IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. … Appellant

VERSUS

Mahant Suresh Das &Ors. etc. etc. … Respondents

AND

OTHER CONNECTED CIVIL APPEALS

RESPONSE TO ARGUMENTS MADE IN REJOINDER AND THEIR APPLICABILITY ON BOTH SIDES

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ADVOCATE ON RECORD:EJAZ MAQBOOL

RESPONSE TO ARGUMENTS AND THEIR APPLICABILITY ON BOTH SIDES

I. PRELIMINARY

A. Not a further reply

1.1 This is not a further reply to the Oral and Written Reply by the Hindu side but to abstract some legal principles which should be equally applicable to the Muslim claims of title, limitation, adverse possession and waqf.

B. Difference of Emphasis

1. 2 While replying to Suit 1, 2 and 5, there was a difference of emphasis between Senior Counsels:

i. One Senior Counsel (Mr. Parasaran) in response to an interruption said that irrespective of whether that particular issue was not argued, the Court would have to adjudicate all issues.

ii. The other Senior Counsel (Mr. Vaidyanathan) had emphasized that since there was no pleading on the Idgah, it could not be raised now even though, it was submitted that there was no occasion for raising it until the ASI digging, the Report and the part of response of experts.

We feel that view taken by the first Senior Counsel is not incorrect in the final adjudication of this appeal, especially, as there were serious objections by the Muslims to the ASI endeavour itself and to its finding by witnesses and experts.

1.3. Further, the attempt to extrapolate a new diagram in the reply to the reply could well constitute evidence which the Court most graciously permitted opposing Counsel to clarify. It may be noted that the same counsel objected to such extrapolated and other aspects by Counsel for Muslims.

1.4. New evidence is being brought to show that the pictures on the wall were not of KK Nayyar and even though their own witness identified them: *(See Statement of DW-3/1 Mahant Bhaskar Das,* ***Running Volume 51, pgs. 8771-8772)***

> *'At that time there was not any photo of Shri K.K. Naiyyar in the disputed building. When Lal Das became the priest the sketches of Shri Naiyyar and Guru Datt Singh were drawn on the wall. Shri Guru Datt Singh who was City Magistrate in Faizabad, retired from Faizabad itself after the attachment of the disputed building. The witness was shown Photo No.128 and 129 of the coloured album and he replied that the sketch of Guru Datt Singh seen in that photo was in the lower western wall under the south dome of the disputed building.'*

We hasten to add that the act of putting these photographs was, in any case, during the 'receiver' period when only Hindus were permitted inside. This was illegal and in violation of the court orders.

1.5. Finally, where new case law or law is cited, the other side has not just a right, but, a duty to the Court to respond and clarify the legal issues.

(A note on the cases cited is attached to this submission.)

II. LEGAL PRINCIPLES APPLICABLE TO BOTH SIDES AS A MATTER OF LAW.

2.1. There were certain legal principles advanced by the Hindu side, which must, perforce, apply as general principles of law. These are discussed below:

(i) Legal proposition based on parens patriae:

2.2. It is now accepted that the doctrine of parens patriae applies both to the public authorities and can be invoked by courts in the

adjudicative process where fundamental rights are involved. The relevant cases *(cited earlier)* are:

i. *Charan Lal Sahu Vs. Union of India,* ***(1990) 1 SCC 613****;*
ii. *Aruna Ramachandra Sahnbaug Vs. Union of India, (****2011) 4 SCC 454****;*
iii. *Mohd. Salim Vs. State of Uttarakhand,* ***2017 SCC Online Utt. 367****;*
iv. *Sheoli Hati Vs. Somnath Das,* ***(2019) 7 SCC 490****.*

(See Submission A51)

2.3. Assuming that this is broadly applicable to civil (and criminal) cases, the *parens patriae* duty applies to Muslims and Hindus and, indeed, all faiths.

(ii) Legal proposition based on the Preamble:

2.4. The term 'justice' in the Preamble was emphasized to support the Hindu case. Surely, it has to be read with equality, secularism and others to apply to Muslims, Hindus and other faith as a duty across the Board.

(iii) Legal proposition based on Article 142 of the Constitution:

2.5. If this broadens the jurisdiction of court or to mould the relief, equities of both sides must be considered including the various admitted illegalities of:

a) Trespass by Nihang Sikh
b) damaging the mosque in l934;
c) harassing Muslims to prevent worship;
d) Trespass to place idols on 22-23rd. December l949;
e) putting pressure in a pending case by rathyatras;
f) demolition of the Mosque;
g) defacing the pillars with paint to hide evidence;

(putting photographs of Commissioner contrary to the very concept of receivership)

h) sleeping under the domes as a form of prayer;

i) The conviction and punishment of UP's Chief Minister for contempt.

It needs emphasis that there are limits to Article 142.

Justice cannot include the injustice of illegal acts.

(See Submission A68)

(iv) Applying the word 'public institution' and other legal aspects:

2.6. We must assume that the right to belief, practice and propagate religion in Article 25(1) and the right in Article 26 'to establish and maintain institutions for religious and charitable purposes' apply to all faiths.

However, the Constitution assumes that there are serious infirmities in the Hindu (Sikh, Buddhist and Jain) faiths to the extent that they practice untouchability (Article 17) prevent temple entry (Article 25(2)).

Can we assume that the Ram Temple *(if existed)* was free from these infirmities?

(v) Application of Roman Law concept of res nullius:

2.7. We submit the definition of 'res nullius' in *Thayarammal Vs. Kanakammal, (2005) 1 SCC 457* is correct.(at pr. 16)

> *'16. A religious endowment does not create title in respect of the property dedicated in anybody's favour. A property dedicated for religious or charitable purpose for which the owner of the property or the donor has indicated no administrator or manager becomes res nullius which the learned author in the book (supra) explains as property belonging to nobody. Such a property dedicated for general public use is itself raised to*

the category of a juristic person. Learned author at p. 35 of his commentary explains how such a property vests in the property itself as a juristic person. In Manohar Ganesh Tambekar v. Lakhmiram Govindram[1] it is held that: (ILR p. 263)

> *"The Hindu law, like the Roman law and those derived from it, recognises, not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations." (emphasis supplied)*

The religious institutions like mutts and other establishments obviously answer to the description of foundations in Roman law. The idea is the same, namely, when property is dedicated for a particular purpose, the property itself upon which the purpose is impressed, is raised to the category of a juristic person so that the property which is dedicated would vest in the person so created.'

Further, the case of *Mabo Vs. Queensland (No. 2) (1992) HCA 23*, correctly identified the meaning of 'res nullius' by invoking 'terra nullius' which was applied in domestic context.

Reliance on this case by twisting its meaning was incorrect and that the concept of 'res nullius' of which 'terra nullius' is a part of the Common law was argued by us earlier. **(See Submission A48)**

2.8. However, an important point was raised applying Roman Law, inter alia, as summed up in the compilation in reply (at pg .26 of Submission A104)

> *"188. Justinian begins his second Book by saying, "Things are either in our patrimony or outside our patrimony"; by which he means that there are certain things which in law or in fact are not the subject of private owner-ship. These are:- (a) Things common to all men (res communes) – the air, running water, the sea and the sea-shore; (b) things public (res publicae) – rivers and harbours; (c) things belonging to a corporate body, such as theatres, race-courses and the like in cities (res universitatis); (d) things*

belonging to no one (res nullius), comprising:- (i) sacred things (res sacrac), i.e. churches and other things dedicated to the service of God; (ii) religious things (res religiosae), i.e. graveyards and graves; (iii) sanctioned things (res sanctae), such as city walls and gates. They are said to be sanctioned, because any offence against them is punished capitally; and penalties imposed by law are termed "sanctions". The first two of these are said to be matter of divine right (divini juris), and the term applies in a way to the third as well (quodammodo divini juris sunt)". **(emphasis added)**

In fact Justinian treats res nullius separately on a public private distinction. It is further pointed out (at pg. 27 of Submission A104)

'185. The phrase res nullius is used in various senses:-

(a) to include all things which according to Roman ideas are not susceptible of private ownership;

(b) specifically, as above, of things sacred, religious and sanctioned;

(c) of things which, though susceptible of ownership, are not at the moment owned, e.g., wild animals uncaptured, or things which have been abandoned by their owner (res derelictae).'

Further R.W. Lee says at pg. 8 of Submission A104:

'Things belonging to no one (res nullius), comprising:-

(i)sacred things (res sacra), i.e. churches and other things dedicated to the service of God; (ii) religious things (res religiosae), i.e. graveyards and graves; (iii) sanctioned things (res sanctae) such as city walls and gates".

"Things belonging to no one are sacred things, religious things, sanctioned things; for a thing which is subject to divine law is owned by no one. Those things are sacred which are duly consecrated to God by the Bishops, such as sacred buildings, and offering dedicated to the

service of God; which things, as our constitution enacts, may not be alienated or pledged except for the redemption of captives.'

2.9. Assuming that Justinian and Roman law is to be applied to Indian law, not as a common law concept, but, as a new found Indo-Roman law, would it also apply to Muslim sacrae? If a mosque had stood for 400-500 years (longer than the post Augustan empire), would it not be res sacrae and not subject to destruction.

(vi) On the legal concept of illegality:

2.10. The legal concept of 'illegality' is linked to whether it caused communal divisiveness as follows: (at pg. 7 of Submission A104)

Shri Vaidyanathan, Senior Advocate in reply observed:

'*1. The submission that the Hindus are claiming rights based on illegalities is mischievous, unfortunate and intended to promote communally divisive feelings. Reference has been made to the incidents of 1934, 1949, 1992.*

2. The plaintiffs in Suit 5 have scrupulously avoided any argument which will incite such communal divide and disrupt amity and peace.They have not invoked such arguments as wanton destruction of Hindu temples by the marauding Muslim forces and loss of life and atrocities committed by them, to keep the Hindus from protesting against such wanton destruction and deliberate insult to the sacred places of worship and desecration of the Temples.

3. The travelogues and gazetteers and the orders in the Suit of 1885 amply bear out the illegalities perpetrated during the Mughal rule.

4. The appeals have to be decided on the merits as borne out by the pleadings and evidence and ignoring such needless prejudicial arguments.' **(See Submission A68)**

From this may be extracted a legal proposition that 'illegalities which are communally divisive alone are illegal.

This proposition squarely applies to this case.

2.10. Before looking to the imprecise evidence of travellers and gazetteers, who love to tell a story, there is, no doubt, contemporary evidence of the divisive of Hindu parties in this case. *(See list at pr. 2.5 of this submission)*

2.11. There is ample evidence of 'Political Violence in Ancient India' as exemplified in Prof Singh's book by the same name.

2.12. We submit that our case is not to trade allegations of communal divisiveness, but, to show the flagrant illegalities which are irrefutable in this case and go to the root of this case and are not denied, but celebrated.

In fact the very purpose of the deities as Plaintiffs as attributed through the Nyas was to remove and demolish/destroy the mosque.

Thus, we submit that the illegalities are central to the determination. **(See Submission No. A68)**

(vi) Legal proposition on Juristic Personality based on belief.

2.14. It has been admitted that the concept of juristic personality was alien to Vedas and came into being during Indo-British rule which in turn prescribed how the juristic personality of Hindus and Muslims and not just copied the concept of English trust.

If belief, spirituality and sacrality are the tests, they are no less and even more prominent in Islam.

2.15. Juristic Personality as a legal concept is a rigotherous concept which requires applications beyond belief that it requires in each case:

a. religious belief;
b. manifestation, consecration and/or acceptance;
c. continuity of use and worship.

(In the case of the Janmasthan or Janmabhumi, travellers and Gazettes testify to belief, without more, of a possible temple (not mentioned). From 1857, the prayer is to an idol only.

Jamabhumi as a juristic entity comes only in l985 and specifically claimed in l989, with intent to remove and destroy the existing structure.

2.16. Significantly, in each example where there is 'no particular corporeal form' or prayer or which has been cited for spiritual purpose, there is a temple or structure and part of continuous prayer.

Several case laws have been cited in order to show that worship is done by Hindu devotees even at places where there are no idols. In this regard the following cases were cited:-

- ***Ram Jankijee Deities v. State of Bihar (1999) 5 SCC 50***- In this case there were two idols, Ram Jankijee and Thakur Raja.
- ***Yogendra Nath Naskar v. CIT (1969) 1 SCC 555:-*** This case is authority for the proposition that a Hindu Idol is a juristic entity.
- ***Sri Sabhanayagar Temple, Chidambaram v. State of Tamil Nadu (2009) 4 CTC 801***-In this case also there is a full scale corporeal temple.
- ***Deoki Nandan v. Murlidhar AIR 1957 SC 133,***-In this case the next friend was an agnate of the settlor, that the true beneficiaries were the worshippers, there was a difference between public and private endowments. In this case it was a public temple.

- ***Addangi Nageswara Rao V. Sri Ankamma Temple (1973), Andh W.R. 379,*** the evidence concretely showed that there was a temple with endowed property.

It is therefore submitted that in each of these cases there was a temple existing and the Hindu devotees were continuously worshipping at the said temple; both of which elements are absent in the present case.

2.17. Implicit in Mr. Parasaran's argument was to follow some non existent but evolving notion of Hindu law, not Indo-Anglian law, obviating any proof of existence and belief. It is also implicit, indeed, specifically argued that this would apply only to beliefs of Hindus because their beliefs are situate in India thereby privileging one faith over another.

(viii) Legal proposition based on Importance of Custom:

2.18. Specific attention was drawn to the use of 'custom' in Article 13. The concept of custom has wide implications beyond any religion and has to be proved before it is tested for constitutional validity as in the case of pre-emption. The existence and proof have to be rigorously applied.

- *Laxmibai v. Bhagwantbuva,* ***(2013) 4 SCC 97****, para 14;*
- *Surajmani Stella Kujur (Dr) v. Durga Charan Hansdah,* ***(2001) 3 SCC 13****, para 10;*
- *Ram Swaroop v. Mahindru,* ***(2003) 12 SCC 436,*** *para 21;*
- *Shakuntalabai v. L.V. Kulkarni,* ***(1989) 2 SCC 526****, Para 19;*

2.19. We have to recognize evolutionary concepts in both Hindu and Islamic law. ***[See Mulla: Hindu law (17th Edition) pgs.85-88]***

2.20. We believe that the concept of custom is not alien to Mulsim law, through Hadith, Ijmaa and Qiyas and portraying the evolution of Islamic law as approved by its jurists.

'There are four sources of Mahomedan law, namely

(1) the Koran;

(2) Hadis, that is, precepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by authorized persons;

(3) Ijmaa, that is, a concurrence of opinion of the companions of Mahomed and his disciples; and

(4) Qiyas, being analogical deductions derived from a comparision of the first three sources when they did not apply to the particular case.'

[***Mulla's Principles of Mohomedan Law (l990, 19th Edition) pg. 22]***

Further, there are secondary sources including:

a) Urf(custom)
b) Judicial decisions
c) Legislation
d) Justice, equity and good conscience
e) Istishan (juristic preference)

III. APPLYING EVOLUTIONARY CONCEPTS IN LAW

(i) Argument made:

3.1. Mr Parasaran made a plea for taking an evolutionary approach which could be de-constructed in two ways:

i. Evolution is linear (or teleological) towards a better end (as used transformationally in constitutional, public and even private law especially towards Muslim law and practices and perforce some practises of Hindus.
(This was invoked by reference to the Constitutional provisions)

ii. Evolution is non-linear and applicative to new situations.

Both these evolutionary approaches were invoked, but, the latter was emphasized and a new situation has confronted the judges in this case.

3.2. **It is submitted that this approach does not give a go-by to existing law on juristic personality or dissolving it altogether.**

(ii) Being and Becoming

3.3. There was a very poignant phrase used by dissenting Justice Dwivedi in ***Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225*** (at pr. 1860, pg. 921)

> *'At bottom the controversy in these cases is as to whether the meaning of the Constitution consists in its being or in its becoming.'*

3.4. This could be taken as succinctly featuring 'transformative constitutionalism' as a linear concept, even if differently interpreted by different constitution benches. (even in *Kesavananda 1973 case*)

That is not directly relevant to this case but to the concept of interpretation generally.

3.5. In statutory or private law, interpretation in addition to literary interpretation, these are encapsulated by Heydon's case, the mischief rule, the context –purpose rule or even the public policy rule

For an example in *Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629*, 4 judges (led by Justice Lokur) took an entirely different view from 3 judges (led by Justice Chandrachud) in a constitutional-electoral case.

3.6. It is submitted that no interpretation can dissolve:

(a) the law of juristic personality as followed for decades across two centuries;

(b) the rigour of converting belief into juristic personality is well established under Indian law;
(c) Juristic personality has adapted the law of 'trusts' carefully and has been interpreted permitting alienation for necessity;
(d) Simply because a belief is limitless, the extent of what is corporeally protected or incorporeally manifested and supported by usage and practice require rigour and proof.
To abandon this approach is to open a Hindu Pandora box at the expense of the other facts.
(e) Where an idol is being worshipped, there is little scope for creating a new juristic personality (conceived in l985 and plaint in l989) to create and independent wider rights, for which no proof of use is provided.
(f) It is well established that sacrality alone does not constitute juristic personality.

It follows that in the applicable aspects of juristic personality, a much larger bench is needed to over-rule existing law.

IV. ON NARROWING PRECEDENT

4.1. It fell from the judges to seek assistance from the Bar on how the precedential value of the possible judgment can be cast into narrow and wider possibilities.

4.2. According to the Places of Worship (Special Provisions) Act, 1991, as interpreted in this case, is stand alone in requiring adjudication whereas protection is given to all other endowments

> '***Section 3.*** *Bar of conversion of places of worship.—No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof.*

Section 5. *Act not to apply to Ram Janma Bhumi-Babri Masjid.—Nothing contained in this Act shall apply to the place or place of worship commonly known as Ram Janma Bhumi-Babri Masjid situated in Ayodhya in the State of Uttar Pradesh and to any suit, appeal or other proceeding relating to the said place or place of worship.'*

However, the singularity of this case does not import legally uniqueness in that:

i. It has to be decided according to settled principles of law;
ii. Any interpretation that would by implication incidentally destroy the very basis of the Act of 1991 should not be indulged without direct arguments in this behalf;
iii. If this case is decided to apply to post 15 August 1947 cases for belief to be the basis of juristic personality to non-sanctified beliefs in non-established temples to justify digging, for what have been called by Mr. Vaidyanathan 'civilizational' reasons to be used against onother community, explosive situations would be created;
iv. While archaeology is useful to learn on part, to use for new communal purposes is not warranted;
v. The only safe precedent for post-1947 belief based assertions would be- no existing temple or mosque temple can be destroyed on the basis of belief.

4.3. In the context of this case:

i. It is not possible to apply the formula that on the peculiar facts of this case, only the new law (or interpretation) will apply- to either SLP or Writ. (Such a formula is used for dismissing SLPs or in respect of reliefs.)
ii. Any general statement of law has precedential value as ratio or obiter.
iii. The test is not unique classification under Article 14.

(e.g. *Charanjit Lal Chowdhury v. Union of India, 1950 SCR 869 or Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co., 1954 SCR 674)*

Any such test of belief founded on imprecise scattered evidence would reopen the findings of endowments before or after 1947 to support an extreme Hindu appropriation of all and every mosque.

Note: Evidence publicly circulated during the mediation by one person indicates over 500 temples over which mosques were allegedly created.

iv. In this case, the uniqueness is a generality to all belief cases whether before or after l947.

v. Its generality would apply if we treat this as a new claim created in l985 and pleaded in 1989 full of destructive potential.

4.4. In this case, the requirements of juristic personality in terms of belief, manifestation, identification and use would apply

It is manifest that, from 1858 the contested case of the Hindus was that prayer was to an idol.

4.5. There is no reason why adverse possession, acquisition etc do not apply to this form of juristic personality.

The argument that 'immoveable property' cannot be moved is fallacious in that legal title can suffer change by the aforesaid concepts and on alienation by necessity.

V. EFFECT OF LACK OF COMPREHENSIVE PRAYER AND DESTRUCTION OR EXISTENSE OF TEMPLE

5.1. There is a difference between the abandonment of a site and of animus possesendi and continuing actual and\or constructive possession.

5.2. Whether a temple existed or destroyed for a mosque will not affect the status of a mosque which existed for 500 years as a site of belief, prayer, existence of building and use.

Nothing has been shown to show that this is contrary to the Koran , hadith, ijmaa (consensus) or qiyas (reasoning).

The onus is on the Hindus in this regard and every aspect pointed out is susceptible to interpretation

VI. NOTE ON METHODOLOGY INADMISSABLE AND SCANT FOR THE COURT

6.1 It has been submitted that note on methodology should be ignored as abusive to the court's image. Infect, in the said note it had been categorically mentioned that the Hon'ble Judges, though, were at a loss to confirm much of the evidence, made their best endeavours to do so by resorting to unconventional techniques lie ASI.

6.2 In fact, the note was accepted. **(See Submission A45)**

VII. REQUEST FOR ARCHAEOLOGICAL DETAIL

7.1 The Courts request to point out areas of non-digging will be provided separately.

7.2 There is no evidence of any destruction/ demolition. (**See Impugned Judgment Vol. II pg. 2445-46, pr. 3988-3990)**

VIII. RESPONSE TO BELIEF AND ITS SPIRITUAL MEANING.

8.1 Submission was advanced by Mr. Narsimha on Belief and Spiritual meaning (at pg. 23)

> *'...it is respectfully submitted that the right to worship is conclusively established as a civil right for more than a century. With the advent of the Constitution, we have resolved to secure to the citizenry the liberty of belief,*

faith and worship. To secure the freedom to worship is, therefore, a cherished value. This legal and preambular objectives necessarily become the "circumstances in which this particular case needs to be decided". (Section 3 Indian Evidence Act, 1872)'

Also:

'The enquiry into the existence of the fact, belief and worship must be made by "robust common sense" coupled with the principle of "more probable than not" as laid down by this Hon'ble Court.'

8.2 If this proposition is accepted, it will nevertheless apply to Islam:

a) Islam dedicates the entire life of worshippers to Allah. Therefore, Allah is accepted as the all pervading God.
b) Islamic civilization still exists.

Thus, the entire argument applies to both the sides.

8.3 It is noticed that for this the Hindus worship has only been sought to be proved by hearsay, particularly by W.C. Bennett.