

A.F.R.

Court No. - 4

Case :- MATTERS UNDER ARTICLE 227 No. - 3562 of 2021

Petitioner :- U.P Sunni Central Waqf Board

Respondent :- Ancient Idol Of Swayambhu Lord Vishweshwar And 5 Others

Counsel for Petitioner :- Punit Kumar Gupta

Counsel for Respondent :- Ajay Kumar Singh, Ashish Kumar Singh

With

Case :- MATTERS UNDER ARTICLE 227 No. - 3844 of 2021

Petitioner :- Anjuman Intezamia Masajid Varanasi

Respondent :- Ancient Idol Of Swayambhu Lord Visheshwar Full And 5 Others

Counsel for Petitioner :- Syed Ahmed Faizan, Sr. Advocate Shri S.F.A. Naqvi, Zaheer Asghar

Counsel for Respondent :- Punit Kumar Gupta

Hon'ble Prakash Padia, J.

1. Since controversy involved in both the petitions are, similar, therefore, they are heard together.

2. Heard Sri S.F.A. Naqvi, learned Senior Counsel assisted by Sri Syed Ahmad Faizan Advocate, appearing in Petition No. 3844 of 2021 and Sri Punit Kumar Gupta, Advocate appearing in Petition No.3562 of 2021 and Sri Ajay Kumar Singh, learned counsel and Sri Vijay Shankar Rastogi, learned counsel for respondent Nos.1 to 6, Sri Shashi Prakash Singh, Senior Advocate/Assistant Solicitor General of India assisted by Sri Manoj Kumar Singh learned counsel is present on behalf of respondent No.7 and Sri M.C. Chaturvedi, learned Additional Advocate General/Senior Counsel assisted by Sri Saurabh Srivastava Chief

Standing Counsel and Sri Vineet Pandey, Chief Standing Counsel put appearance on behalf of respondent No.8.

3. Facts in brief as contained in the petitions are that Original Suit No.610 of 1991 (Swayambhu Lord Vishweshwar and others Vs. Anjuman Intezamiya Masjid Varanasi and others) has been filed by the respondents-plaintiffs on 15.10.1991 in the Court of Civil Judge (Junior Division), Varanasi with the following reliefs:-

“(a) By a decree of this Hon’ble Court it be declared that the structure standing over and above the collors (Tahkhana) and the adjoining part of the old temple of plaintiff no.1 together with the Naubat Thana fully detailed and descried in Shchedule “A” and shown with red hatched lines in the plaint map towards North of the temple of lord Visheweshwar and a house lying to the east of the said Naubat Khana is the property of the plaintiff no.1 and the devotees of lord Vishwashwar i.e. the Hindus at large have every right to use it as place of worship and to renovate and reconstruct their temple adding it with the remaining portion of the temple structure still in existence in any manner they decide in which the defendants have no right, title or interest or any kind whatsoever and the entire Muslim community represented by the defendants have no right to occupy their occupation is illegal.

(b) By a decree mandatory injunction the defendants in ordered to remove its effects from the portion shown with red hatched lines in the plaint map fully detailed and described in Schedule A of the plaint by handing over possession over the said structures to the plaintiffs.

(c) By decree of prohibitory injunction the defendants their agents and servants be permanently restrained from interfering in peaceful possession of the plaintiffs over properties and the structures mentioned in Schedule “A” of the plaint in any way from performing religious, ceremonies, Sewa Puja and Rag Bhog etc. and re-modeling, repairing, reconstructing adding with the remaining portion of the temple of lord Visheshwar existing at spot.

(d) Plaintiff be permitted to file the present suit under Order 1 Rule 8 CPC.

(e) A decree for entire cost of the present suit be awarded to the plaintiffs as against the defendants.

(f) Any other relief to which the plaintiffs found entitled a decree for the same be also passed in favour of the plaintiffs as against the defendants."

4. It is stated in the plaint that the property in dispute has been divided in two parts. First is, the part and partial of the old temple of Lord Vishweshwar lying in the centre of Gyanwapi Compound, over and above the cellars (Tehkhana) situated on Plot No.9130 Mauza Shahar Khas Pargana Dehat Amanat Tehsil & District Varanasi alleged to be Masque, Naubatkhana over the Northern Gate of the Gyanwapi compound and the house towards east of the Naubatkhana, i.e., the Northern Gate. The aforesaid property has been mentioned as Schedule "A" property. The entire property of the Gyanwapi Compound forming settlement Plot Nos. 9130, 9131 & 9132 situated at Mauza Shahar Khas, Pargana Dehat, Amanat Tahsil & District Varanasi, surrounded by the boundary wall containing ancient temple of Lord Visheshwar together with four Mandaps and its ruins Gyankoop, Mukti Mandap newly constructed Vyas Gaddi, Idol of Sri Ganeshwar, Ganga Devi, Sri Hanuman Ji, Nandi, Sri Gauri Shanker, Sri Ganesh and several other idols of Hindu Gods and Goddesses visible and non-visible duly consecrated three trees standing over Idols Nandi, Naubatkhana over the Northern Gate and house of servants of temple towards the east of the Northern Gate and Naubatkhana with its boundaries has been mentioned as Schedule "B" property.

5. From perusal of the plaint it appears that the case of the plaintiffs/respondents is that the temple of Lord Visheshwar has been in

existence from ancient time, i.e., Satyug uptill now and the Swayambhu Jotirlinga is situating in the disputed structure which has never been removed from its place because the aforesaid land in dispute is itself the part and partial of Lord Visheshwar, therefore, the place in dispute is the abode of the Deity Swayambhu Lord Visheshwar and the same cannot be made the place of worship for other religion. It is stated in the plaint that the temple, irrespective of its shape, the ground floor cellar is still in possession of the plaintiff which is the structure of old temple built prior to 15th Century. It is further stated in the plaint that the property in dispute has never been dedicated to the masque by Emperor Aurangzed. The emperor Aurangzeb was not the owner of the aforesaid property in dispute, he could not create any Waqf in favour of the masque or Allah, therefore, the said property in dispute is not a masque. In the circumstances, the alleged Masque cannot be said to be a Masque in true spirit of Muslim Law. The defendant No.2 has illegally and unauthorizedly alleged to have registered the property in dispute as alleged masque in its register which is illegal and void. It is stated that the Waqf Act is not applicable on plaintiff as well as other Hindus, therefore, the religious character of the aforesaid property in dispute can never be changed and converted into Masque and the same is belong to Swayambhu Lord Visheshwar.

6. During the pendency of the suit, defendant No.1, i.e. Anjuman Intezamia Masjid filed an application being Application No.71/C on 23.02.1995/24.03.1995 under Order VII Rule 11(d) of C.P.C. for rejecting

the plaint on the ground that it is barred by the provisions of *Places of Worship (Special Provisions) Act, 1991* (Act No.42 of 1991) (hereinafter referred to as “the Act, 1991”). During the pendency of the aforesaid application, the defendant Nos.1 & 2 filed their written statements on 15.11.1996 & 23.02.1995 respectively. After considering the pleadings of the plaint and written statements, the court below framed ten issues vide its order dated 17.07.1997. The issue no.2 was in respect of Order VII Rule 11(d) of C.P.C which is reproduced below:-

“क्या वाद धारा – 4 उपासनास्थल विशेष उपबन्ध अधिनियम 1991 से वर्जित होने के कारण वाद पत्र आदेश –7 नियम – 11 सीपीसी के अर्न्तगत नामंजूर होने योग्य है ?”

7. By the aforesaid order, the trial Court also directed issue Nos.1 & 2 to be decided as preliminary issues. Against the order dated 17.07.1997, the plaintiffs filed an application being Application No.96C for recalling of the aforesaid order on the ground that the issue No.2 needs to be adjudicated on merits by taking evidence as it involves questions of fact and law both.

8. The trial Court passed order dated 18.10.1997 by which it decided that the Relief Nos.(a) &(c) are not barred by the provisions of Section 4 of the Act, 1991 but the relief (b) is barred by the provisions of Section 4 of Act, 1991. In view of the aforesaid, directions were given to the plaintiffs/defendants to move an amendment application in this regard within 15 days. With the aforesaid observations the application no.96-C was disposed of.

9. Aggrieved against the aforesaid order, three revisions were filed, Revision No.286 of 1997 filed by the plaintiffs, Revision No.285 of 1997 by the defendant no.1 and Revision No.281 of 1997 was filed by the defendant no.2. All the revisions were clubbed together and decided by a common judgment and order dated 23rd September, 1998 passed the District Judge, Varanasi. By the aforesaid order, order passed by the trial Court dated 18.10.1997 was set aside on the ground that Issue No.2 could not be decided without taking evidence.

10. Aggrieved against the aforesaid order dated 23.09.1998, the Anjuman Intazamia Masjid, Varanasi has preferred a Writ Petition before this Court being Writ Petition No.32565 of 1998 which was later converted into Matters Under Article 227 No.3341 of 2017 (Anjuman Intazamia Masazid Varanasi Vs.Ist A.D.J. Varanasi And Others). The aforesaid writ petition was duly entertained and an interim order was granted by this Court staying the further proceedings in respect of Suit No.610 of 1991 pending in the Court below. The aforesaid order was also challenged by the U.P. Sunni Central Board Of Waqfs Lucknow by filing Writ C No. 18576 of 1999, which was subsequently converted into Petition Under Article 227 of the Constitution of India and registered as MATTERS UNDER ARTICLE 227 No. - 234 of 2021 (U.P. Sunni Central Board Of Waqfs Lucknow Vs. Ist A.D.J. Varanasi And Others). The said petition was connected with the petition filed by Anjuman Intazamia Masjid, Varanasi.

11. It is so happened that during the pendency of the aforesaid petitions, an order was passed by the Hon'ble Apex Court in **Asian Resurfacing Of Road Agency ... vs Central Bureau Of Investigation (2018) 16 SCC 299** on 28.3.2018. In the aforesaid judgement it has been held by the Hon'ble Apex Court that all orders staying the proceeding of any matter sub-judiced before the courts shall be treated automatically vacated after expiry of six months from the grant of stay, staying the proceedings.

12. Since more than six months have expired from the date of said order passed by this Court dated 13.8.1998, an application on 10.12.2019 being Paper No.266 Ga was filed in the Court below by the plaintiffs with the relief inter-alia for survey of premises in dispute by the Archaeological Survey of India. In the aforesaid application, the following reliefs were sought:-

"अतः माननीय न्यायालय से निवेदन है कि सम्पूर्ण ज्ञानवापी परिसर एवं विवादित स्थल के सम्बन्ध में भौतिक एवं पुरातात्विक दृष्टि से निरीक्षण करने एवं उक्त परिसर की खुदाई कराकर विश्वेश्वर मन्दिर एवं इससे सम्बन्धित अन्यान्य देवी देवताओं के मन्दिर उनके अवशेष तहखाना, स्वयंभू ज्योर्तिलिंग विश्वेश्वर यथा स्थान चिन्हित करने उसकी यथास्थिति के सम्बन्ध में निम्न बिन्दुओं पर विस्तृत सर्वेक्षण करने हेतु डायरेक्टर जनरल, आर्कियोलॉजिकल सर्वे आफ इंडिया, दारोहर भवन, 24 तिलक मार्ग, नई दिल्ली एवं आर्किलाजिकल सर्वे डिपार्टमेण्ट उ०प्र० सरकार, दार मंजिल परिसर, महात्मा गान्धी मार्ग, कैसर बाग, लखनऊ को निर्देशित किया जावे ताकि न्याय हो।

वांछित आख्या

(क) ए.एस.आई. आ०न० 9130, 9131 एवं 9132 क्षेत्रफल 1 विघा, 9 विस्वा, 6 धूर स्थित मौजा- शहरखास, परगना देहात अमानत तहसील व जिला वाराणसी, मोहल्ला विश्वेश्वरनाथ, वार्ड- चौक, शहर व जिला वाराणसी को मौके पर चिन्हित करें उसका एक स्केली नक्शा बनावे एवं उसमें प्राचीन मन्दिर स्वयंभू ज्योर्तिलिंग विश्वेश्वरनाथ व अन्य मूर्तियां श्री गंगेश्वर गंगा देवी, श्री हनुमान जी, नन्दी, श्री गौरी शंकर गणेश

जी, श्री महा कालेश्वर, श्री महेश्वर, श्री श्रृंगार गौरी मण्डप एवं अन्य अनेक देवी देवताओं, तीन पीपल वृक्ष पक्का प्राचीन ज्ञान कूप व्यास गद्दी, बारादरी, मूर्ति नन्दी के ऊपर बनी रोड, प्राचीन चहारदीवारी एवं नौबतखाना बजानिब उत्तर, विश्वेश्वर मन्दिर के ध्वन्सावशेष, विवादित ढांचा ते जानिब पश्चिम प्राचीन मन्दिर की दीवारो एवं मन्दिर की दीवारो की चुनाई के स्थानो को अपने यथा स्थान प्रदर्शित करें एवं राडार के माध्यम से उक्त सम्पूर्ण ज्ञानवापी परिसर एवं विवादित स्थल का पुरातात्विक सर्वेक्षण करें एवं यह सुनिश्चित करें कि उक्त भूमि के नीचे किसी प्राचीन मन्दिर के अवशेष एवं मन्दिर या उसका अंश उपलब्ध है?

(ख) ए.एस.आई विवादित ढांचे के नीचे तहखाना का भी निरीक्षण करें एवं तहखाना के पन्द्रहवीं शताब्दी के पूर्व के मन्दिर के अवशेषों, पुराने विश्वेश्वर मन्दिर के पुराने पत्थर के खम्भों के बाबत पुरातात्विक आख्या प्रस्तुत करें और यह भी इंगित करें कि वे तहखाने में स्थित प्राचीन खम्भे मन्दिर के हैं अथवा अन्य किसी धार्मिक ढांचे के अवशेष हैं।

(ग) ए.एस.आई विवादित ढांचे की दीवारों का अन्दरूनी व बाहरी निरीक्षण करें एवं उसमें स्थित हिन्दू मन्दिर के चिन्हों के बाबत एवं पूर्व मन्दिर के अवशेषों के बाबत अपनी आख्या प्रस्तुत करें।

(घ) ए.एस.आई विवादित ढांचा के पूरब चबूतरे पर निर्मित तालाब जो पूर्व मन्दिर के तहखाने को घेर कर एक भाग में बना है उसकी बनावट तहखाने के पत्थरों से बने है या पुराने इसके सम्बन्ध में अपनी आख्या प्रस्तुत करें।

(च) ए.एस.आई विवादित ढांचे के मध्य के गुम्बद के नीचे फर्श को हटाकर उसके अन्दर स्थित स्वयंभू ज्योर्तिलिंग विश्वेश्वर जो करीब 100 फुट ऊँचा व उनके अरघा जो 100 फुट गहराई लिए हुए है, को निरीक्षण करें, यदि फर्श हटाना किसी कारण से सम्भव न हो तो अलग से खाई बाहरी भाग में खोद कर स्वयंभू ज्योर्तिलिंग विश्वेश्वर एवं उनके अर्घे को जो मध्य गुम्बद के फर्श के नीचे है उसे, परिलक्षित कर एवं उसके बाबत अपनी आख्या प्रस्तुत करें।

(छ) ए.एस.आई विवादित ढांचे के गुम्बद व उसकी दीवारों के बाबत उसके नये व पुराने एवं उसकी निर्मित होने के आयु पृथक-पृथक अंकित करते हुए उसके बाबत अपनी आख्या दें।

(ज) ए.एस.आई इस बाबत भी अपनी रिपोर्ट देवे की पंद्रहवीं शताब्दी में मन्दिर के नव निर्माण के समय पन्द्रहवीं शताब्दी के पूर्व के विश्वेश्वर मन्दिर के अवशेष को चारो तरफ से सात फुट ऊँची दीवार कायम करके उसे पत्थर की मोटी-मोटी पटिया से ढँक दिया गया था, जो तहखाना के रूप में वर्तमान में स्थित है।

(झ) ए.एस.आई. को मौके पर निरीक्षण के समय अन्य जिन बिन्दुओं पर उनका ध्यान आकृष्ण कराया जावे, उसके भी बाबत अपनी आख्या दें।"

13. When the proceedings started for hearing on the aforesaid application, two applications were filed by the defendant Nos.1 & 2 in Original Suit No.610 of 1991 being Application Nos.270Ga and 274 Ga. Both the applications were rejected by the Court below vide order dated 04.02.2020. Aggrieved against the aforesaid order, the petition being Matters Under Article 227 No.1521 of 2020 was preferred before this Court in which interim order was granted on 26.02.2020. The aforesaid order is quoted below:-

“An interim order was passed by this Court on 13.10.1998 in Writ Petition No. 32565 of 1998 (current registration is Matters Under Article 227 No. 3341 of 2017), Anjuman Intezamiya Masajid Varanasi Vs. Ist Additional District Judge, Varanasi and Others, is reproduced hereinunder:

"Untill further orders by this court further proceeding pursuant to order dated 23.09.1998 in suit no. 610 of 1991 pending in the court of 2nd respondent shall remain stayed."

Placing reliance on a judgment of the Hon'ble Supreme Court in Asian Resurfacing of Road Agency Pvt. Ltd. and another Vs. Central Bureau of Investigation, reported at 2018 (16) SCC 299, the learned trial court in the impugned order dated 04.02.2020, has held that the interim order dated 13.10.1998 is no longer subsisting and has commenced with the trial proceedings.

Shri S.F.A. Naqvi, learned Senior Counsel assisted by Shri F. Husain, learned counsel for the petitioner submits that the learned trial court was misdirected in law to find that the interim order dated 13.10.1998 was not subsisting by relying on the judgment of the Hon'ble Supreme Court in Asian Resurfacing(supra). He calls attention to the various provisions of the Constitution to contend that the observations of the Hon'ble Supreme Court in Asian Resurfacing(supra) will not apply to the facts of this case and the interim order dated 13.10.1998, passed by this Court still survives.

The learned Senior Counsel submits that the directions issued by the Hon'ble Supreme Court in paragraphs 36 and 37 of the Asian Resurfacing (supra), do not fall within the purview of law declared by the Hon'ble Supreme Court under Article 141 of the Constitution of India which is binding on all the Courts. The paragraphs 36 and 37 of the Asian Resurfacing (supra) are reproduced below:

"36. In view of the above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy

is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalised. The trial court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.(emphasis supplied)

Article 141 of the Constitution of India being relevant to the submissions, are extracted hereinunder:

"Article 141. Law declared by Supreme Court to be binding on all courts. ? The law declared by the Supreme Court shall be binding on all courts within the territory of India."

Taking his submission further, the learned Senior Counsel would contend that the aforesaid observations of the Hon'ble Supreme Court in Asian Resurfacing (supra) on which reliance has been placed are relatable to Article 142 of the Constitution of India. The directions have been issued in exercise of the extraordinary powers vested in the Hon'ble Supreme Court by Article 142 of the Constitution of India.

It is then contended that while all courts and authorities have to implement the orders of the Hon'ble Supreme Court with deference and in letter and spirit immediately after the judgments are rendered. However, orders under Article 142 of the Constitution of India can be enforced only in the manner prescribed therein. Article 142 of the Constitution of India being one of the spear points of the argument of the petitioner, is reproduced below:

"142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc:

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the

territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

It is asserted by the learned Senior Counsel that the directions in Asian Resurfacing (supra) can be made enforceable throughout the territory of India including the State of Uttar Pradesh only in the manner prescribed by or under any law made by the Parliament and until such provision in that behalf is so made, in such manner as the President may by order prescribe under Article 142 of the Constitution of India. However, according to the learned Senior Counsel, the law made by Parliament or Presidential order contemplated under Article 142 of the Constitution of India was not placed before the learned trial court and the learned trial court was thus led into error.

Considering the fact that submissions made on behalf of the petitioner may have serious repercussions on a large number of other cases, learned advocates from the Bar at large are also invited to assist the Court in this matter.

Matter needs consideration.

Shri Ajay Kumar Singh, learned counsel for the respondent could not refute the aforesaid submissions. He has raised some preliminary objections. These objections shall be considered on 17.03.2020.

Till the next date of listing, the effect and operation of the order dated 04.02.2020 passed in Original Suit No. 610 of 1991(annexed as annexure 1 to the petition) shall remain stayed. Put up this case on 17.03.2020 in the additional cause list at 02:00 PM.

The records of Writ Petition No. 32565 of 1998 (current registration is Matters Under Article 227 No. 3341 of 2017), Anjuman Intezamiya Masajid Varanasi Vs. Ist Additional District Judge, Varanasi and Others, shall also be placed before the Court. In case pleadings are complete and this Court has the determination, this Court may proceed further in the matter."

14. Subsequently, another order was passed on 17.03.2020 which is reproduced below:-

"Considering the public health emergency which the nation is facing, the learned counsels for both parties in highest traditions of the Bar agree that the matter cannot be heard today.

The learned trial court is restrained from proceeding in the matter since the controversy is engaging attention of this Court and the petitions are proposed to be heard on merits. Further an interim order was also passed by this Court on an earlier occasion in Civil

Misc. Writ Petition No. 32565 of 1998 (current registration being Matters Under Article 227 No. 3341 of 2017) Anjuman Intezamiya Masajid Varanasi Vs. 1st Additional District Judge, Varanasi and Others. The controversy engaging attention of this Court in both petitions go to the root of the proceedings before the learned trial court. In case the interim order granted by this Court on 13.10.1998 in Civil Misc. Writ Petition No. 32565 of 1998 (current registration being Matters Under Article 227 No. 3341 of 2017) Anjuman Intezamiya Masajid Varanasi Vs. 1st Additional District Judge, Varanasi and Others, is allowed to lapse, a serious miscarriage of justice would result.

Learned counsels also informed that there are other matters pertaining to the same controversy which are pending before this Court.

The records of Writ C No.18576 of 1999, U.P. Sunni Central Board of Waqfs Lucknow Vs. 1st ADJ Varanasi and Others, be placed for perusal.

At the request of the learned counsels for the parties, put up this case on 15.04.2020 in the additional cause list.”

15. Thereafter the matter could not be taken up due to Covid-19 pandemic. When this Court were reopened, an application for early hearing was filed by the counsel for the petitioners in the earlier petition before this Court. Thereafter all the petitions were heard together and vide order 15.03.2021, the judgement was reserved by this Court.

16. After the judgement was reserved, again hearing of Paper No.266Ga was started by the Trial Court. Thereafter two objections were filed by the defendants in the Original Suit being Paper Nos.273 Ga and 286Ga. Apart from the same, written arguments were also submitted by the defendants being Paper No.332 Ga. After considering the matter, in great detail, the aforesaid objections were rejected and the order dated 08.04.2021 was passed by the Court below. The operative portion of the aforesaid order is quoted below:-

“I. The Director General, Archaeological Survey of India, Darohar Bhawan, 24 Tilak Marg, New Delhi, functioning under the Ministry of Culture, Government of India, is hereby directed to get a comprehensive archaeological physical survey be done of the entire Settlement Plot No.9130 located at Mauja Shahar Khas, Pargana Dehat Amanat, Tehsil and District Varanasi including the Naubat Khana situated at the Northern Gate of Gyanvapi compound and the house towards the northern gate of the Naubatkhana, i.e., the Gate (Hereinbefore termed as disputed site and duly described in the plaint as Schedule-A.)

II. For above said purpose, the Director General shall constitute a five member committee of eminent persons who are experts and well versed in the science of archaeology, two out of which should preferably belong to minority community.

III. The Director General, shall also appoint an eminent and highly experienced person who can be regarded as expert in the science of archaeology to act as the observer for the committee so constituted. Such person should preferably be a scholarly personality and established academician of any Central University. The committee so constituted shall report the observer about the survey work done on a particular day.

IV. The committee shall prepare a comprehensive documentation along with the drawing, plan, elevation, site map with precise breadth and width of the disputed site, marked with hatched lines in the plaint map.

V. The prime purpose of the archaeological survey shall be to find out as to whether the religious structure standing at present at the disputed site is a superimposition, alteration or addition or there is structural overlapping of any kind, with or over, any other religious structure. If so then what exactly is the age, size monumental and architectural design or style of the religious structure standing at present at the disputed site and what materials has been used for building the same. The committee shall also trace

as to whether any temple belonging to the Hindu community ever existed before the mosque in question was built or superimposed or added upon it at the disputed site. If so, then what exactly is the age, size, monumental and architectural design or style of the same, and also, as to which of Hindu deity or deities the same was devoted to.

VI. For that purpose the committee shall be entitled to enter into every portion of the religious structure standing at present at the disputed site. The committee shall firstly resort to Ground Penetrating Radar (GPR) or Geo-Radiology system or both, to satisfy itself as to whether any excavation or extraction work is needed at any portion of the religious structure standing at present. Even if by use of GPR system the committee feels satisfied that further excavation or extraction work is needed to be carried out, the same shall firstly be done by trial trench method vertically and that too at a very small scale not more than four square feet at a time. Horizontal excavation shall be done only when the committee is fully satisfied that there is indeed a certainty of belief that by such excavation they would be able to reach more concretized conclusion regarding ascertainment of the precise archaeological remain below the ground level.

VII. During the entire survey proceeding every artefacts supporting the plaint or defence version shall be properly preserved. If any artefacts is so deeply entrenched with the earth or super structure standing at the disputed site, removal of which can potentially disturb the existing super structure, or the committee otherwise feels that the same should not be removed due to being bulky in nature or for any other reasons to be recorded, then photography, videography and external measurement, sketching and drawing (comprehensive documentation of the architectural remains) of the same shall only be done and the same shall not be removed.

VIII. The committee shall also record its finding to the effect as to whether true architectural structure traced at the disputed site (Schedule-A) has any sort of connection with the temples and artefacts mentioned in the in the Schedule-B of the plaint.

IX. While carrying out the survey, the committee shall ensure that the people belonging to Muslim community is not prevented to offer Namaj at the disputed site. If due to ongoing survey work, it is not practicable to facilitate the offering of Namaj to the persons belonging to Muslim community at a particular place, then the committee shall provide such persons an alternative and suitable place to offer Namaj at any other place within the precincts of the mosque. The committee is expected be throughout aware of the sensitivity of the matter, hence the committee shall always ensure that stakeholders of both Hindu and Muslim religions shall not be subjected to any partisan or preferential treatment and both shall be equally respected.

X. Before entering into survey work at any point of the time, the committee shall give advance notice to the parties or their counsels,. The parties to this suit shall be entitled to remain present in person or through their counsels. But no party appearing through a counsel shall be entitled to nominate more than one counsel at a time.

XI. Entire survey work shall be done in camouflaged manner, i.e., entire disputed site shall be camouflaged before the commencement of survey and till the same is finished. Non general public or media person shall be allowed to have access to witness the ongoing survey work. Neither the observer nor any of the members of the committee will ever brief the media about the status of ongoing survey work.

XII. No party shall dictate the committee to interpret this order or act in particular manner. The committee alone shall be entitled to do the same.

XIII. Photography (coloured as well as black and white and slides) and videography of the entire survey proceeding shall be ensured by the committee as a record of the proceeding. Comprehensive documentation and preparation of map stating placement of necessary artefacts and drawings shall be done. A report of survey work on routine basis shall be prepared stating the time of entering at the disputed site and exist therefrom.

XIV. To ensure that entire survey work is not tampered with at the behest of the either party, the committee shall be entitled to get necessary security personals be deputed at the disputed site during the survey work as well as after tentative closure thereof.

XV. It shall be the duty of the district administration to ensure that complete peace and tranquillity is maintained at the disputed site and in nearby areas during the entire survey proceeding, and the committee is given due assistance and co-operation by the district administration at all point of time till the survey proceeding is completed so that the committee could be enabled to discharge its functions without any fear or favour.

XVI. The survey work shall be carried out between 09:00 A.M. to 05:00 P.M.

XVII. The committee and parties participating in the survey proceeding shall give due adherence to the norms and guidelines issued time by time by the Central and State Government with regard to upsurge second wave of pandemic Covid-19.

XVIII. After completion of the survey work, the committee shall submit its report and the record of the entire survey proceeding in sealed cover without undue delay.

XIX. Keeping in mind the representative capacity in which the suit is being prosecuted by the plaintiffs and contested by the defendants, and the fact that public at large is interested in the controversy in hand, it would be unjust to burden the plaintiffs alone to bear the expenses and cost of the survey work. It is

therefore, the cost and expenses of the entire survey proceeding shall be borne by the Archaeological Survey of India.”

17. Aggrieved against the aforesaid order, an application was filed by the petitioners before this Court. Since the aforesaid application could not be taken up due to Covid 19 pandemic second wave, two Revisions were filed by both the petitioners being Civil Revision No. Nil of 2021 (U.P. Sunni Central Waqf Board Vs. Ancient Idol Gyanwapi Mandir, Varanasi and others) and Civil Revision No. Nil of 2021 (Anjuman Intezamiya Masjid Vs. Ancient Idol Gyanwapi Mandir, Varanasi and others).

18. During the pendency of the aforesaid Revisions, present petitions have been filed by the petitioners inter-alia with the prayer to direct the District Judge Varanasi to adjudicate and decide the aforesaid revisions. When the aforesaid petitions were taken up, a preliminary objection has been raised by Sri Ajay Kumar Singh, learned counsel for the respondents that the revision was filed very recently and it is not proper to pass any order by this Court for disposal of the revision at an early date.

19. In the aforesaid revisions, applications were filed by the petitioners before the Revisional Court for dismissal of the revisions as not pressed on the ground that the petitioners have already filed petitions before this Court. Since the aforesaid revisions were not admitted, therefore, the In-Charge District Judge, Varanasi returned the aforesaid revisions vide order dated 12.08.2021.

20. After the order dated 12.08.2021 passed by the In-charge District Judge, Varanasi, amendment application has been filed in both the petitions by the petitioners inter-alia with the prayer to set aside the order dated 08.04.2021 passed by the Civil Judge (Senior Division) F.T.C. Varanasi in Original Suit No.610 of 1991.

21. Counter and Rejoinder affidavits have been exchanged in response to the amendment application. Apart from the same, a supplementary affidavit has also been filed by Sri S.F.A. Naqvi, learned Senior Counsel in Petition No.3844 of 2021. Along with supplementary affidavit, various documents have been filed specially document being Application No.332Ga, i.e., written argument filed by the opposite party in the pending suit in the court below. In paragraph 3 of the aforesaid written statement, it is clearly stated that against the Original Suit No.610 of 1991, Writ Petition No.32565 of 1998 (New No.3341 of 2017) as well as Writ Petition No.18576 of 1999 (New No. 234 of 2021) is already pending before this Court in which after hearing the parties in great detail, the judgement has already been reserved on 15.03.2021. Apart from the same, a complete order-sheet of Original Suit No.610 of 1991 with effect from 04.02.2021 till 04.08.2021 has been appended. From perusal of the order-sheets dated 08.04.2021, it is clear that the court below has full knowledge regarding the pending proceedings before this Court.

22. In this view of the matter, it is argued by Sri S.F.A. Naqvi, learned Senior Counsel along with Sri Punit Gupta, learned counsel for the petitioner that once the Court below has full knowledge in respect of the pending proceedings before this Court, the court below should have defer the matter in place of deciding the application No.266Ga. It is further argued that interim order which was also granted in the petition in the year 1998 as well as subsequent interim order granted in the year 2020 are continuing even today and in spite of the same, the court below proceeded to decide the issues.

23. On the other hand, it is argued by Sri Ajay Kumar Singh, learned counsel for the respondents that there was no interim order of this court and only the judgement was reserved on 15.03.2021. There was no occasion for the court below to defer the hearing in the matter. It is further argued that the interim order granted even in the petition filed in the year 2020 came to an end on 05.01.2020 and as such the court below rightly decided the application on 08.04.2021. It is also argued by Sri A.K. Singh, learned counsel for the respondents that present amendment application is barred by the provisions of Order XXIII Rule 1 of C.P.C. It is argued that while filing the application for withdrawal of the revision, no permission was sought from the Revisional Court to challenge the same before this Court. Learned counsel for the respondents also relied upon a judgement of the Hon'ble Supreme Court in the case of *Sarguja Transport Service vs State Transport Appellate reported in 1987 AIR 88*. He was also upon another judgement of Hon'ble the Supreme Court in

the case of *Amita Kaushish & Ors vs Sanjay Kaushish & Ors reported in 1996 SCC (7) 19*.

24. In response to the same, Sri Punit Kumar Gupta, learned counsel for the petitioner relied upon a judgement of Hon'ble Supreme Court in the case of *Kandapazha Nadar & Ors vs Chitraganiammal & Ors reported in AIR 2007 SC 1575*. He also relied upon a judgement delivered by the learned Single Judge of Uttrakhand High Court in the case of *Rajesh Kumar Gautam Vs. Maha Mandeshwar Vedabayasanad Geeta Ashram reported in 2003 (52) ALR 676*.

25. Heard learned counsel for the parties and perused the record.

26. From perusal of the record, it is clear that the judgment was reserved in all pending petitions by this Court, after hearing the learned counsel for the parties at length on 15.03.2021. The court below has full knowledge to the fact that the judgement has already been reserved on 15.03.2021. In this view of the matter, the court below should not have proceeded and decided the application filed by the plaintiffs in the Original Suit for survey by Archaeological Survey of India. In the opinion of the Court, the Court below should wait for the verdict in the petitions pending before this Court and not to proceed further in the matter till the time a judgement is delivered. The judicial courtesy and decorum warranted such discipline which was expected from the Court below but for the unfathomable reasons, neither of the courses were taken. It is to be regretted that the court below departed from this

traditional way in the present case and chose to examine the question himself. I have said so with the fond hope that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Court below. The same view has been taken by the Apex Court in the case of ***Uttar Pradesh Power Corporation Limited Vs. Rajesh Kumar and others reported in (2012) 7 SCC 1*** has been taken similar view. The relevant paragraph No.16 of the aforesaid judgement is quoted below:-

“We have reproduced the paragraphs from both the decisions in extenso to highlight that the Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were being part heard and the hearing was in continuum. It would have been advisable to wait for the verdict at Lucknow Bench or to bring it to the notice of the learned Chief Justice about the similar matters being instituted at both the places. The judicial courtesy and decorum warranted such discipline which was expected from the learned Judges but for the unfathomable reasons, neither of the courses were taken recourse to.”

27. In respect of the arguments advanced by Sri A.K. Singh, learned counsel for the contesting respondents that the present amendment application is barred by the provisions Order XXIII Rule 1 is concerned, it is settled law that Court cannot go into and give a finding on the merits of the amendment sought, without first allowing the amendment. The Hon'ble Apex Court in Paragraphs 19 and 28 of the case of ***Rajesh Kumar Agarwal and others Vs. K.K. Modi and others reported in (2006) 4 SCC 385*** has held as under:-

“19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the

prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.

28. Since the Court has entered into a discussion into the correctness or falsity of the case in the amendment, we have no other option but to interfere with the order passed by the High Court. Since it is settled law that the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing prayer for amendment, the order passed by the High Court is not sustainable in law as observed by this Court in Sampath Kumar v. Ayyakannu reported in (2002) 7 SCC 559.”

28. Thus, the argument of Sri A.K. Singh, learned counsel for the contesting respondent Nos.1 to 6 that the amendment challenging the order dated 08.04.2021 is barred by the provision of Order XXIII Rule 1 of C.P.C. could be considered only when the amendment application is allowed and challenge to order dated 08.04.2021 is incorporated in the petition.

29. Moreover, this Court is of the opinion that the High Court in exercise of its jurisdiction of superintendence can interfere in order to keep the tribunals and Courts subordinate to it, ***‘within the bounds of their authority.’*** The High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted. It is also held by the Hon’ble Apex Court that the main objection of Article 227 of the Constitution of India is to keep strict administration of judicial control by the High Court on administration of justice within its territory.

30. The Hon'ble Supreme Court in the case of *Shalini Shyam Sethi and others Vs. Rajendra Shanker Patel (2010) 8 SCC 329*, has considered the entire history and scope of Article 227 in detail and after considering the various decisions of various High Courts as well as Supreme Court has formulated principles for exercise of jurisdiction under Article 227 of the Constitution of India in para 49 of the which is under:-

“49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court’s jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh Vs. Amarnath (AIR 1954 SC 215) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, ‘within the bounds of their authority’.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) *This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.*

(o) *An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality.”*

31. The principles relating to the scope and applicability of Article 227 of the Constitution of India was considered in great detail by a Division Bench of this Court in the case of ***Ram Roop and others Vs. Bishwa Nath and others reported in AIR 1958 Allahabad 456*** which are reproduced below:-

1. The superintendence referred to in Article 227 of the Constitution includes judicial superintendence.

2. The power conferred by the Article is wide but not unlimited. The exercise of the power is discretionary and relief under the Article cannot be claimed as a matter of right. The principles regulating the exercise of the power are generally speaking the same as the principles on which writs can be issued under Article 226 but in a sense the power under Article 227 is wider as the High Court can sometimes issue directions in the exercise of that power which it could not do under Article 226.

3. The power under the Article can be exercised even in those cases in which no appeal or revision lies in the High Court.

4. The power should not ordinarily be exercised if any other remedy is available to the aggrieved party even though the pursuing of that remedy may involve some inconvenience or delay.

5. The power should not be used to correct mere errors of fact or law. Error of law may include a wrong decision on a question of jurisdiction.

6. The power is to be used sparingly only in appropriate cases in which the conscience of the Court is pricked and it feels that immediate interference is called for as it is necessary to keep the Subordinate Courts or Tribunals within their bound or to prevent some outrageous miscarriage of justice and grave results would

follow if the power is not exercised. Whether a particular case is of this kind or not will depend on its own facts and circumstances. Such cases cannot obviously be exhaustively catalogued.”

32. In this view of the matter, the Court is of the opinion that the amendment applications filed by the petitioners are liable to be allowed and they are hereby allowed.

33. Counsel for the petitioners are permitted to make necessary amendments in the petition within three days. Counsel for the petitioners are also directed to serve a fresh amended copy of the petitions upon Sri A.K. Singh, learned counsel for contesting respondent Nos.1 to 6, Sri Shashi Prakash Singh, Senior Counsel/Assistant Solicitor General of India for respondent No.7 and Sri M.C. Chaturvedi, learned Additional Advocate General/Senior Counsel for respondent No.8 within three days thereafter.

34. All the counsel for respondents are granted three weeks time to file counter affidavit.

35. Rejoinder affidavit, if any, may be filed within one week thereafter.

36. List this matter on 08.10.2021 for further hearing.

37. Till the next date of listing, further proceedings of Original Suit No.610 of 1991 pending before the court below shall remain stayed.

Order dated:- 09.09.2021

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