dated 15.9.1995 and remitted the matter to the appellate authority to decide the appeal within 15 days. The High Court observed that it was conceded that the Minister against whom the allegation of mala fide are alleged is no more a Minister, therefore, on the finding that there was an alternative remedy available to the petitioner, it relegated the petitioner to avail the said remedy of appeal. The appellate authority, though, upheld the allegations of illegality and irregularity in conducting business by the licensee but took a lenient view and instead of cancellation of licence, treated the period from the date of cancellation of licence till filing of writ petition and grant of stay order by the High Court as the period of substantive suspension as a measure of penalty. It is against this appellate order, the writ petition was again filed before the High Court, which was allowed and the matter was remitted to the appellate authority to decide the matter on the ground of mala fide alleged against the Minister. In the second batch of the petitions, the Minister was not made a party. That being so, the High Court was not in a position to go into the question of mala fide. The Apex Court held that it could not have directed the appellate authority to go into the question of mala fide. The Apex Court held that the words "might and ought" used in Section 11 would stand in the way operating as res judicata. In our considered view, the above judgement also lends no support.

1012. In **P. K. Vijayan (supra)** the words "might and ought" again came to be considered. One Kamalakshi Amma, landlord, filed R.C.P. No. 19 of 1974 under Section 11 of Kerala Buildings (Lease and Rent Control) Act, 1965 for eviction of the P.K. Vijayan-tenant. Under the proviso thereto, if the the tenant denies title of the landlord or claims right of permanent tenancy,

the Rent Controller was required to decide whether denial or claim is bona fide and if a finding is recorded positively in favour of the tenant on the aforesaid issue, it will require the landlord to sue for eviction of the tenant in a Civil Court. The Rent Controller accepted the plea of P. K. Vijayan in regard to 'bona fide' and relegated the landlord to seek eviction by a civil Suit. Before the civil proceedings could be initiated, the tenant filed D.A. No. 11730 of 1986 before the Land Tribunal under Kerala Land Reforms Act claiming that the lease was of agriculture land and as a cultivating tenant, he is entitled to get assignment of title of the land under Section 72B of the Land Reforms Act which postulates that the cultivating tenant of any holding or part of the holding, the right, title and interest in respect of which has vested in the Government under Section 72 shall be entitled to assignment of such right, title and interest. The term "cultivating tenant" was defined to mean a tenant who is in actual possession of, and is entitled to cultivate the land comprised in his holding. The Land Tribunal vide order dated 26.11.1976 held that the lease was of commercial building and not agricultural land and dismissed the petition of the tenant. The tenant before the Civil Court, relied on Section 106 of the Land Reforms Act and claimed that the land was demised for a commercial or industrial purpose and he had constructed a building thereon for commercial purpose before 20.5.1967, therefore, by operation of Section 106 of the Land Reforms Act, he cannot be ejected. He also questioned the jurisdiction of the Civil Court to decide the question and contended that the matter has to be referred to the Land Reforms Tribunal under Section 125 (3) of the Land Reforms Act. The Trial Court decided the matter vide order dated 3.8.1887 in favour of tenant upholding

his contention for reference under Section 125 (3) of the Land Reforms Act to the Tribunal. The revision of the landlord was allowed by the High Court holding that the Land Reform Tribunal cannot decide the dispute in view of its earlier order under Section 72B and also on the ground of res judicata. The appeal taken to the Apex Court where it upheld the plea of res judicata of landlord observing hat the plea of entitlement under Section 106 of Land Reforms Act was available to the tenant in the eviction proceedings and if he would have raised at that time before the Rent Controller, lacking jurisdiction, the Rent Controller would have referred the matter to the Land Tribunal for decision under Section 125(3) of the Land Reforms Act. Having said so, the Apex Court held that the rule of "might and ought" envisaged in Explanation IV to Section 11 C.P.C. squarely applies and in para 11 of the judgement said :

> *"**11.** However, the appellant merely chose to deny the title of the landlords and did not raise the plea of S. 106 of the Land Reforms Act. The rule of "might and ought" envisaged in Explanation IV to S.11, C.P.C. squarely applies to the facts of the case and, therefore, it is no longer open to the appellant to plead that, Civil Court has no jurisdiction to decide the matter and it shall be required to be referred to the Land Tribunal.*
>
> *That apart, in the proceedings under S. 72B the appellant pleaded that it is a land governed by the provisions of the Land Reforms Act and that, therefore, he is entitled to the assignment of the right, title and interest therein. The Tribunal found that the lease being a commercial lease, the appellant is not entitled to the assignment of the right, title and interest in the demised*

land which was not vested in the State under S. 72 since the lease was not of agricultural land demised to the appellant. In that view of the matter and the appellant having decided only to avail the remedy of S. 72B and omitted to plead the remedy of S. 106, it is no longer open to him to contend that he is entitled to the benefit of S. 106 of the Land Reforms Act."

1013. The Apex Court further held in para 13 of the Judgement that *"The tenant is expected to raise all the pleas available under the statute at the relevant time. It is a sheer abuse of the process of the Court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. It would be fair and just that the parties to raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive res-judicata to prevent raising of the same at a later point of time. Thereby it must be deemed that they are waived."*

1014. The law declared above by the Apex Court in **P.K. Vijayan (supra)** is binding upon us. However, we fail to understand as to how this would apply to the facts of the cases in hand in the light of the facts of the suits in question which we have already discussed in detail.

1015. In **Gorie Gouri Naidu (supra)**, the Apex Court held that inter party judgement is binding upon the parties even if it is erroneous. The Court said :

"In our view, such decision of the Division Bench is justified since the said earlier decision in declaring the deeds of gift as invalid, is binding between the parties. There is no occasion to consider the principle of estoppel

since considered by the learned single Judge in the facts and circumstances of the case for holding the said transfers as valid, in view of the earlier adjudication on the validity of the said deeds in the previous suit between the parties. The law is well settled that even if erroneous, an inter party judgment binds the party if the Court of competent jurisdiction has decided the lis."

1016. In **Premier Cable Co. Ltd. (supra)**, an assessment order was challenged in appeal which was dismissed on the ground of delay. Revision was also dismissed. The writ petition against the revisional order was also dismissed and the said order attained finality not being taken to the higher Court. In these circumstances, the Apex Court held that the levy under the aforesaid assessment order, which has attained finality, cannot be challenged by means of a civil suit since it is barred by principle of res judicata.

1017. In **Abdul Rahman (supra)**, the issue of principle of res judicata as such was not up for consideration but in the facts and circumstances of the case, the Court refused the plaintiff to peruse the remedy in a Court of law. The peculiar facts of the case are noticed in para 30 of the judgement, which reads as under :

*"**30.** .....The issue as regards the status of the 1st respondent has never been raised before the revenue authorities. As the appellant herein claimed himself to be a tenant of Mangal Singh, there was no reason as to why he could not be said to be aware of the relationship between the 1st respondent and the said Mangal Singh. He allowed the proceedings of the Board of Revenue to be determined against him. The decision of the Board of Revenue attained*

finality. His writ petition was also dismissed. Be it also noted that the civil suit was filed three years after the adjudication of the rights of the parties in the mutation proceedings."

1018. After noticing the aforesaid facts, the Apex Court in para 31 said:

"31. *In the aforementioned situation, in our opinion, the appellant must be held to have taken recourse to abuse of process of Court underlying the principle that the litigation should be allowed to attain finality in public interest. Although the concept of issues estoppel or estoppel by records are distinct and separate from the concept of abuse of process in public interest, the Court may refuse the plaintiff from pursuing his remedy in a Court of law. See Johnson v. Gore Wood and Co., ((2002) 2 AC 1)."*

1019. Thus, the above judgement also lends no support to attract plea of res judicata in the present case.

1020. In **M.T.W. Tenzing Namgyal (supra)** the facts were that Plots No. 1013, 1014 and 1040 (part) situated at Gangtok belonged to one Chogyal Sir Tashi Namgyal. It was his personal property forming part of his private estate. One pucca building was constructed on Plot no. 1014 situated at New Market Road, Gangtok and it was let out to tenants. On the adjacent land to the said building there existed a private passage of 12 feet width made of steps and further on the adjacent south thereto, there was another building known as Yuthok building situated on Plot No. 1012. Another passage existed behind the aforesaid two buildings said to be a private gully being Plot No. 1013. There were two wooden buildings used as kitchen, latrines and

godown for the use of tenants occupying the aforesaid two buildings at New Market Road and Yuthok. It is said that there was a retaining wall on the west of Plot No. 1040 (part) which was the boundary between the land of the Plaintiffs' private estate and the land of defendant No. 2. The plaintiffs filed a suit alleging that the defendants had started construction of a big pucca building for running a hotel on the land situated on the south of his land being Plot no.1040 and it was alleged that the defendants illegally had encroached upon about 6,600 sq. ft. therein. The defendants denied, and disputing the allegations in their written statement, though admitted the existence of the pucca building and the flight of steps, contended that the latter belonged to Gangtok Municipality and meant to serve as the exclusive passage to the plot on which defendant no. 2 started constructing a multi-storeyed building. It was claimed that beyond the structures of the plaintiffs a precipitated hill edge exists on the eastern boundary of the defendants' land and the same was all through in the possession of the defendants. The defendants also claimed settlement of their land by virtue of three documents of the years 1961, 1975 and 1977. The suit was dismissed by the District Judge, Gangtok on 29.03.1985 but in appeal the High Court allowed the same and remanded the matter to the trial court directing to appoint another Commissioner to make local investigation with reference to the cloth survey map and actual measurement on the spot so as to ascertain the actual area of Plot No. 1040 etc. An opportunity was also given to the parties to re-examine their witnesses etc. The trial court appointed another Commissioner who, inter alia, found that Plot No. 1040 measures 0.69 acres out of which the land allotted to the defendants was 13, 879 sq. ft. and the total

area of constructions made by defendants no. 1 and 2 being the Denzong Cinema, two shop houses and hotel comes to 13, 616.46 sq. ft., which was accepted by the defendants but according to the plaintiffs the same was 13, 503.60 sq. ft. The trial court decreed the suit on 26.02.1988 but the judgment was reversed by High Court in appeal on 30.06.1994. The Apex Court noticed that the plaintiffs' predecessor in interest was late Chogyal Sir Tashi Namgyal of Sikkim. There is, therefore, no question of plaintiffs' having any document of title. The only document of title which was produced by the plaintiffs in support of their claim was a 'Khasra' showing entry in the name of 'Sarkar' as also in the name of 'Shri Panch Maharaja Sir Tashi Namgyal of Sikkim'. Some plots were recorded as Private Estate. Plots No. 1013, 1014 and 1040 were recorded in the name of Shri Panch Maharaj Sir Tashi Namgyal but the area of the plots was not mentioned. In the plaint, besides Plot No. 1013 and 1014, the plaintiffs claimed ownership in respect of Plot no. 1040 (part) and not the entire plot. The manner in which ownership for part of Plot No. 1040 claimed was not disclosed**.** It appears that a suggestion was made long back to pay a lump sum amount in lieu of the bazar area including the income so that the private estate may vest in Sikkim Darbar. The said proposal was accepted on 22.06.1959 after being approved and sanctioned by the Chogyal and the payment aforesaid was made. It is in these circumstances the High Court recorded a finding that all land entered in 'Khasra' in the name of “Sir Tashi Namgyal” did not belong to his private estate. The Apex Court, however, considered the matter on the assumption that the said finding of the High Court was not correct in view of the fact that the plaintiffs' land in suit were the subject matter of acquisition,

it was noticed that Sikkim Darbar granted settlement of a piece of land in favour of one of the defendants for construction of Cinema Hall on 10.04.1961. The original plaintiff held shares in Denzong Cinema Limited. The Cinema Hall started in the year 1969. The State of Sikkim merged with the Union of India in terms of an agreement on 26.04.1975. In view of Article 371 F of the Constitution the property and assets vested in the Government of State of Sikkim. The High Court recorded a finding that before and after merger of Sikkim with the Government of India, Plot No. 1040 was always treated as that belong to the Government and not private estate. The Apex Court found that the plaintiffs failed to prove their ownership/title on the plot in question. Having accepted compensation, the successor in interest is estopped and precluded from contending that the property did not vest in Sikkim Darbar and ultimately with the Government of India. In the circumferences, the Court dismissed the appeal and upheld the judgment of High Court. With respect to the evidentiary value of the 'Khasra' and 'Khatian' the Apex Court in paras 32 and 33 said:

> *"32. The khasra and khatian have not been prepared under a statute. The question as to whether the same would be historical material or instrument of title or otherwise, would depend upon either the statute governing the same or the practice prevailing in the State. In the event, however, the records of right were not prepared under a statute, a presumption of correctness may be raised only in terms of Section 35 of the Indian Evidence Act.*
>
> *33. However, ordinarily records of right cannot be treated to have any evidentiary value on the question of*

title inasmuch as such records are prepared mainly based on possession."

1021. The case was decided on the facts of its own and we fail to find any support from the said judgment in respect to the plea of res judicata in the present cases. This judgment was relied by Sri Siddiqui in support of his plea of estoppel and abandonment based on the acquisition notification dated 07.10.1991. He submitted that the said notification was not challenged by the plaintiffs (Suit-5) and, therefore, it amounts to acquiescence on their part in respect to their rights, if any, to the land which was acquired by the State pursuant to the aforesaid notification and its quashing thereafter by the Court in various writ petitions would not change the situation.

1022. We do not find any substance in the submission. It is not in dispute that the notification dated 07.10.1991 and 10.10.1991 whereby the land in question alongwith the others was sought to be acquired by the State of U.P., were challenged in a number of writ petitions led by Writ Petition No. 3540 of 1991. The said notifications were quashed by this Court vide judgment dated 11.12.1992 holding the same to be illegal and unconstitutional. The effect of the judgment would be as if the aforesaid two notifications never existed. It cannot be pleaded that though the two documents quashed by the Court would be non-est for the persons who were party in those cases but would have some consequences for others. Once the very document as a result of its quashing become non-est, it would not result in any consequence whatsoever in law and even otherwise. Therefore, it cannot be said that Suit-5 cannot proceed further as if the plaintiffs have squeezed their rights in land in question.

1023. A similar argument has been made as a result of

acquisition of certain land vide Act No. 33 of 1993. Sri Siddiqui submitted that not only the plaintiffs (Suit-5) did not challenge the said enactment but also submitted to its provisions by filing an Application No. 4(o) of 1993 on 04.02.1993 praying for abatement of the suit in view of Section 4(3) of the Act No. 33 of 1993. Admittedly, sub-section of Section 4(3) of the aforesaid Act has been declared ultra vires and unconstitutional. Any provision which is unconstitutional is non-est i.e. still born and would not result in any consequences. It means as if the said provision never existed or operated. Even if it was not challenged by the plaintiff (Suit-5) and they sought to surrender to the legal consequences of the said Act but if subsequently in any other proceeding the statutory provision is found to be unconstitutional i.e. still born, the consequences would be as if the said provision has no adverse effect. Though reliance has been placed by Sri Siddiqui on certain judgments of the Apex Court as well as of this Court but in our view the aforesaid judgments do not lay down any such law and the reliance is misplaced.

1024. **Jai Narain Parasrampuria (supra)** was a case where the suit for specific performance was filed. The Court held that the relief being discretionary can be refused on the conduct of the parties. Representing the company, other parties were led to believe that the company was owner of the property as a result whereof third parties alter their position. It was thus held by the Apex Court that the principle of estoppel would apply. However, the Court did not forgot to add a caution as under:

> *"We may, however, hasten to add that where there exists a statutory embargo, vesting of title in a person shall be subject thereto."*

1025. Relying on various other authorities on the subject the Court also held:

> *"The doctrine of estoppel by acquiescence was not restricted to cases where the representor was aware both of what his strict rights were and that the representee was acting on the belief that those rights would not be enforced against him. Instead, the court was required to ascertain whether in the particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment. Accordingly, the principle would apply if at the time the expectation was encouraged (sic)."*

1026. It was also held by the Apex Court that the principle of res judicata may not have any application in the aforesaid facts.

1027. In **B.L. Sridhar Vs. K.M. Munireddy (supra)**, the Court considered the principle of estoppel and said that it is not a cause of action but a rule of evidence which precludes a person from denying the truth of some statement previously made by him but would be attracted when *"one person has by his declaration, act or omission caused or permitted another person to believe in it to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thick.*" Sri Siddiqui could not show as to how the party represented by him has acted believing on the statement of the plaintiff (suit-5) so as to attract the principle of estoppel in the case in hand. The judgment, in our view, has no application to the facts involved in the present case.

“Order XXIII Rule 1-Whether applicable and attracted to Application No. 4(o) of 1993 and its consequences, if any”

1028. **M/s Hulas Rai Baij Nath (supra)** was a case with respect to the application of Order XXIII Rule 1 CPC. It was held that Order XXIII Rule 1(1) gives an unqualified right to a plaintiff to withdraw a suit. It also held that there is no provision in CPC which required the Court to refuse permission to withdraw the suit and to compel the plaintiff to proceed with it. However, if a set off has been claimed under Order 8, CPC or a counter claim has been filed the position may be different. We do not find any occasion to have application of the said authority to the facts of this case. Obviously no application under Order XXIII Rule 1 has been filed by the plaintiff (Suit-5) for withdrawal of the suit. The alleged application only drew attention of the Court to Section 4(3) of Act No. 33 of 1993 and its consequences and requested the Court to act accordingly. As soon as the said statute i.e. Section 4(3) seizes to have any legal consequences having been declared unconstitutional, the position as it stood before enactment of the said provision would stand restored.

1029. We now come to the Division Bench decision of this Court in **Smt. Raisa Sultana Begam (supra).** This Court has held that there is no provision laying down procedure for withdrawing the suit, manner in which it can be withdrawn and the essential physical acts required to be done to constitute withdrawal, which can be in any form. The Court further held that withdrawing of suit needs no permission from the Court and since there is no provision allowing revocation of the withdrawal application, therefore, an application for withdrawal of suit becomes effective as soon as it is done i.e. by giving

information to the Court. The Court's order thereon is no part of the act of withdrawal. On page 322, para 9 of the judgement, the Court observed:

> *"The right to withdraw has been expressly conferred by rule 1(1); there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. As we said earlier, certain consequences arise from the withdrawal which prevent his revoking the withdrawal, the withdrawal is complete or effective as soon as it takes place, and, in any case, as soon as information of it is conveyed to the Court, and no order of the Court is required to effectuate it or even to recognize it."*

1030. In **Smt. Raisa Sultana Begam (supra)**, Order 23, Rule 1, as was in the statute book prior to 1976, was under consideration, which read as under :

> ***"1.*** *(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.*
>
> *(2) Where the Court is satisfied-*
>
> *(a) that a suit must fail by reason of some formal defect, or*
>
> *(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,*
>
> *it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of suit or such part of a claim.*

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4)Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others."

1031. The Division Bench, while taking the view as noted above, disagreed with otherwise view taken by the Hon'ble Madras, Bombay and Calcutta High Court, and in an earlier Division Bench of this Court; in **Mukkammal Vs. Kalimuthu Pillay 15 Ind Cas 852 (Mad)**; **Lakshmana Pillai Vs. Appalwar Alwar Ayyangar (supra); Yeshwant Govardhan Vs. Totaram Avasu AIR 1958 Bom. 28; Raj Kumari Devi Vs. Nirtya Kali Debi (1910) 7 Ind Cas 892 (Cal)**; and **Ram Bharos Lall Vs. Gopee Beebee (1874) 6 NWP 66** respectively. We find, with great respect, difficult to subscribe the view taken in **Smt. Raisa Sultana Begam (supra).** In our view, if the Court was unable to agree with the earlier Division Bench judgement in **Ram Bharos Lall (supra)**, the matter ought to have been referred to the Larger Bench. It is true that the right of the plaintiff to withdraw suit is absolute as observed by the Apex Court in **M/s Hulas Rai Baij Nath (supra)** and once an application is made by the plaintiff and pressed before the Court, the Court cannot refuse such withdrawal unless there is a case of counter claim, set off etc. It would not mean that as soon as an application informing the Court is moved by the plaintiff that he intends to withdraw the suit or that an oral information is given, the effect

would be that the suit would stand withdrawn.

1032. So long as a suit is not instituted by presenting a plaint to the Court, the plaint remains the property of the litigant and would not result in any legal consequence, if he does not present it to the Court, but when the plaint is presented before a competent Court of jurisdiction and a suit is ordered to be registered in accordance with rules, the plaint would become the property of the Court and it would result in certain legal consequences, i.e., pendency of a suit or a case before a Court of law. The said legal consequences cannot be nullified without any order of the Court by the litigant simply by orally or in writing informing the Court that he intends to withdraw the suit. It is true that under Order 23 Rule 1, as it stood before 1976 amendment, there was no provision requiring any specific order to be passed by the Court allowing the plaintiff to withdraw his suit but considering the entire procedure of institution of a suit, it cannot be doubted that a suit, duly instituted, and registered in a Court of law cannot stand withdrawn without any order of the Court. In this regard, it would be appropriate to have the procedure of filing of suit in C.P.C., as it was prior to its amendment in 1976.

1033. Order IV Rule 1 (Allahabad amendment) provides for institution of suit and reads as under :

> ***"1.*** *(1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf, a plaint, together with a true copy for service with the summons upon each defendant, unless the Court for goods cause shown allows time to filing such copies.*
>
> *(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the*

case of all other proceeding when the processes applied for."

1034. The manner of registration of suit was provided in Rule 2 Order IV and reads as under :

> ***"2. [S. 58]*** *The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted."*

1035. Once a suit is duly instituted, the Court would pass order issuing summons to the defendants to appear and answer the plaint. Such summons, vide Order V Rule 3, are required to be signed by the Judge or such officer as he appointed, and also the seal of the Court. A suit once duly instituted and registered in the Court would not struck off from the record of the Court on the mere communication by the plaintiff orally or in writing that he intends to withdraw unless an order is passed by the Court to the said effect, which would have the legal consequence of bringing the proceedings set in motion by instituting the suit, to a halt. Mere absence of any provision permitting withdrawal of the application filed by a plaintiff for withdrawing the suit does not mean that no such power is vested in the plaintiff. So long as an order is not passed by the Court, if the plaintiff informs the Court by moving an application that he intends to withdraw the application for withdrawal of suit, he can always request or inform the Court that he does not want to press the application and the same may be dismissed as not pressed or withdrawn. It is only where the plaintiff press his application before the Court requiring it to pass the order for withdrawal of the Suit, the Court would pass the said order in

accordance with law since it cannot compel a plaintiff to pursue a suit though he want to withdraw the same. It would thus be wholly unjust to hold that once an application to withdraw the suit is filed by a plaintiff, he cannot withdraw the same and the suit would stand dismissed as withdrawn. This would have serious and drastic consequences in as much as he cannot file a fresh suit on the same cause of action.

1036. Moreover, the existence of a provision i.e. Rule 1(3), empowering the Court to consider as to whether the plaintiff should be saddled with the liability of payment of cost or not also contemplates that an application for withdrawal of suit by itself would not result in any consequences whatsoever unless the Court has applied its mind regarding the cost. If what has been held in **Smt. Raisa Sultana Begam (supra)** is taken to be correct, it would mean that there would be no occasion for the Court to apply its mind on the question of cost under Rule 1(3) since the suit would stand dismissed as withdrawn as soon as the plaintiff informs the Court about his decision for withdrawal of the suit either orally or in writing. This is nothing but making Rule 3 (1) redundant. The earlier judgement of this Court in **Raja Shumsher Bahadoor Vs. Mirja Mahomed Ali (1867) Agra H.C.R. 158** wherein this view was taken that the withdrawal must be regarded as terminating automatically the proceedings in the suit involving the suit's immediate dismissal was not found to be correct subsequently by the Division Bench in **Ram Bharos Lall**. We, therefore, find it appropriate in the entire facts and circumstances to take a different view and have no hesitation in holding though with great respect to the Bench, that the law laid down in **Smt. Raisa Sultana Begam (supra)** is not correct. In our view, the law laid down in **Ram Bharos Lall**

(supra), **Mukkammal Vs. Kalimuthu Pillay (supra)**, **Raj Kumari Devi Vs. Nirtya Kali Debi (supra)** and **Yeshwant Govardhan Vs. Totaram (supra)** lay down the correct law. We also find that a Division Bench of Orissa High Court in **Prema Chanda Barik Vs. Prafulla Kumar Mohanty AIR 1988 Orissa 33** has also taken the same view and did not find itself agreeable with the Division Bench decision in **Smt. Raisa Sultana Begam (supra)**. In fact, a Division Bench of Calcutta High Court in **Rameswar Sarkar Vs. State of West Bengal and others AIR 1986 Cal. 19** has gone slightly further by observing that where there is no provision under the Code providing for withdrawal of application for withdrawal of suit, Section 151 C.P.C. would apply.

1037. It would be useful to remind ourselves the observations of the Apex Court in respect to the provisions of the Code in **Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal AIR 1962 SC 527** *"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them."* Referring to Section 151, the Apex Court in the same judgement also held *"The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice."*

1038. Order XXIII Rule 1 has now been substituted by C.P.C. (Amendment) Act 104 of 1976 vide Section 74 with effect from 1.1.1977 and the newly substituted provision reads as under :

> ***Order XXIII R. 1. Withdrawal of suit or abandonment of part of claim****.--(1) At any time after the institution of a suit,*

***the plaintiff may**, as against all or any of the defendants, **abandon his suit** or abandon a part of his claim:*

Provided that where the plaintiff is a minor or such other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

*(3) **Where the Court is satisfied**,--*

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

*it may, on such terms as it thinks fit, **grant the plaintiff permission to withdraw from such suit** or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.*

(4) Where the plaintiff--

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in

respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

1039. Proviso inserted in Rule 1 (1) Order XXIII makes it very clear where the plaintiff is a minor or such other person to whom the provisions contained in rules 1 to 14 of order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court. The proviso is mandatory and does not permit withdrawal of a suit filed on behalf of a minor etc. unless the leave of the Court is obtained. In the case in hand, plaintiffs no. 1 and 2 are deities who have been allowed to sue through their next friend.

1040. Plaintiffs no. 1 and 2, being deity, are juristic persons and plaintiff no. 3 is the person taking care of plaintiffs no. 1 and 2. At this stage, we are proceeding by assuming that plaintiffs no. 1 and 2 are deities and, therefore, a juristic person individually though the question whether they are 'juristic person' has also been raised separately which we shall deal later on but for the purpose of objection raised hereat with reference to Order XXIII Rule 1 we proceed to treat plaintiffs 1 and 2 as deity.

1041. A deity has been held to be a 'minor' and cannot sue on its own but through a Shebait or Manager or any other person who can file suit on its behalf. In **Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Das and others, AIR 2000 SC 1421** the Apex Court held that the deity is a minor and its welfare can be looked into by the

Shebait/Sarvakar/Manager or the next friend. In such a case the leave of the Court is necessary for withdrawal of suit as required by proviso to Rule 1(1) and, therefore, also the question of withdrawal of the suit as soon as the application is made cannot arise at all.

1042. In **State Bank of India Vs. Firm Jamuna Prasad Jaiswal (supra)** the Hon'ble Single Judge followed the Division Bench judgment in **Smt. Raisa Sultana Begam (supra)** in order to hold that withdrawal application cannot be allowed to be withdrawn except where it was a case of fraud. Since we have held the judgement in **Smt. Raisa Sultana Begam (supra)** as not laying down a correct law, the Single Judge judgement in **State Bank of India Vs. Firm Jamuna Prasad Jaiswal (supra)** also cannot be said to be a good law. Same is the fate of other Single Judges judgements in **Ram Chandra Mission (supra)** and **Upendra Kumar (supra)** which also rely on **Smt. Raisa Sultana Begam (supra).** Therefore, all the aforesaid judgements would not help Sri Siddiqui in any manner.

1043. We may also observe hereat that so far as the present case is concerned, no application under Order XXIII Rule 1 has been filed by the plaintiff (Suit-5) seeking withdrawal of the suit and instead the alleged application is with reference to Section 4 (3) of Act 33 of 1993. Therefore, Order XXIII Rule 1 even otherwise would not be attracted in the present case.

1044. Since we have taken a view that the suit did not stand abandoned or withdrawn as soon as the application was made, the question of estoppel as argued by Sri Siddiqui is not attracted and, therefore, the Apex Court's decision in **Deewan Singh (supra), Jai Narain (supra), Anuj Garg (supra)** and **Barkat Ali (supra)** would have no application and lend no

support to the plaintiffs (Suit-4) and defendants (Suit-5).

1045. Now coming to the authority cited by Sri Verma, we find that in **State of Maharashtra Vs. M/s. National Construction Company (supra)**, the Apex Court laid down the law that bar under Section 11 CPC applies in a matter directly and substantially in issue in the former suit and has been heard and finally decided by a Court competent to try such suit. Meaning thereby that on the matter in issue, in question, there has been an application of judicial mind and a final adjudication has been made. If the former suit is dismissed without any adjudication on the matter in issue i.e. merely on a technical grounds like non-joinder, that cannot operate as res judicata. The Apex Court relied on its earlier decision in **Sheodhan Singh Vs. Daryo Kunwar, AIR 1966 SC 1332** where the suit dismissed for want of jurisdiction was held not to operate as res judicata. The Court also followed its decision in **Inacio Martins Vs. Narayan Hari Naik, 1993(3) SCC 123.** The legal proposition thus is well settled.

1046. **Munesh Kumar Agnihotri (supra)** was a case where the parties in two suits were different hence the plea of res judicata was negatived by the Hon'ble Single Judge. Where cause of action is different, res judicata has no application in the subsequent suit as held in **Ram Naresh (supra)** and in our view there cannot be any dispute to the said proposition. The same was the position in **Abdul Quadir (supra)** where also the Court found that the cause of action involved in the subsequent suit was different and the parties were also found to be different.

1047. There are some more authorities cited at the bar.

1048. In **Union of India Vs. Pramod Gupta (2005) 12 SCC 1**, the application of res judicata in respect to determination of

market value and title of respondents was under consideration. Certain exemplars in the form of judgment and awards in respect to the acquisition of land and award of compensation were relied on and it was argued that since Union of India was party to those proceedings in the matter of determination of market value, the principle and decision already taken earlier cannot be disputed by it and is estopped besides that the challenge is barred by res judicata. The Apex Court negatived it by giving three exceptions, (1) If the Union of India had not preferred any appeal against earlier judgments and award, it would not be estopped and precluded from raising the said question in a different proceeding since in a given case it is permissible in law to do the same keeping in view the larger public interest. (2) Referring to **Government of West Bengal Vs. Tarun K.Roy 2004 (1) SCC 347** it observed that non filing of an appeal in any event would not be a ground of refusing to consider the matter on its own merits. (3) Referring to **State of Bihar and others Vs. Ramdeo Yadav and others, 1996(2) SCC 493** and **State of West Bengal and others Vs. Debdas Kumar and others 1991 (1) Suppl. SCC 138**, it observed that when public interest is involved in interpretation of law, the Court is entitled to go into the question. It was held that principle of res judicata would apply only when the lis was inter-parties and had attained finality in respect to the issue involved. The said principle will, however, have no application inter alia in a case where the judgment and/or order had been passed by a Court having no jurisdiction therefor and/or in a case involving a pure question of law. It will also have no application in a case where the judgment is not a speaking one. The Apex Court also referred to **Ramnik Vallabhdas**

Madhvani and others Vs. Taraben Pravinlal Madhvani (2004) 1 SCC 497 and reiterated that the principle of res judicata is a procedural provision and has no application where there is inherent lack of jurisdiction. Thus this judgement inroads an exception in the principle of res judicata where the matter carry for larger public interest.

1049. In **Anathula Sudhakar Vs. P. Buchi Reddy and others (2008) 4 SCC 594** no question of estoppel or res judicata as such was involved as is evident from para 12 of the judgment wherein the issues considered by the Apex Court are quoted:

> *(I) What is the scope of a suit for prohibitory injunction relating to immovable property?*
>
> *(ii) Whether on the facts, the plaintiff ought to have filed a suit for declaration of title and injunction?*
>
> *(iii) Whether the High Court, in a second appeal under Section 100 CPC, could examine the factual question of title which was not the subject-matter of any issue based on a finding thereon, reverse the decision of the first appellate court?*
>
> *(iv) What is the appropriate decision?*

1050. The Apex Court considered the first question as to when a mere suit for permanent injunction would lie and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief and briefly summarized the principle as under :

(A) (a)Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simplicitor will lie.

(b) A person has a right to protect his possession against

any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

(c) Where the title of plaintiff is not disputed but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession cannot seek the relief of injunction simplicitor, without claiming the relief of possession.

(d) Where the plaintiff is in possession but his title to the property is in dispute or under a cloud or where the defendants assert title thereto and there is also a threat of dispossession from the defendant, the plaintiff has to sue for declaration of title and the consequential relief of injunction.

(e) Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

(f) A prayer for declaration will be necessary only if the denial of right and challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property.

(B) A cloud is said to have raised over a person's title when some apparent defect in his title to the property or when some prima facie right of a third party over it is made out or shown. An action for declaration is remedy to remove the cloud on the title to the property. On the other hand where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely deny plaintiff's title, it

does not amount to raining a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient.

(C) Where the plaintiff, believing that the defendant is only trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over the plaintiff's title then there is a need for the plaintiff to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction with permission of the Court to file a comprehensive suit for declaration and injunction. **He may file the suit for declaration with consequential relief, even after the suit for inunction is dismissed, where the suit raised only the issue of possession and not any issue of title.** (emphasis supplied)

(D) If the property is a vacant site, which is not physically possessed, used or enjoyed, in such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession as against the person who is not able to establish title.

(E) In a suit relating to a vacant site filed for a mere injunction and the issue is one of the possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere

injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the Court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs. Referring to the Madras High Courts' decision in **Vanagiri (supra)**, the Apex Court in **Pramod Gupta (supra)** observed that the second suit would be barred only when the facts relating to title are pleaded, when an issue is raised in regard to title and parties lead evidence on the issue of title and the Court instead of relegating the parties to an action for declaration of title decides upon the issue of title and that decision attains finality. However, the Apex Court made it clear in para 20 of the judgment that the question relating to res judicata was not before it but the question whether a finding regarding title could be recorded in a suit for injunction simpliciter, in the absence of pleadings and issue relating to title is up for consideration. The said judgment, in our view as such lends no credence to the plaintiff's (Suit-4).

1051. To the same effect is the judgment in **Williams Vs. Lourdusamy & another (2008) 5 SCC 647** wherein the Apex Court relied its decision in **Sajjadanashin Sayed (supra)**.

1052. In **State of Uttar Pradesh and another Vs. Jagdish Sharan Agrawal and others (2009) 1 SCC 689** where a suit was dismissed for non prosecution and there was no decision on merits and also where the Court found that order IX Rule 9 was not applicable, it was held that the principle of res judicata will

not bar a subsequent suit being inapplicable.

1053. In **Mahila Bajrangi Vs. Badribai (2003) 2 SCC 464** in order to attract doctrine of res judicata, it was held that a decision on an issue that has been and substantially in issue in the former suit between the same parties which has been heard and finally decided would be considered as *res judicata* ***and not merely finding on every incident or collateral question to arrive at such a decision that would constitute res judicata.***

1054. In **Bishwanath Prasad Singh Vs. Rajendra Prasad and another (2006) 4 SCC 432** a deposit made under Section 83 of the Transfer of Property Act, 1882 was held to be procedural in nature and not to constitute a decision on an issue directly and substantially arises in an earlier suit so as to operate res judicata even if before allowing the deposit to be made under Section 83, the Court has passed a detailed order dealing the rival submissions.

1055. In **Srikant Vs. District Magistrate, Bijapur and others (2007) 1 SCC 486** referring to its earlier judgments, the Court held that the doctrine of constructive res judicata is confined to civil action and civil proceedings and inapplicable to illegal detention and the action brought for a writ of habeas corpus. However, where an earlier application for habeas corpus has been rejected, a second application on the same ground may not be permissible but if there are some fresh grounds even such a bar would not apply. This judgment, therefore, has nothing to do with the issue of res judicata engaging attention in the present suits.

1056. In **Saroja Vs. Chinnusamy (2007) 8 SCC 329**, the Court summarized conditions to attract the doctrine of res judicata under Section 11 C.P.C. as under :

(i) There must be two suits-one former suit and the other subsequent suit;

(ii) The Court which decided the former suit must be competent to try the subsequent suit;

(iii) The matter directly and substantially in issue must be in the same either actually or constructively in both the suits.

(iv) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit;

(v) The parties to the suits or the parties under whom they or any of them claim must be the same in both the suits;

(vi) The parties in both the suits must have litigated under the same title.

1057. In **Saroja's case (supra)** the interesting thing is that a suit no. 233 of 1989 was filed on 19.4.1989 by one Saroja, her minor children Suganthamani and Ramesh against her husband Kuppusamy and his tenant for declaration of title and permanent injunction in respect of a property "A". During the pendency of the suit, Kuppusamy, husband of Saroja, sold the suit property by a registered sale deed dated 13.6.1990 for a consideration of rupees one lac to the appellant Saroja. She (appellant) filed another suit being O.S. No. 493 of 1990 for declaration of title and permanent injunction claiming absolute ownership and possession of the suit property purchased by her from Kuppusamy claiming that she had been in continuous possession of the suit property from the date of purchase and the *Patta, Chittha* and *adangal* also stood in her name. The suit was contested. When the later suit was pending, the earlier suit was decreed ex-parte in favour of respondent no. 3 and her minor

children. The subsequent suit was also decreed but in appeal the decree was reversed and the judgment of the first Appellate Court was confirmed by the High Court in second appeal. The Apex Court also confirmed the above judgment holding that a decree which is passed ex parte is as good as a decree passed after contest.

1058. In **Bharat Sanchar Nigam Ltd. and another Vs. Union of India & others JT 2006 (3) SC 114**, the application of principle of res judicata in tax matters was considered and it was held that every assessment year gives a new cause of action since different assessment orders are to be passed and, therefore, the order in respect to one assessment proceedings shall not operate as res judicata for the subsequent assessment years. The Court further held as under :

> ***"20.*** *The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent of the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a*

different view. This mandate is subject only to the usual gateway of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.

1059. The discussion made above as also in the light of the principles of law laid down in the various precedents, some of which are discussed above, the conclusion is inevitable that in no manner, it can be said that anything in Suit-1885 may be construed or taken as to operate as res judicata in the suits up for consideration before us. In fact, neither the principles of res judicata nor estoppel is attracted in any manner as the conditions precedent for attracting the said principles are completely lacking. It cannot be said that either the suits are barred by principle of res judicata or that Suit-1885 was filed on behalf of the whole body of persons interested in Janam Asthan and, therefore, all the Hindus are barred by the same. It also cannot be said that the defendants are estopped from denying the title of Muslim community including the plaintiff of Suit-4 to the property in dispute in view of the judgments of Suit-1885.

1060. In **Smt. Dhana Kuer Vs. Kashi Nath Chaubey, 1967 AWR 290** a Single Judge upheld the decision of the courts below holding that the suit was barred by Section 11 Explanation VI. An earlier suit was filed by Kashi Nath, Vindhayachal and Bindeshwari seeking a declaration that Lt. Jadunandan, husband of Smt. Asharfa has no interest of the property in suit except a right of maintenance. The trial court

dismissed the suit but in appeal the suit was decreed and the judgment was confirmed in second appeal also. Thereafter Smt. Dhana Kuer, daughter of Jadunandan and Smt. Asharfa filed another suit seeking a declaration that Jadunandan died as separate member of the family. The Court held that the earlier suit was contested in respect of a private right claimed in common for oneself and others and, therefore, the judgment was binding upon the successors who can be validly said to be represented in the earlier case through the superior member. In our view, this judgment has no application in the case in hand as is evident from the facts noted above.

1061. **Mst. Sudehaiya Kumar and another Vs. Ram Dass Pandey and others, AIR 1957 All. 270** sought to be relied by referring para 6 to contend that Explanation VI Section 11 C.P.C. is not confined only to the representative suits governed by Order 1 Rule 2 but is applicable to other suits as well. This principle has been explained by the Apex Court in **Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu, AIR 1977 SC 1268** giving an illustration where each party in a partition suit claiming that the property, the subject matter of the suit, is joint, asserts a right or title common to others to make identical claims. If that very issue is litigated in another suit and decided, the others making the same claim cannot be held to be claiming a right in common for themselves and others. Each of them in such a case must be deemed to represent all those, the nature of whose claims and interests are common and identical. The crux of the matter to attract Explanation VI is that interest of a person concerned has really been represented by the other; in other words his interest has been protected after in a bonafide capacity. If there be any clash

of interest between the persons concerned and is assumed representative, or if the later deem to collusion, or, for any other reason mala fide involves to defend the claims, it cannot be considered to be a representative interest as held in **Surayya Begum (Mst) Vs. Mohd. Usman and others, 1991(3) SCC 114.** Sri Siddiqui is also relied upon **Bidhumukhi Dasi Vs. Jitendra Nath Roy and others, 1909 Indian Cases (Calcutta) 442; Singhai Lal Chand Jain Vs. Rashtriya Swayam Sewak Sangh, Panna and others, AIR 1996 SC 1211 (para 13);** and **Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh C. (Dead), M.N. Singh and others, AIR 2003 SC 3349 (paras 17 and 19)** but we find nothing therein to help him on this aspect of the matter.

1062. What we notice from the contentions of Sri Siddiqui is that his plea of res judicata is not limited to the suit or issue in suit having been raised, heard and decided but it is in respect to certain facts which are contained in the record of Suit-1885 with respect to the nomenclature of site or building or object and its location etc. He claims that mention of the above amounts to an admission by the plaintiff of Suit-1885 about the title, nature etc. of the said building or site or locality even if it was not in issue or nothing was decided on this aspect. Ignoring the issues raised in Suit-1885 and the decision of the Court, certain observations of the learned District Judge made during his personal visit of the site are also being claimed as a finding of fact binding on the parties not only to Suit-1885 but also to all those who go and intend to visit the aforesaid entire site either as worshipper or otherwise. The submissions is extremely far fetched and too remote to be accepted and applied in the case in hand.

1063. We answer the I**ssues No. 5 (d) (Suit-1), 7(c) and 8 (Suit-4), and 23 (Suit-5) in negative.**

1064. The Issue No. 29 (Suit-5) is:

> *"Whether the plaintiffs are precluded from bringing the present suit on account of dismissal of suit no. 57 of 1978 (Bhagwan Sri Ram Lala Vs. State) of the Court of Munsif Sadar, Faizabad?"*

1065. It is not disputed that Suit No. 57 of 1978 was dismissed for non compliance of Court's order with respect to payment of Court fees. Neither any issue was raised nor argued nor decided by the said Court. Therefore, bar of res judicata is not at all attracted by the order dismissing Suit 57 of 1978 inasmuch as the said order dismissing the suit on technical ground does not come within the purview of judgment or a decision or issue as defined in Section 2 (9) CPC. **The issue no. 29 (Suit-5) is therefore answered in negative and in favour of plaintiffs**.

1066. Issue no. 7(b) (Suit-4) only pertains to the capacity of Mohammad Asghar in which he contested Suit-1885. It is not disputed by the parties that initially when the suit was filed by Mahant Raghubar Das there was only one defendant, i.e., the Secretary, Council of India. Mohammad Asghar later on filed an impleadment application claiming himself to be the Mutwalli of Babari Masjid and the said application was allowed whereupon he was impleaded as defendant no. 2. He pursued the case accordingly before the trial court and the appellate court. It is thus matter of record that in Suit-1885 Mohammad Asghar was allowed to pursue the matter as Mutawalli of Babari Masjid. No party has disputed this factum which is purely a matter of record. What has been in fact suggested by the counsel for

Hindu parties is that mere factum that Mohammad Asghar's application was allowed in Suit-1885 permitting him to pursue the matter as defendant no. 2 in his alleged capacity of Mutawalli as Babari Masjid, whether it would bind the Hindu parties in the present cases. This, however, is not the issue. The only issue before us whether he was impleaded and pursued Suit-1885 as Mutawalli of Babari Masjid which is a fact derived from the record of Suit-1885 and, therefore, has to be decided in affirmance particularly in view of the fact that nothing has been said by the defendants (Suit-4) to disprove or contradict it. **Issue No. 7(b) (Suit-4) is decided accordingly in affirmance and in favour of plaintiffs (Suit-4)**.

(D) Relating to Waqfs Act No. 13 of 1936, 16 of 1960 and certain incidental issues:

1067. Under this category fall Issues No. 5(a), 5(b), 5(c), 5(d), 5(e), 5(f), 17, 18, 23, 24 (Suit-4); 9, 9(a), 9(b) and 9(c) (Suit-1); 7(a), 7(b) and 16 (Suit-3) and 28 (Suit-5).

1068. Issues No. 17, 5(a), 5(c) and 5(d) (Suit-4) stood decided on 21.04.1966. The said issues read as under:

> "*Whether a valid notification under Section 5(1) of the U.P. Muslim Waqf Act No. XIII of 1936 relating to the property in suit was ever done? If so, its effect?"*
>
> "*Are the defendants estopped from challenging the character of property in suit as a waqf under the administration of plaintiff no.1 in view of the provision of 5(3) of U.P. Act 13 of 1936?"*
>
> *"Were the proceedings under the said Act conclusive?"*
>
> "*Are the said provision of Act XIII of 1936 ultra-vires as alleged in written statement?"*

1069. Learned Civil Judge considered issues no. 17, 5(a) and

5(c) (Suit-4) in detail vide his order dated 21.04.1966 and in view of his findings recorded thereon, issue no. 5(d) (Suit-4) was not pressed by the defendants.

1070. The order dated 21.4.1966 is as under :

"All the above four suits were consolidated together on 6.1.1964 on the basis of the joint statement of the parties to all the above suits, which is available at paper No. 184A, of the leading case Original Suit No.12 of 1961. Issues covering the subject matter of all the above mentioned four suits were commonly framed in the leading case, Original Suit No. 12 of 1961 on 5.3.64, which are 16 in number. An additional issue No. 17 was framed on 17.4.65, which is available in the English Notes of the said date in the leading case.

Issue No. 5 (d) was initially taken-up for disposal as a preliminary issue for determination whether the question involved in issue No. 5 (d) should be referred to the Hon'ble the High Court, under Section 113 (Proviso) C.P.C.; or not. Before an answer to issue No. 5 (d) could be given by this court, the defendants of the leading case presented an application paper No. 239/C; whereby they prayed that the plaintiff be called upon to produce the notification contemplated in Section 5 of the U.P. Moslim Waqf Act. In response to the said application, the plaintiffs through their application 242/G filed two papers 243/C and 243/1A as the alleged Government Gazette Identification made under Section 5 of the U.P. Moslims Waqf Act. Paper No. 243/C is the attested copy of the supplement to the Government Gazette of the United Provinces, dated February 26, 1944-Part VIII; and paper

No. 243/1A is the annexure to the said gazette notification printed in Urdu title: "Fehrist Sunni avaqaf wakai suo me Muthadda Agra wa Oudh, jinpar bamoojib report Commissioner Avaqaf, U.P. Moslims Waqf Act No.XIII of 1936 ki Dafat Aayad hoti hai".

Its title page further contains the following words :-

"Fehrist hasl Dafa 5 Act XIII/1936....."

In the said list of waqf property paper No.243/1A, the property in dispute in the above four suits as alleged by the plaintiffs of the leading case is mentioned at serial No. 26, of page 11. The entire list of Sunni Waqf property of Faizabad is mentioned at pages 10 and 11 of paper No. 243/1A. The proforma of the list as well as the entries against item No. 26 of the said list are reproduced below :-

No. Sumar	*Name waquif ya Waqf.*	*Name Mutwalli Maujooda*	*Nauip (sic. Nawyyet) Jaidad Mauqoofa*
26	*Badshah Babar*	*Syed Mohammad Zaki Mutwalli Masjid Babari Qasba Shahnawa, Dak-Khana Darshan Nagar*	*This column stands blank against entry No. 26 of the list paper No. 243/1A*

Subsequently, the defendants 1, 3 and 4 of the leading case filed their objections 247/C and 248/C against the plaintiffs' aforesaid papers 243/C, 243/1A and 244/C.

In reply to the said objections of the defendants, the plaintiffs filed their reply 250/C and 251/C against the

defendants' aforesaid objections 248/C and 247/C respectively.

In connection with the subject matter of applications 239/C, 240/C, 251/C and the alleged Gazette Notification 243/C and the list of waqf property 243/1A, leaned counsel for the parties jointly stated that the following additional issue may be framed and issue No. 17 which should be decided first, because issue No. 5, with all its part recedes to a secondary position in face of the following additional issue No. 17. Their aforesaid joint request appears to be sound, and, therefore, the following additional issue No. 17 was framed :-

ADDITIONAL ISSIUE NO. 17 :

"Whether a valid notification under Section 5 (1) of U.P. Moslims Waqf act No. XIII of 1936, relating to the property in suits was ever done? Its effect?"

Naturally issue No. 17, thus, become primarily the preliminary issue.

Learned counsel for the parties were heard at length in respect of issue No. 17. My findings under issue No. 17, are given here-under :-

FINDINGS ON ISSUE NO.17

The words "Waqf" and "Waqif" have been defined in Section 3(1) of Act XIII of 1936 Muslims Waqfs Act, U.P. as below :-

"Waqf" means the permanent dedication or grant of any property for any purposes recognized by the Mosalman law or usage as religious, pious or charitable and where no deed of waqf is traceable includes waqf by user; and a waqif means any person, who makes such dedication or

grant".

It will be evident from the above definition that the word "waqf is inseparably connected with the word "any property", because the 'Waqf' can come into existence only in relation to any property. In this way, whenever the word 'Waqf" is conveyed to any person, it must necessarily convey simultaneously the idea or description or a tangible connotation about the existence of "any property" covered or included in the 'Waqf'. What I mean to say, is that if some one wants another to know that a particular property is waqf, it will be necessary for him to mention simultaneously the description of at least tangible connotation about the identity of the property of the waqf.

In the instant case, at hand, item No.26 (page 2 of the list paper No.243/1A) is totally blank in its last column, which was prescribed for mentioning the particulars of the property to be known as 'waqf" created by Badshah Babar. The absence of any mention of the tangible identity of the alleged waqf property of item No. 26, is a fatal-flaw in the alleged Government Notification paper No.243/C read with paper No. 243/1A; because no body living in the extensive district of Faizabad or for that matter living in any part of India, could or can reasonably make-out as to what is that specific property, which was proposed to be enlisted as Sunni Waqf" property in item No. 26, page 11, of paper No. 243/1A. Consequently, a person interested in the property in suits-living in a distant tract of Faizabad District or in any other State of India could never understand that the existing entries of item No. 26 of paper No. 243/1A, unequivocally relate to the present property in suits. That

being so, proviso No. 1, to clause 2 of Section 5 of U.P. Moslims Waqf Act, 1936 and clause 3 of Section 5 of the said Enactment cannot come into play, in respect of the present property in suits; because the alleged Government Gazette Notification paper No. 243/C read with paper No. 243/1A, at item No. 26, page 11, of paper No. 243/1A, was meaningless; and because of the blankness of its last column, the same did not and could not convey to the public at-large or to for that matter to any one that the said item No. 26 of 243/1A, related to the present property in suits. The principle laid down in the ruling 'Harla. Vs. The State of Rajasthan, A.I.R. 1951, Supreme Court, p. 467 clearly goes to show that such a notification is no effective notification in the eyes of law or equity.

Learned counsel for the plaintiffs of the leading case cited before me the ruling AIR 1959, Supreme Court, P. 198, 'Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others" to show that it was incumbent upon any Hindu also interested in the property of item No. 26 or 243/1A, to bring a regular suit for declaration within one year from 26.2.1944 when 243/1A was published in the U.P. Government Gazette, according to the provisions of clause 2, of Section 5 of Act XIII of 1936, and since none of the Hindus of India or Faizabad District or the defendants of the leading case or the plaintiffs of the connected three cases had brought any suit for declaration within one year of 25.2.1944, challenging the validity of item No. 26, page 11, of notification No. 243/1A; hence the defense of the defendants of the leading case and the suits of the plaintiffs of the connected three

cases are barred by clause 3, of Section 5 of Act XIII/1936; whereby the aforesaid declaration of waqf by the waqf Commissioner, U.P. at item No. 26 of paper No. 243/1A, had become final and conclusive.

Bowing down to the principle laid down in the aforesaid ruling of Hon'ble the Supreme Court, I respectfully wish to point-out that the said ruling is distinguishable from the facts of the present cases at-hand; because in the aforesaid ruling, it was taken for granted that a valid notification of the proposed waqf property was duly made in the U.P. Government Gazette under Section 5(1) of Act XIII of 1936; whereas in the present cases, at-hand, the alleged notification as contemplated in Section 5, clause (1) of Act XIII of 1936, i.e. item No. 26 of the list paper No. 243/1A, does not amount to a valid notification; because the same does not convey the idea or the identity or necessary particulars about the property proposed by the waqf Commissioner to be listed as Sunni Waqf Property dedicated by Badshah Babar. I have already pointed out above that the definition of the word "Waqf" in Section 3(1) of Act XIII of 1936, necessarily relates to some specific property. This means that a clear mention of the property included in a waqf must necessarily be made when making a mention of a particular waqf. This has not been done in item No. 26 of paper No. 243/1A, inspite of the fact that column No. 4, of the above noted proforma was specifically prescribed for that end. In this connection, I may profitably refer to the aforesaid ruling itself, which has been cited on behalf of the plaintiffs of the leading case, in which their Lordships of Hon'ble The Supreme

Court have themselves held as under :-

> *"That expression 'any person interested in a waqf", must mean 'any person interested in what is held to be a waqf'. It is only persons, who are interested in a transaction, which is held to be a waqf, who could sue for declaration that the decision of the Commissioner of Waqfs in that behalf is wrong and that the transaction in fact is not a waqf under the Act."*

The above under-lined words, as used by their Lordships of Hon'ble The Supreme Court, clearly point-out that persons interested in a property held as waqf by the Waqf Commissioner, will be duty bound to bring a suit for declaration within one year from the date of notification against the decision of the Waqf Commissioner if the notification had conveyed to them, the identity or the particulars of the proposed waqf property; and not otherwise. As pointed out above, item No. 26, of the notification list paper No.243/1A is utterly blank in its column No. 4 due to which no body could understand as to what property was intended to be included in the said item No. 26. That being so, the said notification is meaningless; and does not carry the sanctions provided in clause 3 of Section 5 of Act XIII of 1936 with it.

The entry of the name of Badshah Babar as Waqif, of a property in Faizabad District, as given in column No. 2, of item No. 26 of paper No. 243/1A, is not enough to convey the idea of the identify of the present property in suits, because Badshah Babar was the Emperor of the Moghal empire in India, who never resided in Faizabad

District according to the pages of history of which a judicial notice can be taken by this Court, Secondly, there is no knowing as to how many waqfs were created by Badshah Babar in various parts of Faizabad District.

In column No. 3 of item No. 26 of paper No. 243/1A is given the name of the Mutwalli as Syed Mohammed Zaki Mutwalli Masjid Babari, Qasba Shah Nawa, Dak-Khana Darshan Nagar. A judicial notice of this fact can be taken by this Court, that qasba Shah Nawa lying within the jurisdiction of Post Office Darshan Nagar is at a distance of about 8 to 10 miles from Ayodhya. As the said entry of the particulars of the Mutwali stands in column 3 of item No. 26 of paper No. 243/1A, it shows on the face of it that Syed Mohammed Zaki might have been a Mutawalli of a mosque built by emperor Babar in Qasba Shah Nawa, Post Office Darshan Nagar. In this way, the entries of columns 2 and 3 also of item No. 26 of paper No. 243/1A are so vague and mis-leading that a number of the public at-large, residing in any part of our vast country India, who might be interested in the present property in suits, could never understands from the same that by the notification of item No. 26, of paper No. 243/1A, which was the present property in suits, which was proposed to be listed and declared as Sunni Waqf property by the Commissioner of Waqf U.P.

No explanation, whatsoever, has been offered on behalf of the plaintiffs of the leading case at the time of arguments on issue No. 17 or in the plaintiffs' reply, paper No. 250/C as to why column No. 4, of item No. 26 of paper No. 243/1A was left blank. In para 5 of the plaintiffs' reply

paper No. 250/C, all that has been contended in that connection is that there is no vagueness in the entry relating to the mosque in suit at item No. 26, of paper No. 243/1A; because in its column No. 2, the name of Badshah Babar is clearly mentioned and in its column No. 3, the name of present Mutwalli Syed Mohammed Zaki Mutwalli Masjid Babari, is mentioned with his residential address as Qasba Shah Nawa, Post Office Darshan Nagar. It is noteworthy that in column No.3, of entry No. 26, of paper No. 243/1A, it is nowhere mentioned that Qasba Shah Nawa, Post Office Darshan Nagar was the residential address of Syed Mohammed Zaki. Consequently, it has been simply twisted at the end of para 1 of paragraph 5, of the plaintiffs' reply paper No. 250/2C, contains the 'Sakoonat' of residence of Syed Mohammed Zaki. As a matter of fact, a perusal of column No. 3 of item No. 26 of the notification list paper No. 243/1A, will clearly convey to the reader that Syed Mohammed Zaki was a Mutwalli of some mosque built by Babar in Qasba Shah Nawa Post Office Darshan Nagar. As such, the aforesaid explanation of the plaintiffs has no force.

At the end of para 5, in paper No. 250/3C, another explanation of the above was offered on behalf of the plaintiffs of the leading case as under :

"The plaintiffs' allegation being that the building in suit is mosque built by King Babar whose dynasty and accounts of his conquest are matters of history well known to all educated persons in India."

The aforesaid explanation in the first place, conveys the impression that the plaintiffs of the leading case are

themselves conscious of the fact that it was a fatal lacuna in the aforesaid notification paper No. 243/C read with paper No. 243/1A whereby the description or particulars or identity of the waqf property mentioned in item No. 26, of paper No. 243/1A was omitted in column No. 4 or for that matter in any of the columns of item No. 26, of paper No. 243/1A. Secondly, the aforesaid explanation is confined to the alleged presumed knowledge of the educated persons only-totally ignoring that even uneducated persons whose number surpasses the number of education persons in this country, had also a right vested in them to assail the entries of item No. 26 of paper No. 243/1A.

Thirdly, it will be too remote to presume that the factum of the conquest of Emperor Babar over certain parts of India, which one can derive from the pages of popular books of history taught in schools and colleges must necessarily convey the details of those properties or buildings also, which were built by Emperor Babar in various parts of this vast country at different times.

Lastly, it is to be remembers that it is not the case of the plaintiffs of the leading case that property in suit was originally a temple, which was ever conquered by Emperor Babar, who got it remodeled in the shape of a mosque. The case of the aforesaid plaintiffs is contained in their plaint in leading case, as well as in the statement of the plaintiffs' learned counsel made under order X, rule 2 C.P.C. on 20.1.64, at paper No. 187A, is that the property in suits is the originally mosque, which was built for the first time at its place, by Emperor Babar in 1528 AD in the shape of a

mosque which he had dedicated to the followers of Islam thereafter. That being so, the knowledge of the educated persons regarding the conquest of Emperor Babar derived from the pages of popular history books cannot profitably utilized by the plaintiffs of the leading case because according to the plaintiffs' own case, the property in suits was not conquered property but a property which was originally and for the first time built at its place by Emperor Babar for use of the Moslim public.

In view of the facts and reasons discussed above, I hold under issue No.17 that no valid notification under Section 5(1) of U.P. Moslim Waqf Act No. XIII of 1936 was ever made so far relating to the specific disputed property of the present suits at-hand. The alleged Government Gazette Notification paper No. 243/C read with the list paper No. 243/1A do not comply with the requirements of a valid notification in the eyes of law and equity as I have already discussed above. The aforesaid two papers, therefore, serve no useful purpose to the plaintiffs of the leading cases.

In view of my above findings I hold that the bar provided in Section 5(3) of U.P. Act No. XIII of 1936 does not hit the defence of the defendants of the leading case and their suits which are connected with the aforesaid leading case. Issue No. 17 is answered accordingly.

In view of my findings given above, the subject matter of issue No. 5 (a) also stands automatically decided against the plaintiffs of the leading case; and in favour of the defendants of the leading case and the plaintiffs of the connected cases. Issue No. 5(a) also, therefore, stands

answered accordingly.

My findings under issue No. 17, given above, automatically answer issue No. 5(c) also, accordingly. Consequently, issue No. 5(c) is answered in the negative.

In this way, only two parts (b and D) of issue No. 5 stand for decision now. Issue No. 5 (b) will be taken up for disposal along with the remaining issues.

As regard issue No. 5 (d) counsel for the defendants of the leading case to report today whether issue No. 5 (d) is still prepared in face of my above findings under issues Nos. 17, 5 (a) and 5(c)?"

1071. After delivery of the aforesaid order, the learned counsels for defendants in Suit-4 made the following noting :

"In view of the finding of Court it is not necessary to press Issue no. 5 (d) at present. As such Issue No. 5 (d) is not pressed."

1072. After referring to the above statement of the learned counsels for defendants (Suit-4), learned Civil Judge passed following order in respect to Issue No. 5(d) (Suit-4).

"Learned counsel for the defendants of the leading case has endorsed above that he does not press issue no. 5 (d) in view of the findings on issue nos : 17, 5(a) and 5(c), hence issue no. : 5(d) need not be answered by this Court.

Consequently put up on 25.5.66 for final heading of the above mentioned cases."

1073. **Issue No. 9 (Suit-1)** is similar to Issue No. 5(a) (Suit-4). It reads as under:

"*Is the suit barred by provision of Section 5(3) of the Muslim Waqfs Act (U.P. Act 13 of 1936)?"*

1074. With respect to Issue No. 5(a) (Suit-4) the learned Civil

Judge in his order dated 21.04.1966 has recorded the following findings:

> *"In view of my findings given above, the subject matter of issue No. 5 (a) also stands automatically decided against the plaintiffs of the leading case; and in favour of the defendants of the leading case and the plaintiffs of the connected cases. Issue No. 5(a) also, therefore, stands answered accordingly."*

1075. Issue No. 9 (Suit-1) being similar, also stands decided accordingly in terms of the judgement dated 21.04.1966 of the learned Civil Judge, i.e., in favour of the plaintiff (Suit-1).

1076. **Issues No. 7(a) and 7(b) (Suit-3)** pertain to the notification under 1936 Act and read as under:

> *"Has there been a notification under Muslim Waqf Act Act No. 13 of 1936) declaring this property in suit as a Sunni Waqf?"*
>
> *"Is the said notification final and binding? Its effect?"*

1077. Issue No. 17 (Suit-4) which has been decided by the detailed order dated 21.04.1966 of the learned Civil Judge is similar to both the above issues. Since it has already been held that no valid notification under Section 5(1) of 1936 Act in respect to the property in dispute has been issued, both the issues no. 7(a) and 7(b) (Suit-3) are answered in negative, i.e., in favour of the plaintiffs (Suit-3) and against the defendants therein.

1078. **Issues No. 5(b) (Suit-4) and 9(a) (Suit-1)** are similar which read as under:

> *"Has the said Act no application to the right of Hindus in general and defendants in particular, to the right of their worship?"*

"Has the said Act no application to the right of Hindus in general and plaintiff of the present suit , in particular to his right of worship?"

1079. In the plaint (Suit-4) referring to 1936 Act, the plaintiffs have averred in paras 9 and 10 as under:

"9. That in 1936 the U.P. Muslim Wakfs Act XIII of 1936 was passed and under the provisions of the said Act, the Commissioner of Wakfs made a complete enquiry and held that Babari Masjid was built by Emperor Babar who was a Sunni Mohammedan and that the Babari Mosque was a public wakf. A copy of the Commissioner's report was forwarded by the State Government to the Sunni Central Board of Wakfs and the Sunni Central Board of Wakfs published the said report of the Commissioner of Wakfs in the Official Gazette dated 26.2.1944.

10. That, no suit, challenging the report of the Commissioner of Wakfs was filed by the Hindus or by any person interested in denying the correctness of the report of the Commissioner of Wakfs, on the ground that it was not a Muslim Wakf or that it was Hindu temple."

1080. In the Additional Written Statement of defendants No.1 and 2 (Suit-4) para (g), (h) and (i) read as under.

"(g) That the Commissioner of Wakf only has to make an enquiry about number of Shia and Sunni Waqfs in the district the nature of each waqf, the gross income of property transferred in the Waqf, the Govt. revenue, the expenses and whether it is one expected u/s 2. The Commissioner of Wakf has only to see whether any transaction is Waqf or not and that to which sect the Waqf belongs and further whether such Waqf is or is not

exempted by sec.2 of the Act. All these things he has to do in accordance with the definition of Waqf in Section 3(1) of the Act XIII of 1936, an Act which is exclusively meant for certain clauses of Muslim Waqfs. The finality and conclusiveness in intended to give effect to the scheme of administration under the Muslim Waqfs Act and does not and cannot confer jurisdiction to decide question of title as against non-Muslims. The legislature u/s 5(3) does not say that the court shall take judicial notice of the reports of the Commissioner of Waqfs and shall regard them as conclusive evidence that the Waqf mentioned in such reports are Muslim Waqfs, as was done in Section 10 of the O.E. Act.

(h) That there has been no legal publication of alleged report and hence no question of any finality arises.

(i) That the purpose of publication is only to show to which sect. the waqf belongs. It does not call upon objections or suit by persons not interested in what is held to be a Waqf or not viz. by non muslims."

1081. The written statement dated 25th January, 1963 of defendant no.2, para 32 (g), (h) and (i) read as under :

"(g) That the Commissioner of Wakf only has to make an enquiry about number of Shia and Sunni Waqfs in the District the nature of each waqf, the gross income of property comprosed in the Waqf, the Government Revenue, the expenses and whether it is one expected U/s 2. The Commissioner of Waqf has only to see whether any transaction is Waqf or not, and that, to which sect the Waqf belongs and further whether such Waqf is or is not exempted by sec.2 of the Act. All these things he has to do

in accordance with definition of Waqf in Section 3(1) of the Act XIII of 1936, an Act which is exclusively meant for certain clauses of Muslim Waqfs. The finality and conclusiveness is intended to give effect to the scheme of administration under the Muslim Waqfs Act and does not and ***cannot confer jurisdiction to decide question of title as against non-Muslims****. The legislature U/s 5(3) does not say that the court shall take judicial notice of the reports of the Commissioner of Waqfs and shall regard them as conclusive evidence that the Waqf mentioned in such reports are Muslim Waqfs as was done in Section 10 of the O.E. Act.*

(h) That there has been no legal publication of alleged report and hence no question of any finality arises.

(i) That the purpose of publication is only to show to which sect. the Waqf belongs. It does not call upon objections or suit by persons not interested in what is held to be a Waqf or not viz. by non muslims."

1082. Defendant No.13 and 14 Baba Abhiram Dass and Pundarik Misra also in para 32(g) have said :

"(g) That the Commissioner of Wakf only has to make an enquiry about number of Shia and Sunni Waqfs in the District, the nature of each waqf, the Government Revenue, the expenses and whether it is one excepted U/s 2. The Commissioner of Waqf has only to see whether any transaction is Waqf or not, and that, to which sect the Waqf belongs and further whether such Waqf is or is not exempted by Section 2 of the Act. All these things he has to do in accordance with definition of Waqf in Sec. 3(1) of the Act XIII of 1936, an Act which exclusively meant for

certain clauses of Muslim Waqfs. The finality conclusiveness is intended to give effect to the scheme of administration under the Muslim Waqfs Act and does not and cannot confer jurisdiction to decide question of title as against non-Muslims. The legislature under Section 5(3) does not say that the court shall take judicial notice of the reports of the Commissioner of Waqfs and shall regard them as conclusive evidence that the Waqf mentioned in such reports are Muslim Waqfs as was done in Section 10 of the Taluqdari Act.

(h) There has been no legal publication of alleged report and hence no question of any finality arises.

(i) That the purpose of publication is only to show to which section the Waqf belongs. It does not call upon objections or suit by persons not interested in what is held to be waqf or not viz. by non Muslims."

1083. Defendant No.13 again in his written statement in paras 33 and 36 has pleaded as under :

33. THAT in 1936 the U.P. Muslim Waqfs Act, was passed. It established two Central Boards of Waqfs in U.P., namely the Sunni Central Board of Waqfs and the Shia Central Board of Waqfs, to supervise and control the Muslim Waqfs of the two sects respectively. All the existing Waqfs were required to be surveyed and classified into Sunni and Shia Waqfs by a Commissioner of Waqfs, who was required to submit his report to the local Government, and the Government in its turn was required to send that report to the Central Board concerned, according to the sect to which the waqf belonged, whereafter the Central Board concerned was required to notify in the Gazette the

Waqfs of its respective sect. There was no such notification in respect of the 'waqf' of the 'mosque' in dispute. Allegation to he contrary is wrong. The Plaintiff Waqf Board, has had no jurisdiction in respect of the premises even if it were a 'mosque'. Further, it took no action or positive steps for the custody or the care of the building or its establishment as a 'mosque'. No one acted as its Mutwalli, or Mauzin, or Imam, or Khatib, or Khadim. The descendant of Mir Baqi who was sought to be planted as the Mutwalli by the British was an opium addict. He denied that the grant of revenue free land was waqf for the purposes of the 'mosque', and instead claimed that it was his Nankar for services rendered to the British, and did not look after or manage the 'mosque' at all.

36. THAT the Sunni Central Board of Waqfs, U.P. has no jurisdiction or competence to meddle with the alleged 'waqf ; or the alleged 'mosque', or to sue in respect thereof for want of a proper and valid notification in its favour, in respect thereof, under Section 5 of the U.P. Muslim Waqfs Act, 1936, the notification published in the Official Gazette dated 26.2.1944, having already been held to be invalid by the Court's finding dated 21.4.1966 on issue No.17, in this Suit, which has become final and irreversible between the parties. Further, the suit when filed in 1961, was barred by the provisions of the U.P. Muslim Waqfs Act, 1960 ; only the Tribunal constituted under that Act had the jurisdiction to entertain a suit of this nature, if filed within the limitation prescribed by it, and the Civil Court had no jurisdiction to entertain it.

1084. Defendant No.17 in his (Additional) written

statement dated 14th September, 1995 in para 11 has pleaded as under :

"11. That Sunni Central Board of Waqfs has no legal authority to file the suit and as such the suit is liable to be dismissed."

1085. With respect to Issue No. 9(a) (Suit-1) we find pleadings in paras 25 and 26 of the written statement of defendant no. 10 which read as under:

"25. That the ownership of the mosque in question vests in the God Almighty and the said mosque is a waqf property and the waqf character of the said mosque cannot be challenged by the plaintiff in this suit specially so when the plaintiff had never challenged the entry of the said waqf which was made in pursuance of the gazette notification issued by the State Government of Uttar Pradesh under provisions of the U.P. Muslim Waqf Act, 1936.

26. That the plaintiff's suit is barred even by the provisions of the U.P. Muslim Waqf Act, 1936."

1086. With respect to applicability of Wakfs Act, Sri M.M. Pandey, counsel for plaintiffs (Suit-5) has submitted:

(A) The Act needs a close examination. The Preamble aims at providing better governance and administration of certain classes of Wakfs and supervision of Mutawalli's management. S. 3(1) does not create any 'new' class of Wakf and recognises only those known to the Mahommedan Law; the Statement of Objects and Reasons also says so and adds that the Act "is not intended to deprive the Mutawallis of any authority lawfully vested in them, nor it aims at defining all the powers, duties and liabilities of the Mutawallis…" S. 4(1) provides for

appointment of a District Commissioner of Wakf "for the purpose of making survey of all wakfs". Procedural powers of Civil Court are conferred on the Commissiioner for summoning witnesses, production of documents, local inspection/ investigation u/s 4(4) while making inquiries, but there are no guidelines how to 'initiate' an inquiry, what notices are required to be issued and to whom. S. 4(3) confers power on him to make 'such inquiries as he consider necessary'; there is no guideline for the manner in which he should proceed. This seems to be 'arbitrary' and violates the Constitutional requirement of fairness. The word 'necessary' will make Wakf Commissioner's discretion to be objective and open to judicial review.The Act does not provide for framing Rules of procedure for the Wakf Commisioner to observe before initiating an inquiry. If on particular facts or situation, Notice to a particular person is essential in the interests of justice and fairness, the Wakf Commissioner cannot plead that he had unrestricted discretion whether or not to issue Notice; in law, every fair procedure is permissible unless specifically probited. The Act does not prohibit the Wakf Commissioner to issue notices for giving opportunity to persons interested while conducting the inquiry. The proceeding before the Wakf Commissioner is quasi judicial as held in the case of Board of Muslim Wakfs, Rajasthan Vs. Radha Kishen (1979)2 SCC 468 (para 25). Further the SC has held in paras 37 to 39 that where a stranger who is a ***non-muslim*** *is in possession of a certain property, his right, title and interest therein cannot be put to jeopardy merely because the property is included in the list prepared by the Wakf*

Commissioner under the U.P. Wakf Act. Although this decision concerns Section 6(1) of the Wakf Act of 1960, the SC has observed in para 35 that that Section "is based on Sub-section (2) of Section 5 of U.P. Muslim Wakf Act of 1936". This distinguishes the decision from that in 1959 SC 198, Sirajul Haq Khan Vs Sunni Central Board of Wakf where both Plaintiff and Defendants were Muslims. Thus Hindus, Nirmohi Akhara and any of the Defdts in OOS 4 of 1989, cannot be treated to be a 'person interested in a wakf' u/s 5(2) of the Wakf Act of 1936. It will also be appreciated that if Nirmohi Akhar and others were to be treated to be 'person interested in a wakf', it was incumbent upon the Wakf Commissioner to issue notices at that very time before deciding the issue. Even if it be treated to be administrative, an opportunity of hearing ought to have been given to Nirmohi Akhara and Hindu Community as held, after considering several decisions of Supreme Court, in the case of Muzaffar Hussain Vs. State of U.P, 1982 Allahabad Law Journal 909 (DB).

(B) Wakf Commissioner submits his report of inquiry to State Government u/s 4(5). The State Govt. has to 'forward a copy' of the report to Shia as well as Sunni Boards of Wakf u/s 5(1) and commands the Boards, as soon as possible, to 'notify in the Gazette the Wakfs relating to the particular sect to which, according to such report, the provisions of this Act apply'. This signfies that Shia and Sunni Boards are required to publish notices, in the Gazette, of only those Wakfs which relate respectively to Shia and Sunni Wakfs; further, only the particulars of the Wakf, without the report, are required to be published.

Mere publication of the particulars of Wakf without the report cannot constitute notice of Wakf Commissioner's finding/report to Public, much less to any particular individual.

(C) Over and above the procedure contained in Ss 4 and 5 for the Wakf Commisioner in making survey and preparing lists of Wakfs and their publication by concerned Wakf Boards, S. 38 authorises the Wakf Board concerned also to register a Wakf at its Office. This registration may be made on an application by Mutwalli under sub-section (2), or by wakif, his descendants, beneficiary or any Muslim of the sect under sub-section (3) or by 'any person other than the person holding possession' of wakf property under sub-section (6). In an application under sub-section (6), the Wakf Board is required to give notice of the application to the person in possession and hear him. The Board will make an inquiry and pass final orders. The question is that since the Act specifically provides for issue of notice by Wakf Board to a person in possession of wakf property (whoever he may be – even a stranger), why no provision is made for Wakf Commissioner to issue similar notice to person in possession for the purpose of inquiry u/ss 4 and 5? An essential distinction is that while Wakf Commissioner is an officer of the State, the Wakf Board is not; hence while Wakf Commissioner may be presumed to act in a fair and just manner, the Wakf Board may not be presumed so to act, hence specific procedural methodology is prescribed for it in the matter of deciding a matter. As mentioned above, the proceedings before the Wakf Commissioner are quasi-judicial. 'Natural justice' would

require such notice to be given to person in possession; failure to do so would render Wakf Commissioner's findings and list of Wakfs to be ineffective against strangers. In this case, Wakf Commissioner did not issue notice to Nirmohi Akhara who were admittedly in possession of Eastern half of the platform of DS itself as settled by the British Administration in 1885, in addition to Ram Chabutra, Sita Rasoi Chabutra and other portions of DA within the campus of DS. Admittedly, in 1934 during Hindu-Muslim riots, Hindus had demolished certain portions of DS, thereby exerting their rights over the property to the knowledge of everyone concerned with DS. The Govt. of U.P. even imposed punitive fine on Hindus for demolishing portions of DS which was repaired by the Govt. Thus the Hindu public in general (in addition to Nirmohi Akhara) was interested in DS, and a general public notice for Hindu worshippers too was called for. None was given, hence the entire proceeding of the Wakf Commissioner, declaring DS to be Sunni Wakf, was illegal.

(D) Then follows the provision which is <u>most important</u> for the purposes of these cases: S. 5(2) and 5(3). According to S. 5(2), the Mutawalli of a Wakf, <u>or any person interested in a Wakf</u> may bring a suit in a Civil Court for a declaration that any transaction held by the Commissioner of Wakfs to be Wakf is not Wakf, but no such suit by a person interested in the Wakf shall be instituted "after more than one year of the notification referred to in subclause (1)". Sub-section (3) provides that subject to the final result of such suit "the <u>report</u> of the Commissioner of Wakfs <u>shall be final and conclusive</u>". Subsection (4) commands that the

Commissioner shall not be made a Defendant to the suit and no suit shall be instituted against him for anything done by him in good faith under colour of this Act. This bar cannot be made applicable to Plaintiffs of OOS 5 of 1989. Firstly, there is no valid Wakf of DS. Secondly, the Plaintiffs were neither Parties to the proceedings before, nor were given an opportunity by Wakf Commissioner to contest the claim of declaration of DS to be Wakf. Thirdly, neither Nirmohi Akhara, who were admittedly in possession of almost half portion of Platform (Chabutra) of DS lying towards East of a grilled partition wall erected by British administration in 1855 in addition to considerable portions of campus of DS, including Ram Chabutra, was given notice of the proceedings, nor Hindu devotees/community were given general notice although since 1934 riots they were admittedly asserting rights over it. If the requirements of Section 5 of the Wakf Act of 1936 applied to Nirmohi Akhara/Hindu devotees on the ground that they were 'persons interested in the wakf', then that was all the more reason for the Wakf Commissioner to have given notice to these persons. The action and decision of Wakf Commissioner, or by Sunni Central Board of Wakf on its basis, therefore, could not be binding on Plaintiffs, Nirmohi Akhara or Hindu devotes/community.

(E) When Wakf Act of 1960 came into force, the Sunni Board made 'Registration' of some of the disputed properties as Sunni Wakf u/s 29 of 1960-Act. Supreme Court held that any Survey report made and Registration of Wakf thereon was "futile and of no avail" because Registration of Wakf under 1936-Act had been kept alive

by 1960-Act and the latter Act permitted Registration of only those Wakfs which were 'other than' those already Registered under 1936-Act. The claim of Shia community was upheld and Sunni Community were restrained permanently from interfering with exercise of rights by Shias. Now, there is absolutely nothing in common between Ghulam Abbas' case and the present cases.

1087. The creation of waqf was held valid and lawful by the Prophet Mohammad. It is said that this rule was laid down by Prophet himself and handed down in succession by Ibn Abu Nafe and Ibn Omar. Omar got piece of land in Khaiber whereupon he came to the Prophet and sought his counsel to make the most pious use of it. The Prophet said "if you like you may make a waqf of it, as it is, and bestow it in benification". Omar thereupon bestowed it in charity on his relatives, the poor and slaves and in the path of God, and travellers in a way that the land itself might not be sold, nor conveyed by gift, nor inherited. It is said that waqf continued in existence for several century until the land became waste. The prophet of Islam not only declared such works to be valid and lawful but also encourage their creation by dedicating his own property, the little that he had, in favour of posterity. It would be useful to refer as to what constitute a lawful waqf under Muslim Law. A Division Bench decision of Calcutta High Court in **Meer Mahomed Israil Khan Vs. Sashti Churn Ghose and others, 19 ILR (Calcutta) (1892) 412** where Justice Ameer Ali answering the question as to what constitute a lawful waqf under Mussulman law observed that there must be a substantial dedication for charitable or pious purpose. His Lordship further observed:

"In the Mussulman system law and religion are almost synonymous expressions, and are so intermixed with each other that it is wholly impossible to dissociate the one from the other: in other words, what is religious is lawful; what is lawful is religious. The notions derived from other systems of law or religion form no index to the understanding or administration of the Mussalman law. The words "piety" and "charity" have a much wider signification in Mussalman law and religion than perhaps in any other. Every "good purpose," wujuh-ul-khair (to use the language of the Kiafaya), which God approves, or by which approach (kurbat) is attained to the Deity, is a fitting purpose for a valid and lawful wakf. A provision for one's children, for one's relations, and under the Hanafi Sunni law for one's self, is as good and pious an act as a dedication for the support of the general body of the poor. The principle is founded on the religion of Islam, and derived from the teachings of Prophet."

1088. Thereafter Justice Ameer Ali proceeded to quote from "Hedaya" a commentary by "Fath-ul-kadir" said to be frequently quoted in "Fatawa-i- Alamgiri" in great detail and it would be useful to reproduce the same as under:

"I will give here a few passages from some of the best known authorities to show how utterly opposed the view taken in this case is to the Muhammadan law. The Fath-ul-kadir says--" Literally, it (the word wakf) signifies detention, ... in law . . . according to the Disciples, the tying up of property in such a manner that the substance (asl=corpus) does not belong to anybody else excepting God, whilst the produce is devoted to human beings, or is

spent on whomsoever he [the wakif] likes; and the reason of it is that, though a desire to approach the Deity (kurbat) should form the ultimate motive of all wakfs, yet if, without such an (immediate) desire, a person were to dedicate a property in favour of the affluent (aghnia), the wakf would be valid in the same way as a wakf in favour of the indigent or for the purposes of a mosque: for, in giving to the affluent there is as much kurbat as in giving to the poor or to a mosque, and though the profit may not have been given to the poor on the extinction of the affluent [still] it is wakf and will be treated as wakf even before their extinction. This principle is founded on the reason that the motive in all wakfs is to make one's self beloved by doing good to the living in this world and to approach the Almighty in the next . . . . .

"In wakf Islam is not a condition; consequently if a Zimmi makes a wakf on his children and his posterity and gives it at the end to the indigent, it is lawful [equally with that made by a Moslem]. And it is lawful in such a case to give the usufruct conditioned for the indigent to the poor of both Moselms and Zimmis. The wakif may lawfully condition to give the usufruct solely to the poor of the Zimmis, and in that will be included Jews and Christians and Magians; or he may condition that a special body of them may get the produce . . . . whatever condition the wakif makes if it is not contrary to the Sharaa, will be lawful. And so long as the object is not sinful, the wakif may give to whomsoever he likes . . . According to Abu Yusuf the mention of perpetuity [or dedication to an object of a permanent nature] is not necessary to constitute a

valid wakf, for the words wakf and sadakah conjunctively or separately imply perpetuity . . . In the Baramika it is stated that, according to Abu Yusuf, when a wakf is made in favour of specific individuals, on their extinction the profits of the wakf will be applied to the poor . . . Among the wakfs created by the Sahaba [Companions of the Prophet], . . the first is the wakf of Omar (may God be pleased with him) of his land called Samagh [at Khaibar] . . that created by Zobair bin Awwam of his house for the support of his daughter who had been divorced (by her husband); . . that of Arkam Mukhzumi, on his children of his house called Dar-ul-Islam at Safar (near Mecca), where the Prophet used to preach Islam, and where many of the disciples, among them Omar, accepted the Faith . . . Baihaki in his Khilafiat has stated upon the authority of Abu Bakr Obaidulla bin Zubair that [the Caliph] Abu Bakr (may God be pleased with him) had a house in Mecca which he bestowed in charity upon his children, and that it is still in existence . . . And Saad ibn Abi Wakkas bestowed in charity his houses in Medina and Egypt upon his children, and that wakf is still in existence, and [the Caliph] Osman (may God be pleased with him) made a wakf of Ruma, which exists until to-day, and Amr Ibn al-Aas [the Amru of European history], of his lands called Wahat in Tayef and of his houses in Mecca and Medina upon his children, and that [wakf] also is still continuing . . . According to Abu Yusuf the wakif may lawfully retain the governance of the trust, or reserve the profits for himself during his lifetime. This has been fully dealt with by Kuduri in two parts . . The jurists, Ahmed ibn-i-Abi Laila, Ibn

Shabarma, Zahri, and others, agree with Abu Yusuf. Mohammed alone holds a contrary opinion . . . Abu Yusuf bases his rule upon the practice and sayings of the Prophet himself who used to eat out of the produce of the lands dedicated by him .... Another proof in support of Abu Yusuf's rule is that the meaning of wakf is to extinguish the right of property in one's self and consign it to the custody of God. Therefore, when a person reserves the whole or a portion of the profits for himself, it does not interfere with the dedication, for that also implies the approval of the Almighty and is lawful . . . For example, if a man were to dedicate a caravanserai and make a condition that he may rest in it, or a cistern and condition that he should take water from it, or a cemetery, and say that he may be buried there, all this would be lawful. [Further] our Prophet (may the blessings of God be with him) has declared that a man's providing for his subsistence is a sadakah [an act of piety or charity]. This Hadis has been substantially handed down by a large number [of people] and is authentic, and Ibn Maja states from Mikdam bin Maadi Karib that the Prophet declared that no gain of a man is so meritorious as that which he earns by the labour of his hands; and that which he provides for the maintenance and support of himself, the people of his household, his children, and his servants, is a sadakah. And Imam Nisai from Balia and he from Buhair has given the same tradition in these words:-'Whatever thou providest for thyself is a sadakah.' Ibn Haban in his Sahih states that Abu Said reports from the Prophet that any one who acquires property in a lawful manner, and provides therewith for his maintenance and

for that of the other creatures of God, gives alms in the way of the Lord. . . . And Dar Kutni reports from Jabir that the Prophet (may God's blessing be with him) . . . declared that all good acts are sadakah and that a man providing subsistence for himself and his children and his belongings, and for the maintenance of his position, is giving charity in the way of God. . Tibrani has reported from Abi Imama that the Prophet of God declared that a man making a provision for his own maintenance, or of his wife, or of his kindred, or of his children, is giving sadakah. And in the Sahih of Muslim it is stated from Jabir that the Prophet told a man to make a beginning with himself and give the remainder to his kinsfolk."

1089. Justice Ameer Ali further on page 434 of the report observed that the words "charitable" and "religious" must be understood from a Mussulman and not from an English point of view. His view was concurred by Justice O'Kinealy and His Lordship also observed on page 437 of the report that "*it must be an endowment for religious or charitable purposes; and if we want to interpret a document of that kind, what we must naturally look to is what is really meant by the words "religious" or "charitable" among Muhammadans. As an example, we know that the words "charitable purpose" in Scotland have quite a different meaning from that in which they are used in England. And so in India, in judging of what is really meant by the words "religious" and "charitable" by a Muhammadan, we must take the view which their law takes, and not what is to be found in the English Dictionary."*

1090. The term "waqf" literally means detention. The legal meaning of waqf according to Abu Hanifa, is the detention of a

specific thing in the ownership of the wakif or appropriator, and the devoting or appropriating of its profits or usufruct “in charity on the poor or other good objects.” According to the two disciples, Abu Yusuf and Muhammad, waqf signifies the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied “for the benefit of mankind”. A waqf extinguishes the right of the wakif or dedicator and transfers ownership to God. By dedication and declaration the property in the wakif is divested and vests in the Almighty.

1091. For the present purpose an idea of what constitute waqf in Islam is sufficient and we need not to go into further details. With respect to 'waqf' as recognised in Islamic Law, since hereat we are concerned with the relevant legislative aspect of the matter as it operated in India, we shall deal with Islamic Law in this respect in detail while dealing with the issue of validity of creation of waqf with respect to the property in dispute.

Administration of Waqfs

1092. The concept of waqf in India got introduced with the establishment of Muslim rule. It appear that earlier 'Sultan' was the supreme authority over the administration of waqf properties and ultimate power vested in him. There was some decentralisation of the actual administration, control and supervision of waqf institutions. At the Centre, the Sadar-us-Sadar was entrusted with the overall control of waqfs administration in the empire. His main work was to supervise waqfs' administration and its properties. At the provincial level, it was Sadr-e-Subha and in District, Sadre-e-Sarkar used to look

into the administration of waqfs. At the local level, the waqfs used to be looked after by Qazis who also looked after waqf cases. The administration of individual waqf was the responsibility of Mutawalli, which is still continuing. This kind of arrangement finds mention in detail in Fatwai Alamgiri said to be prepared under the command of Mughal Emperor Aurangzeb.

1093. During the reign of Indian sub-continent by East India Company, in the territory under their command so far as it had charitable and religious institutions of Hindus and Mohammedans, they were regulated by British Government exercising visitatorial powers. In exercise of this power, the British Government enacted several laws to prevent fraud and waste, and to secure honest administration of such institutions. The British Government did not interfere with the personal laws of Hindus and Muslim like inheritance, succession, marriage and religious institutions.

1094. In 1810, the general superintendence of religious and charitable endowments vested in Board of Revenue and the Board of Commissioners. Vide Bengal Regulations XIX of 1810 (The Bengal Charitable Endowment Public Building and Escheats Regulations, 1810), the Board of Revenue was put in possession of landed and other properties of charitable and religious endowments, of both Muslims and Hindus. The Regulations were obviously applicable to the area under the authority of East India Company. The said Regulations, however it appears, had no application to the area or to properties situated in Oudh for the reason that under the agreement of the East India Company with Nawab of Awadh (Lucknow), the said area of Oudh continued to be ruled by the

"Nawabs" till its annexation in 1856.

1095. After the transfer of power from East India Company to British Government in 1857, a series of legislation came including those which were enacted with an object of proper administration of religious and charitable endowment. The Religious Endowments Act, 1863 (Act 20 of 1863) was passed and the properties relating to religious, charitable and public endowments were placed under the control of trustees, managers or superintendents. Local Committees were appointed which exercise the powers of the Board of Revenue or local agents.

1096. In respect to the Muslim in Oudh area, Oudh Laws Act XVIII of 1876 was enacted. Vide Section 3 thereof, the laws to be administered in the case of Mohammadans would be the same as in East Panjub. The East Punjab was governed by Punjab Laws Act IV of 1872 and Sections 5 and 6 thereof provide as under:

> *"5. 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 Mahomedan law, in cases where the parties are Mahomedans,.... except in so far as such*

law has been altered or abolished by legislative enactment, or is opposed to the provisions of the Act, or has been modified by any such custom as is above referred to."

"6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience."

1097. In respect to certain specified waqfs in Husainabad area in Lucknow (Oudh), Husainabad Endowment Act, 1878 (Act 15 of 1878) was enacted.

1098. In 1908, by enacting new Code of Civil Procedure, Sections 92 and 93 were incorporated for the proper administration of trusts. Under these sections two or more persons having any interest in a trust could file a suit with the prior permission of the Advocate General in relation to a matter regarding the appointment and removal of trustees, matters relating to the sale, exchange or mortgage of trust property, etc.

1099. Upto 1913 a waqf was valid if the effect of the deed of wqkf was to keep the property in substance to charitable uses. In **Abul Fata Mohammad Vs. Rasamaya, 22 IA 76** it was held by Privy Council that if the primary object of the waqf was the aggrandizement of the family and the gift to charity was illusory whether from its small amount or from its uncertainty and remoteness, the waqf, for the benefit of the family was invalid and no effect could be given to it. This decision caused lot of protest and dissatisfaction amongst the Muslim communities in India since the said decision in particular paralyzed the power of Muslims to make a settlement in favour of family, children and descendants or what is known as waqf-alal-aulad. Consequently, the matter was represented by the Indian Muslims before Lord

Curzon, the then Viceroy and Governor General of India canvassing that for family settlement by way of waqf from the time of Prophet Mohammad down to the present time an unbroken chain of evidence existed to show that the law of waqf-alal-aulad existed in all countries having Muslim population like Arabia, Central Asia, Persia, Afghanistan and India. It was represented that the precepts of the Prophet support the family settlement amongst Muslim by way of waqf. It is said that the following precepts of the Prophet were cited:

"The apostle of God said:

"When a Mussalman bestows on his family and kindered, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his family and children."

The apostle of God said:

"There is one Dinar which you have bestowed in the Road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is the greatest Dinar in point of reward which you gave to your family."

The apostle of God said:

"The most excellent Dinar which a man bestows is that which he bestows upon his own family. Omme Salma says, "I said to the Prophet, is there any good thing for me of rewards, for my bestowing on the Sons of Abu Salmas. His sons are no otherwise than mine." The Prophet said: "Then give to them, and for you are rewards of that you bestow upon them"

The apostle of God said:

> *"Giving alms to the poor has the reward of one alms, but that given to kindered has two rewards; one the reward of alms, the other the reward of relationship. "The Prophet of God declared that a pious offering to ones family (to provide against their getting into want) is more pious than giving alms to beggars."*

1100. Accepting the claims of Muslims in India, Mussalman Waqf Validating Act, 1913 (Act No. 6 of 1913) *(hereinafter referred to as the "1913 Act")* was enacted to validate the waqf created for the benefit of the members of family i.e. waqf-alal-aulad. This Act came into force on 07.03.1913. The preamble of 1913 Act shows that it was enacted to declare the rights of Muslims to make settlements of property by way of waqf in favour of their family, children and decedents. The term "waqf" was defined in Section 2 (1) as under :

> ***"2.*** .....
>
> *(1) "Waqf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose, recognized by the Mussalman law as religious, pious or charitable."*

1101. Section 5 of 1913 Act states that nothing therein shall affect any custom or usage whether local or prevalent among Musalman or any particular class or sect. The definition of 'Waqf' under 1913 Act recognises the concept of waqf as known in Shariyat Law.

1102. As already stated, a waqf therefore is an unconditional and permanent dedication of property with implied detention in the ownership of God in such a manner that the property of the owner may be extinguished and its profit may revert to or be

applied for the benefit of mankind except for purposes prohibited by Islam.

1103. It may, however, be clarified at this stage that a waqf is distinct from Sadaqah, Hiba and trust. In Islamic Law- Personal by B.R.Verma first published in 1940 (6th Edition published in 1986) (reprinted in 1991 by M.H.Beg and S.K.Verma) identify the above distinction on page 630-631 of the book as under :

Sadaqah	***Wakf***
(1)The corpus itself may be consummed. *(2)It is only a donation.* *(3)The legal estate and not merely beneficial interest passes to charity to be held by trustees appointed by the donor. The trustee can dispose of the corpus itself.*	*(1)The income only can be sent.* *(2)It is an endowment.* *(3)The legal estate is transferred to God. It does not vest in the trustee or mutawalli who cannot deal with the corpus.*

1104. The distinction between waqf and sadaqah is that in the case of former the income only can be spent while in the case of latter the corpus of the property may be consumed.

Hiba	***Wakf***
(1)It relates to absolute interest in the subject of the gift, the donee having a right not only to spend the usufruct but also the property itself.	*(1)It is only the usufruct which can be spent and the corpus cannot be disposed of except under very limited conditions.*
(2)The donee is a human being.	*(2)The ownership is transferred to God.*
(3)There are no limitations as to the object for which it can be made.	*(3)It is made for the benefit of mankind.*
(4)A hiba to an unborn person is invalid.	*(4)A wakf may be made in favour of a succession of unborn persons.*

Trust	***Wakf***
(1)No particular motive is	*(1)It is generally made with a*

necessary.	*pious, charitable or religious motive.*
(2)The founder may himself be a beneficiary.	*(2)The wakf cannot reserve any benefit for himself (except to some extent under Hanafi law).*
(3)It may be for any lawful object.	*(3)The ultimate object must be some benefit of mankind.*
(4)the property vests in the trustee.	*(4)The property vests in God.*
(5)A trustee has got larger power than a mutawalli.	*(5)A mutawalli is only a manager or superintendent.*
(6)It is not necessary that a trust maybe perpetual, irrevocable or inalienable.	*(6)A wakf is perpetual, irrevocable and inalienable.*
(7)It results for the benefit of the founder when it is incapable of execution and the property has not been exhausted.	*(7)The cypres doctrine is applied and the property may be applied to some other object.*

1105. Apparently, Islam is not a necessary condition for constitution of a waqf. It may be made by a Muslim or a non Muslim but the necessary condition for creation of a waqf is the object thereof. Ameer Ali in his book on Mohammedan Law (Fourth Edition) Volume I at page 200 has said *"Any person of whatever creed may create wakf, but the law requires that the object for which the dedication is made should be lawful according to the creed of the dedicator as well as the Islamic doctrines. Divine approbation being the essential in the constitution of a wakf if the object for which a dedication is made is sinful, either according to the laws of Islam or to the creed of the dedicator it would not be valid."* Thus a non Muslim may also create a waqf for any purpose which is religious under the Mohammedan Law. But the object of the waqf must be lawful according to the religious creed of the maker as well.

1106. Section 3 of 1913 Act empowers any person professing muslim faith to create a waqf in all other respects in accordance with the provisions of Muslim Law for the following among other purposes, i.e., for the maintenance and support, wholly or partially of his family, children and descendants etc. It would be useful to reproduce Section 3 as under :

> ***"3.*** *It shall be lawful for any person professing the Mussalman faith to create a waqf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :-*
>
> *(1)for the maintenance and support wholly or partially of his family, children or descendants, and*
>
> *(2)where the person creating a waqf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated :*
>
> *Provided that the ultimate benefit is in such cases expressly or implicitly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character."*

1107. 1913 Act, however, having not been given retrospective effect did not remove the hardship in its entirety created by the decision of Privy Council in **Abul Fata Mohammad (supra)** and in some later cases it was held that 1913 Act could not be construed as validating deeds executed before 07.03.1913.

1108. On 05.08.1923 the Mussalman Waqf Act, 1923 (Act No. XLII of 1923 (hereinafter referred to as "1923 Act") was enacted with the object of better management of waqf property

and ensuring maintenance of proper accounts and its publication in respect of such properties. The aforesaid Act was applicable to the whole of British India at the relevant time and in 1948 the said words were substituted by the words "all the Provinces of India". The term "benefit", "mutwalli" and "waqf" were defined in Section 2 (a) (c) and (e) of 1923 Act, as under :

> *"**2.** In this Act, unless there is anything repugnant in the subject or context,-*
>
> *(a)"benefit" does not include any benefit which a mutwalli is entitled to claim solely by reason of his being such mutwalli;*
>
> *(b) .....*
>
> *(c)"mutwalli" means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a Court of competent jurisdiction to be the mutwalli of a wakf, and includes a naib-mutwalli or other person appointed by a mutwalli to perform the duties of the mutwalli, and, save as otherwise provided in this Act, any person who is for the time being administering any wakf property;*
>
> *(d).....*
>
> *(e)"wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable, but does not include any wakf, such as is described in section, 3 of the Mussalman Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the*

wakf was created or by any of his family or descendants."

1109. Section 3 of 1923 Act placed an obligation on a Mutwalli to furnish certain particulars in respect to waqf property, income and expenses etc. within a period of six months from the date of commencement of the 1923 Act to the Court within the local limits of whose jurisdiction the property of the waqf, for which the said person is mutwalli, is situated. Non compliance of Section 3 was made penal vide Section 10 of the said Act.

1110. Section 10 of 1923 Act provides consequences on failure to comply with the provisions of Sections, 3, 4 and 5 and reads as under:

"10. ***Penalties.--****Any person who is required by or under Sec. 3 or Sec. 4 to furnish statement of particulars or any document relating to a wakf, or who is required by Sec. 5 to furnish a statement of accounts, shall, if he, without reasonable cause the burden of proving which shall lie upon him, fails to furnish such statement or document, as the case may be, in due time, or furnishes a statement which he knows or has reason to believe to be false, misleading or untrue in any material particular, or, in the case of a statement of accounts, furnishes a statement which has not been audited in the manner required by Sec. 6, be punishable with fine which may extend to five hundred rupees, or, in the case of a second or subsequent offence, with fine which may extend to two thousand rupees."*

1111. A question arose as to whether the Court while exercising power under Section 10 can proceed to look into the

question as to whether any property which is denied to be a waqf property can be investigated and looked into so as to find out whether it is a waqf property within the meaning of Section 2(e) of the Act or not. This question came to be considered before a Hon'ble Single Judge of Patna High Court in **(Syed) Ali Mohammad Vs. Collector of Bhagalpur, AIR 1927 Patna 189.** The question was that of application of 1923 Act in respect to property where there was a dispute whether it was a waqf property or not. The petitioner before the High Court return a notice issued by the Collector including petitioner's property in the list of waqf properties stating that he was not incharge of any waqf property as defined in Section 2(e) of 1923 Act whereupon the Collector referred the matter to the District Judge who held the property as a waqf property and the question was whether the order of District Judge was within jurisdiction or not. It was held by the Hon'ble Patna High Court that there is no provision in the Act authorizing the Court, as defined in the Act, to determine as to whether any property which if denied to be a waqf property, is waqf property, within the meaning of the Act. The Act neither authorizes the Court to summon witnesses or to take evidence nor any procedure is prescribed for determining the question as to whether any property is a waqf property and no provision of appeal or revision is made if any such decision is made. It held that the Act applies to admitted waqfs and not to the properties which are denied to be the waqf properties.

1112. However, this view did not find favour with a Full Bench decision of Oudh Chief Court in **Mohammad Baqar and another Vs. S. Mohammad Casim and others, AIR 1932 Oudh 210** where it was held that mere denial of a property as constituting a waqf property by a person would not deprive

jurisdiction to the Court to consider whether the property is a waqf property under 1923 Act or not, otherwise, it would defeat the very objective of the Act. In the majority decision, the Court said that it is a recalcitrant Mutawalli to whom the Act intends to reach and if the jurisdiction of the Court is ousted as soon as a Mutawalli who has failed to observe the provisions of the Act denies the alleged waqf that would defeat the very objective of the legislature. It was held that the application of 1923 Act does not depend upon the attitude which a Mutawalli may take with regard to origin of an alleged waqf. The Court said:

> *"From the definition of the word "wakf" in Cl. (e), S. 2 of the Act it is clear that a wakf of the nature described in S. 3, Mussalman Wakf Validating Act, 1913, is excluded from the operation of the Act of 1923. With a view to determine whether an alleged waqf is inside or outside the scope of the Act the Court must make some inquiry. The inquiry may be limited merely to an interpretation of the instrument creating the wakf if there is any or to the scrutinizing of the terms of an oral wakf." (page211)*

1113. The Court further held:

> *"It is true that the Act does not lay down any obligation on the Court as to the limits to which it should carry any inquiry which it may wish to make and no party is entitled to compel the Court to carry inquiry up to any particular stage. Indeed the Court may refuse to enter into any inquiry on the ground that the allegations of the parties disclose a controversy fit to be determined in a regular suit, and this, in my judgment, explains the absence of any special rule of procedure. The Court is invested with a discretion but it cannot, in my opinion, refuse to look into*

the merits of the case and stay its hands on the sole ground that the alleged mutawalli does not admit the alleged wakf." (page 213)

1114. It is not the case of any of the parties that any such statement was furnished in respect to the property in dispute in the Court as defined under Section 2 (b) of the said Act and the provisions of the said Act were complied with at all. It is not the case of the parties, i.e., the plaintiff, Suit-4, or in general, Muslim parties, that the aforesaid Act was applicable to the property in dispute or that the compliance of the said Act was made by the concerned Mutawalli. In the absence of any pleadings in respect to 1923 Act, we have no hesitation in not considering the matter in the light of 1923 Act inasmuch as if that be so first of all it would be necessary to consider whether the property in question was a waqf made in 1528 and continued to be so thereafter and secondly whether any person as Mutawalli was in possession of the property in question in 1923 and thereafter. We have not been shown any material to show the existence of the above facts and even if so then why and in what circumstances the provisions under 1923 Act were not complied with is also not explained. We also find that it is case of none that Section 12 or 13 of 1923 Act at the relevant time were attracted to the property in dispute and/or that the said property was exempted by the competent government from the operation of 1923 Act.

1115. The next legislation is Mussalman Waqf Validating Act (XXIII) of 1930 which made 1913 Act applicable to waqfs created before the commencement of 1913 Act with the rider that the transactions already completed in respect to right, title, obligations, liability etc. shall not be affected in any manner.

1116. Then came the 1936 Act (Act No. 13 of 1936) published in U.P. Gazette dated 20.03.1937. The above enactment was made for the better governance, administration and supervision of certain classes of Muslim waqf in the United Provinces of Agra and Oudh. Section 1 of 1936 Act provides for the commencement, and extent; and reads as under:

> *"(1) Short title, commencement and extent.--(1) This Act shall be called "the United Provinces Muslim Waqfs Act, 1936."*
>
> *(2) This section and sections 2 to 4 shall come into force at once. The rest of the Act shall not come into force until such date as the local Government may, by notification in the Gazette, appoint in this behalf.*
>
> *(3)It shall extend to the whole of the United Provinces of Agra and Oudh."*

1117. We may mention at this stage that Section 1(2) enforces only Sections 2 to 4 at once and the rest of the Act was to come into force on such date as the local Government by notification in the gazette may appoint in this behalf. Sections 5 to 71 of the said Act came into force on 01.07.1941vide notification dated 20.06.1941 published in Government Gazette of the United Provinces Vol. LXIII, No. XXVI, Part-1, page 311 dated 20.06.1941 which reads as under:

> *"In exercise of the powers conferred by sub-section (2) of section 1 of the United Provinces Muslim Waqfs Act, 1936 (U.P. XIII of 1936), the Governor of the United Provinces is pleased to declare that sections 5 to 71 of the said Act shall come into force on the 1st day of July, 1941."*

1118. The reason for delay in notification giving effect to Sections 5 to 71 of 1936 Act came to be noticed in **Badrul**

Islam Vs. The Sunni Central Board of Waqf, U.P. Lucknow, AIR 1954 Allahabad 459 in para 8 of the judgement as under:

> *"It is true that the provisions of Ss. 5 to 71 of the Act did not come in force till some time in 1941. This fact has no bearing because it appears that the late enforcement of these provisions was due to the fact that what was provided by these provisions could not have been given effect to till the Central Board had found on investigation through proper agency the waqfs which were subject to the Act. It was no use enforcing these provisions which could not have been given effect to. It was for this reason that these sections were later enforced."*

1119. It is said that the Commissioner of Waqf made survey under Section 4 and submitted his report. The Boards proceeded further by issuing notifications in respect to Sunni Waqfs on 26.02.1944 and in respect of Shia Waqfs on 15.01.1954 published in the gazette dated 23.01.1954, we are proceeding further presuming as if the rest of the provisions of the Act were made operative and will try to find out the answer to the above issues accordingly.

1120. Section 2 of 1936 Act provides for applicability of the Act to certain category of waqfs and inapplicability to some other category of waqfs and reads as under:

> ***"2.*** *Applicability of the Act.-(1) Save as herein otherwise specifically stated, this Act shall apply to all waqfs, whether created before or after this Act comes into force, any part of the property of which is situated in the United Provinces.*
>
> *(2) This Act shall not apply to-*
>
> *(i) a waqf created by a deed, if any, under the*

terms of which not less than 75 per cent, of the total income after deduction of land revenue and cesses payable to Government of the property covered by the deed of waqf, if any, is for the time being payable for the benefit of the waqif or his descendants or any member of his family.

(ii) a waqf created solely for either of the following purposes :

(a) the maintenance and support of any person other than the waqif or his descendants or any member of his family,

(b) the celebration of religious ceremonies connected with the death anniversaries of the waqif or of any member of his family or any of his ancestors,

(c) the maintenance of private immabaras, tombs and grave yards, or

(d) the maintenance and support of the waqif or for payment of his debts, when the waqif is a Hanafi Musalman; and

(iii) the waqfs mentioned in the schedule : Provided that if the Mutawalli of a waqf to which this Act does not apply wrongfully sells or mortgages, or suffers to be sold in execution of a decree against himself, or otherwise destroys the whole or any part of the waqf property, the Central Board may apply all or any of the provisions of this Act to such waqf for such time as it may think necessary.

Explanation. A waqf which is originally exempt from the operation of this act may, for any reason

subsequently, become subject to such operation, for example, by reason of a higher percentage of its income becoming available under the terms of the deed for public charities."

1121. The Schedule referred to in Section 2(2)(iii) of 1936 Act is as under :

1. Waqfs governed by Act XV of 1878.

2. Wazir Begam Trust, Lucknow.

3. Agha Abbu Sahib Trust, Lucknow.

4. Shah Najaf Trust, King's side, Lucknow, and Queen's side, Lucknow.

5. Kazmain Trust, Lucknow.

1122. Section 3 contains certain definitions as under:

"3. In this Act, unless there is anything repugnant in the subject or context--

(1) Interpretation clauses.--"Waqf" means the permanent dedication or grant of any property for any purpose recognized by the Musalman law or usage as religious, pious or charitable and, where no deed of waqf is traceable, includes waqf by user, and a waqif means any person who makes such dedication or grant."

(2) "Beneficiary" means the person or object for whose benefit a waqf is created and includes religious, pious or charitable objects, and any other object of public utility established for the benefit of the Muslim community or any particular sect of the Muslim community."

(3) "Mutawalli" means a manager of a waqf or endowment and includes an amin, a sajjadanashin, a khadim, naib mutawalli and a committee of management, and, save as otherwise provided in this Act, any person

who is for the time being in charge of or administering, any endowment as such.

(4) "Family" includes--

(a) Parents and grand-parents.

(b) Wife or husband.

(c) Persons related through any ancestor, male or female.

(d) Persons who reside with, and are maintained by, the waqif, whether related to him or not.

(5) Property includes Government securities and bonds, shares in firms and companies, stocks, debentures and other securities and instruments.

(6) "Prescribed" means prescribed by rules made under this Act.

(7) "Court" means, unless otherwise stated either expressly or by implication, the court of the District Judge or any other court empowered by the local Government to exercise jurisdiction under this Act.

(8) "Net income" means the total income minus the land revenue and other cesses payable to Government and to local bodies:

Provided that in the case of land paying land revenue the recorded income shall be deemed to be the total income."

1123. Chapter I which has Sections 4 to 24 deals with Survey of Waqfs and Central Board of Waqfs. Section 4 deals with the Survey of Waqfs; Section 5 deals with the Commissioner's report and its publication in the Gazette; and, read as under:

"4. (1) Survey of waqfs.--Within three-months of the commencement of this Act the local Government shall by notification in the Gazette appoint for each district a gazetted officer, either by name or by official designation for the purpose of making a survey of all waqfs in such district, whether subject of this Act or not. Such officer shall be called the Commissioner of waqfs."

(2) The Local Government may, from time to time when necessary cancel any appointment under sub-section (1) or make a new appointment.

(3) The "Commissioner of waqfs" shall, after making such inquiries as he may consider necessary, ascertain and determine--

(a) the number of all Shia and Sunni waqfs in the district;

(b) the nature of each waqf;

(c) the gross income of property comprised in the waqf;

(d) the amount of Government revenue, cesses and taxes payable in respect of waqf property;

(e) expenses incurred in the realization of the income and the pay of the mutawalli of each waqf if the waqf is not exempted under section 2; and

(f) whether the waqf is one of those exempted from the provisions of this Act under section 2:

Provided that where there is a dispute whether a particular waqf is Shia waqf or Sunni waqf and there are clear indications as to the sect of which it pertains in the recitals of the deed of waqf, such dispute shall be decided on the basis of such recitals.

(4) In making such inquiries as aforesaid the Commissioner of waqfs shall exercise all the powers of a civil court for summoning and examining witnesses and documents, making local inspections, appointing commissioners for examination of witnesses, examining of accounts and making local investigations.

(5) The Commissioner of waqfs shall submit his report of inquiry to the local Government.

(6) The total cost of carrying out the provisions of this section shall be borne by the mutawallis of all waqfs to which the Mussalmans Waqfs Act, 1923, applies in proportion to the income of the property of such waqfs situated in the United Provinces.

(7) Notwithstanding anything in the deed or instrument creating any waqf, any mutawalli may pay from the income of the waqf property any sum due from him under sub-section (6).

(8) Any sum due from a mutawalli under sub-section (6) may, on a certificate issued by the local Government, be recovered by the Collector in the manner provided by law for recovery of an arrear of land revenue.

***5.** Commissioner's report.--*

(1) The local Government shall forward a copy of the Commissioner's report to each of the Central Boards constituted under this Act. Each Central Board shall as soon as possible notify in the Gazette the waqfs relating to the particular sect to which, according to such report, the provisions of this Act apply.

(2) The mutawalli of a waqf or any person interested in a waqf or a Central Board may bring a suit in a civil

court of competent jurisdiction for a declaration that any transaction held by the Commissioner of waqfs to be a waqf is not a waqf, or any transaction held or assumed by him not to be a waqf is a waqf, or that a waqf held by him to pertain to a particular sect does not belong to that sect, or that any waqf reported by such Commissioner as being subject to the provisions of this Act is exempted under section 2, or that any waqf held by him to be so exempted is subject to this Act:

Provided that no such suit shall be instituted by a Central Board after more than two years of the receipt of the report of Commissioner of waqfs, and by a mutawalli or person interested in a waqf after more than one year of the notification referred to in sub-clause (1):

Provided also that no proceedings under this Act in respect of any waqf shall be stayed or suspended merely by reason of the pendency of any such suit or of any appeal arising out of any such suit.

(3) Subject to the final result of any suit instituted under sub-section (2) the report of the Commissioner of waqfs shall be final and conclusive.

(4) The Commissioner of waqfs shall not be made a defendant to any suit under sub-section (2) and no suit shall be instituted against him for anything done by him in good faith under colour of this Act."

1124. Sections 6, 7 and 8 of 1936 Act show that there shall be two Waqf Board namely, Shia Central Board and Sunni Central Board of Waqf. The constitution etc. thereof is provided from Section 6 to 17. Section 18 deals with the functions of the Central Board and reads as under:

"18. *Function of the Central Board.- (1) The general superintendence of all waqfs to which this Act applies shall vest in the Central Board. The Central Board shall do all things reasonable and necessary to ensure that waqfs or endowments under its superintendence are properly maintained, controlled and administered and duly appropriated to the purposes for which they were founded or for which they exist.*

(2) Without prejudice to the generality of the provisions of sub-section (1) the powers and duties of the Central Board shall be-

(a) to complete and maintain and authentic record of rights containing information relating to the origin, income, object, and beneficiaries of every waqf in each district;

(b) to prepare and settle its own budget;

(c) to settle and pass budgets submitted by the mutawallis direct to the Board and any budget submitted to, but not approved by, a District Waqf Committee, provided that it is in accordance with the wishes of the waqif and the terms of the deed of waqf;

(d) to settle and pass the annual budgets of the District Waqf Committees;

(e) to institute and and defend suits and proceedings in a court of law relating to-

(i) administration of waqfs,

(ii) taking of accounts,

(iii) appointment and removal of mutawallis in accordance with the deed

of waqf if it is traceable,

(iv) putting the mutawallis in possession or removing them from possession,

(v) settlement or modification of any scheme of management;

(f) to sanction the institution of suits under section 92 of the Code of Civil Procedure, 1908, relating to waqfs to which this Act applies;

(g) to take measure for the recovery of lost properties;

(h) to settle scheme of management and application of waqf funds in accordance with the doctrine of cypres in case of those waqfs, the objects of which are not evident from any written instrument or in cases in which the objects for which they were created have ceased to exist;

(i) to enter upon and inspect waqf properties;

(j) to investigate into the nature and extent of waqfs and waqf properties and call from time to time for accounts and other returns and information from the mutawallis and give directions for the proper administration of waqfs;

(k) to arrange for the auditing of accounts submitted by the mutawallis;

(l) to direct the deposit of surplus money in the hands of the mutawalli in any approved bank and to utilize it on the objects of waqf;

(m) to supervise and control the District Waqf Committees;

(n) to administer the waqf fund;

(o) to keep regular accounts of receipts and disbursement and submit the same in the matter prescribed;

(p) to institute when necessary an inquiry relating to the administration of a waqf:

Provided that in the appointment of mutawallis or in making any other arrangement for the management of waqf property the Central Board shall be guided as far as possible by the directions of the waqif, if any."

1125. A careful reading of 1936 Act as also all the earlier enactments make it very clear that neither they create a waqf nor diminish or terminate a waqf nor affect a waqf in any other manner. On the contrary, the provisions have been made only to provide a statutory body for the better governance, administration and supervision of the waqfs to which the said Act apply. Further vide Section 2(1) of 1936 Act though it applies to all waqfs, whether created before the commencement of the Act or thereafter, if any part of the property of which waqf is situate in the United provinces but by virtue of Sub-section (2) of Section 2 certain classes of waqfs have been excluded. The exclusion under Sub-section (2) of Section 2 of 1936 Act is specific and has been categorized with precision. It would mean that only to the extent the waqfs are excluded by virtue of sub-section (2) of Section 2 all other waqfs, if a waqf validly created, would be governed by 1936 Act.

1126. The term 'Waqf' under 1936 Act has also been

defined as a permanent dedication or grant of any property for any purposes recognized by the Musalman law or usage as religious, pious or charitable including waqf by user where no deed of waqf is traceable.

1127. However a cumulative reading of the entire 1936 Act shows that it does not govern the right of worship of Hindus or Muslims. as the case may be. The object of enactment is to provide better governance and administration in supervision of certain classes of Muslim Waqfs. The Waqfs to which the aforesaid Act applies are to be supervised and maintained by the Central Boards, namely, Shia Central or Sunni Central Board, as the case may be, constituted under Section 6 of the said Act.

1128. At this stage it may be pointed out that there was some ambiguity between Section 8(1)(i) and Section 12. Noticing the same, vide U.P. Muslim Waqfs (Amendment) Act 9 of 1953 which received the assent of the President on 26.02.1953, Section 12 was deleted and Section 8-A was inserted which was held valid by this Court in **All India Shia Conference Vs. Taqi Hadi and others, AIR 1954 All. 124.**

1129. In 1954, the Parliament enacted Waqf Act, 1954 (Act XXIX of 1954) (hereinafter referred to as '1954 Act'). The aforesaid Act though extended to whole of India except the State of Jammu and Kashmir but proviso to Section 1(3) thereof provides for the State of U.P., Bihar and West Bengal as under :

> *"Provided that in respect of any of the States of Bihar, Uttar Pradesh and West Bengal, no such notification shall be issued except on the recommendation of the State Government concerned."*

1130. Consequently, 1954 Act did not apply to the State of U.P. since the State of U.P. had its own Act of 1936.

1131. Though not necessary for the category of the issues, with which we are concerned at this stage, but just to complete the legislative history, we find that the State legislature enacted U.P. Muslim Waqfs Act 1960 (U.P. Act No.XVI of 1960) (hereinafter referred to '1960 Act'). This U.P. Act, 1960 received assent of the President of India on 27th August, 1960 and was published in U.P. Gazette Extraordinary on 3rd September, 1960. Vide Section 1(3) of 1960 Act, it came into force at once. Section 2 of 1960 Act provides for the application of the Act and sub-section (1) thereof reads as under :

> *"2. Application of the Act.-(1) Save as herein otherwise specifically stated, this Act shall apply to all waqfs, whether created before or after the commencement of this Act, any part of the property comprised in which it situate in Uttar Pradesh, and to all the waqfs which at the time of the coming into force of this act were the superintendence of the Sunni Central Board or the Shia Central Board constituted under the U.P. Muslim Waqfs Act, 1936 (U.P. Act XIII of 1936).*

1132. Vide Section 85 (2) of 1960 Act, 1936 Act as well as Husainabad Endowment Act, 1878 were repealed. Some more enactments were repealed by insertion of Section 11 of U.P. Act No.28 of 1971 whereby the following was inserted in Section 85(2) of 1960 Act :

> *"The following enactments are also hereby repealed in their application to any waqf to which this Act applies :*
>
> *(1) the Bengal Charitable Endoments, Public Buildings and Escheats Regulation, 1810 (Act XIX of 1810) ;*
>
> *(2) the Religious Endoments Act, 1863 (Act XX of 1863) ;*

(3)the Charitable Endowments Act, 1890 (Act XX of 1890) ;

(4) the Charitable and Religious Trusts Act, 190 (Act XIV of 1920):"

1133. There was saving provisions in Section 85 by way of proviso which read as under :

"Provided that this repeal shall not affect the operation of those Acts in regard to any suit or proceeding pending in any Court or to an appeal or an application in revision against any order that may be passed in such suit or proceeding and subject thereto, anything done or any action taken in exercise of powers conferred by or under those Acts shall unless otherwise expressly required by any provision of this Act, be deemed to have been done or taken in exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action was taken."

1134. Besides, Section 28 of 1960 Act provides saving of waqfs already registered and provides as under :

*"**Savings U.P. Act XIII of 1986**.- A waqf registered before the commencement of this Act under the U.P. Muslim Waqf Act 1936, shall be deemed to have been registered under the provisions of this Act."*

1135. 1960 Act now stands repealed by the Waqf Act, 1995 (Central Act) which has come into effect w.e.f. 1st January, 1996.

1136. Now reverting to 1936 Act, the general power of superintendence vested in the Central Board is to ensure that the waqfs or endowments under its superintendence are maintained, controlled, administered and duly appropriated to the purposes for which they were founded or for which they exist. The very

functions of the Central Board, as such, do not relate directly to the right of worship of either the Hindus or Muslims in any manner. To some extent, however, it may be said that if a religious Waqfs is not properly maintained and administered, and, it causes hindrance or obstruction in observance of such religious activities for which the Waqf was created, the right of people in general who are entitled to use Waqf property for the purposes it is created, to that extent may be obstructed, but directly it cannot be said that 1936 Act in any manner deals with the right of worship of any of the member of the community for whose benefit the Waqf is created. It is moreso when the question of a member(s) of a community other than Muslim arises since neither his right of worship in any manner is sought to be affected by 1936 Act nor otherwise it does appear to do so.

1137. In respect to 1936 Act this question came to be considered by the Apex Court in **Siraj-ul-Haq Khan and others Vs. The Sunni Central Board of Waqf U.P. and others, AIR 1959 SC 198** in an appeal taken against the judgment of this Court in **Sunni Central Board of Waqf Vs. Siraj-ul-Haq Khan and others, AIR 1954 All. 88**. The matter pertains to Darga Hazarat Syed Salar Mahsood Ghazi situated in the Village Singha Parasi, District Bahraich. The appellants were members of the Waqf Committee, Darga Sharif, Bahraich and filed a suit seeking a declaration that the properties of suit were not covered by the provisions of 1936 Act. The Court considered the words "the Mutawalli of a waqf or **any person interested in a waqf**" under Section 5(2) of 1936 Act, and, construing the same, it held that it would mean "any person interested" in what is held to be a waqf and in order to find out so it is open to the Commissioner of the Waqf to find out whether a property is a

waqf or not and if he includes such a property in the list of waqf, the person challenging such decision would be included by the words "any person interested in a waqf" under Section 5(2). It would be appropriate to reproduce the relevant observations in para 16 of the judgment:

> *"The word 'waqf' as used in this sub-section must be given the meaning attached to it by the definition in S. 3 (1) of the Act and since the appellants totally deny the existence of such a waqf they cannot be said to be interested in the 'waqf'. The argument thus presented appears prima facie to be attractive and plausible; but on a close examination of S. 5(2) it would appear clear that the words "any person interested in a waqf" cannot be construed in their strict literal meaning. If the said words are given their strict literal meaning, suits for a declaration that any transaction held by the Commissioner to be a waqf is not a waqf can never be filed by a mutawalli of a waqf or a person interested in a waqf. The scheme of this sub-section is clear. When the Central Board assumes jurisdiction over any waqf under the Act it proceeds to do so on the decision of three points by the Commissioner of Waqfs. It assumes that the property is a waqf, that it is either a Sunni or a Shia waqf, and that it is not a waqf which falls within the exceptions mentioned in S. 2. It is in respect of each one of these decisions that a suit is contemplated by S. 5, sub-s. (2). If the decision is that the property is not a waqf or that it is a waqf falling within the exceptions mentioned by S. 2, the Central Board may have occasion to bring a suit. Similarly if the decision is that the waqf is Shia and not Sunni, a Sunni Central Board may*

have occasion to bring a suit and vice versa. Likewise the decision that the property is a waqf may be challenged by a person who disputes the correctness of the said decision. The decision that a property does not fall within the exceptions mentioned by S. 2 may also be challenged by a person who claims that the waqf attracts the provisions of S. 2. If that be the nature of the scheme of suits contemplated by S. 5(2) it would be difficult to imagine how the mutawalli of a waqf or any person interested in a waqf can ever sue for a declaration that the transaction held by the Commissioner of the waqfs to be a waqf is not a waqf. That is why we think that the literal construction of the expression "any person interested in a waqf" would render a part of the sub-section wholly meaningless and ineffective. The legislature has definitely contemplated that the decision of the Commissioner of the Waqfs that a particular transaction is a waqf can be challenged by persons who do not accept the correctness of the said decision, and it is, this class of persons who are obviously intended to be covered by the words "any person interested in a waqf ". It is well-settled that in construing the provisions of a statute courts should be slow to adopt a construction which tends to make any part of the statute meaningless or ineffective; an attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. In our opinion, on a reading of the provisions of the relevant sub-section as a whole there can be no doubt that the expression "any person interested in a waqf" must mean "any person interested in what is held to be a waqf ". It is only persons

who are interested in a transaction which is held to be a waqf who would sue for a declaration that the decision of the Commissioner of the Waqfs in that behalf is wrong, and that the transaction in fact is not a waqf under the Act. We must accordingly hold that the relevant clause on which Mr. Dar has placed his argument in repelling the application of S. 5(2) to the present suit must not be strictly or literally construed, and that it should be taken to mean any person interested in a transaction which is held to be a waqf. On this construction the appellants are obviously interested in the suit properties which are notified to be waqf by the notification issued by respondent 1, and so the suit instituted by them would be governed by S. 5, sub-s. (2) and as such it would be barred by time unless it is saved under S. 15 of the Limitation Act."

1138. The above decision, however related to a matter where all the parties before the Court were Muslim and there was no question about the rights of non Muslim being affected by a decision of the Commissioner of Waqf or Central Board constituted under Section 6 of 1936 Act. In other words the decision noted above covered the persons following the same religious namely, Mohammadan Law but where such a dispute is raised by another party namely a person of different religion like, Hindu, Christian etc. whether 1936 Act at all will apply in that case or not, is not touched by the above judgment.

1139. In our view, since 1936 Act does not provide or control the right of worship of Hindu or Muslims, the rival dispute between the persons who are not Muslims, in the matter of an immovable property, whether it is waqf or not would not be governed by the provisions of 1936 Act but it would be open

to non-muslim party to stake his claim without being affected in any manner by the provisions of 1936 Act.

1140. Our view find support from a Division Bench decision of Rajasthan High Court in **Radhakishan and another Vs. State of Rajasthan and others, AIR 1967 Rajasthan 1.** This case had arisen from the Waqfs Act, 1954 *(in short "1954 Act")* and interpretation of the words "any person interested therein" appearing in Section 6(1) came to be considered. The Court held that it would not empower the Board of Waqfs to decide the question whether a particular property is a waqf property or not if such a dispute is raised by a person who is stranger to waqf. The Division Bench therein referred to our Full Bench decision in **Mohammad Baqar (supra)** and observed that in reference to 1923 Act Patna, Lahore, Bombay and Madras High Court took a view that the District Judge has no jurisdiction to hold an inquiry into the nature of property where the alleged Mutawalli deny existence of waqf though the Allahabad Chief Court of Oudh took a different view.

1141. We may notice hereat that in the Full Bench judgment of Chief Court of Oudh in **Mohammad Baqar (supra)** there was no question with respect to jurisdiction of the District Judge where the existence of alleged waqf is denied by a stranger and not the Mutawalli, therefore, we do not find that the decision in **Radhakishan (supra)** in any way can be construed as a dissenting view to the decision of Oudh Chief Court in **Mohammad Baqar (supra)**. This is evident from what has been held by the Rajasthan High Court in paras 24 and 25 reproduced as under:

> *"24. The present Act No. 29 of 1954 is, no doubt, an improvement on the Mussalman Wakf Act, 1923, but, in our*

view, this also does not empower the Board of Wakfs to decide the question whether a particular property is a wakf property or not, if such a dispute is raised by a person who is a stranger to wakf. This view is further confirmed by the provisions of section 59 of the Act which lays down that in any suit or proceeding in respect of a wakf or any wakf property by or against a stranger to the wakf or any other person, the Board may appear and plead as a party to the suit or proceeding.

25. To sum up the position, the Wakf Commissioner, though he is invested with the powers of a civil court in respect of certain matters, is not a civil court empowered to decide a disputed question whether a particular property is a wakf property or not. He has only to make a survey of wakf property existing in the State at the date of commencement of the Act and to make a report of survey to the State Government. When the State Government forwards the report to the Board of Wakfs, it becomes the duty of the Board to examine it. Thereafter the Board should publish, in the official gazette, a list of wakfs existing in the State. The law does not require the Commissioner to make a survey of wakf properties which have already become extinct as such. If he mentions in his report that certain properties were once wakf properties and can still be recovered as such, then the proper course, in our opinion for the Board is to file a suit, get them declared as wakf properties and to recover their possession. If a dispute about existence of a wakf is raised by a person who is stranger to the wakf, then it is neither fair nor proper for the Board to include such properties in

the list published in the official gazette. Section 6, in our opinion, refers only to those triangular disputes which exists between the Board of Wakf, the mutawalli and a person interested in the wakf. If there is a dispute between these three on a question whether a particular property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf, it is open to any one of them to institute a suit in a civil court of competent jurisdiction. If a suit is instituted, the decision of the Civil Court will be final. If no such suit is filed by any one of them within a year from the date of publication of the list of wakfs the Court would not entertain the suit thereafter and the list of the wakf shall be final and conclusive between them. The object of Section 6 is to narrow down the dispute between the Board of Wakf, the Mutawalli and the person interested in the wakf as defined in section 3. In our view, it does not concern a dispute if it is raised by a person who is an utter stranger to the wakf. The list cannot be final and conclusive as against a non muslim who is not covered by Section 6(1) of the Act. Again, if a dispute whether a particular property is a wakf property or not, is raised by a non-muslim and a stranger to the wakf, the Board of Wakfs has no jurisdiction to decide the matter in its own favour under Section 27 and enter it in the register. The Board's decision under section 27 would not be binding against such persons. For the same reason, the Board would not be able to recover possession of the property from such persons under Section 36B of the Act."

1142. The judgment of Rajasthan High Court was taken in appeal before the Apex Court in **The Board of Muslim Wakfs,**

Rajasthan Vs. Radha Kishan and others, AIR 1979 SC 289. Two questions raised in appeal. Firstly, the meaning of the words "any person interested therein" in Section 6(1) and (4) of Waqf Act, 1954 and secondly, the power of Waqf Commissioner to make survey of waqf properties whether it includes an inquiry about certain property as a waqf property or not. The Apex Court referring to the various judgments considered by the Rajasthan High Court held that they would be of no assistance in interpreting the provisions of Waqf Act, 1954. However, it was held in para 23 of the judgment that the High Court was right in determining the scope of Section 6(1) of 1954 Act but fell in error in curtailing the ambit and scope of an inquiry by the Commissioner of Waqf under Section 4(3) and by the Board of Waqfs under Section 27 of the Act.

1143. For our purpose, the meaning assigned by the Apex Court in Section 6(1) to the words "any person interested therein" would be relevant to answer the issues noticed above and in this regard it would be appropriate to notice hereunder paras 31, 32, 33, 34, 35 and 36 of the judgment as under:

> *"31. That leaves us with the question as to the scope of sub-s. (1) of S. 6. All that we have to consider in this appeal is, whether if the Commissioner of Wakfs had jurisdiction to adjudicate and decide against the respondents Nos. l and 2 that the property in dispute was wakf property, the list of wakfs published by the Board of Wakfs under sub-s. (2) of S. 5 would be final and conclusive against them under S. 6(4) in case they had not filed a suit within a year from the publication of the lists. The question as to whether the respondents Nos.1 and 2 can be dispossessed, or their possession can be threatened*

by the Board of Wakfs by proceeding under S. 36B without filing a suit in a civil court of competent jurisdiction does not arise for our consideration."

"32. In the present case, the respondents Nos. 1 and 2 who are non Muslims, contended that they are outside the scope of sub-s. (1) of S. 6, and consequently, they have no right to file the suit contemplated by that sub-section and, therefore, the list of wakfs published by the Board of Wakfs under sub-s. (2) of S.5 cannot be final and conclusive against them under sub-s. (4) of S. 6, It was urged that respondents Nos. 1 and 2 were wholly outside the purview of sub-s. (1) of S. 6 and they must, therefore, necessarily fall outside the scope of the enquiry envisaged by sub-s. (1) of S. 4, as the provisions contained in Sections 4, 5 and 6 form part of an integrated scheme. The question that arises for consideration, therefore, is as to who are the parties that could be taken to be concerned in a proceeding under sub-s. (1) of S. 6 of the Act, and whether the list published under sub-s. (2) of S. 5 declaring certain property to be wakf property, would bind a person who is neither a mutawalli nor a person interested in the wakf."

"33. The answer to these questions must turn on the true meaning and construction of the word 'therein' in the, expression 'any person interested therein' appearing in sub-s. (1) of S. 6. In order to understand the meaning of the word 'therein' in our view, it is necessary to refer to the preceding words 'the Board or the mutawalli of the wakf'. The word 'therein' must necessarily refer to the 'wakf' which immediately precedes it. It cannot refer to the 'wakf property'. Sub-section (1) of S. 6 enumerates the persons

who can file suits and also the questions in respect of which such suits can be filed. In enumerating the persons who are empowered to file suits under this provision, only the Board, the mutawalli of the wakf, and 'any person interested therein', thereby necessarily meaning any person interested in the wakf, are listed. It should be borne in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore., be logical and reasonable to infer that its provisions empower only those who are interested in the wakfs to institute suits."

"34. In dealing with the question, the High Court observes:

> *"In our opinion, the words "any person interested therein" appearing in sub-section (1) of S. 6 mean no more than a person interested in a wakf as defined in clause (h) of S. 3 of the Act.....*
>
> *It is urged by learned counsel for the petitioners that the legislature has not used in Section 6(1) the words "any person interested in a wakf" and, therefore, this meaning should not be given to the words "any person interested therein". This argument is not tenable because the words "any person interested therein" appear soon after "the mutawalli of the wakf" A and therefore the word 'therein' has been used to avoid re petition of the words "in the wakf" and not to extend the scope of the section to persons who fall outside the scope of the words "person interested in the wakf". The purpose of section 6 is to confine the dispute between the wakf Board, the mutawalli and a person*

interested in the wakf."

That, in our opinion, is the right construction.

35. We are fortified in that view by the decision of this Court in Sirajul Haq Khan v. The Sunni Central Board of Wakf, U.P. 1959 SCR 1287:(AIR 1959 SC 198). While construing S. 5(2) of the United Provinces Muslins Wakf Act, 1936, this Court interpreted the expression "any person interested in a wakf" as meaning 'any person interested in what is held to be a wakf', that is, in the dedication of a property for a pious, religious or charitable purpose. It will be noticed that sub-s. (1) of S.6 of the Act is based in sub-s. (2) of S. 5 of the United Provinces Muslims Wakf Act, 1936, which runs thus:

"The mutawalli of a wakf or any person interested in a wakf or a Central Board may bring a suit in a civil court of competent jurisdiction for a declaration that any transaction held by the Commissioner of Wakfs to be a wakf is not a wakf, or any transaction held or assumed by him not to be a wakf, or that a wakf held by him to pertain to a particular sect does not be- long to that sect, or that any wakf reported by such Commissioner as being subject to the provisions of this Act is exempted under section 2, or that any wakf held by him to be so exempted is subject to this Act."

The proviso to that section prescribed the period of one year's limitation, as here, to a suit by a mutawalli or a person interested in the wakf.

36. The two provisions are practically similar in content except that the language of the main enacting part has been altered in sub-s. (1) of S. 6 of the present Act and put

in a proper form. In redrafting the section, the sequence, of the different clauses has been changed, therefore, for the expression "any person interested in a wakf" the legislature had to use the expression "any person interested therein". The word 'therein' appearing in sub-s. (1) of S. 6 must, therefore, mean 'any person interested in a waker' as defined in S. 3(h). The object of sub-s. (1) of S. 6 is to narrow down the dispute between the Board of Wakfs, the mutawalli and the person interested in the wakf, as defined in S. 3 (h).”

1144. The Apex Court having said so as noticed above quoted the findings of the Rajasthan High Court with reference to Section 6 in para 37 of the judgment and in para 38 it says that it is in agreement with the reasoning of the High Court. The answer has further been crystallized by the Apex Court in paras 39 and 43 of the judgment as under:

“39. It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the List. Such a person is not required to file a suit for a declaration of his title within a period of one year. The special rule of limitation laid down in proviso to sub s. (1) of S. 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub-s. (2) of S. 5 scan be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises.”

“43. In view of the foregoing, the right of the respondents Nos. 1 and 2 in respect of the disputed property, if at all

they have any, will remain unaffected by the impugned notification. They are at liberty to bring a suit for the establishment of their right and title, if any, to the property."

1145. As noticed above the Apex Court also referred to Section 5(2) of 1936 Act and observed that it is pare materia to Section 6(1) and (4) of Waqf Act, 1954.

1146. The above decision of the Apex Court in **Radhakishan (supra)** was followed in **Board of Mulim Wakfs Vs. Smt. Hadi Begum and others, AIR 1992 SC 1083** where in para 10 of the judgment the Court briefly reproduced what was held in **Radhakishan (supra)** regarding the right, title and interest of a non-muslim with reference to the Waqf Act, 1954 which also contain the provisions, pari materia with 1936 Act, and held:

"The right, title and interest of a person who is non-muslim and is in possession of certain property is not put in jeopardy simply because that property is included in the list published under sub-sec. (2) of S. 5 and he is not required to file a suit in a Civil Court for declaration of his title within the period of one year and the list would not be final and conclusive against him. Sub-sec. (4) of S. 6 makes the list final and conclusive only between the Board, the mutawalli and the person interested in the wakf." (para 10)

1147. To the same effect is a decision of an Hon'ble Single Judge in **Marawthwada Wakf Board Vs. Rajaram Ramjivan Manthri and others, AIR 2002 Bom. 144.** With reference to Waqf Act 1954, in para 19 of the judgement, it observed:

"Therefore, from the above, it is extremely clear that the respondent No. 1, who is a non-Muslim, being a Hindu,

could not file a suit u/S. 6 of the Wakf Act, 1954, but he cannot be barred from filing a suit especially in view of the fact that his right, title and interest have been jeopardised in view of the notification issued by the Government of Maharashtra aforesaid."

1148. Another Hon'ble Single Judge of this Court in **U.P. Sunni Central Waqf Board, Lucknow Vs. State of U.P. and others, 2006(6) ADJ 331** considering Act No.XVI of 1960 which contain similar provisions as that of 1936 Act, in para 9 of the judgment, observed:

"There is no dispute that the respondent No. 3 by virtue of sale deed became the owner of the property is dispute. The respondent No. 3 being non Muslim, the provisions of U.P. Muslim Waqf Act, 1960 was not applicable as held by this Court in the case of Chedda Singh and others Vs. Additional Civil Judge, Moradabad and others."

1149. A similar view was taken in an earlier decision of this Court in **Chedha Singh and others Vs. Additional Civil Judge, Moradabad and others, 1996 Supp. AWC 189** which has been followed in **U.P. Sunni Central Waqf Board, Lucknow (supra).**

1150. Now, therefore, it is well settled that Section 5 of 1936 Act would have no application qua the rights of Hindus in general and plaintiff (Suit-1) in particular in respect to his right of worship. He would not be bound mere by inclusion of the property in a notification issued under Section 5(1) of 1936 Act. Moreover, in this particular case since the notification itself has been held invalid so far as the property in question is concerned, meaning thereby, in the eyes of law, there was no notification under Section 5(1) of 1936 Act and, therefore, also the

restriction or benefit if any under the Act would not be applicable to either of the parties. No further provision has been shown to us from 1936 Act to affect the rights of Hindus in general and plaintiff (Suit-1) in particular affecting their/his right of worship etc..

1151. Therefore, both the issues are answered in favour of plaintiff (Suit-1) and defendants (Suit-4) in particular and in favour of Hindu parties in General. Issues No. 5(b) (Suit-4) and 9(a) (Suit-1) are answered accordingly.

1152. **Issue No. 5(e) (Suit-4)** reads as under:

> *"Whether in view of the findings recorded by the learned Civil Judge on 21.4.1966 on issue no.17 to the effect that "No valid notification under section 5(1) of the Muslim Waqf Act (No. XIII of 1936) was ever made in respect of the property in dispute", the plaintiff Sunni Central Board of Waqf has no right to maintain the present suit?"*

1153. Issue 5(e) (Suit-4) raises a very basic question about the maintainability of Suit-4 pursuant to the finding recorded by the leaned Civil Judge where no valid notification has been issued under Section 5(1) of the Act in respect to the property in dispute. The question is whether in such circumstances, plaintiff, Sunni Central Board of Waqf (Suit 4) has any right to maintain the present suit or not. This leads us to examine about the Waqfs covered by 1936Act as also when the Sunni Central Board of Waqf can file a suit.

1154. Sri P.N. Mishra, learned counsel for the defendant No.20 in suit 4 submitted that once it is held that there is no valid notification issued under Section 5 of 1936 Act and in view of the further fact that no attempt was made by any person including the alleged Mutawalli to get the alleged waqf

registered under Section 38 with the plaintiff No.1 in Suit-4 and the Sunni Central Waqf Board has failed to take any steps to get the alleged waqf registered by issuing necessary directions, as the case may be, under Section 39/40 of 1936 Act, it is evident that the disputed building in suit is never treated to be waqf by them and therefore, since it was not a waqf, the Act itself is not applicable. Hence suit-4 by plaintiff No.1 is not maintainable. He also submitted that even otherwise there was no waqf at all, hence 1936 Act is inapplicable. Sunni Central Waqf Board has no right to file the above suit.

1155. We find that though under the various provisions of 1936 Act, the legislature has attempted and made various provisions so that any waqf in the State of U.P., if existed, may be known to the Sunni Central Waqf Board so that it may be properly supervised and administered. However, the Act does not contain any provision that even though a waqf has been created in accordance with Islamic Law yet it would not be governed by the Act and shall be beyond the power of supervision, administration of Sunni Central Waqf Board or Shia Central Waqf Board, as the case may be for the mere reason that it was not notified under Section 5 of the 1936 Act, not registered due to fault of the Mutawalli, if any or due to inaction of the Board itself. It is, however, admitted by learned counsel for the defendant No.20 that the Act neither creates a waqf nor extinguish the same if the same is already in existence. In these circumstances, particularly in the absence of any provision in the Act, we have to consider whether there is any intrinsic indication in the Act to necessarily exclude such a waqf from the purview of 1936 Act merely for its non notification or registration etc. with the Board. If we find that there is no such

intrinsic hint in the Act also then to accept the submission, wide enough, as advanced by Sri Mishra that even though there is a valid waqf, if it is not notified or registered with the Board or if no person has filed a suit for declaration that there is no waqf within the prescribed limitation, such waqf even if validly created would not be covered by 1936 Act, would mean that we have read certain words in the statute which do not actually exist. It travels in the realm of ***casus omissus*** which normally this Court shall not presume unless there is a necessary compulsion to do so. Considering the basic purpose for which the 1936 Act was enacted we find it difficult to read any such words in the statutes.

1156. The Waqf Act, 1954 though not applicable to the State of U.P. but therein the provisions are mostly pari materia with 1936 Act. To start with there also was no provision which restrain the Central Board or anyone to initiate proceedings for enforcing rights on behalf of a waqf not registered with the Board but later on Section 55-E was inserted therein by Act No. 69 of 1984 which bar enforcement of right on behalf of unregistered waqf by anyone which included the Waqf Board also. It reads as under:

> *"**55-E**. **Bar to the enforcement of right on behalf of unregistered waqfs.-**(1) Notwithstanding anything contained in any other law for the time being in force, no suit, appeal or other legal proceeding or the enforcement of any right on behalf of any waqf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any Court after the commencement of the Waqf (Amendment) Act, 1984, or where any such suit, appeal or*

other legal proceeding had been instituted or commenced before such commencement, no such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any Court after such commencement unless such waqf has been registered, after such commencement unless such waqf has been registered, after such commencement, in accordance with the provisions of this Act.

(2) The provisions of sub-section (1) shall apply, as far as may be, to the claim for set-off or any other claim made on behalf of any waqf which has not been registered in accordance with the provisions of this Act."

1157. We may notice that neither any similar provision was made in 1936 Act nor in Act No. XVI of 1960, therefore, it would not be appropriate to read something in U.P. Waqf Act, 1936 which actually did not find mention therein.

1158. We may clarify at this stage that a provision pari materia with Section 55-E of 1954 Act has been included in Waqf Act, 1995 in Section 87 but we are not concerned thereto in this case.

1159. A collective reading of various provisions of 1936 Act shows that any 'waqf' defined under Section 3(1), whether existed at the time when 1936 Act came into force, or, came into existence subsequently, unless excluded under Section 2(2), would be covered by Section 2(1). In the present suits, there is an issue no. 6 (Suit-3) questioning the very existence of a 'Waqf' and, therefore, unless that issue is answered in favour of the plaintiffs (Suit-4), it can obviously be not said that the property in dispute constituted 'a Waqf' under Section 3(1) of 1936 Act and, therefore, will be covered by Section 2(1) of 1936Act since

it is not excluded by Section 2(2). Apparently the purpose of survey and notification under Section 5(1) is to identify the Waqfs as also the concerned Central Board which would exercise the power of superintendence over the Waqf concerned i.e. whether it is Sunni or Shia. Absence of a notification under Section 5(1) in respect to a property which is a 'Waqf' otherwise would not result in exclusion of other provisions of 1936 Act. The function of Central Board and its power of superintendence is not circumscribed to the 'Waqfs' as notified under Section 5(1) of the Act.

1160. A perusal of Section 18 on the contrary shows that general power of superintendence of all Waqfs to which "the Act applies" is vested in the Central Board. Similarly, Section 38 of the Act also says that there is an obligation regarding registration of 'Waqf' whether it is subject to 1936 Act or not and whether created before or after the commencement of the Act, at the office of Central Board of the sect to which the Waqf belongs, namely, if the Waqf is a sunni Waqf, with Sunni Central Board of Waqf, otherwise, with the Shia Central Board of Waqf. The obligation for making application for registration is upon the Mutwalli. Non compliance of Section 38 is an offence punishable under Section 60. In case of failure of a Mutwalli to get the Waqf registered, the power is also conferred upon the Central Board itself to issue such a direction vide Section 40 of 1936 Act. Section 39 provides for maintaining a register of Waqfs by the Central Board containing particulars in respect to each Waqf. The said provision is not confined to only such Waqfs as are notified under Section 5(1) of 1936 Act. Section 47 confers power upon the Central Board to apply the Court seeking direction in cases of undisposed Waqf funds or

where the directions in the deed of waqf are no longer sufficient to carry out the intention of the waqif or where is a case for the application of doctrine of cypres. Here also the entitlement of the Central Board to approach the Civil Court is not confined to the waqfs notified under Section 5(1). Section 48 and 49 also are applicable to "any waqf" to which 1936 Act applies and not confined to the waqfs notified under Section 5(1) of the Act. Similarly, Section 52 also provides for notice of suits to the Central Board where any suit relating to title to any waqf property or to the rights of a Mutwalli is instituted in any civil Court. It is also not confined to the waqfs notified under Section 5(1) of the Act. Same is the position under Section 53 and 54 of the Act. We are, therefore, of the view that **subject to Issue No. 6 (Suit-3), if answered in positive, i.e. in favour of plaintiffs (Suit-4) or against the plaintiffs (Suit-3)**,i.e. if it is held that mosque was dedicated by emperor Babar for worship by Muslims in general and results in creation of a public waqf property, in that condition, Issue No. 5 (e) has to be answered in favour of the plaintiffs (Suit-4) and it is to be held that the plaintiff, Sunni Central Board of Waqf, has a right to maintain the suit even though a valid notification under Section 5(1) of 1936 Act was never issued in respect to the property in question. Otherwise, this suit at the instance of Sunni Central Board of Waqf would not be maintainable.

1161. It is true that in **Tamil Nadu Wakf Board Vs. Hathija Ammal, AIR 2002 SC 402** which was a case arising out of the provisions of Waqf Act, 1954 and in particular Sections 4, 5, 6 and 27 thereof, the Court held that since the Board itself possess power to decide whether a particular property is waqf property or not and its decision is final unless it

is revoked or modified by a civil court by virtue of Section 27 of 1954 Act and, therefore, the Board cannot file a suit for declaration that any property is a waqf property and for its possession. However, in our view, the above judgment does not apply to a case governed by 1936 Act which contain no provision pari materia to Section 27 of 1954 Act.

1162. At this stage we may also refer an earlier decision of this Court in **Afzal Hussain Vs. 1st Additional District Judge, AIR 1985 All. 79** where it was held that before taking an action under Section 57A, for recovery of possession of waqf property from unauthorised occupants, the first inquiry which the Board has to make is whether the immovable property in respect of which action is to be taken is entered as property of waqf in the register of waqfs maintained under S. 30 of 1960 Act being a jurisdictional issue. The above judgment also is not applicable for the reason that Section 57A provides for summery eviction of unauthorised occupants and is applicable only in such cases where the property is entered in the register of waqfs maintained under Section 30. Therefore, the dictum laid down therein cannot be extended to a case where a suit is to be filed by the Waqf Board for declaration of possession of a waqf even though it is neither notified under Section 5(1) nor registered with it under 1936 Act.

1163. Sri Siddiqui, however, tried to overcome the difficulty as a result of invalidation of the notification by the Civil Judge by contending that neither it afects the power of Sunni Board to maintain the suit nor shall bring into the question of limitation. Placing reliance on the Apex Court's decision in **U.P. Shia Central Board of Waqf Vs. U.P. Sunnir Central Board of Waqf, AIR 2001 SC 2086,** he contended that

mere non-availability of the notification shall not deprive the Board from registering a property as a waqf property on its own inquiry. He further submits that the Hindu parties have also filed certain documents after obtaining certified copies thereof from the Sunni Board and that being so, it is not open to them to challenge that the waqf in question is not registered.

1164. The submissions of Sri Siddiqui, however, are not sustainable. It is though not disputed that U.P. Act 1936 contemplated enlistment of waqfs in the register of concerned Waqf Board in three ways, i.e., based on the list prepared by the Commissioner of Waqfs and consequential notification; on the application of the Mutwalli of the concerned waqf and registration by the concerned waqf after issuing notice by the Waqf Board itself but we have to look all these aspects in the light of the U.P. Act 1936 which continued to hold the field till 1960. Sections 1 to 4 came into force on 20.3.1937 but rest of the provisions, i.e., Sections 5 to 71 were enforced with effect from 1.7.1947. The only way in which the disputed waqf claimed to have been registered by the Waqf Board was the notification dated 26.2.1944 based on the report of the Commissioner. That notification was found invalid by the Civil Judge in its judgment dated 21.4.1966. It is nobody's case and even the counsel for the Waqf Board do not claim that till issue no. 17 was decided by the Civil Judge except of the notification dated 26.2.1944, there was any other procedure or method followed by the Sunni Board to enlist or register the concerned waqf in the register of the Waqf Board. Neither it is pleaded nor there is any material on record to substantiate the same. U.P. Act 1936 was substituted by U.P. Act 1960. This continued to hold the field till the Waqf Act 1995 was enacted by the

Parliament. It is only in the pleadings which the Waqf Board filed after 1989, wherein for the first time it has pleaded that the waqf in question was registered by the Board under Section 30 of U.P. Act 1960. Till then there was no pleading, no material to show that the waqf in question was registered with the Board in any other manner except the notification dated 26.2.1944. That was declared invalid on 21.04.1966 by the Civil Judge. In the case of **Shia Waqf Board (Supra)** there was reference made under section 8 of U.P. Act 1960 since there was a dispute whether the concern waqf was a Sunni waqf or Shia waqf. The Apex Court held that where a dispute arose about the nature of the waqf whether it is a Shia waqf or a Sunni waqf, the only requirement under section 8 is the existence of dispute and not the existence of notification. Referring to section 6 (4) it further observed that if a notification has already been issued, then the restriction is that such dispute can be referred only within a period of one year and not after expiry thereof but so long the notification is not there, outer limit will not be attracted. We do not find this judgment to lend any help to the plaintiff (Suit-4) or Sunni Board in any manner.

1165. Similarly the pleading with respect to section 29 (8) also has no relevance in the case in hand since it is not the case of the Sunni Waqf Board that except the notification dated 26.02.1944 there was any other order of the waqf board which existed declaring the waqf in question as a waqf registered with the Board and the same having not been challenged under section 29(8) within time prescribed and thereafter could not have been raised in this regard. This pleas wholly baseless and is not attracted in these matters.

1166. Even otherwise, Suit-4 has been filed not only by

the Sunni Central Waqf Board but there are nine more individual muslim parties being plaintiffs no. 2 to 10. It is obvious that they are muslims and, therefore, would be interested in the property in dispute to which they claim to be a waqf property. The right to file a suit by a muslim in respect to a property claimed to be a "waqf property" came to be considered before a Division Bench in **Anjuman Islamia Vs. Najim Ali and others, AIR 1982 MP 17** and in para 7 of the judgement it held:

> *"7. We shall first consider the question whether the suit was not tenable at the instance of the plaintiff. In brief S. 195 of the Principles of Mohammedan Law by Mulla (18th Edition), is the complete answer to this question, which contemplates that a suit for a declaration that property belongs to a wakf can be brought by Mohammedans interested in the wakf. Anjuman is a society of Mohammedans registered under the Societies Act (Act No. 21 of 1860), as per registration certificate No. 104 of 1960-61 (Exhibit P-5). Admittedly the members of plaintiff Anjuman and its president Shri Mohd. Abdul Qadir (PW 1) are residents of Chhatarpur and belong to Muslim community. They are, therefore, persons very much interested in the property in suit which they claim to be wakf property. The suit, therefore, instituted at their instance would be perfectly competent and tenable and the learned District Judge was wrong in holding otherwise."*

1167. In the absence of any other precedent persuading us to take a different view, we find ourselves in respectful agreement thereto. We therefore hold that Suit-4 cannot be said to be not maintainable provided the issue regarding the very

nature of the disputed property whether it is a waqf or not is decided in favour of the plaintiffs (Suit-4) i.e. subject to the issue as to whether the disputed property is a waqf or not, i.e., issue no. 6 (Suit-3) if decided in favour of plaintiffs (Suit-4), i.e., defendants (Suit-3).

1168. I**ssue No. 18 (Suit-4)** is as under:

> *"What is the effect of the judgment of their Lordships of the Supreme Court in Gulam Abbas and others vs. State of U.P. and others AIR 1981 Supreme Court 2198 on the finding of the learned Civil Judge recorded on 21st April, 1966 on issue no. 17?"*

1169. Issue No. 18 (Suit-4) relates to the effect of the judgement of the Apex Court in **Gulam Abbas (supra)** on the Issue No. 17 (Suit-4) decided by the learned Civil Judge vide his judgement dated 21.4.1966. Sri Jilani argued that the notification dated 26.02.1944 under Section 5 (1) of 1936 Act was relied by the Apex Court in the above judgment meaning thereby the notification cannot be said to be void ab initio and it would be deemed as if the decision of the leaned Civil Judge is no more a good law in view of the fact that the law laid down by the Apex court is the law of the land vide Article 145 of the Constitution of India.

1170. Sri M.M. Pandey, counsel for plaintiffs (Suit-5), however, submitted that the decision in ***Ghulam Abbas's*** case may be considered. In respect of Doshipura Mosque and other properties, the Wakf Commissoner, after survey and inquiry, made a report dt 28/31.10.1938 u/s 4(5) of Wakf Act 1936 with Appendix VIII of Sunni Wakfs, excluding the Mosque, and Appendix X of Shia Wakfs including the Mosque; copies of the report were sent to both Shia and Sunni Boards of Wakf. On

receipt of the report, Shia Board published Notification dt. 15.1.1954 of Appendix X in Gazette dt. 23.1.1954 u/s 5(1). Neither Sunni Board nor any person interested in the Wakf filed suit u/s 5(2), within the period prescribed, to challenge the omission of disputed properties from Appendix VIII. However, Sunni Board published Notification dt. 26.2.1944, u/s 5(1), including disputed properties, obviously not based on Appendix VIII (which had excluded the properties). Supreme Court held Sunni Board's Notification dt. 26.2.1944 to be invalid on the ground that it was not based on Appendix VIII while S.5(1) required the Notification to be 'in accordance with' Commissioner's report and that Wakf Commisioner's report with Appendix X became 'final and conclusive' in favour of Shia Wakf.

1171. We have perused the above judgment very carefully. The dispute before the Apex Court in **Gulam Abbas (supra)** was between the members of Shia and Sunni communities of muslims. In Mohalla Doshipura of Varanasi City, both sects of muslims, namely, Shias and Sunnis reside. Both revere the martyrdom of Hazrat Imam Hussain and Hazrat Imam Hasan, grandsons of Prophet Mohammad during Moharram but in different manner. The members of Shia sect in Mohalla Doshipura numbering about 4000 constitute a religious denomination having a common faith and observe Moharram for two months and eight days in a year in memory of Hazrat Imam Hussain who along with his 72 followers attained martyrdom at Karbala. The said religious belief is practised by the men-folk and the women-folk of the Shia community by holding Majlises (religious discourses), Recitations, Nowhas, Marsia, doing Matam (wailing) and taking out processions with

Tabut Tazia, Alams, Zuljinha etc. For performing these religious rites, practices and observances, the Shia community has been customarily using from time immemorial nine plots in Mohalla Doshipura and the structures on some of them, particulars whereof are as under :

"*Plot No. 246; on which stands a Mosque which, it is common ground, belongs to both the sects as it was constructed out of general subscription from members of both the sects and every Mohammadan is entitled to go in and perform his devotions according to the ritual of his own sect or school.*

Plot No. 247/1130: on which stands the Baradari (Mardana Imambara- A structure of white stone having 12 pillars) constructed by Shias in 1893 used for holding Majlises, Recitations, Marsia and doing other performance.

Plot No. 245: on which there is a Zanana Imambara used by Shia ladies for mourning purposes and holding Majlises etc.

Plot No. 247: on which there is Imam Chowk used for placing the Tazia thereon (said to have been demolished by the Sunnis during the pendency of the instant proceeding).

Plot No. 248/23/72: a plot belonging to one Asadullah, a Shia Muslim, with his house standing thereon.

Plot No. 246/1134: on which stands a Sabil Chabutra (platform for distributing drinking water) belong to one Nazir Hussain, a Shia Muslim.

Plots Nos. 602/1133, 602 and 603 : being vacant plots appurtenant to the Baradari in plot No. 247/1130

used for accommodating the congregation assembled for Majlises etc. when it over-lows the Baradari."

1172. The manner in which the religious rights, practices and functions used to be performed by the members of Shia community is mentioned in the judgment. The claim of Shia community to perform their religious rights on the said nine plots and structures thereon based on two foundations' (1) decisions of competent Civil Court adjudicating rights in their favour in earlier litigations and (2) registration of Shia Waqfs concerning the plots and structure for performance of theses practices and functions under Section 5 and 38 of 1936 Act, which had become final as no suit challenging the Commissioner's report and registration was filed within two years by any member of Sunni community or the Sunni Central Board of Waqf.

1173. For the purpose of issue no. 18 (Suit-4), we need not to go into the details of the first aspect of the matter, i.e., the various suits and proceedings which became final between the two sects and instead straight way come to that part of the judgment which deals with the notification dated 26.02.1944 issued under 1936 Act. The Shia sect claim that the Commissioner of Waqf submitted his report dated 28/31.10.1938 to the State government under Section 4(5) showing the plots and structures referred to above as Shia Waqfs. This was followed by notification dated 15.1.1954 issued under Section 5(1) of 1936 Act by the Shia Central Board of Waqf and published in the U.P. Gazette dated 23.1.1954. No suit challenging to the said notification was filed either by Sunni Central Board of Waqf or any Sunni Muslim within the period prescribed under Section 5(2) of 1936 Act. The Sunni sect,

however, relied on the notification dated 26.2.1944 issued by the Sunni Central Baord of Waqf under Section 5(1) of 1936 Act following the report of Commissioner of Waqf in respect to the waqfs which he identified a Sunni Waqf.

1174. After analysing the provisions of 1936 Act as well as Muslim Waqf Act 1960 (Act No.14 of 1960) (hereinafter referred to as "1960 Act"), the Apex Court discusses the facts pertaining to preparation of report by Commissioner and notifications issued under 1936 Act, in para 16 of judgment as under :

> *"It appears that the Government of Uttar Pradesh appointed Shri Munshi Azimuddin Khan, A deputy Collector, as a Chief or Provincial Commissioner of Wakfs under Section 4A of the 1936 Act for the purpose of making a survey of all the Wakfs in all the districts of the State. ... After making the necessary inquiries Shri Munshi Azimuddin Khan submitted to the State Government his Report dated 28th/31st October, 1938 and annexed several appendices to his Report; Appendix VIII referred to Waqfs pertaining to Sunnis and declared as subject to the 1936 Act and Appendix IX mentioned Waqfs pertaining to Sunni sect which were exempted from the Act; Appendices X and XI contained corresponding information about the Shia Waqfs which were respectively declared as subject to the Act or exempt from the Act. The original Report bearing the signature of Shri Munshi Azimuddin Khan, Chief Waqfs Commissioner was produced before us marked Exh. A) for our inspection by Mr. Rana, Counsel for the State of U.P. and the same was made available for inspection to the parties. There is a slip attached to the Report placed in*

between Annexure VII and Annexure XIII containing an endorsement to the effect : "Appendices VIII and IX sent to the Sunni Board" and "Appendices X and XI sent to the Shia Board" with the signature of the Chief Commissioner of Waqfs below it.....Presumably the aforesaid action of sending the relevant appendices along with a copy of the Commissioner's report to the respective Sunni Central Waqf Board and the Shia Central Waqf Board was taken as required by Section 5(1) of the Act. ..... after receiving the aforesaid documents (Report together with the appendices X and XI), the Shia Central Waqf Board, as required by Sec. 5(1) of the Act, took steps to notify in the Official Gazette all the waqfs relating to their sect on the basis of the Appendices annexed to the Report; the relevant Notification under Section 5 (1) was issued on 15th January, 1954 and published in the Government Gazette on 23rd January, 1954. .....Admittedly, no suit was filed either by the Sunni Central Board or any other person interested in those Wakfs challenging the decision recorded in his Report by the Chief or Provincial Commissioner for Wakfs within the time prescribed under Section 5 (2) of the Act, and, therefore, the Chief Commissioner's Report together with the appendices X and XI thereto dated 28th/31st October 1938, on the basis of which the Notification dated 15th January, 1954 was issued and published in Official Gazette on 23rd January, 1954, must be held to have become final and conclusive as between the members of the two communities."

1175. Thereafter, in para 17 of the judgement, the Apex Court dealt with the notification dated 26th February, 1944 relied

by the members of Sunni community and said:

> *"As against the aforesaid material respondents 5 and 6 and through them the Sunni community have relied upon a Notification dated 26th February, 1944 issued by the Sunni Central Wakfs Board under Section 5(1) of the U.P. Muslim Wakfs Act, 1936 following upon the receipt of the Report of the Chief or Provincial Commissioner of Wakfs in respect of mosque in Doshipura showing the same as Sunni Wakf, copy whereof has been annexed as Annexure S-2 to the affidavit dated 6th February, 1980 of Mohd. Basir Khan filed on behalf of the Sunni Central Waqfs Board as its "Pairokar'. This Notification on which reliance has been placed by the Sunnis appears to us of doubtful validity and probative value for the reasons which we shall presently indicate. Though issued and published earlier in point of time than the Notification of Shia Central Waqfs Board, it is admittedly not based on Appendices VIII and IX annexed to the Chief Commissioner's Report dated 28th/31st October, 1938 but on the basis of some Registers of Waqfs (meaning lists of Waqfs) said to have been received by the Sunni Board from the Commissioner of Wakfs. Curiously enough the Sunni Central Waqfs Board had stated through two affidavits dated 6th January, 1980 and 9th January, 1980 of their Pairokar Shri Mohd. Basir Khan that along with the copy of the Commissioner's report Registers of Waqfs were received but no appendices like Appendices VIII and IX were received from the Commissioner, that according to the Registers of Waqfs there were 245 charitable Sunni Waqfs in the District of Banaras which were covered by the 1936 Act and all such*

Waqfs were accordingly notified by the Sunni Board in the government Gazette by issuing the Notification dated 26th February, 1944 under Section 5(1) of the Act. The original Report of the Commissioner does not refer to anything like Registers of Waqfs but, as stated earlier, it refers to Appendices Nos. VIII, IX, X and XI and the endorsement on the slip under the signature of the Chief Commissioner shows that the former two appendices were sent to the Sunni Board and the latter two to the Shia Board. In face of this endorsement and having regard to the fact that the Shia Board had received Appendices X and XI along with the Commissioner's Report which that Board offered to produce, it is difficult to accept the Statement of the Pairokar of the Sunni Board that no appendices were received by the Board along with a copy of the Commissioner's Report. It seems that relevant appendices, though received, are being withheld as their production would be adverse to the Sunnis. Apart from that aspect it is clear on their own admission that the Notification under Sec. 5 (1) of the 1936 Act was issued by the Sunni Central Waqfs Board not on the basis of Appendices VIII and IX which formed part of the Commissioner's Report but on the basis of some Registers of Waqfs said to have been received by it. The notification regarding the Sunni Waqfs issued on the basis of material which did not form part of the Chief Commissioner's Report would be in violation of Section 5(1) of the Act which required issuance of a Notification thereunder 'according to' the Commissioner's Report and as such the Notification dated February 26, 1944 relied upon by respondents 5 and 6 and members of

the Sunni community would be of doubtful validity. ... .We are, therefore, clearly of the view that the Notification dated 26th February, 1944 issued under Section 5(1) of the 1936 Act by the Sunni Board is of no avail to the Sunnis for the purpose of defeating the customary rights of the Shias to perform their religious ceremonies and functions on the other plots and structures thereon."

1176. From the above judgment, thus, it is evident that the Apex Court, in fact, did not rely on the notification dated 26.2.1944 but instead held it to be of doubtful validity and probative value having not been issued in accordance with the procedure prescribed under Section 5 of 1936 Act. In our view, instead of upsetting the judgment of the learned Civil Judge, it, in fact, strengthened the said decision which has held that the notification dated 26th February 1944 was not a valid notification in respect to property in dispute. In view of the above discussion, we have no manner of doubt that the Apex Court's decision in **Gulam Abbas (supra)** does not affect the finding of the learned Civil Judge on Issue No. 17 (Suit-4) as contained in his judgement dated 21.4.1966, but on the contrary, support and strengthen his said finding. **Issue No. 18 (Suit-4) is answered accordingly**.

1177. **Issue No. 9(b) (Suit-1)** reads as under:

"Were the proceedings under the said Act referred to in written statement para 15 collusive? If so its effect?"

1178. Issue No. 9(b) (Suit-1) is based on the pleadings of the plaintiffs in para 15 of his replication which reads as under:

"15. ऐक्ट नं0 13 सन् 1936 बिल्कुल ultra vires है और उसके सम्बन्ध यदि कोई कार्यवाई की गई तो वह सब void है वादी किसी नोटिस के बन्धन में नहीं है और न किसी कार्यवाही जिसका वर्णन धारा 15

में किया गया है इस अभियोग पर कोई प्रभाव है वादी का अनुमान है कि वह अभियोग मुसत्मा परस्पर षडयन्त्री भावना (साजिशी) से योजित किया था।''

''15. Act no.13 of 1936 is ultra vires and the proceeding, if any, in its pursuance is void. The plaintiff is not bound by any notice nor does any proceeding, mentioned in para-15, have any bearing on this case. According to the plaintiff, this case has been filed collusively.'' (E.T.C.)

1179. In this paragraph reply contain with respect to para 15 of the written statement filed on behalf of defendants 1 to 5 which reads as under:

''15. यह कि बमौजिब मुसलिम वक्फ ऐक्ट 13 सन 1936 चीफ कमिश्नर औकाफ मुकरर हुए और चीफ कमिश्नर मज़कूर ने बाद तहकीकात व मुआयना मौका मसजिद बाबरी यह तय किया कि मसजिद बाबरी का तामीर कुनिन्दा शहन्शाह बाबर सुन्नीउल मजहब था और वक्फ मुताल्लिक मसजिद मजकूर सुन्नी वक्फ है और इसी सिलसिले में कानूनी नोटीफिकेशन भी जारी कर दिया।''

''15. That a Chief Commissioner of 'Aukaf' (plural of Waqf) was appointed under the Muslim Waqf Act 13 of 1936, and after investigation and inspection of the disputed site Babri mosque the Chief Commissioner decided that emperor Babar, the builder of Babri mosque, was of Sunni sect and the Waqf in respect of the disputed mosque is a Sunni Waqf, and (he) also issued a legal notification in this behalf.'' (E.T.C.)

1180. To the same effect the defendant No.10 has also pleaded in paras 14 and 16 which reads as under:

''14. That after the promulgation of U.P. Muslim Waqf Act, 1936, the Chief Commissioner of Waqfs had got a survey made in respect of the waqf properties and in that connection survey of the mosque in question was also

conducted and the same was registered as a waqf and a gazette notification had also been issued in respect thereto under the provisions of the U.P. Muslim Waqf Act, 1936."

"16. That the said mosque stands registered as a mosque in the office of the U.P. Sunni Central Board of Waqf, hereinafter referred to as the Board, as Waqf No. 26 Faizabad even in the Register of Waqfs maintained under section 30 of the U.P. Muslim Waqf Act, 1960."

1181. In para 15 of the written statement of defendants no. 1 to 5 the statement of fact with respect to the inquiry made by the Chief Commissioner of Waqf and the notification dated 26.02.1944 has been made. This notification has already held to be invalid, so far as the disputed property is concerned. No material has been placed before this Court to show that the alleged proceedings under 1936 Act in any manner were the result of any conspiracy, mala fide etc. of the muslim parties. In fact the plaintiff (Suit-1) could not substantiate the plea of conspiracy taken in para 15 of his replication and during the course of arguments the learned counsel for the plaintiff (Suit-1), in fact, gave up the said plea and neither advanced any submission nor could substantiate the same. In the circumstances, **issue no. 9(b) (Suit-1) is answered against the plaintiff (Suit-1)** and it is held that the proceedings referred to in para 15 of the written statement (Suit-1) cannot be said to be collusive in the absence of placing anything before this court to substantiate the same. In these circumstances, the question of considering its effect does not arise.

1182. **Issue No. 9(c) (Suit-1)** is as under:

"Are the said provisions of the U.P. Act 13 of 1936 ultra vires for reasons given in the statement of plaintiff's

counsel dated 9.3.62 recorded on paper no. 454-A?"

1183. Sri P.D. Goswami, counsel for the plaintiff (Suit-1) on 08/09.03.1962 made the following statement:

> *"Sri P.D. Goswami advocate for the plffs state that the report of the commissioner spoken of in para 15 of the W.S. has no effect on the rights of the plff nor do the provisions of Sec 5(3) of U.P. Act 13 of 1936 apply to the present suits as they are based on a right of worship of plff who is a Hindu. According to him the provisions of this Act are applicable to the property and the rights of the Muslims only.*
>
> *He does not give up the plea taken by him in the replication in that connection.*
>
> *According to him the said Act has been repealed by U.P. Act 16 of 1960. He further adds that in case the said Act be considered applicable to the present suits it is ultra vires the provisions of the Govt of India Act 1935 and is in conflict with the Ancient Monuments Preservation Act (Act No. VII of 1904)."*

1184. As we have already held that firstly, there was no valid notification under Section 5(1) of 1936 Act regarding the property in dispute, and secondly, that the said Act does not apply to non muslims, we do not find any occasion to go into this issue further since the statement of the learned counsel itself was conditional, i.e., if 1936 Act is held applicable to Suit-1 and 2 then it is ultra vires of the provisions of the Government of India Act, 1935 and is in conflict with the Ancient Monument Preservation Act (Act No. 7 of 1904).

1185. Even otherwise, we do not find as to how Act No. 7 of 1904 would come into picture in the case in hand. The

aforesaid Act of 1904 was promulgated on 18.03.1904 with the preamble as under:

> *"Whereas it is expedient to provide for the preservation of ancient monuments, for the exercise of control over traffic in antiquities and over excavation in certain places, and for the protection and acquisition in certain cases of ancient monuments and of objects of archaeological, historical or artistic interest."*

1186. The statement of objects and reasons of 1904 Act reads as under:

> *"The object of this measure is to preserve to India its ancient monuments in antiquities and to prevent the excavation by unauthorised persons of sites of historic interest and value.*
>
> *2. In 1898 the question of antiquarian exploration and research attracted attention and the necessity of taking steps for the protection of monuments and relics of antiquity was impressed upon the Government of India. It was then apparent that legislation was required to enable the Government to discharge their responsibilities in the matter and a Bill was drafted on the lines of the existing Acts of Parliament modified so as to embody certain provisions which have found a place in recent legislation regarding the antiquities of Greece and Italy. This draft was circulated for the opinions of local Governments and their replies submitted showed that the proposals incorporated in it met with almost unanimous approval, the criticism received being directed, for the most part, against matters of detail. The draft has since been revised, the provisions of the Draft Bill prepared by the Government of*

Bengal have been embodied so far as they were found suitable and the present Bill is the result.

3.The first portion of the Bill deals with protection of "Ancient monuments" an expression which has been defined in clause 2 (now section 2). The measure will apply only to such of these as are from time to time expressly brought within its contents though being declared to be "protected monuments". A greater number of more famous buildings in India are already in possession or under the control of the Government; but there are others worthy of preservation which are in the hands of private owners. Some of these have already been insured or are fast falling into decay. The preservation of these is the chief object of the clause of the Bill now referred to and the provisions of the Bill are in general accordance with the policy enunciated in section 23 of the Religious Endowments Act, 1863 (20 of 1863), which recognises and saves the right of the Government "to prevent injury to and preserve buildings remarkable in their antiquity and for their-historical or architectural value or required for the convenience of the public". The power to intervene is at present limited to cases to which section 3 of the Bengal Regulation 19 of 1810 or section 3 of the Madras Regulation VII of 1817 applies. In framing the present Bill the Government has aimed at having the necessity of good will and securing the co-operation of the owners concerned and it hopes that the action which it is proposed to take may tend rather to the encouragement than to the suppression of private effort. The Bill provides that the owner or the manager of the building which merits greater

care than it has been receiving may be invited to enter into an agreement for its protection and that in the event of his refusing to come to terms the collector may proceed to acquire it compulsorily or take proper course to secure its application. It has been made clear that there is to be no resort to compulsory acquisition in the case the monument is used in connection with religious observances or in other case until the owner has had an opportunity of entering into an agreement of the kind indicated above; and it is expressly provided that the monument maintained by the Government under the proposed Act, shall not be used for any purpose inconsistent with its character or with purpose of its foundation, and that, so far as is compatible with the object in view the public shall have access to it free of charge. By the 4th proviso of clause 11 (now section 10) it is laid down that in assessing the value of the monument for the purpose of compulsory acquisition under the Land Acquisition Act, 1894 (1 of 1894) its archaeological, artistic or historical merits shall not be taken into account. The object of the Government as purchaser being to preserve at the public expense and for the public benefits an ancient monument with all its associations, it is considered that the value of those associations should not be paid for.

4. The second portion of the Bill deals with movable objects of historical or artistic interest and these may be divided into two classes; the first consists of ornaments, enamels, silver and copper vessels, Persian and Arabian Manuscripts, and curios general. These are for the most part portable and consequently difficult to trade; they are

as a rule artistic; are of historic interest and it would be impracticable even were it desirable to prevent a dealer from selling and a traveller from buying them. The sculptural carvings, images, bas-reliefs, inscriptions and the like form a distinct class by themselves, in that their value depends upon their local connection. Such antiquities may, as in the case of those of Swat, be found outside India or in Native States and this the Legislature cannot reach directly; while as regards the British territory and under the existing law, it is impossible to go beyond the provisions of the Indian Treasure Trove Act, 1878 (6 of 1878). (In these circumstances, it is proposed, by clause 18 of the Bill to take power to prevent the removal from British India of any antiquities which it may be deemed desirable to retain in the country, and at the same time to present importation. By thus putting a stop on draft in such articles it is believed that it will be possible to protect against spoilation a number of interesting places situated without and beyond British territory. Clause 19 aims at providing for antiquities such as sculptures and inscriptions which belong to another place and ought therefore to be kept in situ or deposited in local museums. The removal of these, it is proposed to enable the local Government to prohibit by notification and the clause also provides that, if the object is movable, the owner may require the Government to purchase it outright and that, if it is immovable the Government shall compensate the owner for any loss caused to him by the prohibition. Clause 20 (now section 19) deals with the compulsory purchase of such antiquities if that is found to be necessary for their

preservation and the owner is not willing on personal or religious grounds to part with them. In such cases it is proposed that the price to be paid should be assessed by the Collector, subject to a right of appeal to the local government but it is for consideration whether the Land Acquisition Act of 1894 should be followed and reference to the Courts allowed.

5. The third portion of the Bill deals with excavations and gives power to make rules to prohibit or regulate such operations."

1187. The term "ancient monument" and "antiquities" are defined in Section 2(1) and (2) of 1904 Act which read as under:

"*2(1) "Ancient monument" means any structure, erection or monument or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest, or any remains thereof, and includes--*

(a) the site of an ancient monument;

(b) such portion of land adjoining the site of an ancient monument as my be required for fencing or covering in or otherwise preserving such monument; and

(c) the means of access to and convenient inspection of an ancient monument;

(2) "antiquities" include any movable objects which the Central Government, by reason of their historical or archaeological associations, may think it necessary to protect against injury, removal or dispersion;"

1188. The term "owner" is also defined in Section 2(6) as under:

"2(6) "owner" includes a joint owner, invested with power of management on behalf of himself and other joint owners, and any manager or trustee exercising powers of management over an ancient monument, and the successor in title of any such owner and the successor in office of any such manager or trustee:

Provided that nothing in this Act shall be deemed to extend the powers which may lawfully be exercised by such manager or trustee."

1189. Section 3 provides for "protected monuments". It is not the case of any of the parties that the disputed building was ever notified by the Government as a "protected monument" under Section 3 of 1903 Act.

1190. Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 are applicable to a "protected monument", i.e., an "ancient monument" which is declared to be "protected monument" by notification in the official gazette under Section 3 and, therefore, ex facie would have no application to the property in dispute.

1191. Section 10A which was inserted in 1932 is only in respect to control of the Central Government where it finds that mining, quarrying, excavation, blasting and other operations of a like nature needs to be restricted and regulated for the purpose of protecting or preserving any "ancient monument". This also has nothing to do with the disputed property as there is no such case of either party. We, therefore, find nothing in 1904 Act in any manner to affect the provisions of 1936 Act.

1192. So far as the Government of India Act, 1935 is concerned, learned counsel for the plaintiff (Suit-1) could not show anything therein to substantiate his plea of ultra vires of 1936 Act. It is no doubt true that 1936 Act was repealed by U.P.

Act No. XVI of 1960 but that by itself would not make anything already done under 1936 Act redundant or illegal or non est. In fact the transactions already taken place are duly protected therein i.e. in 1960 Act. The counsel for the plaintiffs in fact could not substantiate the plea so as to persuade this Court to answer issue no. 9(c) (Suit-1) in his favour and it is accordingly decided in negative.

1193. Now comes **Issue No. 16 (Suit-3)** which reads as under:

> *"Is the suit bad for want of notice u/s 83 of U.P. Act 13 of 1936?"*

1194. We find that there is no pleading to this effect i.e. requirement of such notice, in the written statements of defendants in Suit-3. In fact in para 27 of written statement of defendant no. 10 (Suit-1) a plea of want of notice under Section 56 of 1936 Act has been taken which reads as under:

> *"27. That the suit is not maintainable even on account of the reason that no notice was served upon the Board as required by section 56 of the U.P. Muslim Waqf Act, 1936 and the suit is liable to be dismissed even on this account."*

1195. Learned counsel for the defendant (Suit-3) neither could substantiate their case to support the above issue nor in fact could place anything before this Court to assist us to consider the above issue in an effective manner.

1196. In fact there is no Section 83 in 1936 Act. In the written statement filed in Suit-3 by the defendants No.6 to 8 there is no such pleading with reference to any provision of 1936 Act alleging that the same bars the suit. The defendant No.9, however, has stated before the Court that the plaint of Suit-4 be treated as his written statement and there also we do

not find any such pleading referring to any provision of 1936 Act on the basis whereof it is said that the suit is barred for want of any notice. The only objection with reference to 1936 Act taken is in para 9 and 10 of the plaint (Suit-4) which states that the Commissioner of Waqfs made an enquiry with reference to the disputed building as a public waqf and based thereon the State Government issued a notification on 26th February, 1944 which having not been challenged by the Hindus or any person interested denying the report of the Commissioner of the Waqfs on the ground that it was a Muslim waqf or it was a Hindu temple hence now it cannot be challenged. It is only in Suit-1, the defendant No.10 in para 27 of its written statement has said that due to absence of notice, as required by Section 56 of 1936 Act, the suit is not maintainable and is liable to be dismissed. Even if we read issue 16 (Suit-3) that instead of Section 83 of 1936 Act, it ought to be Section 56 of 1936 Act, we do not find that it requires any notice before filing a suit and in fact reference to Section 56 is not correct, as is evident from a bare perusal thereof, which is reproduced as under:

> *"56. Appointment of mutawalli.- When there is vacancy in the office of mutawalli of a waqf and there is no one competent to be appointed under the terms of the deed of waqf, or where the right of any person to act as mutawalli is disputed, the Central Board may appoint any person to act as a mutawalli for such period and on such conditions as it may think fit."*

1197. However, there is another Section 53 in 1936 Act which contain some provision with reference to notice and reads as under :

> *"53. No suit shall be instituted against a Central Board in*

respect of any act purporting to be done by such Central Board under colour of this Act or for any relief in respect of any waqf, until the expiration of two months next after notice in writing has been delivered to the Secretary, or left at the office of such Central Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left."

1198. From a bare perusal of Section 53 of 1936 Act, it is evident that its scope and purpose is wholly different. Even otherwise, the requirement of notice under Section 53 in 1936 Act is akin to Section 80 CPC. The Apex Court in para 25 of the judgment in Siraj-ul-Haq Khan (supra) has considered Section 53 and its effect and has observed that this Section is similar to Section 80 of the Civil Procedure Code and thereafter having said so further says that it was incumbent upon the appellants to have given the requisite notice under Section 53 before instituting the suit and failure to do so would bar the suit being not maintainable. The parties before us were required to show as to how Section 53 in the case in hand would be attracted to which none has assisted the Court. However, as observed by the Apex Court in Siraj-ul-Haq Khan (supra), the compliance is mandatory where Section 53 is applicable. Without considering the question as to whether the relief sought in Suit-3 would attract Section 53 or not; and, proceeding by assuming that Section 53 would apply, we are of the view that this provision has been made for the benefit of Central Board concerned in particular and Muslim communities in general. It is always open to a party for whose benefit the provisions has been made to

waive such benefit. This aspect we have already considered in respect to the issues relating to Section 80 CPC above and following the reasons as are applicable to Section 80 CPC, we are of the view that the benefit under Section 53 can also be waived. If non-issuance of notice and defect under Section 53 is not pressed by the concerned Board before the Court, non-compliance of Section 53 would not vitiate the suit. The issue is answered accordingly.

1199. **Issue 5(f) (Suit-4)** relates to U.P. Act XVI of 1960 and reads as under:

> *"Whether in view of the aforesaid finding, the suit is barred on account of lack of jurisdiction and limitation as it was filed after the commencement of the U.P. Muslim Waqf Act, 1960?"*

1200. In the written statement dated 20th July, 1968, filed by defendants No.13 and 14 (Suit-4), it has been pleaded that after the enforcement of U.P. Act XVI of 1960, the suit in question having been filed in 1961, is not saved under Section 85(2) thereof. They further say that Section 9(2) of 1960 Act also would not save the finality of the decision of the Commissioner of Waqfs since 1936 Act itself having vanished after repeal and therefore, the suit on behalf of Sunni Central Waqf Board is wholly without jurisdiction.

1201. During the course of arguments, however, learned counsel for the defendants could not substantiate the above objection and could not show as to how Section 85(2) and Section 9(2) of 1960 Act would be attracted in the case in hand to make the suit without jurisdiction and beyond limitation. It is true that notification issued under Section 5(1) of 1936 Act has been held to be invalid so far as the property in dispute is

concerned but in case the property in dispute is found to be waqf, no provision in U.P. Act XVI of 1960 has been shown which may deprive the Sunni Central Waqf Board or other plaintiffs of Suit-4 to maintain the suit in respect to a property which they claim to be a 'waqf property' and to claim its possession in case it is not otherwise impermissible in law. At least we are not able to find any provision under U.P. Act XVI of 1960 which may prohibit either plaintiff No.1 (Suit-4) or other plaintiffs from maintaining Suit-4 in question provided the property in dispute is a "waqf" within the meaning of Shariyat Law.

1202. In view of above, we do not find any substance and decide **issue 5 (f) (Suit-4)** against the defendants and in favour of the plaintiffs (Suit-4) holding that the suit in question is not barred having been filed after the commencement of U.P. Act No.XVI of 1960.

1203. Now we come to **Issues 23 and 24 (Suit-4)** which can be considered together, and read as under:

> *"Whether the Waqf board is an instrumentality of State? If so, whether the said Board can file a suit against the State itself?"*
>
> *"If the Waqf Board is State under Article 12 of the Constitution? If so, the said Board being the State can file any suit in representative capacity sponsoring the case of particular community and against the interest of another community?"*

1204. The learned counsels for the defendants could not point out any pleadings raising such objection therein. However, they contended that since the Sunni Central Waqf Board has been constituted under 1936 Act and therefore, being a statutory

body, its constitution, function etc. can be looked into from the various provisions of the statutory enactment and that itself would be sufficient to give necessary information. Though *prima facie* we find it difficult to accept the above proposition, but, however, we proceed to consider the above issues analyzing the relevant provisions of 1936 Act as well as 1960 Act to find out whether there is any substance in these issues.

1205. It is not in dispute that Sunni Central Waqf Board has been established under Section 6(1) of 1936 Act. Its constitution is provided in Section 7 thereof. The two provisions read as under:

> *"**6. Establishment of Central Boards**.-(1) there shall be established in the United Provinces two separate Boards to be called the "Shia Central Board" and the "Sunni Central Board" of waqfs. Each such Board shall be a body corporate and shall have perpetual succession and a common seal and shall by its said name sue or be sued."*
>
> *"**7. Constitution of Sunni Central Board**.- The Sunni Central Board shall consist of-*
>
> *(i) five members to be elected in the manner prescribed by Sunni members of the local legislature,*
>
> *(ii) four members to be elected in the manner prescribed by the District Waqf Committees.*
>
> *(iii) three members to be co-opted by the above nine members from persons whom they regard as ulamas, and two members from among mutawallis, and*
>
> *(iv) the President, if he is not one of the above fourteen members :*
>
> *Provided that the first Sunni Central Board shall be established by the local Government within three months of*

the date on which this section comes into force and shall consist of-

(i) five members to be elected, in such manner as the local Government may direct, by the Sunni members of the local legislature;

(ii) two members to be elected, in such manner as the local Government may direct, by the Sunni members of Executive Committee of the Provincial Muslim Educational Conference ;

(iii) three members to be co-opted by the above seven members from persons whom they regard as ulamas ; and

(iv) three members to be co-opted by the above ten members."

1206. Section 10 of 1936 Act provides that the members of Central Board shall hold office for five years. Section 13 of 1936 Act provides for the place where the office of the Central Board shall be located and Sections 14 to 17 of 1936 Act are in respect to manner of function and requisite staff of such Board. Section 18 of 1936 Act provides for the functions of the Central Board which we have already referred to.

1207. Chapters 3, 4, 5, 6 and 7 of 1936 Act contain provisions with regard to registration of waqfs, audit of accounts, enquiry and supervision, legal proceedings and administration charges. Chapter 8 of 1936 Act provides for Mutawalli and Section 58 of 1936 Act confers powers upon the Board to remove Mutawalli from his office in certain circumstances. Section 68 of 1936 Act provides that the Government shall not be liable for any expenditure incurred in the administration of 1936 Act.

1208. From a perusal of 1936 Act, it is evident that the

Central Sunni Waqf Board is a statutory body constituted in accordance with the provisions of the said Act. By no stretch of imagination it can be said to be either a Department of the State Government or an instrumentality of the State Government.

1209. A similar question came up for consideration in respect to the employees of certain statutory bodies like Jal Nigam, Banks, Local Bodies etc. where the employees claim themselves to be the Government employees as the bodies are controlled by the Government but negativing the said contention it was held by the Apex Court that the statutory bodies are neither a Department or part and parcel of the State Government nor the employees of the statutory bodies can be said to be the Government employees.

1210. Being a statutory body constituted under statute having powers, functions and duties, which the Waqf Board is liable to perform, it may be covered by the term 'Other Authority' under Article 12 of the Constitution of India but that by itself would neither make it an instrumentality of the State Government of U.P. nor would deprive it to file a suit where it is aggrieved against some action of the State Government or its authorities. The Waqf Board having been constituted with a particular objective i.e. for the better governance, administration and supervision of certain classes of Muslim Waqfs, from its very nature, its duty is confined for the welfare of certain special kind of properties of the persons of a particular community and in particular religion i.e. Muslims. It will wholly be misconceived to suggest that by representing or sponsoring the cause of members of a particular community against another community i.e. Muslims against Hindus, the Waqf Board is causing discrimination though it is a “State” under Article 12 of

the Constitution. No authority could be placed before this Court binding upon us to take a view different than what we have discussed above.

1211. On the contrary, we find support from a decision of the Apex Court in **Syed Yousuf Yar Khan and others Vs. Syed Mohammed Yar Khan and others, AIR 1967 SC 1318** where a somewhat similar contention was raised that the "Waqf Board" is an agent of Central Government but rejecting the same the Apex Court in para 4 of the judgment held as under:

> *"(4) Counsel submitted that the present suit was a suit by or on behalf of the State Government and was therefore governed by art. 149 of the Indian Limitation Act 1908. He submitted that the Board of Muslim Endowments, Hyderabad, which according to him was the Board of Wakfs constituted under the Muslim Wakfs Act 1954, was an agent of the Central Government. By s. 9(2) of the Muslim Wakfs Act, 1954, the Board of Wakfs is a body corporate and by s. 15 of this Act, the Board is vested with the right of general superintendence of wakfs and is empowered to take measures for the recovery of the lost properties of any wakf and to initiate and defend suits and proceedings relating to wakfs. Counsel submitted that a corporation may be an agent of the State Government, and in support of this contention relied upon Halsbury's Laws of England, 3rd Ed., Vol. 9, p. 10-Tamlin v. Hannaford (1949) 2 All E. R. 327, and the observations of Shah, J. in State Trading Corporation of India Limited v. The Commercial Tax Officer, A.I.R. 1963 S.C. 811, 849, 850, paras. 115-117. He submitted that the State Government has delegated its functions of superintendence over wakfs*

to the Board of Wakfs and the Board should therefore be regarded as an agent of the State Government. We are unable to accept this contention. By the Religious Endowments Act 1863, the Government divested itself of the management and superintendence of religious endowments which was vested in it under Regn. 19 of 1810 and Regulation 7 of 1817. The Board of Wakfs though subject to the control of the State Government, is a statutory corporation and is vested with statutory powers, functions and duties. The Board has power to hold property and is in control of the wakf fund (ss. 9 and 48). The State Government has no concern with the property vested in the Board save during the period of supersession of the Board under s. 64. Nor is the State Government liable for any expenditure incurred by the Board in connection with the administration under the Act (S. 54). The Board of Wakfs is not discharging a governmental function. The Act nowhere says that the Board would act as the agent of the State Government. It rather indicates that the Board is not the agent of the Government and the Government is not responsible for its acts. We must, therefore, hold that the Board of Wakfs is not an agent of the State Government and a suit instituted by it for the recovery of a wakf property is not a suit by or on behalf of the State Government."

1212. In **Syed Yousuf Yar Khan (supra)** the issue of identifying mutawalli with the State Government was also raised by contending that the mutawalli is an agent of the "Government" in order to take the benefit of Article 149 of the Limitation Act but that was also rejected by the Apex Court by

observing:

> *"5. Counsel next submitted that the mutawalli is the agent of the State Government and that in any event the limitation for a suit by the mutawalli starts on the date of his appointment. In support of this contention counsel relied upon the decision in Jewun Doss Sahoo v. Shah Kubeer-ood-Deen, (1837-41) 2 Moo Ind. App. 390 at p. 422 (PC) where the Privy Council held that under the law then in force it was the duty of the Government to protect endowments and the mutawalli in that case was the procurator of the Government and his right to sue arose on his being appointed mutawalli. This ruling of the Privy Council was given under Regulation 19 of 1810. Since the passing of the Religious Endowments Act 1863, the mutawalli cannot be regarded as a procurator of the Government. He is not appointed by the Government, nor does he manage the endowment on its behalf and a suit by him for the recovery of the wakf property cannot now be regarded as a suit on its behalf, see Shaikh Laul Mahomed v. Lalla Brij Kishore, (1872) 17 Suth WR 430 and Behari Lal and Ors. v. Muhammad Muttaki, (1898) ILR 20 All. 482 at p. 488 (FB)."*

1213. In view of the above, we find it difficult to hold that the Waqf Board is an instrumentality of the State. However, even if it is an instrumentality of State, we do not find any disability for the Board to file a suit against the State if there is any wrong done by the State or its authorities. In our view, the issue which has been raised to suggest as if the Sunni Central Waqf Board if held as an instrumentality of the State, would be incompetent to maintain a suit against the State is thoroughly

misconceived.

1214. The concept of instrumentality of the "State" came to be noticed in the light of considering the applicability of Part III of the Constitution of India dealing with fundamental rights vis a vis the meaning of the words "other authority" under Article 12 of the Constitution. To find out the bodies to whom Part III of the Constitution would apply, and if there is any infringement etc., the complaint may be raised before the High Court or the Supreme Court directly under writ jurisdiction also this concept was developed. To understand the concept, it would be prudent to have a perusal of Article 12 of the Constitution :

> *"**Article 12**. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."*

1215. The Central and State Governments, the legislatures, Central and Provincial, and, Local authorities are obviously covered by the term "the State" under Article 12. The question arose as to what are the bodies which would answer the description of "other authorities" so as to qualify to be within the ambit of the word 'the State' to attract Part-III of the Constitution. In **Ramana Dayaram Shetty Vs. International Airport Authority of India and others, 1979 (3) SCC 489** the question arose as to whether "International Airport Authority of India" is "the State" within the meaning of Article 12 so as to attract the provisions under Part-III of the Constitution. Admittedly, "International Airport Authority of India" was neither the Government, Central or State, nor Legislature nor a

Local authority. The question arose as to whether the words “other authorities” within the territory of India or under the control of the Government of India would include “International Airport Authority of India” so as to attract the provisions under Part-III of the Constitution. In this context the matter was examined. The Apex Court held that “International Airport Authority of India” is 'the State' within the meaning of Article 12 of the Constitution of India and, therefore, the provisions of Article 14 are attracted. If the act or omission on the part of International Authority of India is found to be arbitrary or discriminatory.

1216. There are catena of decision on this aspect but it may not be necessary for us to consider in detail all such authorities laying down various tests to determine when a body or authority can be said to be an “instrumentality” of the State so as to be within the ambit of the words “other authorities” for the purposes of Article 12 of the Constitution of India for the reason that in case a body qualify such tests and becomes an “instrumentality of the State” and, therefore, becomes “an authority” within the words “other authorities” under Article 12 of the Constitution, the result would be that provisions of Part-III of the Constitution would be applicable to it and any infringement thereof would be subject to judicial review directly before the superior courts in writ jurisdiction, i.e., under Article 226 of the Constitution of India as also under Article 32 of the Constitution. For our purposes suffice it to mention that an “instrumentality of the State” does not mean a “department of the State Government”.

1217. The learned counsels for the defendants, despite of repeated query, could not tell us as to how an instrumentality of

the State cannot invoke the jurisdiction of a Civil Court for enforcing its common law rights by filing a civil suit. It appears that misconception on the part of the defendants in Suit-4 is that an instrumentality of the State, if comes within the words 'the State' under Article 12 of the Constitution, the distinction of personality between the State Government as well as such instrumentality disappear and, therefore, one may not file suit against another. This is apparently fallacious and lacks substance. A body incorporated in accordance with the procedure prescribed by statute or a statutory body, i.e., constituted under a statute or by a statute, on its own is a juristic personality, i.e., legal person, who can possess property, enter into transactions by executing contract with the other persons (including natural, legal or juristic persons) and also to sue or be sued. An authority or statutory body which can be said to be an instrumentality of the State does not become necessarily a part and parcel of the Government.

1218. The term 'Government' in its wider sense includes all the wings of Government, viz., executive, legislative or judicial but in narrower sense, it is normally the executive wing of the State.

1219. Bombay High Court in **Emperor Vs. Bhaskar Balwant Bhopatkar, (1906) ILR 30 Bom 421** observed:

> *"What is contemplated under this section is the collective body of the Government . . . . . It means that the person or persons collectively, in succession, who are authorized to administer the Government for the time being. One particular set of persons may be open to objection and to assail them, and to attack them and excite hatred against them, is not necessarily exciting hatred*

against the Government, because they are only individuals and not representatives of that abstract conception which is called Government . . . . . The individual is transitory and may be separately criticized but that which is essentially and inseparably connected with the idea of Government established by law cannot be attacked without coming within this section."

1220. In **Annie Besant Vs. Government of Madras, AIR 1918 Mad 1210,** Madras High Court said**:**

"Government denotes an established authority entitled and able to administer the public affairs of the country. On the other hand, 'Government' is not identical with any particular individuals who may be administering the Government."

1221. Dixon J. in **Burns Vs. Ransley, (1944) 79 CLR 101** explaining the word "Government" as under:

"I take the word "Government" to signify the established system of political rules, the governing powers of the country consisting of the executive and the Legislature considered as an organized entity and independently of the persons of whom it consists from time to time. Any interpretation which would make the word cover the persons who happen to fill political or public offices for the time being, whether considered collectively or individually, would give the provision an application inconsistent with the parliamentary and democratic institutions and with the principles of the common law as understood in times, Governing the freedom of criticism and of expression."

1222. A Full Bench of this court in **Ram Nandan Vs. State, AIR 1959 All 101** observed that the term "Government" has not been defined anywhere. Considering various provisions of the Constitution this Court observed that the "Government" means the executive machinery of the Union and of the States. It means the President acting with the advice of the Council of Ministers and the Governors acting with the advice of their Councils of Ministers. It is the system of Government or institution consisting of the President and the Governors acting with the advice of their Councils of Ministers and not the actual persons holding the offices of Presidents or Governors and the Ministers advising them. This Court quoted the approval and followed the observations of Bombay and Madras as noted above in **Bhaskar Balwant Bhopatkar (supra)** and **Annie Besant (supra)** respectively.

1223. In **State of U.P. Vs. Nemchandra Jain, 1984 (2) SCC 405** the term "Government" was analyzed by the Apex Court observing that from the legal point of view, Government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers, together with certain private persons or corporations exercising public functions. The structure of the machinery of Government, and the regulation of the powers and duties which belong to different parts of this structure, are defined by the law, which also prescribes, to some extent, the mode in which these powers are to be exercised or those duties are to be performed. Government generally connotes three estates, namely, the Legislature, the Executive and the Judiciary. In a narrow sense it connotes executive only.

1224. The word "Government" has been defined in

Section 3(23) of the General Clauses Act, 1897 as under:

> *"3(23). "**Government**".--This sub-section says that the terms "Government" or "the Government", shall include both the Central Government and any State Government."*

1225. The term "State Government" has also been defined in the General Clauses Act, 1897 in Section 3(60). The above definition of General Clauses Act in fact does not give any exact meaning except of referring the words, in general and in broader sense.

1226. The Constitution declares the "Government" being entitled to file a suit or to be sued by virtue of Article 300 of the Constitution which reads as under :

> ***"Article 300.** (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.*
>
> *(2) If at the commencement of this Constitution--*
>
> *(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and*
>
> *(b) any legal proceedings are pending to which a*

Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings."

1227. Similarly, Section 79 C.P.C. provides for suits to be filed by or against the Government, as under :

*"**Section 79. Suits by or against the Government—** In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—*

(a) in the case of a suit by or against the Central Government, the Union of India, and

(b) in the case of a suit by or against a State Government, the State."

1228. Interpreting Article 300 of the Constitution of India the Apex Court in **State of Punjab Vs. Okara Grain Buyers Syndicate Ltd. and others, AIR 1964 SC 669** observed that this Article does not give rise to any cause of action but merely says that the State can sue or be sued as a juristic personality. The juristic personality of the State is conferred as a whole which consists of the executive government headed by the Governor and it is not divided into various branches or department of the Government so as to result constituting such number of juristic personality as are the departments in a State Government.

1229. Nothing has been brought to us and neither any authority has been cited nor anything else has been placed before us to persuade us to take a view that the Sunni Central Waqf Board can be held to be a department of the State Government so as to bar a suit against the State Government. Had it been a department of the "Government" obviously a civil

suit under Section 9 CPC would not be maintainable for the reason that the State Government is a juristic personality as a whole which consists of all its limbs, i.e., various departments etc. Each and every department of the State Government cannot be said to be an "independent juristic personality" which can sue or be sued.

1230. The term "department of a State Government" also came to be considered before this Court in **Ram Chandra Vs. District Magistrate, AIR 1952 All. 520** and this Court held that a department is a unit or branch of the Government, either Union or State, under the political control of a Minister or Secretary of State or President of the Board. Individual officers serving under a department do not constitute a department. The department has an entity distinct and separate from the officers serving under it.

1231. Drawing distinction between the "Government" and "Instrumentality of the State" within meaning of Article 12 of the Constitution in reference to Section 80 C.P.C. the question arose as to whether notice before filing a suit is a condition precedent to Electricity Board or not. The High Court of Kerala in **V.Padmanabhan Nair Vs. Kerala State Electricity Board AIR 1989 Kerala 86** held that the statutory bodies like Electricity Board, Food Corporation, Urban Development Corporation etc. may be an "Instrumentality of the State" within the meaning of "Article 12" of the Constitution, nevertheless would not answer the description of "Government" as understood in law and has understood in the context of Section 80 C.P.C.

1232. We have referred to the term "Government" in detail only to demonstrate that the personality of the Government for

the purpose of being sued or to sue is not to be looked into as further divided in various departments but it is the entire executive government including all its departments which constitute the "Government", a legal personality, having status to sue or be sued in that capacity.

1233. Where there is a dispute between two "States" of the Union of India or between one or more States and the Union of India, Article 131 of the Constitution confers original jurisdiction upon the Apex Court in regard to resolution of such dispute. In this context, the Apex Court in **Chief Conservator of Forests, Government of Andhra Pradesh Vs. Collector and others, AIR 2003 SC 1805** observed that neither the Constitution of India nor CPC contemplates that two departments of a State or the Union of India will fight a litigation in a Court of law. It is neither appropriate nor permissible for two departments of the "State" to fight litigation in a Court of law. Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Although that was a case with respect to the justification of filing a writ petition yet the Apex Court deprecated the attempt of filing writ petition by one department against another and invoking extraordinary jurisdiction of the High Court. The Court observed that it smacks of indiscipline. It also held to be contrary to the basic concept of law that requires for suing or be sued there must be either a natural or juristic person.

1234. In para 13 of the judgment, the Court held:

> " *Every post in the hierarchy of the posts in the Government set-up, from the lowest to the highest, is not recognised as a juristic person nor can the State be treated*

as represented when a suit/proceeding is in the name of such offices/posts or the officers holding such posts, therefore, in the absence of the State in the array of parties, the cause will be defeated for non-joinder of a necessary party to the lis..."

1235. It was made clear that the above principle does not apply to a case where an official of the Government acts as a statutory authority and sues or pursues further proceeding in its name because in that event, it will not be a suit or proceeding for or on behalf of a State /Union of India but by the statutory authority as such.

1236. With respect to the two departments fighting with each other, in para 14 of the judgment, the Court observed:

"It was not contemplated by the framers of the Constitution or the C. P. C. that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in co-ordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of undiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person."

1237. Best C.J. in **Neale Vs. Turton (1827) 4 Bing. 149** at

page 151 observed that there is no principle by which a man can be at the the same time plaintiff and defendant. Sometimes it may happen that a person may be having different capacities in which he may act but as opined by Salmond in **Salmond On Jurisprudence (supra)** a man having two or more capacities would not derive a power to enter into a legal transaction with himself. Double capacity does not connote double personality. In certain circumstances, now by statute this concept has been diluted but so far as the two departments of the Government are concerned, the law of the land as already noticed above, is holding the field and we need not deal into this aspect any further.

1238. Thus, it is now settled that a department of the Government by itself has no legal personality and, therefore, it lacks capacity to sue or be sued ignoring the personality of the State. A department of the Government can always sue or be sued under the cover of the personality of the State and not of its own.

1239. This concept, however, would not apply to the cases where a statutory body or an incorporated body on its own enjoy the capacity of legal persona and, therefore, is well within its right to sue or be sued under its own name.

1240. Nobody could suggest in these cases that the Sunni Central Waqfs Board can be said to be a department of the Government. It cannot thus be identified with the Government. Once it is clear that the Waqfs Board has a different and independent juristic personality than the "Government", in the absence of any prohibition or bar either specifically or by or necessary implication in the statute, filing of a suit by one individual juristic personality against another cannot be

objected. Exclusion of remedy by way of filing a civil suit cannot be assumed easily and unless there is an express or by necessary implication a bar provided by the statute, a suit under Section 9 cannot be held “not maintainable”. Though we have expressly held that Sunni Central Waqfs Board is not an instrumentality of the State, yet even if it is so, we are clearly of the view that there is no impediment in its way in filing a suit in its own name against the State or its authorities for redressal of its grievance, if there is anything wrong by such authority.

1241. So far as the second issue that if it is a “State" within Article 12 of the Constitution, it may not act in a manner which may amount to discrimination against one set of community, we have already said and at the pain of repetition hold that the statutory functions of the Waqfs Board is to supervise the management of the Waqfs registered in various manners as provided in the statute and in such discharge of duty, it can take all such steps as permissible in law irrespective of fact whether such step is against an individual of a different religion or the entire community of different faith.

1242. Looking the matter in a wider concept, the act of the Sunni Central Central Waqfs Board in filing Suit-4 even otherwise cannot be said to be an act discriminatory to a community inasmuch treating the disputed property as a Waqf created in accordance with the Islamic laws, the Board is trying to protect the same from being usurped by anybody else, be that it is an individual or a group of individuals or the entire community and in this respect if in a particular manner all such persons constitute members of a particular community, that will not make the act of the Sunni Central Waqfs Board discriminatory or/and against a particular community.

1243. We **answer both the above issues accordingly**. We hold that neither the Waqf Board is "an Instrumentality of the State" nor it suffers any disability of filing a suit against State Government or its authorities nor there is anything wrong in the Waqf Board to file a suit representing the cause of Muslim community particularly for protection of a property which it claims to be a "waqf property". This is the principal function under the Act 1936, substituted by various subsequent Acts, as discussed above. Even if the Waqf Board is treated to be an "other authority" under Article 12 of the Constitution and covered by the term 'State' as defined under Article 12 of the Constitution, there is no impediment in the way of Sunni Central Waqfs Board in maintaining its suit.

1244. **Issue 28 (Suit-5)** reads as under:

> *"Whether the suit is bad for want of notice under Section 65 of the U.P. Muslim Waqfs Act, 1960 as alleged by defendants 4 and 5? If so, its effect."*

1245. Defendant No.4-Sunni Central Waqf Board (Suit-5) in para 45 of the written statement dated 26/29 August, 1989 has pleaded about the non-maintainability of suit for want of notice and it reads as under:

> *"That as the subject matter of the instant suit is a waqf property and stands registered as a waqf in the Register of Waqf maintained by the Sunni Waqf Board under section 30 of the Waqf Act and a Gazette notification in respect thereto has also been issued by the State Government in 1944 and the same stands recorded as a mosque even in the revenue record and other government records and the same is even accepted as a mosque by the State Government and its officers in the written statements filed*

in Regular Suit No. 2 of 1950 as well as in Regular Suit No. 25 of 1950, (the instant suit could not be instituted against the answering defendants until the expiration of two months next after notice, in writing, had been delivered or left at the office of the Board as per requirement of Section 65 of the U.P. Muslim Waqf Act, 1960 and no such notice having been given to the answering defendants by the plaintiffs, the suit is not maintainable and is liable to be dismissed).”

1246. To examine the correctness of the above objection, let us consider Section 65 of U.P. Act No.XVI of 1960 which reads as under :

*“**Notice of suits by parties against the Board**.- No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules made thereunder until the expiration of two months, next after notice in writing has been delivered to or left at the office of the Board, stating the cause of action the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.”*

1247. From a bare reading of Section 65 of 1960 Act it is evident that the same would apply where a suit is filed questioning the validity of any action of the Waqf Board. It clearly says that in respect of any act purporting to be done by the Board in pursuance of 1960 Act or of any rules made thereunder, if a suit is filed, the same would not be maintainable unless a two months' notice has been given in writing to the Board giving the details, as mentioned in the aforesaid provision. Suit-5 does not challenge any action of the Waqf

Board taken under 1960 Act or the rules framed thereunder. *Ex facie,* the above provision is inapplicable considering the relief sought by the plaintiffs (Suit-5) which is confined to a declaration that the property in dispute therein belong to plaintiffs themselves and have sought a permanent injunction against the defendants prohibiting them from interfering with or raising any objection or placing any obstruction in construction of a new temple at the disputed site.

1248. Learned counsel for the defendants 4 and 5 (Suit-5) could not show as to how Section 65 would be attracted in respect of Suit-5. In fact they could not show that any action of the Waqf Board taken under 1960 Act or rules framed thereunder has been the cause of action for filing Suit-5. We therefore, have no hesitation in holding Section 65 of U.P. Act No.XVI of 1960 has no application in respect to the reliefs sought in Suit-5 and therefore, the suit cannot be held "not maintainable" for want of notice.

1249. Since the provisions itself is not applicable, as we have said, the question of considering its effect does not arise. The issue is answered accordingly.

1250. Though no such issue specifically has been framed, but during the course of argument Sri P.N.Mishra, learned counsel appearing for defendant No.20 (Suit 4) pointed out that U.P. Act No.XVI of 1960 has been repealed by Central Act No. 43 of 1995 i.e. Waqf Act, 1995 (hereinafter referred to as '1995 Act')which has came into force on 01.01.1996. He drew our attention to Section 112 of 1995 Act which read as under :

> *"Repeal and savings.-(1) The Waqf Act, 1954 (29 of 1954) and the Waqf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.*

(2) Notwithstanding such repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act.

(3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that corresponding law shall shall stand repealed;

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were action was taken."

1251. He submits that since all State Laws have also been repealed by sub-section (3) of Section 112, U.P. Act No.XVI of 1960 is no more operative since 1st January, 1996. He also drew our attention to Section 87 of 1995 Act which reads as under :

*"**87. Bar to the enforcement of right on behalf of unregistered waqfs**.-(1) Notwithstanding anything contained in any other law for the time being in force, no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any waqf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any Court after the commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted or commenced before such commencement, no*

such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any Court after such commencement unless such waqf has been registered, in accordance with the provisions of this Act.

(2) The provisions of sub-section (1) shall apply as far as may be, to the claim for set-off or any other claim made on behalf of any waqf which has not been registered in accordance with the provisions of this Act."

1252. It is contended by him that the notification dated 26th February, 1944 in respect to the property having been held invalid, no suit in respect to an unregistered waqf is maintainable and Section 87 encompass even the pending suits. He submits that even hearing or trial of the pending suit in respect to an unregistered waqf is not permissible.

1253. Sri Jilani, learned counsel for the plaintiffs (Suit-4) raised serious objection to the above argument pointing out that since no such issue has been framed, it would not be permissible for this Court to look into this aspect of the matter and the above argument has to be rejected outright as not entertainable.

1254. We gave our serious thought to the matter. Since Section 87 of 1995 Act prohibits even pending suits from being heard and tried in respect to an unregistered waqf and this being a mandate of law, this Court cannot ignore the same merely because there is no formal issue framed in this respect particularly considering the fact that enactment of 1995 Act is a subsequent event and the said Act has come into force during the pendency of this matter i.e. at the stage when this Court started recording evidence. However, we find that the question whether Suit-4 cannot proceed by virtue of the mandate contain in Section 87 of 1995 Act is not a pure question of law since

condition precedent for attracting the said provision is that the waqf has not been registered with the Board at all.

1255. Despite our enquiry from the learned counsel for the defendant No.20, Sri Mishra could not show any such pleading in the written statement or additional written statement. In fact no such averment has been made in any of the written statement or additional written statement of any of the defendants that the property in dispute is not a registered waqf.

1256. On the contrary, Sri Jilani drew our attention to his written statement dated 26/29 August, 1989, para 45 (quoted above) (Suit-5) and para 16 of the written statement dated 24.2.1989 of defendant no. 10 (Suit-1) wherein it is averred that the property in question is a waqf property registered as a waqf in the register of waqf maintained by the Sunni Waqf Board under Section 30 of Act XVI of 1960. Sri Jilani pointed out that Section 30 of U.P. Act No.XVI of 1960 provides for register of waqfs, which is to be maintained by the Board containing details of each such waqfs.

1257. It is not the case of any of the defendants (Suit-4) that there is no registration or that registration was not done validly in accordance with the procedure prescribed under the Act or the averments contained in para 45 of the written statement of defendants No.4 (Suit-5) or para 16 of the written statement of defendant no. 10 (Suit-1) is factually incorrect. Since the question as to whether a particular waqf property is a registered one or unregistered one is a question of fact and there being an averment stating that the disputed property is a registered waqf, which has not been pleaded to be incorrect by the other side, we are of the view that Suit -4 filed by the Waqf Board and others cannot be held not maintainable by virtue of

Section 87 of 1995 Act.

1258. It would also be important to notice that the Notification under Section 5 of Act of 1936 was held invalid by the learned Civil Judge in 1966, to be more precise on 21st April, 1966. The defendant No.4 had filed its written statement in Suit 5 on 26/29 August, 1989 stating that the property in question is registered as waqf in the register of waqfs maintained by the Board under Section 30 of Act 16 of 1960. There are three ways in which details of Muslim waqfs can be collected and thereafter they are to be entered in the register maintained by the Board; (i) pursuant to the notification issued by the Board after enquiry made by the Waqf Commissioner; (ii) On an application made by the Mutwalli of the concerned waqf; and (iii) Suo moto by issuing notice by the Board to the Mutawalli of the Waqf..

1259. The averments that the disputed building is registered as 'waqf' in the Board under Section 30 of Act 16 of 1960 having not been seriously challenged by the plaintiffs (Suit-5), no issue on this aspect has been framed. Lots of amendments were made in the pleadings after the decision of the Apex Court in **Dr. Mohammad Ismail (supra)** but no amendment or addition of any issue in this regard has been found necessary by any of the parties opposing the authority of the Sunni Board in pursuing Suit-4 as plaintiff or other suits as defendant. Mere declaration of the Notification issued under Section 5 of Act 1936 as invalid would not deprive the Sunni Board to take steps for registration of the building in dispute as waqf in the register maintained by it under Act 16 of 1960. In the absence of any factual foundation, it would not be justified for this Court to take recourse of Section 87 of 1995 Act and non suit Sunni Board or other muslim parties.

1260. Sri Mishra, however, made some detailed legal arguments on this aspects hence we propose to consider such submissions to find out substance, if any, therein.

1261. It is said that Section 87 has a non obstante clause and therefore its mandate shall prevail not only over any contract but to any other law for the time being in force. Reliance is placed on **Union of India and Others Vs. SICOM Ltd. and Anr. 2009 AIR SCW 635** (at page 638) where para 3 reads as under:

> *"3. Mr. Shekhar Naphade, Learned senior counsel appearing on behalf of the respondent, on the other hand, submitted that principle that a crown debt prevails over other debt is confined only to the unsecured ones as secured debts will always prevail over a crown debt. Our attention in this behalf has been drawn to the non obstante clause contained in Section 56 of the 1951 Act. It was furthermore contendd that for the self-same reason Section 529A in the Companies Act was inserted in terms by way of special provisions creating charge over the property and some of the State Government also amended their Sales Tax Laws incorporating such a provision. The Central Government also with that view, amended the Employee's Provident Funds and (Miscellaneous) Provisions Act, 1952 and Employee's State Insurance Act, 1948.*
>
> *The learned counsel appears to be right."*

1262. Reliance is also placed on **State Bank of India Vs. Official Liquidator of Commercial Ahmedabad Mills Co. and Others 2009 CLC 73** where Gujrat High Court in para 13 of the judgement observed:

> *"Section 529-A of the Act opens with a non obstante*

clause… Therefore, the said provision has an over writing effect not only qua the provisions of the act but also any other law for the time being in force...".

1263. The proposition with respect to a provision having non obstante clause being a well established legal principal admits no doubt. However this by itself may not result in any consequence to the suits in question.

1264. Sri Mishra further submitted that the prohibition contained against unregistered waqf is quite reasonable and in accord with the judgement of the Apex Court in **Bhandara District Central Cooperative Bank Ltd. and Others Vs. State of Maharashtra and Anr. 1993 Supp (3) SCC 259** wherein Section 145 of Maharashtra Cooperative Societies Act, 1996, which barred an unregistered society from using the word 'cooperative' in its name or title, was held reasonable and in the interest of general public. There is no challenge to the correctness of Section 87 of 1995 Act and therefore, in our view, the aforesaid submission and the authority cited would have no application in this case.

1265. Relying on a decision of Andhra Pradesh High Court in **Pamulapati Buchi Naidu College Committee Nidubroly and Ors. Vs. Government of Andhra Pradesh and Ors. AIR 1958 A.P. 773,** it was submitted that registration of waqf confers right upon the Sunni Central Board of Waqf to sue or be sued in respect of the affairs and properties of the registered waqf while in case of unregistered waqf of alleged Babari Masjid, the Sunni Central Board of Waqf has no right to maintain Suit-4. In the above decision it was held that if a society is not registered under the Act, it would have the character of an association which cannot sue or be sued except

in the name of all the members of the association. Registration of the society confers on it certain advantages. Once the society is registered, it enjoins the status of a legal entity apart from the members constituting the same and is capable of suing or being sued. To the same effect is another authority relied by Sri Mishra i.e. **Radhasoami Satsang Sabha Dayalbag Vs. Hanskumar Kishanchand AIR 1959 MP 172** wherein the Court said that the registration under the Societies Registration Act confers on a society a legal personality and make it corporation or quasi corporation capable of entering into contracts.

1266. In our view, the submission as well as the reliance on the aforesaid judgments in the case in hand is thoroughly misconceived though the ratio of the said authorities is unexceptionable. It is not the case of defendant No.20 that the Sunni Central Waqf Board, a statutory body, was not constituted in accordance with the provisions contained in U.P. Act, 1936. The U.P. Muslims Waqf Act whether of 1936 or 1960 or the Central Waqf Acts of 1954 or 1995 neither create a waqf nor extinguish one, if it already exists. They recognize the waqfs created and existing in accordance with the law of Islam and make provisions for proper administration and maintenance thereof primarily so as to avoid any maladministration, misfeasance of waqf property. Registration of waqf in effect, considering in the light of the provisions of the aforesaid enactments, only means that the waqf is known to the concerned Waqf Board as to whether it is a Shia waqf or Sunni waqf and having entered their name in the register, the concerned Board should be in a capacity to supervise management and administration etc. of such waqfs. The purpose of enactment is

public interest so that the waqf property may not be misappropriated or misused. With this objective the legislature intend to compel so as to have a complete picture of all existing valid waqfs created in accordance with Islamic law, has made such provision. By itself, it neither affects the existence of a waqf which though created in accordance with the Islamic law but for one or the other reason could not have been entered in the register of the concerned Waqf Board nor extinguish it. Besides, Section 87 it does not say that a pending suit in respect of a waqf which has not been registered shall stand abated or be dismissed but provides that it shall not be tried, or heard or decided by the Court, after the commencement of the Act, unless such waqf has been registered in accordance with the provisions of 1995 Act. Meaning thereby even during pendency of a matter, such a waqf can be registered by the Waqf Board and thereafter the suit, if pending but deferred, would continue and can be heard and decided.

1267. It is also contended that under U.P. Act, 1936, a waqf can be registered by the Sunni Board pursuant to its name find mention in the gazette issued by the Central Board under Section 5(1) or if it is registered on an application of Mutawalli under Section 38(2) or where the Central Waqf Board has issued direction to concerned Mutawalli to apply for registration of a waqf or supply any information regarding waqf. It is said that the notification dated 26th February 1944 qua the alleged waqf in question having been declared invalid, registration based thereon also becomes null and void. Further that there is no registration as per the procedure prescribed in Section 38 or 40 of 1936 Act, it cannot be said that the Sunni Board can maintain a suit on behalf of such a waqf since Section 18(1) and (2)

enable the concerned Board to maintain suit in respect of administration and recovery of lost properties only of those waqfs to which the provision of the Act applies. It is contended that the Act being inapplicable to waqf in question due to its non registration, the plaintiffs have no right to maintain Suit-4 and it is liable to be dismissed.

1268. In our view, there is no occasion to consider this aspect of the matter for reasons more than one. The notification under Section 5(1) of 1936 Act has been held invalid so far as the alleged waqf in question is concerned. This is not disputed by the learned counsels appearing for the plaintiffs (Suit-4). However, there is a presumption on the part of the defendant No.20 that the alleged registration claimed by the plaintiffs (Suit-4) in para 45 of written statement in Suit-5 is based on the notification dated 26th February, 1944 and none else though defendant 4 (Suit-5) (Central Sunni Waqf Board) has taken this stand in para 45 of their written statement by referring to Section 30 of Act 16 of 1960 and not that of U.P. Act, 1936. There is no averment in pleadings of any of the Hindu parties including defendant No.20 that this averment of defendant No.4 in Suit No.5 is incorrect or that there is no registration of the waqf in question at all. In the absence of any such facts pleaded by the concerned parties and in particular defendant no. 20, we find no reason to consider this aspect of the matter merely on the presumption of defendant No.2 particularly when the question is a mixed question of fact and law and in the absence of specific factual pleading, it would not be appropriate to presume certain facts and thereafter decide the applicability of Section 87 of 1995 Act in this case.

1269. In the written submissions Volume 2 at page 254

para 11 it has been contended by Sri Mishra:

> *"As after invalidation of notification under Section 5(1) of the United Provinces Act, 1936* ***neither fresh survey of the waqf in question was caused under Section 6 of the Uttar Pradesh Muslim Wakfs Act, 1960 nor application for registration was made under Section 29(2) of the said Act of 1960 within a period of three months nor the Board did take any steps for registration of the said wakf under Section 31 of the said Act of 1960.*** *The alleged wakf remained unregistered wakf to which neither 1936 Act nor 1960 Act or 1995 Act are applicable as such the Plaintiff Wakf Board has no locus standi and instant Suit is hit by the provision of Section 87(1) of the Wakf Act, 1995. As such, the instant suit is not fit for being continued, heard, tried or decided and is liable to be dismissed on this score alone."*

1270. In respect to the procedure to be followed under 1960 Act without there being any pleading, the learned counsel has presumed that neither any registration was made under Section 29(2) nor any steps were taken under Section 31 of Act 16 of 1960 nor any fresh survey of the waqf in question was made under Section 6 of the aforesaid Act, hence the waqf in question remain unregistered. In the absence of any pleading, we find it difficult to entertain the above submission involving pure factual aspects which ought to have been pleaded. Reference is also made to Section 66E of Waqf Act, 1954 but Sri Mishra, learned counsel could not dispute that Waqf Act, 1954, which was a Central Act, was not made applicable to the State of Uttar Pradesh and therefore, reliance on the said provision is wholly misplaced.

1271. Sri Mishra referred to Section 6 of the Societies Registration Act, 1860 and Section 69(2) of Partnership Act, 1932 which are concerned to registered Society or Firm but in our view, the same would have no application to the case in hand for the reason we have already discussed above with reference to the decisions in **Pamulapati Buchi Naidu College Committee Nidubroly (supra)** and **Radhasoami Satsang Sabha Dayalbag (supra).**

1272. Referring to Section 2 of Shariyat Act, 1937 as amended by Madras Act 18 of 1949 as also the Apex Court's decision in **C.Mohammad Yunus Vs. Syed Unnissa and Ors. AIR 1961 SC 808,** it is contended that the Act was applied to all cities and provinces but in our view, neither the aforesaid provisions nor the decision of the Apex Court in **C. Mohammad Yunus (supra)** has any relevance with the point in question.

1273. Referring to certain documents, which are on record, and the translation provided thereof, Sri Mishra has submitted in his written arguments as under:

> A. In the application for registration of waqf made under section 38 of the United Provinces Muslim Waqfs Act, XIII of 1936 being exhibit 38 on pages 199 to 205 of the Volume No.11 of the documents filed in the instant suit by the Plaintiffs in its column no.3 it has been stated that there is no waqf but the waqifs are Emperor Babar and Nawab Sa'-a-Dat Ali Khan. Below column no.16 there is a note which says that the claim of the alleged Mutwalli's family is that the within mentioned property said to be granted for maintenance of the alleged Babari Mosque at somewhere else is not a waqf but a Service Grant in their favour. The aforesaid application tells the

Emperor Babar and Nawab Sa'-a-Dat Ali Khan as joint waqifs which is quite impossible because the Emperor Babar died in 1530 AD while Nawab Sa'a-Dat Ali Khan ascended on throne in 1732 AD as such the persons who were not contemporary and there was a gap of 202 years between the former and later they cannot be joint waqifs of same of one waqf alleged to be Babri Masjid Waqf. This fact alone totally falsify the claim of the plaintiffs that the alleged waqf was created by the Emperor Babar. The grant in question was also a service grant not a waqf. The person who made application namely, Syed Kalbe Hussain had also his vested interest as it appears from the note of the application that his intention was to file a case against the persons who were enjoying their property claiming the same to be a service grant; from being motivated with such spirit and he made the aforesaid application for registration making fraudulent dishonest false and frivolous statements.

B. Be it mentioned herein that the plaintiffs have used fraud upon this Hon'ble Court by producing wrong transliteration of the note contained in said application for registration. Though in its original Urdu text it has been recorded that the persons recorded in revenue records do not consider it waqf but in Hindi transliteration thereof the plaintiffs by deleting the word 'nahi' of vital importance which finds place in between the words 'waqf' and 'tasleem' have made it meant that those persons says that it is waqf and nankar mafi. This fact came into light when the original text was read over in open Court by the Hon'ble Justice S.U.Khan, J. during my argument.

C. In the list of Sunni Waqfs published in supplement to the Government Gazette of United Provinces dated 26th February, 1944 under Section 5 of U.P. Muslim Waqfs Act, XIII of 1936 to which, according to the report of the Commissioner of waqfs, the provisions of the said Act apply; on page 11 at serial no.26 (being the volume No.12 of the documents filed in the instant suit) it has been notified that Babri Mosque is located at Qasba Shahnawa not at Ramkot in Ayodhya. Hindi transliteration of relevant page of the said gazette notification containing the name of Badshah Babar on serial No.26 is on page no.341 to 345 of volume 12 of the documents filed in the instant suit. Hindi Transliteration of the proforma of the list as well as the entries against item no.26 of the said reads as follows:

	नामे वाकिफ या वक्फ	नाम–ए–मतवली मौजूदा	नौ इयते जायदाद मकूफा
26	बादशाह बाबर	सैयद मोहम्मद जकी मतबली मस्जिद बाबरी कस्बा शाहनबा डाकखाना दर्शनगर	

From the above Gazette notification dated 26th February, 1944 it appears that Badshah Babar had erected a Mosque in Shahnawa town within the postal jurisdiction of Darshan Nagar of which Syed Mohammed Zaki was Mutawalli. The said gazette notification did not say that there was a mosque in Ramkot Pargana Havelli, Ayodhya in the district of Faizabad. As such said Babri Mosque Waqf cannot be construed to be waqf of any other Babri Mosque located anywhere else.

D. In the said gazette notification dated 26th February, 1944 (on page 479 of the volume 12 of the documents filed in the instant suit) another Babri Mosque along with

the Mausoleum of the Emperor Babur has been mentioned in some other district perhaps in the district of Kanpur. It is well known recognized and admitted fact that the Mausoleum of the Emperor Babur is in Kabul, Afganistan not in India. This is glaring example of the facts of fraud, forgery and fabrication.

E. From the above mentioned relevant entries of the list of the gazette notification dated 26th February, 1944 it becomes clear that the waqf commissioners had not discharged their duties as it was cost upon them under the provisions of the United Provinces Muslim Waqfs Act, 1936 and in very casual manner either on hearsay they have listed several properties as of waqfs or the concern Waqf Commissioner were active participant in the fraud, forgery and fabrication.

F. The Waqf Commissioner Faizabad's report dated 8th February, 1941 says that it appears that in 935 A.H. Emperor Babar built Babari or Janam Asthan Mosque at Ajudhya and appointed one Syed Abdul Baqi as the Mutwalli and khatib of the Mosque and for its maintenance an annual grant of Rs.60 was allowed by the said Emperor which continued till the fall of the Mughal kingdom. Later on said grant was increased by Nawab Sa-a-Dat Ali Khan to Rs.302/3/6 but no original papers about this grant by the king of Oudh are available. Relevant extract of said report reads as follows:

> "It appears that in 935 A.H. Emperor Babar built this mosque and appointed Syed Abdul Baqi as the mutwalli and khatib of the Mosque (vide clause 2 statement filed by Syed Mohammad Zaqi to whom a

notice was issued under the Wakf Act.) An annual grant of Rs.60/- was allowed by the Emperor for maintenance of the mosque and the family of the first mutwalli Abdul Baqi. This grant was continued till of the fall of the Moghal Kingdom at Delhi and the ascendancy of the Nawabs of Oudh.

According to Cl. 3 of the written statement of Mohammad Zaki Nawab Sa'adat Ali Khan, King of Oudh increased the annual grant to Rs.302/3/6. No original papers about this grant by the king of Oudh are available."

From the aforesaid extract it is crystal clear that the Commissioner on the basis of mere statement of Syed Mohammed Zaki found that the Disputed Janam Asthan Structure was a mosque built by Emperor Babar which is in total discard to his duty cast upon him under said Act XIII of 1936.

G. Commissioner's said report dated 8th Feb. 1941 says that after the mutiny the British Govt. continued the above grant in cash upto 1864 and in the later year in lieu of cash some revenue free land in village Bhuraipur and Sholeypur was granted. The said report further records that Syed Mohammed Zaki produced a copy of the grant order of the British Govt. which was made on condition that Rajab Ali and Mohammad Asghar would render Police, Military or Political service etc. Thereafter the commissioner records that the above-mentioned object is elucidated in Urdu translation as follows:

"After the Mutiny, the British Government, also continued the above grant in cash upto 1864, and in

the latter year in lieu of the cash grant, the British Government ordered the grant of some revenue free land in villages Bhuraipur and Sholeypur. A copy of this order of the British Government has been filed by the objector Syed Mohammad Zaki (vide Flag A). This order says that 'the Chief Commissioner under the authority of the Governor General in Council is pleased to maintain the Grant for so long as the object for which the grant has been made is kept up on the following conditions'. These conditions require Rajab Ali and Mohammad Asghar to whom the sannad was given, to perform duties of land holder in the matter of Police Military or political service etc. Thus the original object of the state grant of Emperor Babar and nawab Sa'adat Ali Khan is continued in this Sunnad by the British Government also i.e. maintenance of the mosque. The Nankar is to be enjoyed by the grantees for so long as the object of the grant i.e. the mosque is in existence."

H. In fact, this Urdu elucidation is creation of the said Waqf Commissioner as it is not in the alleged Sunned being page 33 of the volume 6 of the documents filed in the instant suit. Hindi transliteration and meaning of the said elucidative Urdu text as incorporated in the Waqf Commissioner's said report reads as follows:

''उस नानकार को जबतक कि मस्जिद जिसके वास्ते ये नानकार दी गयी थी बरकरार है। हसबे शरायत,दर्ज जैल कायम फरमाते हैं (जो शर्तें लिखी गयी हैं उसे कहते हैं)''

A handwritten copy of the said sunnad with some error has been reproduced at page 27 of volume 10 of the documents filed in the instant suit. In the said alleged original version of the grant Urdu elucidation did not find place. From the said alleged original version of the alleged grant, it becomes crystal clear that the grant, if any, it was a service grant for rendering police, military and political services to the British Govt. against the enemies of the British Govt. Be it mentioned herein that in those days in the eyes of the Britishers the persons who were fighting against them for liberation of their motherland i.e. India they were considered to be mutineers and enemies of the Britishers. As such it can be inferred that the said service grant was given for helping the Britishers to defeat and rout the freedom fighters, not for a good cause of maintaining any Mosque. Full text of the alleged SUNNAD from page 33 of Vol. 6 (hand written copy on page 27 of Vol. 10 that is not accurate) is reproduced as follows:

"Chief commissioner's

It having been established after due enquiry, that Rajub ally and Mohamad Usgar received a Cash Nankar of (Rs.302.3.6) Rupees three hundred to and three annas and six pie from Mouzah Shanwah Zila Faizabad from former Government. The Chief Commissioner, under the authority of the Governor General in Council is pleased to maintain the grant for long as the object for which the grant has been made is kept the following conditions. That they shall have surrendered all sunnads, title deeds, and other

documents relative to the grant. That they and their successor shall strictly (illegible) all the duties of land-holder in matter of police, and an (torn) or political service that they may be required of them by the authorities and that they shall never fall under the just suspicion of favouring in any way designs of enemies of the British Government. If any one of these conditions is broken by Rajub ally and Mohamad Usgar or their successor the grant will be immediately resumed."

I. From the aforesaid alleged to be original text of the grant as produced by the plaintiffs it becomes crystal clear that Urdu interpolation has been done by the said Commissioner with sole motive to deprive the Hindus from their sacred shrine of Sri Ramjanamsthan which has been described as Babri Mosque in the plaint as well as Janam Asthan Mosque in the said Commissioner's report. From the words 'Janam Asthan Mosque' itself it becomes clear that the alleged Mosque was erected over the birth place of someone, and since time immemorial said place is being worshipped by the Hindus asserting that it is the birth place of the Lord of Universe Sri Ram it is needless to say that according to the said Commissioner, the alleged Mosque was erected over the janamasthan of Sri Ramlala.

J. The said Waqf Commissioner after recording the facts that Syed Mohammed Zaki had submitted before him that the said British grant was a service grant in favour of his predecessors for rendering police, military and political services to the Britishers subject to resumption on

non-fulfillment of the aforesaid conditions thus it was not a waqf property granted for maintenance of the alleged mosque; the commissioner without any cogent evidence rejected his said contention simply stating that he did not agree to that view because the grant was not originally granted by the Britishers but it was continuation of original grant granted by the Muslim rulers as also for the reasons that after the Ajodhya riot of 1934 Syed Mohammad Zaki had presented an application to Deputy Commissioner in which he had described himself as Mutawalli or trustee of the mosque and of the trust attached thereto. In fact, prior to coming on this reference, in the preceding paragraphs of his said report the said commissioner himself has recorded that no paper of old grant even of the Nawabs of Oudh was available and placed before him. It is contrary to the law of evidence to draw inference on the basis of the statement of a person whose credibility was found suspicious, doubtful and non-reliable. As in his report the commissioner records that said Syed Mohammed Zaki was an opium addict and most unsuited for the proper performance of the duties expect of a Mutwalli of an ancient and historical mosque, which was not kept even in proper repairs for which reason he recommended to discharge the said Mutwalli. Relevant extract from said report is reproduced as follows:

> "Syed Mohammad Zaki, the objector, who is known as the Mutwalli of the Babari mosque, and also called himself as such raises an objection to the land in Sholeypur and Bhuranpur being regarded as a waqf, because he says the grant has been made for

his substenance only (in Urdu). In do not agree with this view of his. The written statement filed by Mohammad Zaki himself is sufficient to show that the grant has been continued ever since 935 A.H. only because he and his ancestors were required to look after the mosque and keep it in proper condition out of the income allowed to them and also to provide for the maintenance of himself and his ancestors out of a part of the same grant.

Clearly then the grant of land to Mohammad Zaki must be regarded as a Waqf, the purpose of which is the maintenance of the religious building known as the Babari Mosque.

The learned counsel for Mohammad Zaki has also argued.

1) That the particular grant of land in Sholeypur and Bhureypur has been made by the British Government. A Non-Muslim body and hence the grant cannot be regarded as Muslim Waqf.

2) That the grant is a conditional one, being subject to resumption on non fulfillment by the grantee of any of the police Military or duties enjoined in the Sunnad, and that on account of these conditions the grant cannot be classed as a Muslim Waqf.

I do not agree with either view. firstly the British Government only continued a grant which had been made by the Muslim Government originally and in these circumstances, I cannot but regard the grant as a waqf.

3) As for the second point the conditions have been

imposed upon the grantee, and not upon the way in which the grant to be utilized, which latter purpose is recognised as maintenance of the mosque. It is clear that if the conditions are broken the enjoyment of the grant by the Mutwalli himself for his sustence is to be withdrawn apparently implying that any other mutwalli will then be appointed to administer the grant for the original purpose of maintaining the mosque. I am strengthened in this view because I find the mention of the object of the grant i.e. maintenance of the mosque at the very outset of the Sunnad and the desirability thereof seems to be clear from the whole Sunnad.

I also find that after the Ajodhya riot of 1934, Syed Mohammad Zaki presented an application (Flag Ex. A) to Deputy Commissioner, in which he clearly described himself as Mutwalli or trustee of the mosque and of the trust attached thereto.

I also find that this same Mohammad Zaki submitted accounts in 1925 in Tahsildar's court in which he stated that the income from the grant managed by him was utilized for maintenance of the mosque, pay of Imam Muezzin and the provisions of Iftari etc., during Ramzan after deduction of Rs.20/- per month for sustence of the Mutwalli himself. The pay of the Mutwalli spends a much greater portions of the income on his own personal needs.

K. The Wakf Commissioner Faizabad in his said report dated 8th Feb. 1941 says that he examined Abdul Ghaffar, the then pes Niwaz who deposed that the imam was not

being paid for last 11 years and thereafter the said commissioner says that the then Syed Mohammud Zaki was an opium addict and most unsuited to the proper performance of the duties expected from an Mutwalli of an ancient and historical mosque, thus he was liable to be discharged from his duties. Relevant extract from the said report which is on page nos. 45 to 48 of the volume No. 6 of the documents filed in the instant suit read as follows:

> "The present Mutwalli is of course a Shia. There is no information as to the sect to which Abdul Baqi himself belonged, but the founder Emperor Babar- was admittedly a Sunni, the Imam and Muezzin at the mosque are Sunni and only Sunnis say their prayer in it. Abdul Ghaffar the present Pesh Niwaj was examined by me. He swear that the ancestors of Mohammad Zaki were Sunnis who latter on was converted to Shia. He further said that he did not receive his pay during the last 11 years. In 1936 the Mutwalli executed a pronote promising to pay the arrear of pay by installment but upto this time nothing actually was done. I think therefore that this should be regarded as a Sunni Trust.
>
> I must say in the end that from the reports that I have heard about the present Mutwalli, he is an opium addict (vide his statement flag Ez) and most unsuited to the proper performance of the duties expected of a Mutwalli of an ancient and historical mosque, which is not kept even in proper repairs. It is desirable that, if possible, a committee of management should be appointed to supervise the

proper maintenance and repairs of the mosque and discharge of his duties by the Mutwalli."

L. From the second report of the Commissioner of Waqf Faizabad being report dated 8th February, 1941 it becomes clear that the Imam was not being paid since 1930 and the alleged Mutwalli was an opium addict and most unsuitable person and in 1934 riots on 27th March, the alleged Mosque was demolished it can be safely inferred that Sri Ramjanamsthan temple structure was being used as a mosque because it cannot be imagined that a person will discharge duty of imam without getting salary for such a long period as according to Islamic law, only salary is the prescribed means of livelihood no imam can survive for want of salary as such in fact neither there was any mosque nor there was any mutwalli or imam.

M. From exhibit-62 being page nos.367 to 405 of volume 12 of the documents filed in the instant suit which is a report of the four historians it becomes crystal clear that how said report has been prepared having some design in mind or inadvertently and negligently which reflects from page 397 of the said volume where the dimension of the vedi described by Tieffenthaler has been wrongly reproduced as "a square platform 5 inches above ground, 5 inches long and 4 inches wide, constructed of mud and covered with lime. The Hindus call it Bedi, that to say, the birth place. The reason is that here there was a house in which Beschan (Bishan = Vishnu) took the form of Ram". Though correct dimension given by Tiffenthaler reads "a square chest, raised five inches from the ground, covered with lime, about five ells in length by not more

than four in breadth. The Hindoos call it bedi, the cradle; and the reason is, that there formerly stood here the house in which Beshan (Vishnoo) was born in the form of Ram." This correct translation is given in the book 'Modern Traveller' volume 3, published by James Duncan in 1828. It is crystal clear that in the report of said historians the word 'ells' has been translated as 'inches' in fact, ells means yards which has been correctly translated in the translation made available by the Govt. of India to this Hon'ble Court. Tieffenthelar has not stated that the Bedi was of mud, it is creation of the mind of the aforesaid historians, as such said report of the historians is not reliable for the reasons of being prepared by incompetent persons or for being biased, motivated.

N. The page No. 155 of volume 6 of the documents filed in the instant suit purported to be copy of a folio of a register contains a pedigree wherein it has been written that the mafi was created for the muezzin and khattib of masjid Babari of Oudh date and year of the waqf is unknown to Syed Baqi therefore his son Syed (illegible) Ali, his son Syed Hussain Ali who was in possession for about 60 years now his son-in-law Rajab Ali and his daughter's son Muhammad Asgar are in existence and were in receipt of cash from village Shahnawa vide receipt (illegible) till fasali year 1263. In the year 1264 fasali enquiry about mafi was started but riot took place (illegible) crop (illegible) year 63 fasali was found (illegible) original (illegible) of and is document (illegible) in respect of mafi (illegible) settlement of village versus (illegible). A copy of the said contents has

also been compiled in the said volume no.6 of the documents filed in the instant suit on its page nos. 157 to 161.

O. From the said enquiry report it appears that during the period of 332 years people of five generations including Syed Baqi held the office of muezzin and khattib of alleged Babri mosque during the period of 1528 to 1860 which means 66½ years was average of each generations which is quite impossible as according to Life Insurance Corporation's assessment average span of a change of generation is 26 years. And this pedigree is completely false, forged and fabricated one. During this period 16 generations of the Mughal rulers elapsed average whereof comes about 20 ¾ years. In the matter of Radha Krishan v. State of Bihar the Hon'ble Supreme Court has laid down the principle of law to evaluate and judge authenticity of a pedigree which has been reproduced in this argument at relevant place.

P. The alleged documents and/or transliteration thereof being page nos. 53 to 61 of the volume no.6 of the documents filed in the instant suit tells that the alleged Babri Mosque was demolished by the rioters and Bairagis on 27th March, 1934. The damaged domes were beyond repair. The allege list of damages says that apart from damaging the building, the Hindus either burnt or took away with them three pieces of mats, six pieces of matress, one piece of box, two pieces sandal, six pieces of curtains, five pieces of pitchers, hundred places badhana mitti, four pieces of small earthen pot, one piece chahar, water pot (illegible) three pieces Kasauti Patthar Tarikhi, 3

x 1½ sq. ft. one piece, ladder two pieces, large iron jar two pieces. From the said list it is crystal clear that no engraved stone i.e. inscription was either carried away by the rioters or destroyed by the rioters. As such the story of the destruction of inscription is wholly concocted and the inscription which was prepared by the contractor was done at the instance of the Britishers to deprive the Hindus from their religious place and make the said place as bone of contention between Hindus and Muslims to facilitate their policy of divide and rule. As it has been written in the East India Gazetteer 1828 p. 352, 2nd column last para as well as the preface of the Neil B.E. Baillie's Digest of Moohummudan Law Vol.2 Edn. 1875 Introduction p. xi and xii.

Q. In Waqf Commissioner's report dated Feb. 8 1941, it has been recorded that the alleged Babri Mosque was built by one Abdul Baqi on being ordered to do so by the Emperor Babur. He records that there is no document to show that grant was sanctioned to the said Mosque either by the Mughal Emperors or Nawabs of Oudh, but as in 1864 a sunnud was issued stating that the grant was given to the grantee for rendering military, police and political services. It may be presumed that it was granted in continuance of the grants of Mughal Emperors to Nawabs of Oudh right from the Emperor Babur. The said Commissioner in his waqf report has committed forgery and fabrication by inserting certain words in Urdu transcript to show that the grant was given for maintenance of the alleged Babri Mosque. In fact, said sunnud is on record and entire sunnud is in English

language and nothing is written in the said sunnud in Urdu transcript as such question of grant for maintenance of Babri Mosque cannot and does not arise at all. He says that some return submitted in the office of Tahsildar in 1995 shows that though major expenses was done by the grantee for his own maintenance, but a portion thereof was spent on maintaining alleged Babri Mosque. Be it mentioned herein that if grant would have been spent on maintaining alleged Babri Mosque its account would have been submitted to the District Civil court which was made mandatory under the provisions of The Mussalman Wakf Act, 1923 under Section 3 of the said Act. Report also says that the Imam was not paid for last 11 years i.e. since 1930 as also that the Mutwalli is a drug addict and the alleged Mosque is in not good condition as such Mutwalli should be removed.

1274. Suffice it to say that Section 87 would be attracted where a waqf is not registered under the Act. If there was some irregularity or discrepancy in the procedure observed, whether that would make a waqf otherwise registered by the Central Sunni Waqf Board as unregistered, is neither an issue framed nor there is requisite pleadings by the concerned parties giving an opportunity to plaintiffs (Suit-4) to place on record the relevant evidence. So far as the appreciation of the documents, referred to above in sub paras A to Q, we are clearly of the view that the same would not negate an otherwise positive assertion by defendant 4 (Suit-5) which is not disputed at all by the other side by challenging the said pleading. Moreover no issue on this aspect has been framed. In our view, the suits in question cannot be held to be barred by Section 87 of the Act.

1275. There is another aspect. There are specific issues concerning the very existence of the waqf and creation of a valid waqf in accordance with Shariyat Law. Where such a basic issue is involved about the very existence of a waqf, whether in such a case also Section 87 would have any application or not, we have our serious doubts but on this aspect in the absence of any pleadings or arguments on the part of the respective parties we find no occasion to express a final opinion. We are not inclined to widen the scope of the suits in question, the canvass whereof is already enlarged extraordinarily and we have enough complicated issues to consider and decide having wider ramifications. In the totality of the circumstances, as also the discussion as above, we are clearly of the view that the suits in question cannot be held untriable at this stage by virtue of Section 87 of 1995 Act. The submission of Sri P.N.Mishra, learned counsel for defendant 20 in Suit-4 with reference to Section 87 of 1995 Act is hereby rejected. We, however, make it clear that the submissions with respect to various documents in the above mentioned paragraphs F to Q are in fact not relevant to the above aspect of the matter. We intend to consider it later on while deliberating on the concerned issues involving those documents and their effect.

(E) Miscellaneous issues like representative nature of suit, Trust, Section 91 C.P.C., non joinder of parties, valuation/ insufficient Court fee/under valuation and special costs.

1276. **Issue no. 6 (Suit-4)** reads as under:

> "*Whether the present suit is a representative suit, plaintiffs representing the interest of the Muslims and defendants representing the interest of the Hindus?"*

1277. Issue no. 6 (Suit-4) pertains to the nature of the suit

in a representative capacity in respect to both the parties, i.e., plaintiffs and defendants. It is not disputed by learned counsel for the parties that the Civil Judge passed order dated 08.08.1962 under Order 1 Rule 8 CPC permitting plaintiffs to represent the interest of Muslims and the defendants to represent the interest of Hindus. The relevant part of the order says:

> *"I therefore allow appln 4-C and reject the objections 77-C & 97-C. The pltffs are permitted to sue representing the entire Muslim community and the pltffs are also permitted to sue the defdts no. 1 to 4 on behalf of and for the benefit of the entire Hindu community."*

None has made any submission otherwise. **The issue is answered accordingly in affirmance**.

1278. **Issue No.22 (Suit-4)** relates to special costs in case suit is dismissed. It reads as under:

> *"Whether the suit is liable to be dismissed with special costs?"*

Learned counsel for the defendants have fairly stated that they do not press for any special costs and for they it would be sufficient if the suits are decided on merits expeditiously.

In the circumstances and in view of the above statement made on behalf of the learned counsel appearing for the defendants in Suit-4, **we answer Issue no.22 in negative i.e. no special costs need be awarded.**

1279. **Issues no. 11(a) and 11(b) (Suit-1)** reads as under:

> "*(a) Are the provisions of section 91 C.P.C. applicable to present suit? If so, is the suit bad for want of consent in writing by the Advocate General?*
>
> *(b) Are the rights set up by the plaintiff in this suit independent of the provisions of section 91 CPC? If not, its*

effect."

1280. These issues are in respect to Section 91 CPC which reads as under:

> ***"91. Public nuisances and other wrongful acts affecting the public**.--(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,-*
>
> *(a) by the Advocate General, or*
>
> *(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.]*
>
> *(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."*

1281. The onus to prove the above issue initially lie upon the defendants but no arguments have been advanced in respect to the above issue. Besides, we find from the record that Sri Chaudhary Kedarnath, Advocate, counsel of the plaintiff, Gopal Singh Visharad, who initially filed Suit-1, made a statement on 15.09.1951 under Order 10 Rule 2 stating that he is filing the above suit for enforcement of his individual right of worship and, therefore, has a right to maintain the above suit in his individual capacity. The relevant part of his statement is as under:

> *"Q. In what capacity does the plaintiff seek to exercise the relief which he seeks in the plaint.*
>
> *Ans. In my individual capacity.*

Q. What is your individual capacity.

Ans. My individual capacity is distinct from public capacity and in this matter an idol worshipper."

1282. It also appears that an application was filed on behalf of defendants no. 1 to 5 under Order 1 Rule 8 CPC before the Civil Judge, Faizabad praying that the suit be treated to be in a representative capacity but the said application was rejected on 27.10.1951. The order has attained finality as nothing has been placed before us to show that the matter was taken up before the higher Court assailing the order dated 27.10.1951. Section 91 CPC does not take away the independent right of a person where such right partly relates to a public right of others also. It lays down merely the procedure to be adopted in a representative suit where a right of suit already exist. It did not confer or extinguish a new right on its own. In **Kadarbhai Mahomedbhai and another Vs. Haribhari Ranchhodbhai Desai and another, AIR 1974 Gujarat 120** a suit was filed by a person affected by public nuisance praying for removal of the public nuisance alleging special damage to him and it was held that such a suit is not barred either by Section 91 CPC or Order 1 Rule 8 CPC. To the same effect is the view taken by this Court in **Mst. Bhagwanti Vs. Mst. Jiuti and another, AIR 1975 Allahabad 341**. **In view of the above we answer issue no. 11(a) (Suit-1) in negative** and hold that neither Section 91 CPC is applicable to Suit-1 nor it is bad for want of consent in writing by Advocate General. **Issue No. 11(b) (Suit-1) is answered in affirmance**, i.e., the right of the plaintiff is independent as set up by him in the plaint as also in view of the statement under Order 10 Rule 2 CPC and has nothing to do with Section 91 CPC. The question of the subsequent part of the issue 11(b) need not be decided in view

or our answer in favour of the plaintiff, i.e., in affirmance.

1283. **Issue no. 12 (Suit-1)** reads as under:

"Is the suit bad for want of steps and notice under Order 1, Rule 8 CPC? If so, its effect?"

1284. This issue is with reference to Order 1 Rule 8 CPC which reads as under:

"***8. One person may sue or defend on behalf of all in same interest.--****(1) Where there are numerous persons having the same interest in one suit,-*

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiffs expense, give notice of the institution of the suit to all persons so interested either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no

agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiffs expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.-For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the person on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

1285. As we have already discussed above the application filed on behalf of defendants no. 1 to 5 under Order 1 Rule 8 CPC was rejected by Civil Judge, Faizabad by order dated 27.10.1951. The plaintiff had also made statement under Order 10 Rule 2 CPC that the right of worship, he is claiming by means of Suit-1, is his individual and personal right hence Order 1 Rule 8 CPC has no application. That being so, the question of taking steps and notice under Order 1 Rule 8 CPC does not arise. **Issue no. 12 (Suit-1) is accordingly answered in negative, i.e., in favour of the plaintiff (Suit-1)**.

1286. **Issue no. 15 (Suit-1)** pertains to non-joinder of defendants and says:

"*Is the suit bad for non-joinder of defendants?"*

1287. It is not pointed out by any of the defendants as to who has not been impleaded as defendant though a necessary or proper party in the suit. No arguments have been advanced on this aspect and in the absence thereof **we answer issue no. 15 (Suit-1) in negative, i.e., in favour of the plaintiffs (Suit-1)**.

1288. **Issue no. 16 (Suit-1)** reads as under:

"*Are the defendants or any of them entitled to special costs under Section 35-A C.P.C."*

1289. It relates to special costs. Section 35A CPC says:

"35A. Compensatory costs in respect of false or vexatious claims or defenses.--*(1) If any suit or other proceedings including an execution proceedings but excluding an appeal or a revision any party objects to the claim of defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if it so thinks fit] may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment the object or by the party by whom such claim or defence has been put forward, of cost by way of compensation.*

(2) No Court shall make any such order for the payment of an amount exceeding three thousand rupees or exceeding the limits of it pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause

Courts Act, 1887 (9 of 1887) or under a corresponding law in force in any part of India to which the said Act does not extend and not being a Court constituted under such Act or law, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided, further, that the High Court may limit the amount or class of Courts is empowered to award as costs under this Section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence."

1290. Learned counsels for the defendants have at the outset stated that they do not press any cost whatsoever and for them the biggest compensation would be the decision of the matter at the earliest and, therefore, none has pressed the above issue. **In the result issue 16 (Suit-1) is answered in negative, i.e., in favour of the plaintiff (Suit-1)**.

1291. **Issues no. 11, 12 and 15 (Suit-3)** read as under:

"Is the suit bad for non-joinder of necessary defendants?"

"Are defendants entitled to special costs u/s 35

CPC?"

"Is the suit property valued and court fee paid sufficient?"

1292. None has pressed the above issues inasmuch as neither any submissions have been advanced as to who is the necessary party not impleaded in the suit rendering it bad for non-joinder nor the learned counsels for the defendants have pressed for special cost and on the contrary very fairly have said that the decision of the suit at the earliest is itself the biggest cost to them. No arguments have been advanced with respect to the valuation and the Court fees in the matter. **We, therefore, answer issues no. 11 and 12 (Suit-3) in negative, i.e., in favour of the plaintiffs (Suit-3). Issue no. 15 (Suit-3) is answered in affirmance, i.e., in favour of the plaintiff (Suit-3)**.

1293. **Issue no. 20 (Suit-5)** reads as under:

"Whether the alleged Trust creating the Nyas , defendant no.21, is void on the facts and grounds stated in paragraph 47 of the written statement of defendant no.3?"

1294. Defendant no. 3 represented by Sri R.L. Verma, Advocate has not placed anything before this Court to show as to how the alleged trust defendant no. 21 is void. Besides, defendant no. 21 is not seeking any relief as such before us. The question as to whether the alleged trust is void or not would have no material bearing on the matter to the relief sought in Suit-5 which has been filed on behalf of two deities through next friend. We, therefore, find no reason to answer the aforesaid issue in the present case. **Issue no. 20 (Suit-5), therefore, remain unanswered** since it is unnecessary for the dispute in the present case to adjudicate on the said issue. The learned counsel for defendant no. 3 (Suit-5) also could not make

any submission persuading us to take a different view.

(F) Issues relating to the Person and period- who and when constructed the disputed building:

1295. Mainly there are three issues under this category which requires adjudication on the question whether the building in dispute was constructed in 1528 AD and whether the construction was made by Babar or under his orders by any of his agent including Mir Baki.

1296. To be more precise, issues no. 6 (Suit-1), 5 (Suit-3) and 1(a) (Suit-4) fall in this category.

1297. **Issue No.6 (Suit-1)** reads as under:

> *"Is the property in suit a mosque constructed by Shahanshah Babar commonly known as Babri Mosque, in 1528 A.D.?"*

1298. Defendants no.1 to 5 (Suit-1) in para 9 of their written statement said:

> *''**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 शहंशाह मजकूर ने बाद फतेहआबी हिन्दुस्तान दौरान कयाम अयोध्या अपने वजीर व मुदारूल मोहाम मीर बाकी के एहतमाम 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 regarding which the plaintiff has filed the suit, is the mosque built by Babar, emperor of India, which is called Babri Masjid. It was built by the aforesaid emperor, after his conquest of India, in the year 1528 through his Governor and confederate (मुदारूल मोहाम) Mir Baqi during his stay at Ayodhya and after building the same, he created a universal Waqf in favour of Muslims in general, and all the Muslims have the right of worship over*

there." (E.T.C.)

1299. In the replication filed by the plaintiff, he denied the existence of Babri Masjid in para 9 and said:

''बाबरी मस्जिद होने से इन्कार है।''

"Its existence as Babri Mosque is denied" (E.T.C.)

1300. The defendant no.10 (Suit-1) in para 2 and 10 of the written statement have said:

"2. .... and the same was constructed during the regime of Emperor Babar....."

"10. That the property in suit is an old mosque constructed around the year 1528 A.D. during the regime of Emperor Babar under the supervision of Mir Baqi and the same has always been used as a mosque and it was never used as a temple or as a place of worship for any other community except muslims."

1301. **Issue No.5 (Suit-3)** reads as under:

"Is the property in suit a mosque made by Emperor Babar known as Babari Masjid?"

1302. In Suit-3, defendants no. 6 to 8 in written statement dated 28th March, 1960 in para 15 have said:

''धारा 15.. यह कि जिस जायदाद का मुद्दैयान ने दावा किया है वह शहनशाह हिन्द बाबर बादशाह के तामीर करदा मसजीद मौसमे बाबरी मसजिद है जिसको शहनशाह मजकूर ने अपने वजीर व मदारूल मोहाम मीरबाकी के एहतमाम से 1528 ई0 में तामीर कराया और मुसलमानान के लिये वक्फ आम कर दिया जिसमें तमाम मुसलमान का हक इबादत है।''

"Para 15. That the property regarding which the plaintiff has filed a claim, is a mosque built by Babur, Emperor of India, and is known as Babri Masjid. The mosque was built by the afore-named Emperor through his Secretary and Commander, Mir Baqi in 1528 and was given in public waqf to Muslims in which Muslims in general have a right

of worship." (E.T.C.)

1303. The plaintiffs (Suit-3), in replication, have denied para 15 of the written statement and said:

"15. The allegations contained in para 15 of the written statement are totally incorrect and are denied. The property in suit is neither a mosque nor is it known as Babri Mosque, nor was it built by Emperor Babar nor is it known as Babri Mosque, nor was it built by Emperor Babar through Mir Abdul Baqi. Nor was it made wakf. The property in suit is the temple of Janma Bhumi."

1304. **Issue No.1(a) (Suit-4)** reads as under:

"When was it built and by whom-whether by Babar as alleged by the plaintiffs or by Meer Baqi as alleged by defendant no.13?"

1305. Plaintiffs (Suit-4) in para 1 and 2 of the plaint have said:

"1. That in the town of Ajodhiya, Pergana Haveli Oudh there exits an ancient historic mosque, commonly known as Babri Masjid, built by Emperor Babar more than 433 years ago, after his conquest of India and his occupation of the territories including the town of Ajodhiya, for the use of the Muslims in general, as a place of worship and performance of religious ceremonies."

"2. That in the sketch map attached herewith, the main construction of the said mosque is shown by letters A B C D, and the land adjoining the mosque on the east, west, north and south, shown in the sketch map attached herewith, is the ancient graveyard of the Muslims, covered by the graves of the Muslims, who lost the lives in the battle between emperor Babar and the previous ruler of

Ajodhiya, which are shown in the sketch map attached herewith. .....The mosque and the graveyard are in Mohalla Kot Rama Chander also known as Rama Kot Town, Ayodhya. The Khasra number of mosque and the graveyard in suit are shown in the Schedule attached which is part of the plaint."

1306. Defendants no.1 and 2 (Suit-4) while denying paras 1 and 2 of the plaint, in written statement dated 12th March, 1962 have in para 2 pleaded:

"2. That para 2 of the plaint is absolutely wrong and is denied. There was never any battle between Babar and the ruler of Ajodhya on any graveyard or mosque built as dictated by the said Babar."

1307. Defendant no.2 (Suit-4) in his written statement dated 25th January, 1963 while denying paras 1 and 2 (Suit-4), has further pleaded in para 2 of his written statement:

"2. That para 2 of the plaint is absolutely wrong and is denied, there was never any battle between Babar and the ruler of Ajodhya on any grave yard or Mosque alleged to the built (as dictated) by the said Babar."

1308. Defendants no. 3 and 4 (Suit-4), in their written statement dated 22/24 August, 1962 have pleaded in paras 1 and 2 as under:

"1. The allegations contained in para one of the plaint are totally incorrect and are denied. There does not exist any mosque known as 'Babri Masjid' in Ajodhya – Nor was any mosque built by Emperor Baber in Ajodhya more than 460 years ago as alleged- Nor did Babar made any conquest or occupation of any territory in India at the time alleged in the plaint- The story of the mosque as narrated

in plaint para 1 is a pure fiction."

"2. The allegations contained in Para 2 of the plaint are totally incorrect and are denied. The alleged sketch map is entirely false and imaginary and is the outcome of the plaintiffs fancy. On the Khasra no mentioned in the sketch map there stands neither any mosque nor any grave. The story of the alleged battle between Emperor Babar and any previous ruler of Ajodhya, whose name the plaintiffs are unable to mention in the plaint is pure canard. Neither did any Muslim lose his life in any battle on the land of the said Khasra Nos nor is there any grave or grave yard of any Muslim at the said place. . . . The real facts are that the said Khasra numbers pertain to the 'Temple of Janam Bhumi' and other land appurtenant thereto."

1309. In the additional written statement dated 28/29 November, 1963, the defendants no.3 and 4 (Suit-4) in para 38 said:

"Emperor Babar never built a mosque as alleged by the plaintiffs and...."

1310. Defendant No.13/1 (Suit-4) Dharam Das in his written statement dated 24th December, 1989 in para 1 said:

"1. That the contents of paragraph 1 of the plaint are denied. It is submitted that Babar was not a fanatic but a devout Muslim who did not believe in destroying Hindu temples, it was Mir Baqi, who was a Shia and commanded Babar's hords, who demolished the ancient Hindu temple of the time of Maharaja Vikramaditya of Sri Rama Janma Bhumi, and tried to raise a mosque-like structure in its place with its materials."

1311. Doubting the very factum whether the disputed

building was constructed by Babar during his regime the defendant no.20 (Suit-4) in his written statement dated 5th November, 1989 in paras 32, 33, 34, 35 and 36 has said:

> *"32. ...There appears to be no description of any so called Baburi Masjid allged to have been constructed by Emperor Babur.*
>
> *"33. That the Faizabad Gazetteer, Volume 43 (XLIII) of the District Gazetteers of the United Provinces of Agra and Avadh compiled by Sri H.R. Nevill, I.C.S., published by Government Press in 1905 under the topic 'Directory' while dealing with Ayodhya (at page 12-F) affirmed that "The Janmsthan was in Ramkot and marked the birthplace of Ram". Later on, it is said, "The Mosque has two inscriptions, one on the outside and the other on the pulpit; both are in Persian and bear the date 935 Hizri, of the authensity of the inscriptions there can be no doubt, but no record of the visit to Ayodhya is to be found in the Musalman historians. It must have occurred about the time of his expedition to Bihar." It is to be noted that nothing has been found so far to establish the visit of Babur to Ayodhya. Only on the basis of these two inscriptions, the conclusion is being drawn all round that the mosque was built by Babur. It is very doubtful that it was so built. It appears to be a creation of Britishers sometimes in the Nineteenth century in order to create hatred between the two communities of India viz. Hindus and Muslims and thereby implement an effective policy of communal disharmony, and thereby create problems of law and order so that their annexation of Avadh may be justified on moral grounds. The script on the outer inscription of the mosque*

is pretty bold and more artistic, a style which was developed sometimes in the middle half of the Nineteenth century while the inner inscription is very fine and thin, a style developed in the latter half of the Nineteenth century. It is therefore absolutely certain that on the basis of these two inscriptions it cannot be concluded that either the mosque was build in 1528 AD or in 935 Hizri, or it was built by Emperor Babur or his Governor Mir Baqui, as stated therein."

"34. That in the U.P. District Gazetteers Faizabad published by U.P. Government in 1960 and edited by Smt. Esha Basanti Joshi at page 47 quotes the inscription inside the mosque and relies on it for the date of construction of the mosque. The translation of the inscription in Persian given by her is as follows-

"By the command of Emperor Babur whose justice is an edifice reaching upto the very height of the heavens. The good hearted Mir Baqui built this alighting- place of angels; Buvad Khair Baqi: (May this goodness last for ever). The year of building it was made clear when I said Buvad Khair Baqi (=935)."

This also shows that for both the things i.e. for year of construction and for naming Emperor Babur as the builder of the mosque, authorities have relied upon only on two inscriptions found in the mosque."

"35. That in the Babur Nama translated by Annette Susannah Beveridge, Vol. II published by Sayeed International, New Delhi, in appendix 'U' the heading is 'The Inscriptions of Babur's mosque in Ayodhya (Awadh)'. While reproducing the inscription inside the mosque, and

translating it at page IXXVIII after quoting the cuplets and giving its translation and working out the number 935 to identify the year, the author at the bottom appended the following notes, which is very important-

'Presumably the order for building the mosque was given during Babur's stay in Aud (Ayodhya) in 934 A.H. at which time he would be impressed by the dignity and sanctity of the ancient Hindu shrine- it (at least in part) displaced and like the obedient follower of Muhammad he was in intolerance of another Faith, would regard the substitution of a temple by a mosque as dutiful and worthy. The mosque was finished in 935 A.H. but no mention of its completion is in the Babur Nama. The diary for 935 A.H. has lost much matter, breaking off before where the account of Aud might be looked for. On the next page the author says, 'The inscription is incomplete and the above is the plain interpretation which can be given to the cuplets (aforesaid) that are to hand."

"36. That the Britishers in achieving their object got a book published in 1813 by Laiden and known as Memoirs of Badruddin Mohd. Babur, Emperor of Hindustan and for the first time in this book it was stated that Babur in March 1528 passed through Ayodhya and even though Laiden has not mentioned that Babur in Ayodhya demolished the Hindu temples and built the mosque in their place, yet the British rulers gave currency to this false news that Babur demolished the Ram Janma Bhumi Mandir and constructed the Baburi Masjid thereon. The translated Babur Nama, Memoirs of Babur, published in 1921 and translated by M.A.S. Beveridge has mentioned that Babur

never interfered with the religion of others and even though he visited various Hindu temples he appreciated their archaeological beauties. It appears there are no evidences that Babur ever visited Ayodhya or demolished any Hindu temple in Ayodhya. To claim the disputed mosque as one built by Babur 400 years ago by the plaintiffs is therefore wholly wrong. In fact, in Faizabad Gazetteers 1960 at page 352, it is said 'It is said that at the time of Muslim conquest there were three important Hindu shrines (Ayodhya) and little else, the Janmasthan temple, the Swargadwar and the Treta-ke-Thakur. The Janmasthan was in Ramkot and marked the birth place of Ram....."

1312. In para 41, 46, 49 and 50, defendant no.20 though has given some other reasons to show that the building in dispute was not constructed in 1528 AD by Babar but they are more in the nature of characteristics of mosque etc. and therefore, we propose to refer while considering those issues.

1313. Sri Zafaryyab Jilani submitted that it has never been doubted by any authoritative Historian and others that the building in dispute was constructed in 1528 AD under the command of Babar by one of his commander Mir Baki. He admits that the said findings are based on the inscriptions fixed on the disputed building, which came to be noticed for the first time by Dr. Buchanan in the earlier part of 19th century and has consistently been acknowledged and affirmed thereafter by several authorities like Robort Montgomry Martin, P. Karnegi, Alexander Cunningham, W.C.Benett, A.S.Beveridge as well as the ASI. He contends that for the first time this novel argument has been advanced by defendant no. 20 raising doubt over

whether the building in dispute was constructed by Babar or not though nothing has been placed on record to prove the same.

1314. Per contra, challenging the very basic submission of the plaintiffs (Suit-4) about construction of the disputed building by Babar in 1528 AD based on the inscriptions installed thereat, Sri Misra very ably argued that the basic premise itself is unsubstantiated, baseless and false. He said that it is an admitted position that Babar was a Sunni Muslim governed by Hanafi school of law as mentioned by A.S. Beveridge in her work titled as **"Babur-Nama"** *(hereinafter referred to as the "Babur-Nama by Beveridge")* translated in English from original Turki text, first published in 1921 (reprinted in 2006 by Low Price Publications, Delhi). On page 15, faith of Babur is described in the following manner:

> *"He was a true believer (Hanafi mazhablik) and pure in the Faith, not neglecting the Five Prayers and, his life through, making up his omissions. He read the Qur'an very frequently and was a disciple of his Highness Khwaja 'Ubaidu'l-lah (Ahrari) who honoured him by visits and even called him son."*

1315. Sri Misra points out that in "Babur-Nama by Beveridge" the daily description of Babar by two days in Hijra 934 has not been given though for the entire earlier part a *de die-diem* description is given. However, in Hijra 935, narration of events for about 5 months and more is missing. Babar when invaded India entered from the northern front and defeated Sultan Ibrahim Lodi, Emperor of Delhi in the battle of Panipat in April, 1526 AD. He became king/Emperor of the entire area of which Sultan Ibrahim Lodi was exercising his authority as Emperor of Delhi. There was no change of reign in the matter of

religion inasmuch as Ibrahim Lodi was also a Muslim and Babar defeated him, therefore, the Muslim rule continued. There was only a change of the Ruler. So far as Oudh is concerned, it was ruled directly by Delhi Emperor, i.e., Ibrahim Lodi and with his defeat the said area immediately fell within the authority of Babar. In **"Babur-Nama by Beveridge"** the arrangement of Oudh area, has been narrated at page 527 under the head "Action against the rebels of the East" as under:

> *"Sl. Ibrahim had appointed several amirs under Mustafa Farmuli and Firuz Khan Sarang-khani, to act against the rebel amirs of the East (Purab). Mustafa had fought them and thoroughly drubbed them, giving them more than one good beating. He dying before Ibrahim's defeat, his younger brother Shaikh Bayazid-Ibrahim being occupied with a momentous matter-had led and watched over his elder brother's men. He now came to serve me, together with Firuz Khan, Mahmud Khan Nuhani and Qazi Jia. I shewed them greater kindness and favour than was their claim; giving to Firuz Khan I krur, 46 laks and 5000 tankas from Junpur, to Shaikh Bayazid I krur, 48 laks and 50,000 tankas from Aud (Oude), to Mahmud Khan 90 laks and 35,000 tankas from Ghazipur, and to Qazi Jia 20 laks."*

1316. Sri Mishra says that Shaikh Bayazid, was an appointee of Babar but soon after appointment he (Bayazid) revolted and declared himself independent. About the appointment of Bayazid, on page 544, **"Babur-Nama by Beveridge"**, it says:

> *"Humayun, in accordance with my arrangements, left Shah Mir Husain and Sl. Junaid with a body of effective*

braves in Juna-pur, posted Qazi Jia with them, and placed Shaikh Bayazid (Farmuli) in Aude (Oude).”

1317. When Bayazid revolted, to defeat him and some other rebel commanders, the Babar while proceeded towards Bihar moved via Ayodhya, Jaunpur etc. On 28th March, 1528 he reached near Ayodhya. However there is nothing in Babur-Nama to show that he ever entered the city. When Babar came near Ayodhya, the name of his commander was “Chin Timur”. There is no mention of any person as “Mir Baqi” in the entire **Babur-Nama by Beveridge**, who ever entered Ayodhya as a commander of Baber’s army or otherwise. Bayazid fled away from Ayodhya hearing arrival of Babar and his army. Baber’s commanders chased him from one place to another. Bayazid was ultimately killed by Humayun. There is no mention of a battle between Babar or his army and the then ruler of Ayodhya in 1528 AD. There was no occasion of burying muslims who were killed in the alleged battle in the graves, claimed to exist near the disputed site.

1318. **“Babur-Nama by Beveridge”** shows that Babar was not fond of destroying temples and instead he visited temples having idols at Gwalior and appreciated the Artistry thereof. It is only at one place where he found naked idols being extremely indecent which he ordered to destroy but not otherwise. Sri Mishra says that the very basis of the pleadings of Muslim parties that there was a battle between Babar and the then ruler of Ayodhya in 1528 AD is false and unsubstantiated.

1319. Referring to the inscriptions which are the basis of identifying the period of construction of disputed building by Babar i.e. 1528 AD, he said that the alleged inscriptions are

nothing but a subsequent forgery. They were not installed in 1528 AD as claimed. He submits that the first reference of the inscription is found in **"Gazetteer of Territories under the Government of East India Company and of the Native States on the Continent of India"** by **Edward Thornton**, first published in 1858 AD (reproduced in 1993 by Low Price Publications, Delhi) and at page 739 it says that according to native tradition the temples were demolished by Aurangzabe, who build a mosque on the part of the site. The falsehood of the tradition is however, proved by an "inscription on the wall of the mosque", attributing the work to the conqueror Babar, from whom Aurangzabe was fifth in descent. He says that the said inscription has not been quoted in the said gazetteer. However, the Archaeological Survey of India in its book titled as **"The Sharqi Architecture of Jaunpur"** by A. Fuhrer, first published in 1889, reprinted in 1994 has reproduced the "inscriptions" said to be found on the disputed building at Ayodhya and whatever is mentioned therein has much difference to the text of the inscriptions quoted by Beveridge in her book i.e. "Babur-Nama". This difference fortify the fact that they were subsequently implanted. Some words are different which show that the said building was not constructed at the instance of Babar in 1528 AD.

1320. Fuhrer in Chapter X of the book **"The Sharqi Architecture of Jaunpur"** has given details of inscriptions found at the disputed building at Ayodhya. He points out that Beveridge claimed that texts of the inscriptions on Babar's Mosque in Ayodhya were received by her through her husband's inquiry made from the Deputy Commissioner of Faizabad. She has given details of the said inscriptions in Appendices 'U' at

page lxxvii in 'Babur-Nama by Beveridge' (supra). The footnote, item two, says that a few changes in the turm of expressions have been made for clearness sake. Again with respect to the date of building she has tried to read it as 935 and in the footnote she says that presumably the order for building the mosque was given during Babur's stay in Aud (Ajodhya) in 934 A.H. though Babur-Nama itself shows that Babar reached near Ayodhya at the end of 934 A.H. and only two days of Hizra 934's description is missing.

1321. Sri Misra then referred to the third version of inscriptions published by ASI in **"Epigraphia Indica Arabic and Persian Supplement (in continuation of Epigraphia Indo-Moslemica) 1964-1965"** (reprinted in 1987). The chapter under the heading "Inscriptions of Emperor Babar" is said to have been written by Late Maulavi M. Ashraf Husain. The inscriptions dated A.H. 935 from Ayodhya are at page 58, 59, 60, 61 and 62. The opening part of the Chapter make certain comments about writer in the following words:

> *"A rough draft of this article by the author, who was my predecessor, was found among sundry papers in my office.* ***At the time of his retirement in 1953****,* ***he had left a note*** *saying that it might be published after revision by his successor. Consequently, the same is published here* ***after incorporation of fresh material and references and also, extensive revision and editing****. The readings have been also checked, corrected and supplemented with the help of my colleague, Mr. S.A. Rahim, Epigraphical Assistant,-Editor."*

1322. On page 58 the author refers to the reading of inscriptions by A. Fuhrer and says that he (Fuhrer) has

incorrectly read it. In the last paragraph it says that the mosque contains a number of “inscriptions”. On the eastern facade is a *chhajja* below which appears a Quranic text and above an inscription in Persian verse. On the central mihrab are carved religious texts such as the Kalima (first Creed), etc. There was another inscription in Persian verse built up into right hand side wall of the pulpit. Of these, the last two mentioned epigraphs have disappeared. They were reportedly destroyed in the communal vandalism in 1934 AD but the writer of the chapter Sri Ashraf Husain managed to secure an inked rubbing of one of the them from “Sayyid Badru'l-Hasan of Faizabad”. He further says that the present inscription restored by the muslim community is not only in “inlaid Nasta'liq” characters, but is also slightly different from the original, owning perhaps to the incompetence of the restorers in deciphering it properly. The author further declare the translation and reading of inscription by “Fuhrer” and Beveridge both incomplete, inaccurate and different from the text. Sri Hussain has based his entire conclusions from the estampage claimed to have been received from Saiyyid Badru's Hasan of Faizabad whose credentials have not been given. In the bottom note it has said that the tablet was found in 1906-07 AD by Maulavi M. Shuhaib of the office of the Archaeological Surveyor, Northern Circle, Agra (Annual Progress Report of the Office of the Archaeological Surveyor, Northern Circle, Agra, for 1906-07, Appendix-D. The author had deciphered the three inscriptions on pages 59, 60, 61 and 62.

1323. Sri Mishra submits that the differences in inscriptions appear for the reason that the same were not installed in 1528 AD for the simple reason that no such

construction at all took place at that time. He refers to the record of Tieffenthaler and submits that Tieffenthaler himself was a fine scholar with an unusual talent for languages. Besides his native tongue (Austrian) he understood Latin, Italian, Spanish, French, Hindustani, Arabic, Persian and Sanskrit. He argued with vehemence that had such inscriptions been available when Tieffenthaler visited Ayodhya after arriving in India in 1740 AD, he himself could have read it and would not have said in his work that an existing temple was demolished by Aurangzabe to construct three domed structure thereat (also mention that some says that the demolition and construction was made by Babar). Had the inscriptions been there, he would have clearly written that the said work was of Babar and not by Aurangzabe.

1324. Sri Mishra says that the actual demolition and construction, as the case may be, took place later on and was not done by Babar. He says that Mir Baqi is not a name but 'Baqi' means 'Bakshi', i.e., commander of an army of 100 men and 'Mir' is a title used to be given to civilian muslims at that time. Besides, there is no mention of any one named “Mir Baqi” who stayed at Ayodhya and undertook the above job. He submits that forgery of inscriptions by replacing and travelling from one place to another is not unknown. In this regard he referred to the inscriptions of “Rajputon Ki Masjid”. He also points out that “Fuhrer” mentions of only two inscriptions while in **“Epigraphia Indica 1964-65”** there is mention of three/four inscriptions. According to him the inscription might have been installed between 1776 to 1807 though the building in dispute might have been raised earlier but neither by Babar nor during his time nor by anyone at his instance.

1325. The other learned counsels appearing on behalf of

Hindu parties adhered to their stand that a Hindu temple was demolished in 1528 AD under the command of Babar and thereafter building in dispute was constructed. However, the learned counsels submitted that their stand is not taken to be in refuting or challenging the stand taken by Sri P.N.Mishra, learned counsel appearing on behalf of defendant no.20 (Suit-4) and the same be examined by this Court on the basis of its own merits, in the light of the arguments advanced by him as also contradicted by the learned counsels appearing on behalf of Muslim parties and they (Hindu parties) be not treated to have joined this issue with the Muslim parties. They however submit that their basic premise continue that is demolition of temple at the birthplace of Lord Rama and construction of disputed building.

1326. The question as to whether the building in dispute was constructed in 1528 AD at the command of Babar or by Babar himself is a very important and pivotal issue, which may have its reflection on several other issues in all these connected suits. We proceed to examine this aspect of the matter very carefully.

1327. The root of the entire controversy is the disputed building which is said to have been constructed by Emperor Babar through his Commander/ Governor/Confederator, Mir Baqi. In the pleadings of muslim parties, though there is some difference in the language, but in an undisputed manner it has been pleaded that the building in dispute got constructed in 1528 AD by Emperor Babar after his conquest of India through his Commander/Governor/Confederator, Mir Baqi. This is what is the stand also taken by plaintiffs (Suit-5) and some other Hindu Parties.

1328. Though already referred, but in a concised recapitulation, we may tell hereat that in para 1 of the plaint (Suit-4) it is averred that in Ayodhya there exist an ancient historic mosque commonly known as "Babri Masjid", built by Emperor Babar more than 433 years ago after his conquest of India and his occupation of the territories including the town of Ajodhya. It is also said in para 2 that on the land adjoining the said mosque, on all the four sides, there existed graveyard of Muslims who lost lives in battle between Emperor Babar and the previous ruler of Ajodhya. Suit having been filed in 1961, 433 years took it back to 1528 AD.

1329. In Suit-1, defendants No.1 to 5 in para 2 of their written statement dated 21st February, 1950, have said that the disputed building is a mosque constructed by Emperor Babar. In para 9, (additional pleas), it is averred that the disputed building is Babri mosque constructed by Emperor Babar of India, after conquest of India, during his stay at Ayodhya through his Minister/Commander Mir Baqi. The building in dispute was constructed in 1528 AD. Similar averments are made by defendant no.10 i.e. Sunni Central Waqf Board (Suit-1) in paras 2 and 10 of their written statement.

1330. In Suit-3, defendants No.6 to 8 in para 15 of their written statement, have said that the disputed building is a Babri Mosque constructed by Emperor of India through his Minister/Commander Mir Baqi in 1528 A.D.

1331. In Suit-5, defendant No.4 Sunni Central Waqf Board in para 13 of written statement dated 26/29 August, 1989, has said that the property in dispute is an old mosque known as Babri Mosque constructed during the regime of Emperor Babar. This has been reiterated in para 24. However, in para 24-B

defendant No.4 states that the land in question undoubtedly belong to the State when the mosque in question was constructed on behalf of the State. He further says that Emperor Babar built the Babri Mosque on a vacant land lay in his State territory and did not belong to any one . It could very well be used by his officers for the purpose of mosque especially when the Emperor himself consented and gave approval for construction of the said mosque.

1332. The defendant No.5 (Suit-5) in para 40 of written statement dated 14/21st August, 1989, has averred that according to the inscription in the mosque, the same was constructed by Mir Baqi, one of the Commander of Babar in 1528. The existence of mosque in 1528 AD has been reiterated in para 67. The written statement of defendant No.5 has been adopted by defendant No.6 vide his application dated 21/22 August, 1989.

1333. Defendant No.24 (Suit-5)in para 12 has referred to the period of construction of the disputed building as 1528 AD. However, in para 15 there is slight change in the stand to the effect that Emperor Babar never came to Ayodhya and the Babri Mosque was built by Mir Baqi and not Babar. The period of construction as 1528 has been reiterated in para 22.

1334. Defendant No.25 (Suit-5) though in general supported the claim of other Muslim parties but in the written statement dated 16/18 September, 1989 it has not disclosed any particular date of construction of the building in dispute. The pleading therefore is that the building in dispute was constructed in 1528 AD by Babar or with his consent by Mir Baqi, a senior officer of Emperor Babar, but the basis on which the said date is mentioned is not given in the pleadings.

1335. Except the defendant No.5 (Suit-5) who in written

statement has given the basis of such averment i.e. the inscription installed on the building in dispute, no further details of such inscription has been given either by him or anyone else. We however find that the only foundation is the inscription on the disputed building to claim the period of construction as would appear hereinafter.

1336. On behalf of the plaintiffs (Suit-4), 32 witnesses have been examined in all which include Expert Historians (as they claimed) namely Suresh Chandra Mishra, PW 13; Sushil Srivastava, PW 15; Prof. Suvira Jaiswal, PW 18; and Prof. Shirin Musvi, PW-20. Besides, a large number of witnesses examined on facts have deposed mainly about continuous offering of Namaz in the disputed building till December, 1949, possession of Muslims on the disputed building but some of them have also said about date of construction of the disputed building being 1528 AD based on their knowledge derived from various sources but basically derived from the inscriptions said to be existed in the disputed building, inside and outside, and some on the basis of History books without referring any name. Some others who claimed Expert Archaeologists have also said same thing on this aspect.

1337. It would thus be appropriate to see what has been said by these witnesses about the date/period of construction of the disputed building as also the basis of such information/opinion.

1338. **P.W.13 Sri Suresh Chandra Mishra** in his cross examination has said:

''बाबर मेरा चुनिंदा विषय था।'' (पेज 54)

"Babur was my favourite subject." (E.T.C.)

''मेरे अध्ययन के अनुसार बाबर अवध से होकर गुजरे थे। यह घटना सन् 1528 के आसपास की है। . . . विवादित ढॉचे का निर्माण सन 1528

में हुआ था। इस बात का जिक्र भी आता है कि सन् 1528 में यह किस समय निर्माण हुआ था, लेकिन मुझे अब याद नहीं आ रहा। ***अभिलेख के परिशिष्ठ में इसका जिक्र आता है।*** *'' (पेज 69)*

"As per my study, Babur had passed through Oudh. This incident occurred in and around 1528 . . . The disputed structure was constructed in 1528. There is also a mention as to which time in 1528 this construction was raised but I do not remember that at present. ***It is mentioned in the appendix to the document.*** *" (E.T.C.)*

''जिस समय मैं मौके पर गया था, तो ***मैंने इस अभिलेख यानी इन्सकिप्सनज को भी महत्वपूर्ण समझा था। लेकिन यह अरबी में थे।*** *क्योंकि यह अतिरिक्त सूचना है और विश्वसनीय सूचना है इसलिए इसे मैं अब बता रहा हूँ। पहले महत्वपूर्ण बताये गये चिन्हों और चीजों में इनका जिक्र मैंने नहीं किया था।'' (पेज 71)*

"At the time when I visited the site, ***I considered only these records, viz., inscriptions to be important. But they were in Arabic language.*** *As that is an additional and credible information, I am telling it now. I did not make mention of these things in the symbols and objects earlier stated to be important." (E.T.C.)*

''यह अभिलेख अरबी में थे और मैं अरबी भाषा नहीं जानता। ***ऐसा नहीं है कि मैं आदतन झूठ बोलता हूँ।*** *14.07.98 को इस अदालत में मेरा बयान हुआ था। उसमें मैंने यह वाक्य लिखवाया था कि ''वहॉ पर जो शिलालेख था, वह फारसी में लिखा हुआ था लेकिन उसके बारे में मुझे पहले से पता था। मेरा आज वाला बयान ठीक है कि वह अभिलेख अरबी में लिखा हुआ था। वास्तव में वह शिलालेख नहीं, अभिलेख था। मेरा पहिला वाला बयान कि वह फारसी में लिखा हुआ था, गलत था। यह मेरे समझने में गल्ती के कारण से हो सकती है।* ***क्योंकि मैं न ही तो फारसी जानता हूँ और न अरबी।*** *मैं लैटिन भी नहीं जानता।''*

(पेज 72)

"These records were in Arabic and I do not know

Arabic language. ***It is not that I am a habitual liar.*** *I on 14.07.98 gave my statement in this court. In the statement I had caused it to be recorded that 'the inscription which was there, was written in Persian language but I had been in the know of that from earlier'. My today's statement is correct that the record was written in the Arabic language. Actually it was a record, not an inscription. My earlier statement to the effect that it was written in Persian language, was incorrect. It may be due to mistake in understanding it,* ***because I know neither the Persian language nor the Arabic language.*** *I do not know Latin either." (E.T.C.)*

"मैंने अपने अन्वेषण के समय जब पहली–पहली बार वहॉ पर इन्सक्रिप्सन देखें तो मैंने किसी को बुलवाकर उन्हें नहीं पढ़वाया। मैंने उस इन्सक्रिप्सन की किसी कागज पर नकल नहीं उतारी। मैंने कोई फोटो भी नहीं लिया। मैं पुस्तक साथ लेकर गया था। मैं सिर्फ मिसेज बेवरीज की किताब लेकर गया था। . . . ये वही इन्क्रिप्सन हैं, जो मुझे कल दिखाई गई पुस्तक के रोमन पृष्ठ –77 से 79 पर दर्शायी गयी हैं। मैंने मौके पर उन इन्सक्रिप्सन्स का मिलान इस पुस्तक में दिये गये इन्सक्रिप्सन्स के साथ किया और फिर इस निष्कर्ष पर पहुॅच गया कि यह वही मस्जिद है। यह बातें 1989 या 1990 की हैं, लेकिन एक्जेक्ट तिथि मैं नहीं बता पाऊॅगा।"(पेज 79)

"In course of my investigation, when I for the first time saw inscriptions there, I did not call anybody to read them out to me. I copied the inscription on paper. I did not take any photograph either. I had gone there with a book. I had gone there only with the book written by Mrs. Beveridge. . . . . These are those inscriptions that are shown on Roman pages from 77 to 79 of the book shown to me yesterday. On the site I tallied those inscriptions with the inscriptions given in this book, and then I came to an

inference that it was that very mosque. This incident pertains to 1989 or 1990 but I am not in a position to tell the exact dates." (E.T.C.)

"अन्वेषण के लिए मैं अपना सारा सामान इस परिसर के बाहर रखकर खाली हाथ अन्दर परिसर में गया था और बाहर आकर मैंने अपना सामान वापस ले लिया। मैं अपना सारा सामान जिसमें मेरी पुस्तक भी शामिल थी, अपने एक साथी के पास परिसर से बाहर उस स्थान पर छोड़ गया था, जहॉ पुलिस चेक कर रहीं थी।" (पेज 79–80)

"In order to carry out investigation, I had gone inside the premises empty-handed and after keeping all my belongings out of the premises, and after coming out I took all the belongings. I had left all my belongings, including my book also, with a friend at a place outside the premises where the police was checking." (E.T.C.)

"प्रश्नः क्या आपने परिसर से बाहर रखी हुई अपनी पुस्तक में दी गई अभिलेखों की शैली और लिपि का मुकाबला परिसर में वाका भवन पर लगे अभिलेखों के साथ बाहर आकर कर लिया था?

उत्तरः मैंने बाहर आकर मेल–मिलान किया था। और अन्दर जाने से पहले उसे समझकर गया था।

यह दोनों प्रक्रियायें उसमें शामिल थी कि अन्दर जाने के पहले उस पुस्तक में दिये गये अभिलेखों को उनकी शैली और लिपि के साथ अपने मानस पटल पर अंकित किया और अन्दर जाकर भवन पर लगे अभिलेखों के साथ उसका मिलान किया और इसी तरह से अन्दर लगे अभिलेखों को देखकर उनकी शैली और लिपि को अपने मानस पटल पर अंकित कर लिया और बाहर पुस्तक में दिये गये अभिलेखों से उनका मिलान कर लिया।" (पेज 80)

"Question:- After coming outside, did you tally the style and script of the records given in your book kept outside the premises with the inscriptions at Waqua Bhawan in the premises?

Answer:- After coming outside I tallied the records

and before going inside I had understood them.

This exercise included two processes, which were that before going inside I had recorded the style and script of the records in my mind and on going inside I tallied them with the inscriptions in the building and that I registered the style and script of the inside inscriptions in my mind and on coming out I tallied them with records given in the book." (E.T.C.)

"प्र0 – यदि आपको एपीग्राफी का एक्सपर्ट कहा जाये तो सही होगा या गलत?

उ0– शालीनता से मैं एपीग्राफी का जानकार होना स्वीकार करता हूँ।

प्र0– आप से प्रश्न किया गया था और यह जानना चाहता हूँ कि आप अपने को एपीग्राफी का विशेषज्ञ मानते हैं या नहीं?

उ0– यह यदि आत्मश्लाघा या अपनी तारीफ न समझी जाये तो मैं विनम्रतापूर्वक कह सकता हूँ कि आप मुझे इस वर्ग में रख सकते हैं।"

(पेज 111)

"Question:- If you are called an expert in epigraphy, will it be correct or incorrect to say such?

Answer:- With humility I accept my being conversant with epigraphy.

Question:- You were queried and I want to know whether you consider yourself to be a specialist in epigraphy or not ?

Answer:- If it is not taken to be self-praise, I can humbly say that I can be placed under this category."(E.T.C.)

"अयोध्या के बारे में मैंने जो अध्ययन किया है, वह गहन अध्ययन भी है और शोध भी है।" (पेज 170)

"The study which I have made with regard to Ayodhya, is no only a deep study but a research

also."(E.T.C.)

*''मुझे याद नहीं आ रहा कि बाबरनामें में उसके द्वारा या उसके राज्यकाल में अयोध्या में किसी मस्जिद के निर्माण का जिक्र आया है या नहीं। **बाबरनामा में जिक्र मीरबाकी का है न कि ''बाकी'' का।'' (पेज 196–197)***

*"I fail to remember whether or not the Baburnama makes mention of the construction of any mosque in Ayodhya by him or during his reign. **The Baburnama makes mention of Mir Baqi, not of 'Baqi'.**" (E.T.C.)*

''मुझे इस समय स्मरण नहीं आ रहा कि बाबरनामा में ''बाकीताशकन्दी'' और ''बाकीशगावल'' का भी जिक्र आया है या नहीं। अगर ऐसा कोई जिक्र आया है तो वह उसके सेनापति मीरबाकी के लिए नहीं हो सकता।'' (पेज 197)

"At present I fail to remember whether 'Baqitashkandi' and 'Baqisadwal' find mention or not in Baburnama. If there is any such reference, it cannot be for his army-chief Mir Baqi." (E.T.C.)

''यह कहना गलत है कि परशियन भाषा का अभिलेख 1934 में कहे गये दंगों के बाद लगाया गया हो।'' (पेज 198)

"It is wrong to say that an inscription in Persian language was engraved after the riots which allegedly erupted in 1934." (E.T.C.)

*''बाबर ने **बाकीताशकंदी को अवध का प्रशासक बना दिया था।** मुझे यह बात स्पष्ट नहीं है कि यह बाकीताशकंदी वही व्यक्ति था या नहीं जिसे मीरबाकी के नाम से जाना जाता है। सम्भावना तो यही है कि बाकीताशकंदी और मीरबाकी एक ही व्यक्ति के 2 नाम हों। मैं इस बात को निश्चित रूप से नहीं कह सकता सिर्फ सम्भावना ही है कि यह दोनों नाम एक ही व्यक्ति के थे।*

***इन्सक्रिप्शन के बारे में एक जर्नल इपीग्राफिका इंडिका प्रकाशित हुई हैं उसको मैंने पढ़ा है।** वास्तव में यह एक जरनल है जो हर साल प्रकाशित होता है। इसके एक अंक में एक इंसक्रेपशन*

आया है, एक लेख आया है जिसमें बाबरी मस्जिद के अंदर 14 लाईनों के अभिलेखों का जिक्र है। इसमें 3 शिलालेखों का जिक्र है। मैंने कल इसी अदालत में बयान दिया था कि वहां पर केवल एक शिलालेख था। ***वास्तव में मेरा वह बयान जबान के स्लिप करने के कारण हुआ। और इस इम्प्रेशन में हुआ कि वहां किसी नये जाली इन्सकपशन का जिक तो नहीं हो रहा।*** *''*

(पेज 213)

*"**Babur appointed Baquitashkandi administrator of Oadh.** I am not clear whether or not this Baquitashkandi was the same person that has come to be known as Mir Baqi. The possibility is that Baquitashkandi and Mir Baqi are two different names of one and the same person. I cannot say this definitely. It is just a possibility that these two names were of the same person.*

***I have read a journal 'Epigraphica Indica' in regard to inscription.** Actually, it is a journal published every year. One of its editions makes mention of an inscription and contains an article which makes mention of inscriptions with 14 lines inside the Babri mosque. It makes mention of three pillar inscription. Yesterday I gave a statement in this very court that there was just one pillar inscription there. **Actually, that statement of mine was due to slip of tongue and under the impression that there should not be any mention of any new fake inscription.**"(E.T.C.)*

''मैंने जब विवादित भवन का निरीक्षण किया तो ***मौके पर 2 शिलालेख देखे थे। एक शिलालेख तो बाहरी द्वार पर लगा था और दूसरा सम्भवतः पेलपिट मिम्बर पर लगा था।*** *उसके ऊपर लगा हुआ था। निरीक्षण से पहले मुझे यह जानकारी नहीं थी कि वहां पर 3 शिलालेख हैं। मुझे केवल 2 का ही पता था। मुझे 1990–91 के पास यह लगा था कि वहां पर 3 शिलालेख हैं। यह जानने के बाद कि वहां पर*

3 शिलालेख है मुझे निरीक्षण करने का मौका नहीं मिला और वैसे भी पढ़ने के पश्चात मेरी तसल्ली हो गयी कि 3 शिलालेख हैं और उससे ही मेरी जिज्ञासा की संतुष्टि हो गयी। शिलालेखों का निरीक्षण करने से पहले ही मुझे यह जानकारी हो चुकी थी कि उन पर क्या कुछ लिखा हुआ है।''

(पेज 214)

''When I observed the disputed building, ***I saw two pillar inscriptions on the site. One pillar inscription was at the exterior door and the other one was perhaps at fall fiat member.*** *It was above it. Prior to my observation, I did not have the knowledge that three pillar inscriptions were there. I had knowledge only of two ones. In and around 1990-1991 I came to know that three inscriptions are there. After knowing that three pillar inscriptions are there I did not have the opportunity for observation. As a matter of fact, after reading I got satisfied that three inscriptions are there and that alone satisfied my curiosity. Even before observation of the pillar inscription, I had got the information what was written on them.'' (E.T.C.)*

''जहां तक मैं समझता हूँ, मुझे इस अदालत में गवाही के लिए इस विषय पर बुलाया गया है कि जिस भूमि पर विवाद है आया कि वहॉ किसी मन्दिर को तोड़कर मस्जिद बनाई गई थी या नहीं मैंने यह बयान दिया है''(पेज 224)

''As far as I understand, I have been summoned in this court to depose whether or not a mosque was constructed by demolishing a temple on the disputed site. I have given this statement,'' (E.T.C.)

*''मैंने कुछ कदम उठाये थे विवादित भवन की ऐतिहासिकता को जानने के लिए। ....**उस स्थल पर एक अभिलेख था,** जो बाबरी मस्जिद में था, उसको देखा। .... **अभिलेख से मेरा मतलब बाबरी मस्जिद में लगे हुए इन्सकिप्सन से है।**'' (पेज 276)*

''I had made some attempts to know the history of the

*disputed structure. .... **I had seen a record at that place**, which was within the Babri mosque. .... **By record, I mean the inscription at the Babri mosque.**" (E.T.C.)*

''मुझे परशियन नहीं आती।'' (पेज 287)

"I do not know Persian." (E.T.C.)

1339. The witness has claimed himself to be an Expert Historian and on page 111 has also claimed that he may be placed in the category of Expert in "Epigraphy". His statement on page 54 shows that Babar was his favourite subject. He is M.A. in Ancient History (Culture and Archeology) and Ph.D. He claims that having undergone a deeper inquiry and study on the dispute he concluded that the mosque was constructed by Mir Baqi and for this purpose there was no destruction of any kind at the disputed site. He referred to Skand Puran, Baburnama, his visit to Ayodhya before 1992 and the report (Exhibit D25, Suit-5) (Paper No. 110C1/96) submitted to the Government of India by Prof. R.S. Sharma, Prof. D.N. Jha and Prof. Suraj Bhan alongwith Prof. Athar Ali being his study material. However, he admits that he did not find any reference of construction of the disputed building/Babari mosque in Baburnama and it also contains no reference of Mir Baqi. On the one hand he accepts of being expert in Epigraphy (page 111) but simultaneously he admits that neither he knows Arabic nor Persian nor Latin, therefore, he had no occasion to understand the language in which the alleged inscription was written. In his statement dated 14.07.1998 he claims that the inscriptions were written in Persian but later on page 72 he retracted and said that the inscriptions were written in Arabic and his earlier statement was wrong for the reason that neither he understand Persian nor Arabic. He attempted this Court to believe in his knowledge of

History being an Expert Historian in Ancient History and that he has made a deep study on the subject which is like a research and therefrom he has come to know that the building in dispute was constructed in 1528 AD by Mir Baqi but his cross examination shows that for arriving at the said conclusion, without any further inquiry into the matter, what was written about the inscriptions in Epigraphica Indica (1964-65) as well as Baburnama by Beveridge and on that basis he believed and concluded as above. The slipshod and casual manner in which he made inquiry about inscriptions is further interesting. On page 79 he says that he carried inside the disputed building, the book "Baburnama by Beveridge" and therefrom compared the script of the inscriptions with the text quoted in the said book and since the matter relate to 1989/1990 he is not able to tell the correct date but thereafter on page 79/80 he admits that for security reasons his entire belongings were made to be left outside the premises and he went inside the disputed building empty handed. The book was also left outside where police checking was going. On page 80 when his statement about comparison of the text of the inscription with the book was further examined he says that he kept the text after reading the book in his mind and compared it with the inscription. This wonderful memory of the witness has to be seen in the light of the fact that the witness admits that he knows neither Persian nor Arabic. On page 79 he also admits that he also do not know Urdu language.

1340. The correctness of his statement can further be scrutinised in the light of what has been written by Maulvi F. Ashraf Hussain in his paper published in Epigraphica Indica (1965) where he admits that the original two inscriptions were

damaged in 1934 and replaced by new one. Therefore, in 1989/90 what PW 13 saw, were the inscriptions replaced in 1934 and not that text which was available to Mrs. Beveridge, she has quoted in her book published in 1921. The difference between the text of the inscriptions quoted by Beveridge and that which was available to Maulvi Ashraf Hussain which he published in Epigraphica Indica, we would be demonstrating a bit later. Suffice it to mention at this stage that the inscriptions which were available in 1989/1990, having been replaced in 1934 contains lot of difference. The alleged deep study/research of PW 13 thus become seriously suspicious and make this witness wholly unreliable.

1341. Further, he claims to have read **"Baburnama by Beveridge"** but on page 197 could not tell whether the names Baqi Shaghawal and Baqi Tashkandi are mentioned therein or not. His lack of knowledge in this matter is writ large from the fact that Mrs. Beveridge has suggested that it is probably Baqi Tashkandi whose name was mentioned in the inscription as Mir Baqi but PW 13 on page 197 says that even if the names of Baqi Tashkandi and Baqi Shaghawal have been mentioned in Baburnama that cannot be connected with the army chief Mir Baqi. He also says that there is reference of Mir Baqi in Baburnama but during the course of arguments the learned counsel for the plaintiff (Suit-4) admits that the words "Mir Baqi" as such are not mentioned in the entire Baburnama translated by Mrs. Beveridge or others but what he submits that most of the Historians are of the view that "Baqi Tashkandi" was "Mir Baqi" since he was given the command and made incharge of Awadh by Babar.

1342. In fact PW 15 another expert historian witness on

page 85 has clearly said that “Mir Baqi's” name does not find mention in Baburnama. He also says that there is nothing in Baburnama which may co-relate “Baqi Tashkandi” with “Mir Baqi”.

1343. From the entire statement of PW 13 this much is evident that in his opinion for the period of construction of the building, i.e., 1528 AD, and the person who got it constructed, i.e., Mir Baqi, the ultimate reliance is on the inscriptions (whether two or three, that would be discussed later on) and no other authentic material. The opinion of PW 13 in this regard, however, is based on the information which he received from the book “Baburnama” by Mrs. A.S. Beveridge and Epigraphica Indica (1965) from which he was satisfied and concluded his opinion. Beside that, he had no other reliable information to form the said opinion.

1344. At this stage we may also mention that Dr. S.C. Misra (PW 13) did his Ph.D. under Prof. D.N. Jha (page 49) and claims to be closely acquainted with him. On page 44 he has also admitted that except **Baburnama by A.S. Beveridge** he has read no other translation at all. On page 31 he says that he has intellectually analysed and contemplated whether God is a reality or not and has come to the conclusion that there is no existence of God, since, he had no occasion to come face to face with God. On page 53, he says that he has also studied the “History of India” written by “Romila Thaper” and has also consulted her in the course of so called deep study on the dispute in question and believed whatever she has written is correct. On the one hand he claims to be a man of scientific temperament and in order to believe anything he looks into the matter and several things, analyse them and only then come to a

concrete finding (page 49) but on page 56 he says that on the basis of general conception among majority of people and also because of acceptance on the part of scholars he accepted that Islam emerged through revelation. From reading of the books enumerated he came to a conclusion that scholars opined that Islam appeared through revelation. On page 57 he admits that neither he know what "revelation" means nor has read the process of such revelation and, therefore, he is wholly ignorance of the term "revelation" and its meaning. At several places he sought to correct his statement made earlier which throw light on his knowledge of the matter, his confidence as also his memory. One of such aspect is about the constitution of ASI which he stated to be in 1934 on 14.07.1998 but later, on page 73/74, he admits the incorrectness in the earlier statement and rectify the same by stating that it was constituted in 18th century. In his research he admits of having not read any gazetteer or Government gazette (page 74-75). On page 88 he further contradicted to some extent his statement about his scientific temperament and says that in respect to "Allahoupanishad" he has made statement only on secondary basis. He also admits the falsity of statement that in 1968 he went to the disputed site alongwith his parents but did not go inside although the parents went (page 33) and on page 93 in this regard he has said:

> *"यह कहना भी गलत है कि मैंने उसमें यह गलत बयानी की हो कि जब मेरे माता–पिता इस भवन के अन्दर चले गये तो मैं बाहर खड़ा रह गया था। वैसे यह ठीक है कि सन् 66 और सन् 68 में भी इस विवादित परिसर के बाहरी मुख्य द्वार पर ताला बन्द था और कोई भी व्यक्ति अन्दर नहीं जा सकता था।" (पेज 93)*
>
> *"It is wrong to say that in the said testimony I have wrongly stated that when my parents went inside this building, I was left standing outside the building. However,*

it is true that even in 1966 and 1969 the main outdoor of this disputed premises was locked and none could go inside." (E.T.C.)

1345. On page 167 PW 13 said that there is nothing like Sanatan Dharm and on the same page he said that the word "Hindu" is a mixed term which comprises several type of people including those who had their origin somewhere outside and who have assimilated in it. Nobody was original Hindu. It is subsequent concept. It commenced from circa 4th or 3rd BC.

1346. Learned counsel for the defendants (Suit-4) pointed out to us that PW 13 was **not an expert of Medieval History** and this is evident from his admission on page 152/153 where he says that he is teaching students Ancient History and his Ph.D. was limited to the study of Kautilya's Arthshastra. The relevant part of his statement on page 152/153 is:

"जिस कालेज में मैं अध्ययन करता हूं, वहॉ भारतीय प्राचीन इतिहास में केवल मैं ही एक ऐसा व्यक्ति हूं जो रीडर के पद पर कार्यरत है। हमारे कालेज में इस विभाग में प्रोफेसर पर पर कोई व्यक्ति नहीं है। हमारे कालेज में प्राचीन भारतीय इतिहास का कोई अलग विभाग नहीं है, यह इतिहास के विषय में ही सम्मिलित है और इस तरह से इतिहास का एक सामूहिक विभाग है, जिसके हेड आफ द डिपार्टमेण्ट श्री के0 भाग्या राव हैं।" (पेज 152)

"In the college where I am a teacher, I am the only person who is working as a reader of Ancient history. No person is posted on the psot of professor in this department in our college. There is no separate department of ancient Indian history in our college. It is comprised in the history subject itself and in this way there is a combined department of history, which is headed by Sri K.Bhagya Rao." (E.T.C.)

"मेरी शोध यानी डाक्ट्रेट कौटिल्य के अर्थशास्त्र तक सीमित है,

जिसमें अभिलेखीय अध्ययन भी समाहित है। यह ठीक है कि यह अभिलेखीय अध्ययन भी कौटिल्य के अर्थशास्त्र तक सीमित है।

मैं बी0ए0 के विद्यार्थियों को पढ़ाता हूँ और एम0ए0 फाइनल के विद्यार्थियों को भी पढ़ाता हूँ। ***मैं केवल प्राचीन इतिहास पढ़ाता हूँ।*** *प्राचीन इतिहास में हम लोग भारतीय सन्दर्भ में, इस भूमि पर सर्वप्रथम अवतरित मनुष्य के साक्ष्य मिलने के समय से 750–800 ए.डी. तक का इतिहास पढ़ाते हैं।'' (पेज 153)*

''My research i.e. doctorate is limited to the study of Kautilya's 'Arthashastra and it also comprises documentary study. It is true that this documentary study is limited to the study of Kautilya's Arthashastra.

I teach the students of B.A. and also those of M.A. final. ***I teach ancient history only.*** *In ancient history, we teach history, in Indian context, from the time we get the earliest traces of human beings on this earth up to 750-800 AD.'' (E.T.C.)*

1347. The defendants sought to highlight the fact that PW 13 was a paid witness and made certain questions about the manner in which he comes from Delhi. On page 185 he said:

''मैं दिल्ली से लखनऊ इस मुकदमें में गवाही देने के लिए कई बार आया हूं आती दफा कभी हवाई जहाज से नहीं आया लेकिन वापसी पर लखनउ से दिल्ली 2 दफा हवाई जहाज से गया हूं। आज भी मैं हवाई जहाज से वापस जाना चाहता हूं। यह ठीक है कि इस समय अदालत में मेरा हैण्ड बैग रखा हुआ है और उस पर इंडियन एयर और सहारा एयर लाईंस के कई (फिर कहा) एक–एक टेग कुल 2 टेग हैं।'' (पेज 185)

''I have been to Lucknow from Delhi several times in order to depose in this litigation. I never came by air but on my way back from Lucknow to Delhi I went by air two times. Even today I want to go back by aeroplane. It is true that at present my hand bag is kept with the court and it has many tags (then stated) one tag each of Indian Airlines

and Sahara Airlines totalling two tags." (E.T.C.)

1348. However, later on he retracted and made a different statement on page 201 as under:

"मैं कभी भी गवाही देने के लिए हवाई जहाज से नहीं आया मैं जब कभी गवाही के लिए आता हूं तो या तो अपने पास से खर्च करता हूं या अदालत से मिली हुई धनराशि का प्रयोग करता हूं। मैं रेल यात्रा करता हूं और आने जाने की रिजर्वेशन करा कर चलता हूं। मैं सेकेण्ड ए0सी0, जिसके लिए मैं हकदार हूं द्वारा ही यात्रा करता हूं। यह ठीक है कि मैंने पिछली बार अदालत को बतलाया था कि मैं 2 बार हवाई जहाज से भी वापस दिल्ली गया हूं।" (पेज 201)

"I never came by air to give my testimony. Whenever I come for deposition I bear expenses either on my own or from the amount received from the court. I travel by rail and get my seat reserved while making to and fro journey. I travel in second class A.C., to which I am entitled. It is true that I told the court last time that I had gone back to Delhi by aeroplane two times." (E.T.C.)

1349. His statement fails to inspire confidence and lack independent, fair and impartial opinion. He admits to have done Ph.D. under Prof. D.N. Jha who according to him was one of the signatory to the document "A Historians Report to the Nation" alongwith three others and on page 142 he admits that all these four persons he considered to be the top historians of the country and, therefore, place them above the published research of Hans Baker of Ayodhya. Prof. D.N.Jha in fact did not sign the letter. The other three took a partisan stand as we shall demonstrate later. He do not agree with Baker's conclusions though reason for such disagreement could not be given by him.

1350. **PW 15, Sushil Srivastava** is a Historian working on the post of Professor in Maharaja Saya Ji Rao University Baroda. During the course of examination, he rejoined

Allahabad University. He deposed to have seen inscriptions and has further said that the same appears to have been written in Persian. The script is in Arbo-Persian. He is also author of a book on the subject titled as **"The Disputed Mosque – A Historical Enquiry"** which was published in 1991.

1351. With regard to the date of construction of the disputed building, inscriptions and his book, PW 15 in his cross examination has said:

> *''मैंने विवादित स्थल के सम्बन्ध में जो पुस्तक लिखी है, उसको लिखने के समय मुख्य गजेटियर और जो अन्य विदेशी यात्रीगण के लेख हैं, उनको आधार बनाया है।'' (पेज 9)*
>
> *"While writing the book, which I have written about disputed site, I made main gazetteers and articles of other foreign travellers, the basis of my book." (E.T.C.)*
>
> *''**वहां पर मैं भीतर व बाहर प्राचीन व राजकीय अभिलेख देखे थे दो बाहर थे।** एक अंदर था। **यह लेख दीवार पर लिखे थे**। यह लेख विवादित ढांचे पर बहुत ऊंचे पर लिखे थे। यह लेख पत्थर पर खुदा था। मैं यह नहीं कह सकता कि पत्थर पर बाहर की तरफ यह शब्द निकले हुए थे या भीतर खुदे हुए थे। मैंने विवादित स्थल के सम्बन्ध में पुराने मुकदमों में दाखिल रिकार्ड इस सम्बन्ध में नहीं देखे। मैंने कलेक्ट्रेट में इस सम्बन्ध में रखे रिकार्ड का अध्ययन किया था। मैंने पी0कार्नेगी डिप्टी कमिश्नर फैजाबाद द्वारा लिखित रिपोर्ट वहां पढ़ी थी। कलेक्ट्रेट कचहरी के रिकार्ड रूम में मैंने यह अभिलेख देखा था। पी0 कार्नेगी द्वारा अयोध्या स्केच मैने एक पार्ट में देखा था। इस रिपोर्ट में अयोध्या के मंदिर मस्जिद कुण्ड आदि का जिक्र आया है। विवादित स्थल का जिक्र मैंने उस रिपोर्ट में पढ़ा है। विवादित स्थल के बारे में उस रिपोर्ट में पी0 कार्नेगी ने लिखा है कि मस्जिद बाबर ने बनवायी थी **यह मस्जिद 1528–29 में बनवायी थी।** यह भी लिखा है कि यह मस्जिद जहां बनवायी गयी है वहां पर पहले राम जन्म का मंदिर रहा होगा। यह पी0 कर्नेगी का नोट 1867 में प्रकाशित हुआ था। इसके अलावा वहां मैने और कोई रिकार्ड नहीं देखा। मैंने जे0डब्लू0 होज डिप्टी कमिश्नर फैजाबाद का*

कोई नोट 1905 वाला नहीं देखा।'' (पेज 13–14)

*''**There I had seen inside and outside ancient and official inscriptions, two were outside,** one was inside. **These inscriptions were written on the wall.** These inscriptions were written on much height of the disputed structure. I cannot say whether these words were engraved projecting outside or engraved inside the stone. In this connection, I have not seen the records filed in old cases regarding disputed site. I had studied the records kept in Collectorate in this connection. There I had read the report of P.Karnegi, Dy. Commissioner, Faizabad. I had seen this record in the Record Room of Collectorate. I have seen the sketch of Ayodhya in one of the Parts. In this report there is reference of temple, mosque, Kund etc. I have read in that report reference of the disputed site. In that report, regarding the disputed site, P. Karnegi has written that **the mosque was got constructed by Babar in 1528-29.** It is also written that at the place, where this mosque has been got constructed, there might have been Ram Janam temple earlier. This note of P. Karnegi was published in 1867. Except this I have not seen any other record there. I have not seen any note of 1905 by J.W. Hose, Deputy Commissioner, Faizabad.'' (E.T.C.)*

''बाबर अयोध्या नगरी कभी नहीं आया था।'' (पेज 14)

''Babar never came to Ayodhya city.'' (E.T.C.)

*''विवादित स्थल में जो शिला लेख मैंने जो बताये हैं वह किस सन् के थे या किस काल के थे मैं नहीं जानता । मुझे यह नहीं मालूम कि उन शिलालेखों पर कौन सा सन् या सम्बत् लिखा हुआ था। मैंने अपनी किताब में यह जिक्र किया है कि विवादित स्थल को शिलालेख पर कौन सा सन या सम्बत लिखा है। विवादित ढांचे के ऊपर जो लेख लिखा था उस पर जो सन या सम्वत लिखा था वह **बेवरेज साहब ने अपनी पुस्तक***

में दर्शाया है मैंने उसी को अपनी किताब में लिख दिया है। उसमें 935–ए0एच0 अर्थात 1528–29 ए0डी0 लिखा हुआ था। *बाहर या भीतर वाले शिलालेख एक से नहीं थे। बाहर वाला शिलालेख काफी लम्बा था उसका पत्थर स्लेब काफी लम्बा था भीतर वाला पत्थर या पत्थर स्लेब छोटा था। यह बाहर वाला पत्थर का स्लेब जिस पर शिलालेख था वह 10–12 फिट लम्बा होगा फिर कहा कि 8–10 होगा। इस पत्थर के स्लेब की चौड़ाई करीब डेढ फिट रही होगी। अंदर वाला शिलालेख बाहर वाले पत्थर के स्लेब से आधे से भी छोटा था।'' (पेज 14–15)*

"I do not know as to which year or period the stone inscriptions of the disputed site, which I have referred, pertained. I do not know as to which year or Samvat is written on those inscriptions. I have referred in my book as to what year or Samvat is written on the stone inscriptions of the disputed site. ***The year or Samvat written in inscriptions over disputed structure was mentioned by Bevrez Saheb in his book. I have written that matter in my book. Therein 935 A.H., i.e., 1528-29 A.D. was written.*** *Stone inscriptions of outside and inside were not similar. The outer stone inscription was too much lengthy and its stone slab was very lengthy and inside stone or stone slab was small. This outer stone slab containing the inscription was 10-12 ft in length (Then said) might be 8-10 ft. The inside stone inscription was smaller than half of the outer stone slab." (E.T.C.)*

''बाबरनामा में विवादित ढांचे के सम्बन्ध में कोई जिक्र नहीं है। मस्जिद के सम्बन्ध में भी कोई जिक्र नहीं है। बाबरनामा में 2 मस्जिदों का यानी सम्भल वाली मस्जिद और शायद पानीपत वाली मस्जिद का जिक्र किया गया है।''(पेज 17)

"There is no reference of disputed structure in Babarnama. Nor any reference is there with regard to mosque. In Babarnama, there is reference of two mosques, i.e., of

Sambhal Mosque and perhaps, Panipat Mosque." (E.T.C.)

*''**मैं परशियन भाषा न पढ़ सकता हूं और न लिख सकता हूं। मैं अरबी भी न पढ़ सकता हूं और न लिख सकता हूं।** संस्कृत का भी मुझे कोई अच्छा ज्ञान नहीं है।'' (पेज 32)*

*''**Neither I can read nor write Persian. I can also not read Arabic Language nor can write it.** I have no sound knowledge of Sanskrit also." (E.T.C.)*

''यह ठीक है कि जिस परशियन भाषा को मैं न पढ़ सकता हूँ और न लिख सकता हूं उसको पढ़ने लिखने पर अर्थात इन्टरप्रिट करने में मेरे ससुर ने बहुत मदद की।'' (पेज 33)

*''It is correct that my father-in-law helped me a lot in reading and*1366 *writing, i.e., in interpreting the Persian language, which neither I can read nor write, " (E.T.C.)*

''मेरे ससुर जी अरबी भाषा और फारसी भाषा के विद्वान हैं।'' (पेज 36)

''My father-in-law is a scholar of Arabic and Persian languages." (E.T.C.)

''मैंने विवादित स्थल पर जो लेख या शिलालेख देखे थे वह फारसी भाषा में थे तथा फारसी लिपि में थे। यह सही है कि मुझे फारसी भाषा और लिपि के बारे में मुझे मेरे ससुर साहब से ज्ञान प्राप्त हुआ। फिर कहा कि यह कहना सही है कि यह ज्ञान मुझे विवादित स्थल पर पाये गये लेखों और शिलालेखों के सम्बन्ध में ससुर जी से प्राप्त हुआ था।'' (पेज 37)

''The script or inscriptions which I had seen at the disputed site, were in Persian language and script. It is correct that I acquired knowledge about Persian language and script from my father in law. Further said, it is correct to say that I acquired knowledge from my father in law, about script and inscriptions found at the disputed site."(E.T.C.)

''यह हो सकता है कि मैंने किताब में इतिहासकार होते हुए भी लोगों की स्कालरली फीलिंग को ध्यान में रखते हुए उन पर विश्वास किया और उनको विश्वास करके किताब में लिखा। मैंने अपनी किताब को लिखते

समय इसका नाम हिस्टारिकल इन्क्वायरी रखा। यह हो सकता है कि मैंने इसे एक मोड इतिहासिक जांच का मानकर किताब लिखी हो।'' (पेज 38)

"It might be that despite being a historian, keeping in view the scholarly feeling of the people, I relied on them and noted down in my book. At the time of authoring my book , I titled it as Historical Inquiry. It may be that treating it as a turning point of historical investigation, I have written the book." (E.T.C.)

*''**यह सही है कि मेरे ससुर जी ने यह महसूस किया था कि बेवरेज के द्वारा विवादित स्थल के लेखों का जो अनुवाद किया गया है वह बिल्कुल पूरी तरह से सही नहीं है।**''(पेज 38)*

*"**It is true that my father in law felt that the translation of articles on disputed site made by Bevarage is not wholly correct."** (E.T.C.)*

''सन् 1988 में मेरा शोध कार्य पूरा नहीं था और चल रहा था।'' (पेज 39)

"In 1988 my research was not complete and was under process." (E.T.C.)

*''**मेरे 1988 के प्रकाशन के बाद से ही मेरे उसी के कारण भाग्य जग गये** और मुझे डाक्टर की डिग्री मिल गयी और मुझे रीडर भी बना दिया गया। जिस समय मैं रीडर हुआ था और पी0एच0डी0 की डिग्री मिली थी **उस समय इलाहाबाद विश्वविदयालय के कुलपति श्री वहीदउदीन मलिक थे।** यह भी सही है कि उस समय उ0प्र0 के मुख्यमंत्री मुलायम सिंह यादव थे।'' (पेज 39)*

*"**It was only after 1988 publication that my luck brightened up,** I acquired degree of Doctorate and I was appointed Reader also. When I became Reader and was conferred Ph.D. Degree, **Sri Wahiuddin Malick was the Vice Chancellor of Allahabad University.** It is also correct that, at that time the Chief Minister of U.P. was Mulayam Singh Yadav." (E.T.C.)*

*''**मैं यह नहीं कह सकता कि तीन शिलालेखों में***

से एक शिलालेख फारसी में था और दो अरबी में थे, क्योंकि मुझे इन दोनों भाषाओं का ज्ञान नहीं था। *'' (पेज 51)*

*"**I can not say whether out of three inscriptions one was in Persian and two were in Arabic, as I had no knowledge of these two language.**" (E.T.C.)*

''मैने अपनी पुस्तक में इन तीनों शिलालेखों का ॲग्रेजी अनुवाद करवाकर लिखा है। अंग्रेजी अनुवाद के लिए मैंने अपने ससुर जी से निवेदन किया था और उन्ही से करवाया था।'' (पेज 51)

"In my book I have written about the three inscriptions after getting the same translated in English. For English transcription I have requested my father-in-law and got it done from him." (E.T.C.)

''परन्तु वह अरबी तथा परसियन जानते हैं।'' (पेज 51)

"But he know Arabic and Persian." (E.T.C.)

''मैंने अपनी पुस्तक में यह लिखा है कि स्टाइल आफ कैलीग्राफी जो शिलालेखों पर है, उससे यह सन्देह पैदा होता है कि यह मस्जिद बाबर द्वारा बनवाई गई थी या नहीं। यह सही है कि इस उपरोक्त बात का आधार यह है कि मेरे ससुर शमशुल रहमान फारूकी साहब यह महसूस करते थे। यही बात मैंने अपनी किताब में लिखी है।'' (पेज 51)

"I have written in my book that the style of Calligraphy on inscriptions creates doubt whether this mosque was constructed by Babar or not. It is correct that the basis of the aforesaid fact is that my father-in-law realized so. I have written this fact in my book." (E.T.C.)

''मैंने साइन्स आफ कैलीग्राफी नहीं पढ़ी है। एपीग्राफी का विषय भी मैंने नहीं पढ़ा है।'' *(पेज 51)*

*"**I have not studied Science of Calligraphy. I have also not studied the subject of Epigraphy**." (E.T.C.)*

''यह कहना सही हो सकता है कि विवादित मस्जिद 1501 ए.डी. में बनाई गई हो।'' *(पेज 52)*

*"**It may be right to say that disputed mosque was***

built in 1501 AD. *" (E.T.C.)*

"यह हो सकता है कि विवादित मस्जिद को बाबर से पहले किसी और ने बनवाया हो। बाबर ने 1526 से 1530 ए.डी. तक भारत के कुछ अंश पर ही विजय प्राप्त की थी।"

(पेज 52)

*"**It is possible that the disputed mosque might have been built by someone else prior to Babar. Between 1526 to 1530 AD, Babar conquered over only certain parts of India.*** *" (E.T.C.)*

"विवादित स्थल पर जिन तीन शिलालेखों का जिक्र मैंने किया है, उनमें से दो बहुत ऊपर थे, जो करीब 20–22 फिट ऊंचे थे। तीसरा शिलालेख नीचे था, उसको मैंने 4–5 फिट की दूरी से देखा था। परसियन भी स्क्रिप्ट होती है। अरेबिक व फारसी स्क्रिप्ट में लिखी जाती है। यह कहना गलत होगा कि फारसी कोई भी लिपि नहीं है। यह सही हो सकता है कि फारसी भाषा अरेबिक लिपि में लिखी जाती है। अरबी और परसियन लिपि में कुछ अल्फाबेट का अन्तर है, बाकी एक ही है इस सम्बन्ध में जो भी मैंने अपनी पुस्तक में लिखा है, मैं सेकण्ड्री सोर्स के आधार पर लिखा है। सेकेण्ड्री सोर्स दो प्रकार के होते हैं। पहले वाले में लिखित रूप में अखबार आदि आते हैं, और दूसरे में, लिखी हुई पुस्तकें आती हैं।"(पेज 52)

"Out of the three disputed inscriptions on disputed site which I have mentioned, two were at great height, approximately at the height of 20-22 ft. Third inscription was downward side which I viewed from a distance of 4-5 ft. Persian is also a script. Arabic and Persian is written in script. It will be wrong to say that Persian is not any script. It may be that Persian language is written in Arabic script. There is difference of few alphabets in Arabic and Persian script, remaining are the same. Whatever I have written in this regard in my book is based on secondary source. There are two sorts of secondary source. In the first category comes written newspapers etc. and in the second category

comes written books." (E.T.C.)

*"उक्त विवादित ढांचा 16वीं शताब्दी के अलावा 15वी0 शताब्दी का बनाया हो सकता है। **विशेषज्ञ के रूप में मेरी राय में यह सम्भव है कि विवादित ढांचा बाबर का बनवाया हुआ न हो।** एक विशेषज्ञ के रूप में मैं यह कह सकता हूं कि यह विवादित ढांचा जौनपुर के सुल्तान का भी बनवाया हो सकता है।" (पेज 57)*

*"The aforesaid disputed structure might be a construction of fifteenth century besides sixteenth century. **As an expert, in my opinion, it is probable that the disputed structure was not constructed by Babar.** As an expert I can say that, it may be that the disputed structure was constructed by the Sultan of Juanpur." (E.T.C.)*

*"मैंने अपनी किताब सत्य के खोज के लिए लिखा। इस पुस्तक में एक अध्याय "डिड बाबर ब्लिट दि मस्जिद" है। इस पुस्तक को लिखने के पहले मैंने काफी छानबीन किया था। **छानबीन के पश्चात मैं इस नतीजे पर पहुॅचा कि विवादित ढांचा या तो तुगलक शासकों द्वारा बनाया गया था या शर्की शासकों द्वारा बनाया गया था।** मैं इस नतीजे पर नहीं पहुॅचा कि यह अवध के नवाबों द्वारा भी कुछ भाग बनाया गया। **अवध के नवाबों का एम्बलम (सरकारी निशान) दो मछलियॉ थीं।** वर्तमान समय में प्रदेश राज्य का एम्बलम भी दो मछलियॉ हैं।" (पेज 62)*

*"I have written my book for discovery of truth. This book contains a chapter entitled "Did Babar Build the Masjid". Before authoring this book, I had made a thorough probe. **After the investigation, I came to the conclusion that the disputed structure had been built either by Tughlaq rulers or Shirky rulers.** I did not reach the conclusion that some part of it was constructed by Nawabs of Avadh. **The emblem of Nawabs of Avadh was "two fish".** Presently also, the emblem of the State Government is two fish." (E.T.C.)*

''मैंने अपनी पुस्तक के पृष्ठ 74 एवं 75 पर अरेबिक और परसियन के लेटर्स के स्क्रिप्ट्स के बारे में राय दिया है। मैंने अपना राय यह दिखाने के लिए दिया है कि बाबर अयोध्या नहीं गया था।'' (पेज 63)

''At pages 74 and75 of my book I have recorded my opinion with respect to scripts of Arabic and Persian letters. I have given this opinion in order to demonstrate that Babar never visited Ayodhya.'' (E.T.C.)

''मैंने अपनी पुस्तक के पृष्ठ संख्या–89 में बाबरी मस्जिद के कैलीग्राफी के स्टाइल पर अपनी राय व्यक्त किया है और उसके आधार पर यह निष्कर्ष निकाला कि इस बात पर ग्रीवियस सन्देह उत्पन्न होता है कि यह मस्जिद बाबर ने बनवाई। ***मुझे आर्ट या साइन्स आफ कैलीग्राफी का ज्ञान जरा भी नहीं है।''*** *(पेज 65)*

''At page 89 of my book I have recorded my opinion regarding the style of calligraphy of Babari Mosque, and on that basis came to this conclusion that on this point, a grievous doubt emerges if Babar had built this mosque. ***I have not the least knowledge of art or science of calligraphy.''*** *(E.T.C.)*

''मैने अपनी पुस्तक के कालम–6 पृष्ठ –92, 93 एवं 94 में उन पुस्तकों का विवरण दिया है जिनके बारे में मुझे जानकारी है। मैंने उक्त सभी पुस्तकों को पूरी तरह से नहीं पढ़ा है। इनमें से मैंने लेनपूल, लेडेन, बेवरिज एवं रशबुक विलियम की पुस्तकें मैंने पढ़ी हैं। बाकी पुस्तकें केवल थोडी–थोड़ी पढ़ी हैं। उनमें कुछ पुस्तकें ऐसी हैं जो मैंने नहीं पढ़ी हैं।''

(पेज 68)

''In column 6 of pages 92,93 and 94 of my book, I have given description of those books about which I know. I have not read wholly all the aforesaid books. Out of these, I have read the books of Lenpool, Laden, Baverige and Rushbook William. I have studied a little the remaining books. There are certain books therein, which I have not studied.'' (E.T.C.)

*"**यह सही है कि मैंने जिन किताबों को नहीं पढ़ा उनका भी जिक्र मैंने अपनी किताब में फुटनोट में किया है।**" (पेज 68)*

*"**It is true that, in the foot note of my book, I have mentioned those books too which I have not read.**"(E.T.C.)*

*"मैंने जिन तीन गांवों का जिक्र ऐपेडिक्स में किया है उसे मैंने रेवेन्यू के अभिलेखों में नहीं देखा है केवल गजेटियर के आधार पर लिखा है। मैंने यह ज्ञात नहीं किया कि विवादित स्थल किस मौजे में स्थित है। **मैंने गजेटियर में देखा कि विवादित स्थल नजूल में है।**"*

(पेज 71)

*"I had not seen in revenue records, the three villages, which I have mentioned in the appendix and have written only on the basis of Gazetteer. I did not find out as to in which village the disputed site lay. **I saw in Gazetteer that the disputed site is in Nuzul.**" (E.T.C.)*

"यह कहना गलत है कि गजेटियर मौलिक शोध कार्य के श्रेणी में नहीं आता है। यह प्राइमरी सोर्स माना जाता हैं यह कहना सही है कि गजेटियर का मूल स्त्रोत जिले में रखे हुए रेवेन्यू रिकार्ड होते हैं।" (पेज 73)

"It is wrong to say that the gazetteer does not come within the category of original research work. It is considered a primary source. It is true to say that the basic source of gazetteer is revenue records maintained in the District." (E.T.C.)

*"**मैंने इस बात पर गौर नहीं किया कि शिलालेख शुरू से लगे हैं या बाद में लगा दिए गए हैं।**" (पेज 77)*

*"**I did not pay attention on this fact, as to whether the inscriptions were installed from the beginning or installed subsequently**." (E.T.C.)*

"मैंने बाबरी मस्जिद के हिस्टोरिसटी के बारे में कोई प्रमाणित पुस्तक नहीं पढ़ा केवल प्रशासनिक अंग्रेज अधिकारियों के हिस्टारिकल

एकाउंट एवं गजेटियर ही पढ़ा है। मैंने किसी भारतीय या तुर्की या विदेशी मुसलमान लेखक की प्रमाणिक पुस्तक केवल बाबरी मस्जिद पर नहीं पढ़ी।'' (पेज 77–78)

"I have not read any authoritative book about the historicity of Babari Masjid, read historical accounts of British Administrative Officers and gazetteers only. I have not read any authentic book of any Indian or Turkish or Foreign Muslim on the Babari Mosque only." (E.T.C.)

''मुझे साइंस आफ एपीग्राफी की जानकारी नहीं है। पर्शियन और अरेबिक भी नहीं आती है।'' (पेज 78)

"I have no knowledge of Science of Epigraphy. I do not know even Persian and Arabic." (E.T.C.)

''विवादित स्थल पर जो शिलालेख मैंने देखे उस पर गिनती अंकित नहीं थीं देखने पर मुझे यह ज्ञात नहीं हुआ कि शिलालेख किस वर्ष में लिखे गए। बाद में मुझे किसी ने बताया कि यह 935 ए0एच0के लिखे हुए हैं फिर कहा कि प्रो0 राधेश्याम ने मुझे यह बात बतायी कि यह शिलालेख 935 ए0एच0के लिखे हुए हैं और मैंने उन्हें सही मान लिया यह बात मैंने बेवरिज साहिबा की किताब से भी पढ़ी। ***उपरोक्त दोनों लेखकों ने शिलालेख के एपीग्राफी को पढ़कर उपरोक्त नतीजा निकाला था। और मैंने उसी को सही मान लिया।*** *'' (पेज 78–79)*

"There was no figure indicated on the inscriptions which I saw on the dispute site. On seeing, it could not be known as to in which year the inscriptions were written. Later on, someone told me that these are written in 935 AH, further said, Prof. Radhey Shyam had told me this fact that these inscription were written in 935 A.H. and I took the same to be true. I also read this fact in the book of Beverige. ***The aforesaid two writers had drawn the said conclusion on deciphering the epigraphy of the inscriptions and I considered the same to be true.****"(E.T.C.)*

"शिलालेख पर मीरबाकी का नाम लिखा था पर उन ***मीर बाकी का जिक्र बाबरनामें में नहीं आता है।*** *" (पेज 85)*

"On the inscription, the name of Mir Baqi was written but ***reference of the said Mir Baqi does not find place in Babarnama.*** *" (E.T.C.)*

"ऐसा बाबरनामें में कुछ भी नहीं मिलता कि शिलालेख में जिस बांकी का जिक्र आया है वह बांकी ताशकंदी रहा हो।" (पेज 85)

"In Babarnama nothing of the sort is found to indicate that Baqi mentioned in the inscriptions would have been Banki Tashkandi." (E.T.C.)

"मैं निश्चित रूप से इस निष्कर्ष पर नहीं पहुंच सका कि यह विवादित ढांचा किस पीरियड का है परन्तु ***यह मुगल काल के पहले का है।*** *" (पेज 106)*

"I could not reach with certainty to the conclusion as to which period the disputed structure pertains but ***it relates prior to the Mughal period****." (E.T.C.)*

"एपीग्राफी का ज्ञान मुझे नहीं है। न्यूमिसमेटिक का ज्ञान मुझे नहीं है। आर्कोलाजी में मैंने कोई विशेष ज्ञान प्राप्त नहीं किया। सर्वे आफ लैण्ड का कोई ज्ञान मैंने प्राप्त नहीं किया। साईंस आफ आर्कीटेक्चर का मैंने कोई विशेष ज्ञान प्राप्त नहीं किया। तुर्की अरबी फारसी का भी कोई ज्ञान मैंने प्राप्त नहीं किया।" (पेज 106)

"I have no knowledge of Epigraphy. I have no knowledge of Numismatic. I did not acquire any specialization in archaeology. I did not acquire knowledge about survey of land. I did not acquire any specialized knowledge in Science of Architecture. I did not acquire any knowledge of Turkish, Arabic and Persian too." (E.T.C.)

"विवादित ढांचे का निर्माण आधुनिक काल में नहीं हुआ है बल्कि मध्य काल में हुआ है।" (पेज 109)

"This disputed structure has not been constructed in modern period, instead, it has been constructed in

Medieval period." (E.T.C.)

''मेरी राय कनिघंम की रिपोर्ट तथा फ़्यूरर की रिपोर्ट जो 1891 की है पर ही आधारित है।'' (पेज 113)

"My opinion is based only on Cunningham's Report and Fuhrer's report of 1891." (E.T.C.)

''विवादित ढांचे के निर्माण के समय के बारे में कोई पुस्तक उपलब्ध नहीं है।'' *(पेज 114)*

"There is no book available with respect to construction of disputed structure." *(E.T.C.)*

''मेरी पुस्तक का नाम ''डिस्पयूटेड मास्क ए हिस्टोरिक इन्कवायरी'' है। मेरी पुस्तक मेरे शोध का नतीजा है। इस पुस्तक के अलावा मध्य कालीन इतिहास के बारे में मेरा कोई अन्य शोध नहीं है और न प्रकाशित हुआ है।'' (पेज 131)

"The title of my book is 'Disputed Mosque, a Historic Enquiry'. My book is the outcome of my research. Except this book, there is no any other research of mine nor published, about Medieval history." (E.T.C.)

''अपनी पुस्तक लिखने के लिए मैंने तीनों पुस्तकों यानी बाबर नामा आईने अकबरी और अकबरनामा के अलावा अन्य पुस्तकें भी पढ़ी। जिनके विवरण निम्नलिखित हैः– गजेटियर (1868), नेविल का गजेटियर (1901) से 1905 हण्टर द्वारा इम्पीरियल गजेटियर, इरविन की पुस्तक, पिलग्रिमेज से सम्बन्धित तथा कुछ अन्य पुस्तकें देखी हैं। इसके अलावा तीर्थ विवेचन काण्ड देखा है, तारीख फरा बक्श देखा है, कलिघम की रिपार्ट, फयूरर की रिपोर्ट समाचार पत्र भी देखें हैं।'' (पेज 134)

"For the purpose of writing my book, Except these three books, i.e. Babarnama, Aine Akbari and Akbarnama, I read other books also, particulars whereof are: Gazetteer(1868), Gazetteer of Nevil (1901 to 1905), Imperial Gazetteer by Hunter, Irvin's book and some other books related to pilgrimage. Except this, I have also seen Tirth Vivechan Khand, Tarikh Fara Bux, I have seen the

Report of Cunningham, Report of Furher as also the Newspapers." (E.T.C.)

"1526 पहले के अयोध्या का इतिहास मैंने उतना ही पढ़ा है जो गजेटियर में दिया गया है। गजेटियर 1905 में छपा था वो अयोध्या के बारे में पहला स्त्रोत था।" (पेज 137)

"I have read History of Ayodhya of the period prior to 1526 only to the extent which has been given in the gazetteer. What was published in Gazetteer 1905, was the first source about Ayodhya." (E.T.C.)

"जिन बातों को मैंने गलत पाया वो निम्नलिखित हैंः– 1. ***बाबर ने मस्जिद नहीं बनवाया क्योंकि बाबर अयोध्या कभी नहीं आया।***

बाबर के अयोध्या न आने के प्रमाण निम्नलिखित है। बाबरनामा में बाबर के अयोध्या के आने का जिक्र नहीं है। बाबरनामा में यह जिक्र नहीं है कि बाबर ने अयोध्यामें मस्जिद बनाने का हुक्म दिया।" (पेज 137–138)

"The facts which I found wrong are: 1. ***Babar did not get the mosque constructed since he never visited Ayodhya.***

The following is the evidence showing that Babar did not visit Ayodhya. In Babarnama there is no reference of Babar's visit to Ayodhya. There is no mention in Babarnama that Babar commanded for construction of a mosque in Ayodhya." (E.T.C.)

"अयोध्या के बारे में पुरातत्व से संबंधी सबसे पहली सामग्री कनिंघम की रिपोर्ट में ही है। उसके बाद दूसरी रिपार्ट फयुरर की रिपोर्ट है। जो 1891 की संभवतः है। ये आर्क्यालाजिकल सर्वे आफ इण्डिया के डाइरेक्टर और अंग्रेज अफसर थे।" (पेज 150)

"Regarding Ayodhya, the foremost material pertaining to archaeology is in Cunningham's report only. Thereafter, the second report is of Fuhrer, which is probably of 1891. They were British Officers and Director of Archaeological Survey of India." (E.T.C.)

''मेरा निष्कर्ष है कि बाबर अयोध्या कभी नहीं आया था।'' (पेज 156)

"My conclusion is that Babar never came to Ayodhya" (E.T.C.)

''मेरे इस निष्कर्ष कि बाबर अयोध्या कभी नहीं आया का आधार यह है कि जिस रूट से बाबर 1528 में चल रहा था वह रूट अयोध्या होकर नहीं था। बाबर के रूट का आधार बाबरनामा है। यह आधार बाबरनामा के उस अनुवाद का है जो बेबरिज ने किया था। मैंने बेबरिज का पूरा अनुवाद जो उसने बाबरनामा का किया है मैंने पढ़ा है। ब्रेबरिज के अनुवाद को देखकर कहा कि बेबरिज ने ''ए यू डी'' अवध माना है। ब्रेबरिज के अनुवाद के पृष्ठ 401 एवं 402 का फोटो प्रति मेरे सामने हैं।'' (पेज 156)

"The basis of my inference that Babar never came to Ayodhya, is that the route by which Babar was proceeding in 1528 was not via Ayodhya. The basis of Babar's route if Babarnama. This basis is the translation of Babarnama by Beverige. I have read the entire transcription of Babarnama, which was made by Beverige. Seeing the transcription of Beverige, he (witness) said that Beverige has considered "AUD' as Awadh. Photocopy of pages 401 and 402 of Beverige's translation is before me." (E.T.C.)

''मैंने अपनी पुस्तक के पृष्ठ 71 पर यह लिखा है कि बाबर को एक मुख्य खलनायक के रूप में दर्शाया जाता है किन्तु यह आरोप उसके व्यक्तितत्व से मेल नहीं खाता है।'' (पेज 206)

"I have written at page 71 of my book that Babar is described as a main villain but this charge does not match with his personality." (E.T.C.)

''रशब्रुक विलियम तथा राधेश्याम दोनों ने बाबर के व्यक्तित्व के बारे में तारीफ की है। इसके अतिरिक्त आर0पी0त्रिपाठी और बनारसी प्रसाद सक्सेना ने भी बाबर की तारीफ किया है।'' (पेज 206)

"Rushbrook Willian and Radhey Shyam both have commended about Babar's personality. Besides, R.P. Tripathi and Banarsi Prasad Saxena also have praised

Babar." (E.T.C.)

*"**राधेश्याम मेरे गुरू 1968 से 1996 तक रहे।** मैं उनकी विचारधारा से प्रभावित और सहमत हूँ। मेरी पुस्तक के लिखने में भी मेरे गुरू राधेश्याम साहब का सहयोग मिला और समय समय पर मैं पुस्तक लिखते समय उनसे डिसकस करता था।" (पेज 207)*

*"**Radhey Shyam had been my teacher from 1968 to 1996.** I agree and am influenced with his thought. While writing my book, I got cooperation from my teacher Radhey Shyam and while writing the book, I used to discuss with him from time to time." (E.T.C.)*

"मैंने अपनी पुस्तक के पेज सं0 88 पर जो लिखा है कि बाबर ने यदि मस्जिद बनाने के लिए हुक्म दिया होता तो ऐसा लिखा होता कि "बाहुक्म जहीरउद्दीन मो0 बाबर गाजी"। जो मैंने ऊपर कहा है यह मैंने कहीं पढ़ा नहीं है बल्कि मैंने यह अपने आप कहा है कि यदि बाबर ने कहा होता तो ऐसा होता।" (पेज 216)

"I have written at page no. 88 of my book, had Babar commanded to construct the mosque, it would have been written "Under the Command of Zahiruddin Mohd. Babar Ghazi". The fact which I stated above, I have not read it anywhere, instead, I have said of my own that if Babar had commanded, it would have been so." (E.T.C.)

*"मैंने अपनी पुस्तक के पृष्ठ सं0 89 पर यह लिखा है कि **इसकी बहुत सम्भावना है कि शिलालेख बाद में लगाया गया हो जिसमें लिखा है कि यह मस्जिद बाबर ने बनायी हो।"***

(पेज 217)

*"I have written at page no. 89 of my book that **there is great probability that the inscription, wherein it is written that this mosque had been built by Babar, might have been installed subsequently.**" (E.T.C.)*

"मैंने इस बात पर शोध किया कि यह शिलालेख कितने पुराने हैं और कब के हैं। जो शिलालेख बाबरी मस्जिद के बाहरी दीवार पर लगा था

वह शिलालेख पुराना लगता था पर अन्दर वाला शिलालेख की लिखावट 19वीं सदी की लगती थी। मेरी राय में वह 19वीं सदी का शिलालेख हो सकता था। बाबरी मस्जिद में कुल तीन शिलालेख थे जिनमें दो बाहर थे एक अन्दर।'' (पेज 218)

"I conducted research on the point as to how much old and of which period these inscriptions are. The inscription engraved on the outer wall of the mosque appeared to be old. But the calligraphy of the inner inscription appeared to be of 19th Century. In my opinion, it could be an inscription of 19th Century. The Babri mosque had three inscriptions in all of which two were outside and one was inside." (E.T.C.)

''यह बात कि भीतर वाला शिलालेख नया प्रतीत होता था मैंने इस आधार पर लिखा क्योंकि मुझे कैलिग्राफी की स्टाइल से ऐसा प्रतीत हुआ था। कैलीग्राफी स्टाइल पर मैंने कोई अध्ययन नहीं किया है। मैंने कुछ एक्सपर्टस से बात करने के पश्चात् इस कैलिग्राफिक स्टाइल की बात लिखी थी।'' (पेज 219)

"I have written the fact that the inner inscription appeared to be new, because it so appeared from the style of caligraphy. I have not undertaken any study on Caligraphy. After having discussion with few experts, I wrote about this caligraphic style." (E.T.C.)

*''**यह सही है कि मुझे इतिहास का ज्ञान बहुत कम है।**''*

(पेज 222)

*"**It is true that I have a very little knowledge of history**." (E.T.C.)*

''यह सही है कि उपरोक्त तीनों पुस्तकों में विलियम फिन्च के वृतान्त एक ही हैं यानी उनके भारत यात्रा के वृतान्त तीनों पुस्तकों में एक ही हैं।'' (पेज 228)

"It is correct that in the aforesaid three books, description of William Finch is the same, i. e., their