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**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**

**SUMMARY NOTE**

**ON**

**SUBMISSIONS IN REPLY TO SUIT 3 OF 1989**

**BY**

**DR. RAJEEV DHAVAN, SENIOR ADVOCATE**

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

**SUMMARY NOTE ON SUBMISSIONS IN REPLY  
—TO SUIT 3 OF 1989**

**I. PRELIMINARY**

- 1.1 This is a summary note bringing together the Submissions by reply made to the appeal by Nirmohi Akhara to the judgment of Lucknow Bench of the Allahabad High Court in respect of Suit 3 of 1989.
- 1.2 Needless to say, this note is a pointer to the Submissions A-56 to A-68 handed over to the Court, but, not intended as a substitute for either those submissions made or the oral arguments.
- 1.3 It will also respond to some of the cases cited which have not been dealt with in the earlier Submissions.

**II. ARGUMENTS OF NIRMOHI AKHARA**

- 2.1 Essentially, the Nirmohi Akhara's arguments were:
  - i. The arguments advanced have been separately submitted earlier. **(See SUBMISSION NO. A61)**
  - ii. That the Sunni-Suit 4 is barred by limitation. Since it was filed on 16 December 1961, he looked for an anterior date to 16 December 1949. He also asserts that otherwise (a) the mosque ceased to be a mosque because of lack of prayer on the site, or (b) because after that it was lost by adverse possession for more than 12 years.

**Note:** This will be dealt with in submissions on Suit 4.

- iii. The Deity's Suit V would also be barred by limitation generally and also because the claim of the deity to be a minor for the purposes of limitation was not valid in law.
- iv. However, the Nirmohi Suit IV was within limitation because Article 120 of the Limitation Act would not apply and (a) his suit was not for declaration but possession (b) the limitation started not on 22<sup>nd</sup>-23<sup>rd</sup> December 1949 but when the Magistrate took over on 29 December 1949 and those proceedings were still pending but simply put in suspense until the civil suit was decided. It follows that limitation must be admitted in all suits by token of this argument (c) Alternatively, limitation started when the civil injunction was confirmed (d) This was a case of continuing wrong to the Nirmohi Akhara's right to pray continued as an injury.
- v. The deity could only have been represented by the shebait of the Nirmohi Akhara and not the next friend of the deity under the present circumstances.
- vi. That the entire suit of the Deity was malicious at the instance of Deoki Nandan (the plaintiff no 3 in that suit) and is also not maintainable.
- vii. That including the area as a deity (swayambhu) was not sustainable in law

viii. The disputed property could only be managed by the shebais of the Nirmohi Akhara with property rights over it.

2.2 Later, during the argument he tried to align support for the deity in the following way (i) all Hindus were welcome to pray there as they have been doing (ii) Parikrama round the deity also gave rights to the Nirmohi Akhara (iii) if the deity was given the benefit of being a minor for the purposes of limitation.

2.3 It is important to note that the stance of the Nirmohi Akhara was totally against the two deities in Suit V as well as Plaintiff No 3 in that Suit. This has caused a fissure in the Hindu parties.

It also means that (i) the Hindu plaintiffs in Suit III and the Muslim Plaintiffs in Suit IV and are together in their attack on the Hindu Plaintiffs in Suit V; and (ii) the Muslim Plaintiffs in Suit IV and the Hindu Plaintiffs in Suit V are in many respects together in their attack on the Hindu Plaintiffs in Suit III.

### **III. RESPONSE TO STATEMENT IN COURT.**

3.1. After being alerted in Court to the possibility of a self-defeating conflict between the Nirmohi Akhara (Plaintiff in Suit 3) and the Plaintiffs in Suit V, the counsel for the

Nirmohi Akhara made the following Statement in Court on 27.08.2019.

*'Statement on the stand of the Nirmohi Akhara on the Maintainability of Suit OOS No. 5 OF 1989*

1. The Nirmohi Akhara would not press the issue of maintainability of Suit No. OOS No. 5 of 1989 which has been filed on behalf of the deities Plaintiff No. 1 and 2 through Plaintiff No. 3 as their next friend under Order 32 Rule 1 CPC provided the other Hindu Parties of OO No. 1 of 1989 and Plaintiff No. 3 of OOS No. 5 of 1989 do not press or question the Shebaiti right of Nirmohi Akhara in relation to the deities in question and the Maintainability of Suit OOD no. 3 of 1989 by the Plaintiff Nirmohi Akhara.

2. It is submitted that the plaintiff – Nirmohi Akhara can independently maintain the suit even in the absence of Deities as parties in Suit OOD No. 3 of 1989 as the identity of the deities is merged in the identity of the Shebait – Nirmohi Akhara. A suit filed by Nirmohi Akhara "as a Shebait" is a suit filed by and on behalf of the deities.

3. It is stated that, the reliefs sought by the Nirmohi Akhara "For restoration of charge and management from the receiver" cannot be categorised as a relief "against" the interest of the deities for which it

*can be said that they should be represented as a defendant through a disinterested next friend.'*

3.2. A closer look at the above Statement shows:

- i. The First paragraph of the Statement is a contingent anticipatory trade off that if the Plaintiffs in Suit 1 and 5 do not press or question the shebaiti right of the Nirmohi Akhara in Suit 3 of 1989 or that Suit's maintainability, in return the Nirmohi Akhara will give up the challenge to the maintainability of Suit No 5 through the plaintiffs in the latter suit.

(Significantly, although the plaintiffs in Suit V were given an opportunity to respond to this, they did not avail of this opportunity.)

We must assume that the oppositional status quo continues.

- ii. In the Second paragraph, the Nirmohi Akhara claimed an independent (and orally asserted as exclusive) right to file on behalf of the deity.
- iii. The Third paragraph clarifies that the next friend of the deity has to be disinterested because the present next friend was wrongly motivated with *malafide* intent and not even a believer Vaishnavite.
- iv. The Third paragraph also confirms that the claim for restoration of charge and management does not militate

against the deity's interest as long as it is represented by shebait or a disinterested friend.

3.3. This response is constructed on basis of the Statement made on 27.08.2019, the pleadings, exhibits and the arguments made in Court.

#### IV. RESPONSE ON THE 'PLEADINGS, EXHIBITS AND WITNESSES

4.1 A reading of the pleadings shows that the relief sought by Nirmohi Akhara was directed towards seeking management and charge from the Official State respondents only.

The charge that the Muslim Defendants were in a collusive conspiracy with the Official respondents was simply asserted without proof.

4.2 An account of the conclusions to be drawn from the pleadings is as follows:

- i. The only claim is against the State and against the Section 145 Order.
- ii. The claim is for management and charge of the temple.
- iii. The suit was restricted only to inner courtyard.
- iv. Earlier Hindus were worshipping at the Ram Chabutara, in the Outer Courtyard.

- v. On the intervening night of December 22-23, 1949, the idol was shifted from Ram Chabutara (in the outer courtyard) to Central Dome (in the inner courtyard).
- vi. No averment that the central dome was the birth place.
- vii. Nirmohi as Shebait has been deprived of the management and charge of the property.
- viii. Shebaitship has been denied to them.
- ix. Even in the new temple (if built by Nyas), Nirmohi will remain the Shebait.
- x. Nirmohi has first stated that the term Janam Asthan is a completely meaningless phrase, later it has accepted that Janam Asthan is a juridical entity.
- xi. Disowned Mahant Raghubar Das, then accepted him.
- xii. Though, it has been held by Justice Sudhir Agarwal, that Nirmohi (Plaintiff) was not entitled to any relief, outer courtyard has been given in the possession of Nirmohi.
- xiii. The arguments advanced have been separately submitted earlier.

**(See SUBMISSION NO. A56)**

- 4.3 The number of exhibits were 21 exhibits from Suit No. 3 and 11 exhibits from Suit no. 5. Out of these, 9 exhibits from Suit No. 3 and 11 exhibits from Suit no. 5 were found not to



support the Nirmohi Akhara's case. Rest of the exhibits were not pressed.

4.4 The arguments advanced have been separately submitted earlier. **(See SUBMISSION NO. A58, A59, A60)**

4.5 As elaborated during arguments, the witnesses produced by Nirmohi Akhara are unreliable as they have not only contradicted themselves, but also suffer from other infirmities.

4.6 A separate note on the aforesaid has been supplemented earlier. **(See SUBMISSION NO. A62)**

4.7 Some of these may be pointed out as follows:

- a) Some of these witnesses had not read the affidavits filed by them;
- b) Some contradicted themselves in cross examination;
- c) Some were not able to confirm their assertions;
- d) Some supported the case of the Muslims in Suit 4 that a Babri Masjid existed where prayer was going on;
- e) Some witnesses and exhibits show that there was a planned conspiracy to trespass by putting idols in the inner courtyard of the night of 22-23 December 1949;
- f) Unclear about Parikrama Marg and the total number of idols;

- g) Some have given elaborate description of idols inside the disputed structure but later stated that they never entered the disputed structure;
- h) Some who claim to have visited the disputed site numerous times have been unable to recall the physical features of the disputed site;
- i) Further one witness has recognised the Photo of Shri K.K. Nayar and Shri Guru Dutt Singh, who were involved in the planned desecration of the mosque on December 22-23, 1949;
- j) In addition to the foregoing, many witnesses have established the Nirmohi Akhara was only praying to the idol kept at the Ram Chabutara and have gone to the extent of stating that Ram Chabutara was known as the Ram Janam Bhoomi temple. Lastly, it is relevant to mention that one witness has mentioned that Ram Chabutara was also called bedi. When this statement is read in the context of Tieffenthaler's observations wherein he has stated that bedi (cradle) was being worshipped as the birthplace of Lord Ram, it becomes clear that the Hindus were worshipping the Chabutara as the birthplace and not the portion under the middle dome of the disputed structure.

V. ON THE WORDS 'BELONGING' AND 'POSSESSION' IN  
THE PLAINT

5.1 It is respectfully submitted that:

- a. These words have to read in the context of the pleadings read as a whole;
- b. On reading pleadings, no factual foundation has been laid to assert the nature of the right in each case.

'BELONGING TO'

5.2 We have submitted:

- a. that if the pleadings are read and the case law is analysed, the 'belonging to' or 'belong to' term is used in an ascriptive sense to show a factual and legal nexus between the claimant and the alleged claim on facts.
- b. 'Belonging to' denotes title.

5.3 It is clear from the law on shebait, that unlike a 'trustee', shebait is not the owner and cannot claim any such relief.

5.4 The arguments advanced have been separately submitted earlier.

**(See SUBMISSION NO. A64)**

**POSSESSION:**

5.5 It is submitted that the whole purpose of this argument is to extend the period of limitation. If possession is claimed a legal foundation has to be made as to what kind of possession is claimed.

5.6 On the basis of the provisions of the Limitation Act and the law of possession, it has to be shown whether the possession is:

*(a) legal possession*

*(b) illegal possession*

*(c) adverse possession*

*(d) some other kind of possession*

With respect, the Nirmohi Akhara has not laid down any factual or legal foundation as to the kind of possession they seek and with what consequences to escape the prescribed limitation in the Limitation Act.

5.7 It was also submitted that although 'possession' is an open textured concept but that its polymorphous nature did not deprive specific legal consequences to emanate from specific fact situations.

5.8 The arguments advanced have been separately submitted earlier.

**(See SUBMISSION NO. A66)**

## VI. CONTINUING WRONG

- 6.1 By invoking the concept of 'continuing wrong' it has been sought to bring Nirmohi Akhara case within the domain of Section 23 of the Limitation Act.
- 6.2 No factual foundation has been laid for showing who the continuous wrong has been claimed against, and since relief has been claimed against the officials what was the wrong that they committed to defer the limitation period beyond the period of 6 years prescribed in Article 120 (since the attempt at title and possession has not been satisfactorily founded on fact and law.)
- 6.3 In determining the application of the concept of continuous wrong, the following has to be taken into account:
- a. Statutes of limitations are also statutes of repose Section 3 must not be interpreted so as widen its scope to run a coach and horses through the purpose and intent of the Limitation Act.
  - b. Continuous wrong cannot be read in ever expanding circles as a concept in terms of the injuries perceived to be caused for which damages or other remedies are available.
  - c. Any attempt to expand the concept of continuous wrong will have an effect not just on the law of limitation but also criminal law, revenue and tax law, tort and contract law and the law of duties and responsibility generally.

- d. There is a difference between the causal effect of an event in ordinary language as opposed to the causal effect as by the law applicable.
- e. The phrase used is 'continuous wrong' is not 'continuous right' or 'continuous injury'.
- f. 'Continuous wrong' denotes a wrong by a defendant (or someone against whom such a claim is made) of a legal nature because there is a legal responsibility and duty on an on-going basis beyond the event that precipitates the start of limitation.
- g. Due attention has to be given to considering whether the event precipitating the start of limitation is a stand-alone finite, complete and identifiable event.
- h. The concept of duty may be inherent in the nature of some causes of action (e.g. nuisance) or whether the act continues the right and duty (in question e.g. trespass).
- i. There is a difference between a recurring wrong which gives rise to a fresh cause of action and a continuing wrong.
- j. No continuous wrong can attribute an official action in discharge of their duty where either no further action can be taken or where there is the *novus actus interveniens* of further independent discharges of duty with other consequences.

- k. Execution of a decree bears its own regime of limitation; and the doctrine of merger does not extend limitation.
  - l. Any application of the concept of continuous wrong should not lead to the grotesque result of on indefinite prolongation.
- 6.4 The arguments advanced have been separately submitted earlier. (See SUBMISSION NO. A65)

## VII. JURISTIC PERSONALITY AND RIGHTS OF A SHEBAIT

7.1 The following legal position obtains:

- a. In the Vedic period, prayer was addressed to beings representing the beneficent and radiant powers of nature e.g. earth, air, sky etc. with an eye on the infinity behind these finite forces. Prayer was through offerings poured into the sacred fire and charity was in the form of consecration of tanks and wells and planting trees and building rest houses for travelers. Monastic institutions were unknown.
- b. It was in the post-Vedic period that idol worship began, perhaps inspired by the respect that Buddhists paid to relics and sacred structures and later to the image of Buddha himself. The Buddhist *sangha* paved the way for monastic institutions capable of holding property.
- c. The legal character of a *shebait* cannot be defined with precision and exactitude. Broadly described, he is the human ministrant and custodian of the idol, its earthly spokesman, its

authorized representative entitled to deal with all its temporal affairs and to manage its property.

- d. The possession and management of the dedicated property belong to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol.
- e. The only situation where some other agency can be said to have the right to act for the idol is where the shebait refuses to act for the idol or where the suit is to challenge the acts of the shebait himself as prejudicial to the interests of the idol.
- f. The shebait can sue in his own name and the deity need not figure as a plaintiff in the suit, though the pleadings must show that the shebait is suing as such.
- g. Since the shebait acts as the human agent of the idol, a suit by the shebait is in law a suit by the idol itself.
- h. The only situation where some other agency can be said to have the right to act for the idol is where the shebait refuses to act for the idol or where the suit is to challenge the acts of the shebait himself as prejudicial to the interests of the idol.
- i. It is necessary for protecting the interests of the idol that in cases where default of the shebait is alleged that a suit on behalf of the idol be permitted to be filed by a person claiming to be next friend with the permission of the court and



the court might in proper cases issue notice to all persons interested before granting permission.

7.2 The arguments advanced have been separately submitted earlier.

**(See SUBMISSION NO. A63, A67)**

## **VIII. CONSEQUENCES OF DISMISSAL OF SUIT**

8.1 What would be the consequences for the shebait if the suit is dismissed on grounds of limitation or other legal cause.

8.2 It is submitted:

- a. The shebait, even though not able to maintain Suit 3 but will, nevertheless, remain the shebait unless the shebait is lawfully removed by a lawful procedure and cause of action (eg. Section 92 of the CPC).
- b. The shebait would continue to be the shebait of the idols at the disputed site (if decreed) or any other site.
- c. The shebait can challenge any default suit by an unsuitable next friend.
- d. As long as the shebait's status remains unsuccessfully unchallenged, his exclusive right to sue remains.
- e. If suit 5 is decreed, the shebait will act on behalf of the deities.

8.3 As far as establishing the right of the shebait to be so, it is submitted: \_\_\_\_\_

- a. There is no proof that the Nirmohi Akhara has been a shebait since times immemorial.
- b. At best it can be said that the Nirmohi Akhara has established intermittent presence since 1855-1858.
- c. The right of the shebait to the inner courtyard was rejected in the decisions of 1885-1886.
- d. In the outer courtyard, only easementary or prescriptive right was recognized without title or possession.

8.4 Submissions to Suit 5 and 1 will be placed on the basis of the above.

#### IX. RIGHTS NOT TO BE BASED ON ILLEGAL ACTS:

9.1 Several illegal acts have become the foundation of the case in Suit No. 3 and Suit No. 5.

These include:

- a) The partial destruction of the mosque in 1934;
- b) Harassing Muslims to prevent them from praying at the mosque;
- c) Trespass to put the idols in the mosque on 22-23 December, 1949;
- d) The destruction of the mosque on 6<sup>th</sup> December, 1992;
- e) Ant other unlawful intimidations arising in this case.

9.2 Our submission on this is:

- a) It is contrary to law and justice to allow anyone to take advantage of a wrong, whether committed by them or not.
- b) If they are compliciting the illegal wrong, any such recognition emanating from the illegal wrong is contrary to law and justice.
- c) Even if they are not complicit, the illegal wrong should not be the bases of rights.
- d) Even if they knew of the illegality, whether complicit or not, they cannot built an entitlement on that basis.

9.3 The arguments advanced on illegal acts have been submitted separately earlier. **(See SUBMISSION NO. 68)**

#### X. SUBMISSIONS ON CASE LAW CITED:

10.1 It is submitted that this submission note only deals with cases not dealt with under separate heads in other submissions.

10.2 The following comments may be noted:

- a. *PN Mullick v. PN Mullick (1925) 52 IA 245* is a case of recognizing the juristic personality of an idol. But it is also important that this case:
  - (i) It does not give absolute rights to the deity
  - (ii) It permits the shifting of idols to follow the intent of the founder and the circumstances
- b. The law applicable will be Indo-Anglian law after the Crown took over:

- (i) *Angurbala v. Debabrata* (1951) SCR 1125 indicates the rights of shebait to get recognition for a shebait in under the Hindu Women's Right to Property Act 1937 as a successor. It is not a complete authority on the limitations on the shebait's rights.
- (ii) *Commr. HRE v Sri Lakshmindra Mutt* (1954) SCR 1005 once again was not concerned with the rights and limitations on the shebait's rights and powers except to the extent to which they were regulatable by statute.
- (iii) *Ishwqar v. Harihar* (1999) 3 SCC 457 is on joinder of parties and will not help Nirmohi Akhara to expand its remedies if not established or prayed for in its own suit, even if suits are heard together.
- (iv) *Hukum Chand v. Maharaj Bahadur* (1933) 12 Patna 681 did not give title of the entire Parasnath Hill to the Jains but found that that there was a continuing wrong to the Digambaris as long as the feet representing part of the human body were not removed.
- (v) *Bishwanath v Sri Thakur* AIR 1967 SC 1044, apart from giving a worshipper the right to recover illegal possession of property also laid down that Section 92 of CPC was not available for such recovery.

(A converse proposition has been canvassed that rights cannot be founded on illegal acts) (See SUBMISSION NO. A68)

*Veruareddi v. Konduru* (1966) Supp. SCR 270 is an authority for the proposition that a deity will not be bound by an earlier compromise between a worshipper and the Commissioner of Endowments which parted with rights declaring that certain properties were private rights.

On facts, clearly all worshippers are not to be trusted

(vi) *Shivaji Maharaj v. Lala Barati Lal* AIR 1956 All. 207 actually lays down that in the case of a public endowment, a worshipper cannot bring a suit for possession but can bring a suit for reliefs under Section 92 of the CPC with permission.

10.3 The cases on extending the period of limitation through merger, actions for execution, and continuous wrong are dealt with in the Submission dealing with Continuous Wrong.

10.4 The arguments advanced on Continuing Wrong have been separately submitted earlier. **(See SUBMISSION NO. A65)**

10.5 The cases on next friend and the deity as a minor will be dealt with in the response to Suit 5.

10.6 The cases on the right of the shebait to represent and exclusively sue for the idol except when there is mismanagement by the shebait and by a next friend is unexceptional and will be dealt with further in the response to Suit 5.

10.7 The law and cases on adverse possession will be dealt with in the response to Suit 5.