **"Blackstone"** as under:

*"'**The earth**,' he writes, '**and all things therein were the general property of mankind from the immediate gift of the Creator**. Not that the communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing; nor could be extended to the use of it. For, by the law of nature and reason he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force, but the instant that he quitted the use of occupation of it, another might seize it without injustice.' He then proceeds to argue that "when mankind increased in number, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used." (Page 208-209)*

2825. Explaining occupancy, Maine observes :

"Occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual.

Their object in so stating their theory was to reconcile the doctrine that ***in the state of Nature res nullius became property through Occupancy****, with the inference which they drew from the Scriptural history that the Patriarchs did not at first permanently appropriate the soil which had been grazed over by their flocks and herds." (Page 209-210)*

2826. Referring to 'Savigny', 'Sir Maine' observed:

"It is not wonderful that property began in adverse possession. It is not surprising that the first proprietor should have been the strong man armed who kept his goods in peace. But why it was that lapse of time created a sentiment of respect for his possession—which is the exact source of the universal reverence of mankind for that which has for a long period de facto existed—are questions really deserving the profoundest examination, but lying far beyond the boundary of our present inquiries." (Page 212)

"Occupancy is the advised assumption of physical possession; and the notion that an act of this description confers a title to 'res nullius', so far from being characteristic of very early societies, is in all probability the growth of a refined jurisprudence and of a settled condition of the laws. It is only when the rights of property have gained a sanction from long practical inviolability, and when the vast majority of the objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with dominion over commodities in which no prior proprietorship has been asserted. The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and

uncertainty of proprietary rights which distinguish the beginnings of civilisation. Its true basis seems to be, not an instinctive bias towards the institution of Property, but a presumption, arising out of the long continuance of that institution, that everything ought to have an owner. When possession is taken of a 'res nullius', that is, of an object which is not, or has never been, reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally the subjects of an exclusive enjoyment, and that in the given case there is no one to invest with the right of property except the Occupant. The Occupant in short, becomes the owner, because all things are presumed to be somebody's property and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing." (Page 212-213)

2827. Referring to "laws of ownership" followed in India by Hindus, 'Sir Maine' says:

"The Roman jurisprudence will not here assist in enlightening us, for it is exactly the Roman jurisprudence which, transformed by the theory of Natural Law, has bequeathed to the moderns the impression that individual ownership is the normal state of proprietary right, and that ownership in common by groups of men is only the exception to a general rules. There is, however, one community which will always be carefully examined by the inquirer who is in quest of any lost institution of primeval society. How far soever any such institution may have undergone change among the branch of the Indo-European family which has been settled for ages in India, it will

seldom be found to have entirely cast aside the shell in which it was originally reared. It happens that, among the Hindoos, we do find a form of ownership which ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the Law of Persons would lead us to entertain respecting the original condition of property. The Village Community of India is at once an organised patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights, and to the attempts of English functionaries to separate the two may be assigned some of the most formidable miscarriages of Anglo-Indian administration. ***The Village Community is known to be of immense antiquity****. In whatever direction research has been pushed into Indian history, general or local, it has always found the Community in existence at the farthest point of its progress. A great number of intelligent and observant writers, most of whom had no theory of any sort to support concerning its nature and origin, agree in considering it the least destructible institution of a society which never willingly surrenders any one of its usages to innovation. Conquests and revolutions seem to have swept over it without disturbing or displacing it, and the most beneficient systems of government in India have always been those which have recognised it as the basis of administration.*

The ***mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of***

property. *This view is clearly indicated in the maxim which obtains universally in Western Europe, Nemo in communione potest invitus detineri ('No one can be kept in co-proprietorship against his will').* ***But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common***. *The process has been adverted to already. As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but* ***the Community is more than a brotherhood of relatives and more than an association of partners***. *It is an organised society, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for internal government, for police, for the administration of justice, and for the apportionment of taxes and public duties." (Page 215-217)*

2828. Regarding village communities and their system of

holding land, Sir Maine observed:

> *"The process which I have described as that under which a Village Community is formed, may be regarded as typical. Yet it is not to be supposed that every Village Community in India drew together in so simple a manner. Although, in the North of India, the archives,* ***as I am informed****, almost invariably show that the Community was founded by a single assemblage of blood-relations, they also supply information that men of alien extraction have always, from time to time, been engrafted on it, and a mere purchaser of a share may generally, under certain conditions, be admitted to the brotherhood. In the South of the Peninsula there are often Communities which appear to have sprung not from one but from two or more families; and there are some whose composition is known to be entirely artificial; indeed, the occasional aggregation of men of different castes in the same society is fatal to the hypothesis of a common descent. Yet in all these brotherhoods either the tradition is preserved, or the assumption made, of an original common parentage. Mountstuart Elphinstone, who writes more particularly of the Southern Village Communities, observes of them (History of India, i. 126): 'the popular notion is that the Village landholders are all descended from one or more individuals who settled the village, and that the only exceptions are formed by persons who have derived their rights by purchase or otherwise from members of the original stock. The supposition is confirmed by the fact that, to this day, there are only single families of landholders in small villages and not many in large ones;*

but each has branched out into so many members that it is not uncommon for the whole agricultural labour to be done by the landholders, without the aid either of tenants or of labourers. The rights of the landholders are theirs collectively and, though they almost always have a more or less perfect partition of them, they never have en entire separation. A landholder, for instance, can sell or mortgage his rights; but he must first have the consent of the Village, and the purchaser steps exactly into his place and takes up all his obligations. If a family becomes extinct, its share returns to the common stock." (Page 217-219)

2829. On page 223 he further says:

"In India, not only is there no indivisibility of the common fund, but separate proprietorship in parts of it may be indefinitely prolonged and may branch out into any number of derivative ownerships, the de facto partition of the stock being, however, checked by inveterate usage, ***and by the rule against the admission of strangers without the consent of the brotherhood****."*

2830. The Hindu Dharam-shastras containing legal principles are mainly in Smritis. ***Narada-smriti*** *or* ***Naradiya Dharmasastra*** contains the laws with regard to 'property' or and 'possession' are stated as under:

"43. All transactions depend on wealth. In order to acquire it, exertion is necessary. To preserve it, to increase it, and to enjoy it : these are, successively, the three sorts of activity in regard to wealth.

44. Again, wealth is of three kinds : white, spotted, and black. Each of these (three) kinds has seven subdivision.

45. White wealth is (of the following seven sorts) : what is acquired by sacred knowledge, valour in arms, the practice of austerities, with a maiden, through (instructing) a pupil, by sacrificing, and by inheritance. The gain to be derived from exerting oneself to acquire it is of the same description.

46. Spotted wealth is (of the following seven sorts) : what is acquired by lending money at interest, tillage, commerce, in the shape of Sulka, by artistic performances, by servile attendance, or as a return for a benefit conferred on some one.

47. Black wealth is (of the following seven sorts) : what is acquired as a bribe, by gambling, by bearing a message, through one afflicted with pain, by forgery, by robbery, or by fraud.

48. It is in wealth that purchase, sale, gift, receipt, transactions of every kind, and enjoyment, have their source.

49. Of whatever description the property may be, with which a man performs any transaction, of the same description will the fruit be which he derives from it in the next world and in this.

50. Wealth is again declared to be of twelve sorts, according to the caste of the acquirer. Those modes of acquisition, which are common to all castes, are threefold. The others are said to be ninefold.

51. Property obtained by inheritance, gifts made from love, and what has been obtained with a wife (as her dowry), these are the three sorts of pure wealth, for all (castes) without distinction.

52. The pure wealth peculiar to a Brahman is declared to be threefold : what has been obtained as alms, by sacrificing, and through (instructing) a pupil.

53. The pure wealth peculiar to a Kshatriya is of three sorts likewise : what has been obtained in the shape of taxes, by fighting, and by means of the fines declared in lawsuits.

54. The pure wealth peculiar to a Vaisya is also declared to be threefold : (what has been acquired) by tillage, by tending cows, and by commerce. . . . .”

2831. Similarly, ***Brihaspati Smriti*** deals with 'possession' as under:

*“2. I**mmovable property** may be acquired in seven different ways, viz. by learning, by purchase, by mortgaging, **by valour**, with a wife (as her dowry), by inheritance (from an ancestor), and by succession to the property of a kinsman who has no issue.*

3. In the case of property acquired by one of these seven methods, viz. inheritance from a father (or other ancestor), acquisition (in the shape of a dowry), purchase, hypothecation, succession, valour, or learned knowledge, possession coupled with a legitimate title constitutes proprietary right.

4. That possession which is hereditary, or founded on a royal order, or coupled with purchase, hypothecation or a legitimate title : possession of this kind constitutes proprietary right.

5. Immovable property obtained by a division (of the estate among co-heirs), or by purchase, or inherited from a father or other ancestor), or presented by the king, is

acknowledged as one's lawful property ; it is lost by forbearance in the case of adverse possession.

6. He who is holding possession (of an estate) after having merely taken it, occupying it without meeting with resistance, becomes its legitimate owner thus; and it is lost (to the owner) by such forbearance.

7. He whose possession has been continuous from the time of occupation, and has never been interrupted for a period of thirty years, cannot be deprived of such property.

8. That property which is publicly given by co-heirs or others to a stranger who is enjoying it, cannot be recovered afterwards by him (who is its legitimate owner).

9. He who does not raise a protest when a stranger is giving away (his) landed property in his sight, cannot again recover that estate, even though he be possessed of a written title to it.

10. Possession held by three generations produces ownership for strangers, no doubt, when they are related to one another in the degree of a Sapinda ; it does not stand good in the case of Sakulyas.

11. A house, field, commodity or other property having been held by another person than the owner, is not lost (to the owner) by mere force of possession, if the possessor stands to him in the relation of a friend, relative, or kinsman.

12. Such wealth as is possessed by a son-in-law, a learned Brahman, or by the king or his ministers, does not become legitimate property for them after the lapse of a very long period even.

13. Forcible means must not be resorted to by the

present occupant or his son, in maintaining possession of the property of an infant, or of a learned Brahman, or of that which has been legitimately inherited from a father.

14. Nor (in maintaining possession) of cattle, a woman, a slave, or other (property). This is a legal rule.

15. If a doubt should arise in regard to a house or field, of which its occupant has not held possession uninterruptedly, he should undertake to prove (his enjoyment of it) by means of documents, (the depositions of) persons knowing him as possessor, and witnesses.

16. Those are witnesses in a contest of this kind who know the name, the boundary, the title (of acquisition), the quantity, the time, the quarter of the sky, and the reason why possession has been interrupted.

17. By such means should a question regarding occupation and possession be decided in a contest concerning landed property ; but in a cause in which no (human) evidence is forthcoming, divine test should be resorted to.

18. When a village, field, or garden is referred to in one and the same grant, they are (considered to be) possessed of all of them, though possession be held of part of them only. (On the other hand) that title has no force which is not accompanied by a slight measure of possession even.

19. Not to possess landed property, not to show a document in the proper time, and not to remind witnesses (of their deposition) : this is the way to lose one's property.

20. Therefore evidence should be preserved carefully; if this be done, lawsuits whether relating to immovable or to movable property are sure to succeed.

21. Female slaves can never be acquired by possession, without a written title; ***nor (does possession create ownership) in the case of property belonging to a king, or to a learned Brahman, or to an idiot, or infant****.*

22. It is not by mere force of possession that land becomes a man's property ; a legitimate title also having been proved, it is converted into property by both (possession and title), but not otherwise.

23. Should even the father, grandfather, and great-grandfather of a man be alive, land having been possessed by him for thirty years, without intervention of strangers.

24. It should be considered as possession extending over one generation ; possession continued for twice that period (is called possession) extending over two generations ; possession continued for three times that period (is called possession) extending over three generations. (Possession continued) longer than that even, is (called) possession of long standing.

25. When the present occupant is impeached, a document or witness is (considered as) decisive. When he is no longer in existence, possession alone is decisive for his sons.

26. When possession extending over three generations has descended to the fourth generation, it becomes legitimate possession, and a title must never be inquired for.

27. When possession undisturbed (by other) has been held by three generations (in succession), it is not necessary to produce a title ; possession is decisive in that case.

28. In suits regarding immovable property, (possession)

held by three generations in succession, should be considered as valid, and makes evidence in the decision of a cause.

29. He whose possession has passed through three lives, and is duly substantiated by a written title, cannot be deprived of it ; such possession is equal to the gift of the Veda.

30. He whose possession has passed through three lives and has been inherited from his ancestors, cannot be deprived of it, unless a previous grant should be in existence (in which the same property has been granted to a different person by the king).

31. That possession is valid in law which is uninterrupted and of long standing ; interrupted possession even is (recognised as valid), if it has been substantiated by an ancestor.

32. A witness prevails over inference ; a writing prevails over witnesses ; undisturbed possession which has passed through three lives prevails over both.

33. When an event (forming the subject of a plaint) has occurred long ago, and no witnesses are forthcoming, he should examine indirect witnesses, or he should administer oaths, or should try artifice."

2832. Thus in brief, the concept of possession in ancient laws may be stated that Possession in Roman law recognised two degrees of possession, one is being detentio (or *possessio naturalise)* of the object/thing; and the other is *possessio strictly* or *possessio civilise.* Roman law appears to be mainly concern with developing a theory to distinguish between detention and possession from each other. Physical control of an object by

sale, a bailee or an agent was considered only as detention and all other kinds of physical control were treated as possession.

2833. In Muslim law a man in possession of property although by wrongful means has obvious advantages over the possessor. The possessor is entitled to protection against the whole world except the true owner. [The Principles of Mohammedan Jurisprudence (1911)].

2834. In 'Ancient Indian Law' possession was nothing but a legal contrivance based on the considerations of *dharma.* Use and enjoyment of property was restricted and controlled by the holy scriptures. In old Hindu law possession was of two kinds. (a) with title; and (b) without title where possession continued for three generations. Enough importance, however, was given to title (agama) to prove possession. Katyayana said, "*there can be no branches without root, and possession is the branch"*.

2835. Possession, therefore, has two aspects. By itself it is a limited title which is good against all except a true owner. It is also prima facie evidence of ownership. In **Hari Khandu Vs. Dhondi Nanth, (1906) 8 Bom.L.R. 96,** Sir Lawrence Jenkins, C.J. observed that possession has two fold value, it is evidence of ownership and is itself the foundation of a right to possession. The possession, therefore, is not only a physical condition which is protected by ownership but a right itself.

2836. In **Supdt. & Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja & Ors. AIR 1980 SC 52** the possession was described by the Court in paras 13, 14 and 15 as under:

> *"13. "Possession" is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of*

"possession" uniformly applicable to all situations in the contexts of all statutes. Dias & Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Edition, 1966) caused by the fact that ***possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control****. (See Dias and Hughes, ibid)*

14. According to Pollock & Wright "when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that "possession" is not a purely legal concept but also a matter of fact; Salmond (12th Edition, page 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it".

2837. In this case we are concerned with the concept of adverse possession. A person other than owner, if continued to have possession of immoveable property for a period as prescribed in a Statute providing limitation, openly, without any

interruption and interference from the owner, though he has knowledge of such possession, would crystallise in ownership after the expiry of the prescribed period or limitation, if the real owner has not taken any action for re-entry and he shall be denuded of his title to the property in law. 'Permissible possession' shall not mature a title since it cannot be treated to be an 'adverse possession'. Such possession, for however length of time be continued, shall not either to be converted into adverse possession or a title. It is only the hostile possession which is one of the condition for adverse possession.

2838. Ordinarily an owner of property is presumed to be in possession and such presumption is in his favour where there is nothing to be contrary. But where a plaintiff himself admits that he has been dispossessed by the defendant and no longer in proprietary possession of the property in suit at the time of institution of the suit, the Court shall not start with the presumption in his favour that the possession of the property was with him. Mere adverse entry in revenue papers is not relevant for proof of adverse possession. Possession is prima facie evidence of title and has to be pleaded specifically with all its necessary ingredients namely, hostile, open, actual and continuous.

2839. In **Gunga Gobind Mundul Vs. Collector of the 24-pergunnahs 11 Moore's I.A., 345** it was observed by the Privy Council that continuous possession for more than twelve years not only bars the remedy, but practically extinguishes the title of the true owner in favour of the possessor. This was followed by a Division Bench of Calcutta High Court in **Gossain Das Chunder Vs. Issur Chunder Nath 1877 III ILR 3 (Cal.) 224.**

2840. In **Gossain Das Chunder (supra)** the High Court

held that 12 years continuous possession of land by wrong doer not only bars the remedy to also extinguishes the title of the rightful owner. It confers a good title upon the wrong doer.

2841. In **Bhupendra Narayan Sinha (supra)** the Privy Council held where a person without any colour of right wrongfully takes possession as a trespasser of a property of another, any title which he may require by adverse possession will be strictly limited to what he has actually so possessed. That was an interesting case of dispute of ownership in respect to subsoil. It was held that there can be separate ownership of different strata of subsoil, at all events where minerals are involved. If a grant of surface right was given by the owner and the licensee is given possession to carry out the said right, by quarrying stones etc. possession of subsoil in the eyes of law remain with the owner though it is only a constructive possession but in the absence of anything to show that with the knowledge of the owner the licensee held possession of subsoil and minerals therein and continued with that possession for statutory period of limitation to continue its ownership such plea of adverse possession in respect to subsoil cannot be accepted.

2842. In **Basant Kumar Roy Vs. Secretary of State for India & others AIR 1917 PC 18**, it was held:

> *"An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely; acts which prima facie are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other characters or have some other object. ... If, as their*

Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, article 144 is the article applicable, and not article 142."

2843. In **Board Nageshwar Bux Roy Vs. Bengal Coal Co. AIR 1931 PC 18** the observation in respect to adverse possession similar to what has been noted above were made and the said judgement was followed in **Bhupendra Narayan Sinha (supra).**

2844. The law in respect to adverse possession, therefore, is now well settled. It should be nec vi nec clam nec precario. (**Secretary of State for India Vs. Debendra Lal Khan, AIR 1934 PC 23, page 25).** This decision has been referred and followed by the Apex Court in **P. Lakshmi Reddy (supra)** (para 4). The Court further says that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. [**Radhamoni Debi Vs. Collector of Khulna, 27 Ind App. 136 at p. 140 (PC)].** The case before the Apex Court in **P. Lakshmi Reddy (supra)** was that of co-heirs where the plea of adverse possession was set up. In this regard it was held:

"But it is well settled in order, to establish adverse possession of one-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of the joint title. The co-heir in possession cannot

render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster."

2845. In **Thakur Kishan Singh Vs. Arvind Kumar, AIR 1995 SC 73** the Court said:

"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."

2846. In **Sheo Raj Chamar & another Vs. Mudeer Khan & others AIR 1934 All. 868**, it was held:

""If, indeed it did, the defendants have acquired a right by sheer adverse possession held and maintained for more than 12 years. The adverse possession to be effective need not be for the full proprietary right."

2847. In **Saroop Singh Vs. Banto and others, 2005(8) SCC 330** the Court held in para 30:

"30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. . . . ."

2848. In **T. Anjanappa (supra)** the pre-conditions for taking plea of adverse possession has been summarised as

under:

"It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent to as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverese possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

2849. In **P.T. Munichikkanna Reddy (supra)** it was held:

"It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner."

2850. In the above case the Apex Court discussed the law in detail and observed:

"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." (Para 5)

"Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion 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 colour of title."(Para 6)

"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" (Para 9)

2851. In para 12 of the judgment, referring to its earlier decision in **T.Anjanappa (supra),** the Court held that if the defendants are not sure who is the true owner, the question of their being in hostile possession and the question of denying title of the true owner do not arise. It also referred on this aspect its earlier decision in **Des Raj and others vs. Bhagat Ram(Dead) by LRs. And others 2007(3) SCALE 371** and **Govindammal v. R. Perumal Chettiar and others JT 2006(1) SC 121.**

2852. In **Annakili Vs. A. Vedanayagam and others, AIR 2008 SC 346** the Court pointed out that a claim of adverse possession has two elements (i) the possession of the defendant who become adverse to the plaintiff; and (ii) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi is held to be a requisite ingredient of adverse possession well known in law. The Court held:

"It is now a well settled principle of law that mere possession of the land would not ripen into possessor title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more do not

ripen into a title."

2853. In **Vishwanath Bapurao Sabale Vs. Shalinibai Nagappa Sabale and others, JT 2009(5) SC 395** the Court said:

". . . . for claiming title by adverse possession, it was necessary for the plaintiff to plead and prove animus possidendi.

A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim nec vi, nec clam, nec precario, long possession by itself would not be sufficient to prove adverse possession."

2854. The title of property can vests in idols also by adverse possession as held in **Ananda Chandra Chakrabarti vs. Broja Lal Singha and others 1923 Calcutta 142** wherein reliance was also placed on **Balwant** vs**. Puran (1883) 10 I.A. 90; Ramprakash** vs**. Ananda Das 43 Cal.707; Vidya** vs. **Balusami (1921) 48 IA 302; Khaw Sim** vs. **Chuah Hooi (1922) 49 I.A.37; Damodar Das** Vs. **Lakhandas 37 I.A. 147=1910 (37) ILR (Cal.) 885.**

2855. In **Dasami Sahu Vs. Param Shameshwar Uma Bhairabeshwar Bam Lingshar and Chitranjan Mukerji (1929) A.L.J.R. 473**, Hon'ble Sulaiman, J. of this Court held that there can be adverse possession, not only as against the idols but over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour and for the said purpose, reliance was placed on **Maharaja Jagadindra Nath Roy Bahadur V. Rani Hemanta Kumari Debi (1904) 1 A.L.J.R.585; Rao Bahadur Man Singh Vs. Maharani Nawlakhbati (1926) 24 A.L.J.R. 251** and **Damodar Das Vs. Lakhan Das (Supra).** It further held:

"In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such decision is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period."

2856. On the question of whether the claim of adverse possession may succeed against the idol and over the idol, we have already discussed the matter while considering issues relating to limitation. The judgements of Privy Council in **Maharaja Jagadindra Nath Roy Bahadur (supra)** and **Damodar Das Vs. Lakhan Das (supra)** have also been considered and explained thereat. They were also explained by the Privy Council in **Mahanth Ram Charan Das. Vs. Naurangi Lal (supra)** where the Privy Council set aside the judgment of Patna High Court which had followed the said two judgments.

2857. In certain circumstances, it may not be doubted that a deity may acquire property by adverse possession and that the property of a deity may also be lost by adverse possession. Those circumstances where it may happen are quite restricted and we need not to go in depth on this aspect in this judgment. However, suggestion that an idol /deity can itself be acquired by adverse possession, with great respect cannot be accepted for the reason that if an idol truly consecrated is a legal person, the question of application of the doctrine of adverse possession would wholly be inapplicable since it applies to a property and not a person. The person's property may be subject matter of possession but the person itself cannot be.

2858. In **Secretary of State Vs. Debendra Lal Khan (supra)** it was held that the period of possession of a series of

independent trespassers cannot be added together and utilized by the last possessor to make up the statutory total period of adverse possession. This was followed in **Wahid Ali & another Vs. Mahboob Ali Khan AIR 1935 Oudh 425**.

2859. Applying the principle of adverse possession on a waqf property of Oudh, a Single Judge in **Ramzan & Anr. Vs. Mohammad Ahmad Khan AIR 1936 Oudh 207** held:

> *"If a takiadar in possession of a graveyard sells a portion of it to some other person who builds a house, and if the Mohammadan community are apathetic in the matter and allow the encroachment to remain for more than 12 years, then it might will be held that the person in possession had perfected his title by adverse possession for more than 12 years over the portion of the graveyard sold to him. In my opinion it could not be further held that the takiadar by asserting a right of adverse possession in respect of one portion of the graveyard has thereby perfected his title by adverse possession in respect of the whole graveyard."*

2860. However, the Court further held that the possession of a takiadar started as a permissive possession and the mere building of kothris on the land by the takiadar would not imply renunciation of the takiadar's permissive possession or the open and public assertion of a hostile title and therefore decline any relief on the ground of alleged adverse possession.

2861. In **Mosque known as Masjid Shahid Ganj and others (supra)** the very question cropped up for consideration is as to whether the principle of adverse possession can be applied to a mosque or not. It is necessary to have facts in brief which led to the said dispute. There stood a structure having three domes and five arches at Naulakha Bazar, Lahore constructed as

a mosque having projecting niche (*mehrab*) in the centre of the west wall and claimed to have been established in the year 1134 A.H. (1722 A.D.) by one Falak Beg Khan. Sikhs claimed that the mosque having been built by demolishing a Gurdwara, they took possession and occupation of the said building alongwith courtyard, well and adjacent land sometime about 1762 A.D. when the Sikh power grown in that part of India. After taking possession at some point of time and during the Sikh domination, the land adjacent to the mosque building (but the north of Naulakha Bazar) became the site of a Sikh shrine (gurdwara)and the tomb of a Sikh leader named Bhai Taru Singh situated thereon. Sikh rule after 1762 continued and expanded under Maharaja Ranjit Singh who in 1799 A.D. established him as the Ruler of Punjab. After his death and ten years thereafter in 1849 the area of Punjab became part of British India by annexation when the Sikhs lost what is called by the Britishers as "second Sikh War". A part of the building in the meantime was also used for the worship of Guru Granth Sahib or the holy book of Sikhs and the other parts were being used for secular purposes. The reason of occupation and possession taken by Sikhs as explained by them, mentioned in the trial court's order was that the land adjacent to the building was a place of martyrs on which spot Bhai Taru Singh and other Sikhs suffered for religious reasons at the hands of the then Muslim rulers and a lot of women and children had been executed thereat. It came to be established that after the Sikhs having taken possession and control of the above property did not allow the Muslims to have access to the building for any purpose whatsoever upto 1853. For the first time in 1850 a criminal case was brought by one Nur Ahmad claiming himself

to be Mutawalli. He also brought proceedings before the Settlement Department in 1853. As he was out of possession since long, nothing helped him. Hence, a civil suit was filed on 25th June 1855 in the Court of Deputy Commissioner, Lahore against Sikhs in possession of the property. The suit was dismissed on 14th November 1955 by that officer and further on 9th April 1856, by the Commissioner. The appeal was also dismissed by the Judicial Commissioner on 17th June 1856. In 1925 the Sikh Gurdwaras Act (Punjab Act 8 of 1925) was enacted pursuant whereto a Government notification was issued on 22nd December 1927 including the old mosque building and the land adjacent thereto belonging to Sikh Gurdwara named "Shahid Ganj Bhai Taru Singh". Several claims were filed claiming rights and one of that was by Anjuman Islamia of Punjab on behalf of Muslims filed on 16th March 1928 claiming that the land and property were dedicated for a mosque and did not belong to the Gurdwara. The claim of Anjuman Islamia failed before the Sikh Gurdwaras Tribunal on 20th January 1930 on the ground of adverse possession and the previous decision operating as res judicata. In 1935 the building was demolished causing much resentment amongst the Muslims. A civil suit was filed on 30th October 1935 in the Court of District Judge, Lahore against the Shiromani Gurdwara Prabandhak Committee and the Committee of Management for the Notified Sikh Gurdwaras at Lahore, who were in possession of the disputed property. The relief claimed therein was a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had right to worship and an injunction restraining from any improper use of the building and any interference with the plaintiffs' right of worship. A mandatory injunction was also

sought to reconstruct the building. The suit was dismissed on 25.5.1936 and the first appeal was dismissed by a Full Bench of Lahore High Court on 26th January 1938. The judgment of the Full Bench is reported in **AIR 1938 Lah. 369 (FB).** The majority decision of the High Court held that the suit in question was governed by Limitation Act 1908 and the defendants having completed their possession maturing in the right of ownership, the plaintiffs have lost it on the principle of adverse possession and the defence of the plaintiff appellant that the principle of adverse possession does not apply to Muslim religious place, i.e., mosque, was rejected. The Privy Council upheld the decision of the High Court. Before the Privy Council the relief was confined to the actual site of the mosque building. The first question which was considered by the Privy Council was who possessed the title when the sovereignty of that part of the territory passed on to the British Government in 1849. In this context the Privy Council observed:

> *"It may have been open to the British on the ground of conquest or otherwise* ***to annul rights of private property at the time of annexation as indeed they did in Oudh after 1857****. But nothing of the sort was done so far as regards the property now in dispute. There is nothing in the Punjab Laws Act or in any other Act authorizing the British Indian Courts to uproot titles acquired prior to the annexation by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property."*

2862. For the above proposition the Privy Council placed reliance on **West Rand Gold mining Co.** Vs. **The King (1905) 2**

KB 391. The Privy Council also observed that before considering the claim of the plaintiffs regarding application of Muslim Law in respect of limitation and adverse possession to the above property certain important questions need to be considered which are:

(a) Who then immediately prior to the British annexation was the local sovereign of Lahore ?

(b) What law was applicable in that State to the present case ?

(c) Who was recognized by the local sovereign or other authority as owner of the property now in dispute ?

2863. It was held that before calling upon the courts to apply Mahomedan Law to events taking place between 1762 and 1849 first it was necessary to establish that this was the law of the land at that time recognized and enforced as such. The Privy Council observed in this regard:

> *"If it be assumed, for example, that the property in dispute was by general law or by special decree or by revenue-free (muafi) grant vested in the Sikh gurdwara according to the law prevailing under the Sikh rulers, the case made by the plaintiffs becomes irrelevant. It is not necessary to say whether it has been shown that Ranjit Singh took great interest in the gurdwara and continued endowments made to it by the Bhanji Sardars as was held by Hilton J. (20th January 1930) presiding over the Sikh Gurdwaras Tribunal. Nor is it necessary that it should now be decided whether the Sikh mahants held this property for the Sikh Gurdwara under a muafi grant from the Sikh rulers. It was for the plaintiffs to establish the true position as at the date of annexation. Since the Sikh mahants had*

held possession for a very long time under the Sikh State there is a heavy burden on the plaintiffs to displace the presumption that the mahants' possession was in accordance with the law of the time and place. There is an obvious lack of reality in any statement of the legal position which would arise assuming that from 1760 down to 1935 the ownership of this property was governed by the Mahomedan law as modified by the Limitation Act, 1908."

2864. Then considering the question of application of Limitation Act, the Privy Council held that the rules of limitation which apply to a suit are the rules enforced at the time of institution of the suit, the limitation being a matter of procedure. Since the suit was filed in 1935 when Limitation Act 1908 was in force, hence that would obviously apply to the suit in question. It held:

"But the Limitation Act is not dealing with the competence of alienations at Mahomedan law. It provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of a mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as "mosque" or

unless the building is razed to the ground or loses the appearance which reveals its original purpose."

2865. The attempt on the part of the plaintiffs to demonstrate that the land and building of a mosque are not mere property but a juristic person was not accepted by the Privy Council and to that extent, the otherwise view taken by Lahore High Court was also reversed by observing :

"The argument that the land and buildings of a mosque are not property at all because they are a "juristic person" involves a number of misconceptions. *It is wholly inconsistent with many decisions whereby a worshipper or the mutwalli has been permitted to maintain a suit to recover the land and buildings for the purposes of the wakf by ejectment of a trespasser. Such suits had previously been entertained by Indian Courts in the case of this very building. The learned District Judge in the course of his able and careful judgment noted that the defendants were not pressing any objection to the constitution of the suit on the ground that the mosque could not sue by a next friend. He went on to say:*

It is proved beyond doubt that mosques can and do hold property. There is ample authority for the proposition that a Hindu idol is a juristic person and it seems proper to hold that on the same principle a mosque as an institution should be considered as a juristic person. It was actually so held in 59 P R 1914, p. 200 (Jindu Ram v. Hussain Bakhsh, (1914) 1 AIR Lah 444) and later in Maula Bux v. Hafizuddin, (1926) 13 AIR Lah 372.

That there should be any supposed analogy

between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships. *The question whether a British Indian Court will recognize a mosque as having a locus standi in judicio is a question of procedure.* ***In British India the Courts do not follow the Mahomedan law in matters of procedure*** *(cf. Jafri Begum v. Amir Muhammad Khan, (1885) 7 All 822 at pp 841.2, per Mahmood J.)* ***any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence***. *At the same time the procedure of the Courts in applying Hindu or Mahomedan Law has to be appropriate to the laws which they apply. Thus the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognizes certain doctrines of Hindu Law as essential thereto, e.g.* ***that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait****: 31 IA 203 (Jagadindranath v. Hemanta Kumari (1905) 32 Cal 129)*

Very considerable difficulties attend these doctrines- in particular as regards the distinction, if any, proper to be made between the deity and the image : cf. 37 Cal 128 at p 153 (Bhupati Nath V. Ram Lal (1910) 37 Cal.128), Golap Chandra Sarkar Sastri's Hindu Law, Edn. 7, pp. 865 et seq. But there has never been any doubt that the property of a Hindu religious endowment-including a thakurbari- is subject to the law of limitation: 37 I A 147 (Damodar Das V. Lakhan Das (1910) 37 Cal 885); 64 IA 203 (Iswari

Bhubaneshwari Thakurni V. Brojo Nath Dey (1937) 24 AIR PC 185). From these considerations special to Hindu law no general licence can be derived for the invention of fictitious persons. It is as true in law as in other spheres "entia non sunt multiplicanda praeter necessitatem." ***The decisions recognizing a mosque as a "juristic person" appear to be confined to the Punjab****:153 P R 1884 (Shankar Das Vs. Said Ahmad (1884) 153 PR 1884) ; 59 P R 1914 (Jindu Ram v. Hussain Bakhsh, (1914) 1 AIR Lah 444), Maula Bux v. Hafizuddin, (1926) 13 AIR Lah 372. In none of these cases was a mosque party to the suit, and in none except perhaps the last is the fictitious personality attributed to the mosque as a matter of decision. But so far as they go these cases support the recognition as a fictitious person of a mosque as an institution–apparently hypostatizing an abstraction. This, as the learned Chief Justice in the present case has pointed out, is very different from conferring personality upon a building so as to deprive it of its character as immovable property.*

It is not necessary in the present case to decide whether in any circumstances or for any purpose a Muslim institution can be regarded in law as a "juristic person*." The recognition of an artificial person is not to be justified merely as a ready means of making enactments- well or ill-expressed -work conveniently. It does not seem to be required merely to give an extended meaning to the word "person" as it appears in the Punjab Preemption Act, 1905, or in the definition of 'gift' contained in S. 122, T.P. Act. It is far from clear that it is required in order that property may be devoted effectively to charitable purposes*

without the appointment of a trustee in the sense of the English law. It would seem more reasonable to uphold a gift, if made directly to a mosque and not by way of wakf as having been made to the mutwalli than to do so by inventing an artificial person in addition to the mutwalli (and to God in whom the ownership of the mosque is placed by the theory of the law).

There Lordships do not understand that in this respect a mosque is thought to be in any unique position according to the authorities on Mahomedan law*. "A gift may be made to a mosque or other institution" (Tyabji's Principles of Mahomedan Law, Edn.2, 1919, page 401, cf. Abdur Rahim's Muhammadan Jurisprudence, page 218). A gift can be made to a madrasah in like manner as to a masjid. The right of suit by the mutwali or other manager or by any person entitled to a benefit (whether individually or as a member of the public or merely in common with certain other persons) seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a caput mortuum, and* ***some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions generally or to masques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case and hold that suits cannot competently be brought by or against such***

institutions as artificial persons in the British Indian Courts.

2866. The nature of the right of an individual to offer prayer in the disputed building treating it to be religious one was also considered in reference to the application of the provisions of Limitation Act, i.e., Article 144 and the Privy Council said:

> *"The property now in question having been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than 12 years,* ***the right of the mutawali to possession for the purposes of the waqf came to an end under Art, 144****, Limitation Act, and the title derived under the dedication from the settlor or wakif became extinct under S. 28. The property was no longer for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to his creatures." The main contention on the part of the appellants is that the* ***right of any Moslem to use a mosque for purposes of devotion is an individual right like the right to use a private road****, 7 All 178 (Jawahra v. Akbar Hussain, (1884) 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 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 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 mutwali and the terms of the endowment can no longer be enforced: cf. 41 Mad 124 at p. 135 (Chidambranatha Thambiran v. Nallasiva Mudaliar (1918) 5 AIR Madras 464).* ***The individual character of the right to go to a mosqe 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****."*

2867. It also held that rights of worshipers stand or fall with the wakf character of the property and do not continue apart from their right to have the property recovered for the wakf and applied to its purpose. As the law stands, notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the wakf.

2868. **Gnanasambanda Pandara Sannadhi Vs. Velu Pandaram and another (1899) 27 IA 69** is a decision by the

Judicial Committee, pertains to application of Article 144 of Act XV of 1877 (Limitation). It held that "there is no distinction between the office and the property of endowment. The one is attached to the other; but if there is, Art.144 of the same schedule is applicable to the property. That bars the suit after twelve years' adverse possession."

2869. We may also notice at this stage that the Privy Council also deprecated the practice adopted by the trial court therein permitting the parties to produce religious experts and obtain their opinion when the matter was to be seen in the light of codified law. The Privy Council also observed that system of expert adviser has gone long back and ought not to have been continued in that case. It would be appropriate at this stage to refer the above observations:

> *"A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The authority of Sulaiman J. to the contrary, 47 All 823 at p.835 (Aziz Banu Vs. Muhammad Ibrahim Hussain (1925) 12 AIR All.720), was cited to him but he wrongly considered that S. 49, Evidence Act, was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of pandits on questions of Hindu law and the reference made thereto in 12 MIA 397 at pp. 436-9 (Collector of Madura v. Moottoo Ramalinga Sathupathy (1868) 12 MIA 397). No great harm, as it happened, was done by the admission of this class of evidence as the witnesses made reference to authoritative texts in a short and sensible manner.*

But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth. ***The Muslim law is not the common law of India; British India has no common law in the sense of law applicable prima facie to everyone unless it be in the statutory Codes, e.g. Contract Act, transfer of Property Act****. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence.* ***The system of "expert advisers" (muftis, maulavis or in the case of Hindu law pandits) had its day but has long been abandoned, though the opinion given by such advisers may still be cited from the reports****. Custom, in variance of the general law, is matter of evidence but not the law itself. Their Lordships desire to adopt the observations of Sulaiman J. in the case referred to:*

It is the duty of the Courts themselves to interpret the law of the land and to apply it and ***not to depend on the opinion of witnesses however learned they may be****. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinion of experts on*

foreign law are therefore allowed to be admitted."

2870. This stage that this decision of the Privy Council has been followed by the Constitution Bench of the Apex Court in **Dr. M. Ismail Faruqui (supra)** involving the property in dispute before us to discard the contention on behalf of the parties (pro mosque) that a property of a waqf or mosque cannot be a subject matter of compulsory acquisition under the provisions of Land Acquisition Act, 1894 since a Muslim religious property cannot be compulsorily acquired.

2871. In **(Sm.) Bibhabati Devi (supra)** it was observed that in order to claim a right of ownership applying the principle of adverse possession it is a condition precedent that the possession must be adverse to a living person. Herein the appellant was possessing the property under a mosque after the death of the defendant, it was held that the possession cannot be said to be adverse.

2872. In **Chhote Khan & others Vs. Mal Khan & others AIR 1954 SC 575**, the Court observed that no question of adverse possession arises where the possession is held under an arrangement between the co-sharers.

2873. The Court in **P. Lakshmi Reddy (supra)** quoted with approval Mitra's Tagore Law Lectures on Limitation and Prescription (6th Edition) Vol. I, Lecture VI, at page 159, quoting from Angell on Limitation:

> *"An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him (sic) who was in possession. (Angell,*