

(2024) 03 MP CK 0011

In the Madhya Pradesh High Court

Case No : Writ Petition No. 10497 Of 2022

Hindu Front For Justice (Regd. Trust No. 976) Through Its
President Ms. Ranjana Agnihotri And Others

APPELLANT

Vs

Union Of India Ministry Of Culture And Others)

RESPONDENT

Date of Decision : 11-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 25, 26, 29, 49
Code Of Civil Procedure, 1908 — Section 75(e), Order 26 Rule 9, Order 26 Rule 10,
Order 26 Rule 10A
Ancient Monuments And Archaeological Sites And Remains Act, 1958 — Section 16,
16(2), 21, 39
Wakf Act, 1995 — Section 2, 5
Evidence Act, 1872 — Section 45

Citation : (2024) 03 MP CK 0011

Hon'ble Judges : Sushrut Arvind Dharmadhikari, J;Devnarayan Mishra, J

Bench : Division Bench

Advocate : Vishnu Shankar Jain, Vinay Joshi, Himanshu Joshi, Vaibhav Bhagwat,
Ajay Bagadia, Devansh Awal, A. S. Kutumbale, Baldeep Singh Gandhi

Final Decision : Disposed Of

Judgement

Sushrut Arvind Dharmadhikari, J

Heard on I.A. No. 986/2024, which is an application seeking issuance of directions to the Director, Archaeological Survey of India in terms of Section 75(e) and Order 26 Rule 10A of the CPC.

1. It is contended on behalf of the petitioners whilst pressing the Interlocutory Application that survey by the Archaeological Survey of India (for short 'ASI') is a statutory duty, which the ASI ought to have performed long back at the inception when the mystery and confusion about the true character of Bhojshala Saraswati Temple ('Bhojshala Temple') cum Maulana Kamal Maula Mosque ('mosque') arose leading to disputes about its true status. He goes on to contend that under Section 16 read with Section 21 of The Ancient Monuments and Archaeological

Sites and Remains Act, 1958 ('the Monuments Act, 1958'), determining and entertaining the true character of any ancient monument is a starting point for the ASI to discharge its statutory duty. A mandamus can be issued to the ASI for discharging its statutory duty in terms of Section 16, towards determining the character and nature of the premises in question, viz. Whether a Temple or Mosque or to what extent are traits of temple along with the deity present in the temple. It is further submitted relying on the documents annexed with the Writ Petition vide Annexure P-5 (I-V) (Images of the various parts & structures standing in the premises) that there are yantras and sanskrit shlokas inscribed on floors, pillars, walls, which have been deliberately defaced and scratched by visitors from other community and religion; there are carved pillars with defaced images of Hindu goddesses and Gods of various buildings standing inside the premises, including images of Sun God and other Hindu Gods with their traditional engravings. Drawing attention of the Court to various structures like walls, sanctum sanctorum in the disputed complex, it is further argued that there are present mantras inscribed in Sanskrit with recitals of Pali/Prakrit.; a large Hawan Kund and other Kunds constructed originally for conducting Yajnas and offering rituals before them.

2. The petitioners have also relied upon number of historical documents and research material done by foreign as well as Indian Scholars which have mentioned that Bhojshala complex with the Vagdevi temple pre-existed the Kamal Maula Mosque hundreds of years before it. The documents relied upon by the petitioners side disclose that the mosque had been constructed by dismantling, destroying and dismantling the ancient structures of previously constructed Hindu temples for construction of the Mosque. This construction of the mosque on the pre-existing Bhojshala temple took place during the reigns of Alaudim Khilji at the turn of 13th - 14th century. Subsequently, the Kamal Maula Mosque was constructed during the regime of Mehmood Khilji (II) sometime in the year 1514. Even the study reports of the ASI prepared from time to time have stated that originally constructed Bhojshala and Vagdevi temple was destroyed / dismantled to install and construct a mosque over at the instance of Islamist rulers and forces.

3. In the backdrop of the aforementioned submissions, therefore the petitioners prays that it is the sanguine and bounden duty of the ASI acting under the Ancient Monuments Act, 1958 to ascertain the true character, nature and form of the premises in question.

4. Shri Ajay Bagadia, Senior Counsel appearing for the respondent no. 8 has lodged serious objections to the maintainability of the reliefs as sought for by the petitioners, as also interim application for survey by the ASI. He contended that a similar issue was agitated earlier in WP No. 4216/2003 (Qazi Zakullah and Ors. v State of Madhya Pradesh and Ors.). In the said writ petition also, very same order dated 07.04.2003 was put to challenge by the petitioners, when a Single Bench of this Hon'ble Court at the Principal Seat at Jabalpur had dismissed the

aforesaid writ petition being non-maintainable and replete with disputed facts and submissions. The question of territorial jurisdiction was also laid open. Mr. Bagadia therefore contended that once the said WP No. 4216/2003 was dismissed by the Single Bench against which the W.A. No. 784/2006 is pending before the Division Bench of the Principal Seat at Jabalpur, no interference can be made.

5. Shri Bagadia further submitted that the State Government and ASI for obvious reasons are taking a particular stand under the influence and pressure of the Government of the day and the Court must pierce through the said obvious reasons of such a partisan stand in favour of the existence of Bhojshala Vagdevi Temple against the interests of Muslims, who have been praying on the situs and offering Namaaz for years. Mr. Bagadia further contended that the present proceedings are barred by the principle of 'res-judicata', which shall impede the maintainability of the present writ petition. He contended that eventually the final relief sought by the petitioners is overlapping and similar to the proceedings instituted at the Principal Seat Jabalpur and, therefore, the Court must not entertain the present writ petition. He vehemently argued that present proceedings cannot be equated with Ayodhya (Ramlala temple) dispute, where there was no dispute about the title of the deity, which makes the said case different from the present.

6. Shri Himanshu Joshi, Ld. ASG representing the Archaeological Survey of India (ASI) contended that the order passed by the DG, ASI in July, 2003 apparently did not take into consideration the previously prepared report in the year 1902-03 under the aegis of then existing expert body and the said report clearly pointed out the pre-existence of Bhojshala Temple of Vagdevi and stated the same to be the important Gurukul & temple of vedic learning and studies. This report also stated that the said temple was razed down and dismantled, defaced by the Islamic invaders, who ruled the country later to construct the mosque therein. However, to separate the grain from the chaff, it is the specific submission & stand of the ASI that a fresh survey would clear the entire dust around the whole status of complex as a noon day.

7. In the counter affidavit filed by the State Government, through the documents filed on record, it has been stated that the revenue records throughout till 1935-1936 bore the description of premises as Bhojshala & Temple, vide survey number 313 old (604 new) of village Dhar. Since Bhojshala has already been notified as one of the protected monuments under the Monuments Act of 1904 and thereafter again in 1951, therefore it has been managed and controlled entirely by the GOI/ ASI. There is no mention of 'Jama Masjid' anywhere in the revenue records. It is further contended by the State Government that entire land of the Bhojshala complex belong to the State Government, under the management & control of ASI since times preceding the independence. Therefore the same could have never been declared as a waqf property at all. It does not fulfill the necessary requirement for declaration of valid waqf under Section 2 of

the Waqf Act and the property never belonged to any muslim person to be created as a valid waqf endowment. The dargah of Hazrat Kamaluddin Chisti is situated on survey number 302 and not on the structure of Bhojshala, and both the places are separate and distinct. Being notified monument under the provisions of earlier Monuments Act, 1904, substituted by later Monuments Act, 1958, it could have never been notified as waqf nor be conferred the status of waqf as claimed to have happened in 1985. There is no evidence of offering of namaz prior to year 1935 and the order issued by Dhar State in the year 1935 is illegal void ab initio as the whole premises was under the control of ASI, under the ownership of the State. The State also supported the plea of the petitioners that ascertainment of the status of whole site is necessary to be undertaken to clear the misunderstanding, which has long been the reason for communal strife between both the communities.

8. In rejoinder, the petitioners submitted that ASI survey becomes all the more pressing and important in the backdrop of varied submissions made across the Bar, more so when ASI has admitted that there is a serious mystery enveloping the true nature, character and form of the premises in question. He has submitted that the situation and circumstances of Bhojshala temple are akin to Ayodhya Temple dispute, where there was a dispute about existence of the foundational birthplace of Lord Ram, where the Babri masjid was constructed.

9. Heard, learned counsel for the parties and perused the record.

10. Before proceeding with the matter, it would be apt to refer to the relevant provisions of the Monument Act, 1958.

? Section 16 of the Monuments of 1958

"Section 16: Protection of place of worship from misuse, pollution or desecration.? (1) A protected monument maintained by the Central Government under this Act which is a place of worship or shrine shall not be used for any purpose inconsistent with its character.

(2) Where the Central Government has acquired a protected monument under section 13, or where the Director-General has purchased, or taken a lease or accepted a gift or bequest or assumed guardianship of, a protected monument under section 5, and such monument or any part thereof is used for religious worship or observances by any community, the Collector shall make due provision for the protection of such monument or part thereof, from pollution or desecration?

(a) by prohibiting the entry therein, except in accordance with the conditions prescribed with the concurrence of the persons, if any, in religious charge of the said monument or part thereof, of any person not entitled so to enter by the religious usages of the community by which the monument or part thereof is used, or

(b) by taking such other action as he may think necessary in this behalf."

? Section 21 the Monument Act, 1958

ARCHAEOLOGICAL EXCAVATIONS

21 . An archaeological officer or an officer authorised by him in this behalf or any person holding a licence granted in this behalf under this Act (hereinafter referred to as the licensee) may, after giving notice in writing to the Collector and the owner, enter upon and make excavations in any protected area

11. As per Section 39 titled as Repeals and Savings, the Monuments Act of 1958 has repealed the Monuments Act of 1904 and the Ancients and Historical Monuments and Archaeological Site and Remains (Declaration of National Importance) Act, 1951. Therefore the legislation that governs the premises in question of the Bhojshala today is the Monuments Act of 1958. It is not a matter of dispute that vide gazette notification dated 28. 11.1951, the premises have been notified as protected monuments, the status admitted by all the parties to the lis.

12. It is also not a matter of dispute that previously under the erstwhile Monuments Act, 1904 also, the said premises were notified as an ancient monument already. Therefore there can be no iota of doubt that statutory duty of the ASI exists as enjoined under Section 16 of the Monument Act, 1958, viz. to ascertain the nature, character and original form of the place of worship. It is only thereafter that the protection of the said place of worship from misuse, pollution or desecration can happen at the instance of ASI. The starting point of applicability of Section 16 is therefore ascertainment of the true character, nature and form of place or the site, where the ancient monument is situated.

13. The existence of a duty to find out the true character of any monument or an archaeological site is followed by the exercise under Section 21 of the Monument Act, 1958, viz, that of excavation, whenever any Archeological Officer has reasons to believe that the area contains ruins or relics of historical or archaeological importance. The survey therefore, by necessary implication includes qua the protected area a right accompanied with the duty of the Archaeological Officer to excavate, dig the said protected area containing ruins or relies of historical or archaeological importance. Ascertainment of character of a place of worship or a shrine is a precondition to decide or to determine the primary, fundamental and essential purpose of the place of worship or shrine under Section 16 of the Monuments Act, 1958. Till and until the character or the nature of the place of worship or shrine is not determined, decided or ascertained, the purpose of the temple is bound to be enveloped in mystery, just like the Bhojshala Temple or the Kamal Maula Mosque. The detailed arguments at the bar by all the contesting parties fortifies the Court's belief and assumption that the nature and character of the whole monument admittedly maintained by the Central Government needs to be demystified and freed from the shackles of confusion. How to unshackle the whole site from the shackles of mystery, conflicting narratives and quandaries is a duty enjoined upon the ASI under

Section 16 the Monument Act, 1958, and not upon the Court of law. Both the ASI and State Governments in their counter affidavits have categorically stated referring to various official dossiers, research studies and other associated material that the said perplexity exists even today having snowballed into an extreme controversy today for any Government of the day to even touch the whole issue. In short, because of the mystery surrounding the exact nature, form and character of the Bhojshala Temple cum Kamal Maula Mosque, the ghost of controversies has assumed such mammoth proportion that it has become 'touch me not'. Though Mr. Bagadia argued that the stand of the ASI and State Government is actuated more by political considerations, than by law, however the Court feels that it is a submission which weighs all the more in favour of the necessity of ASI to perform its statutorily assigned duty u/s 16 r/w Section 21 of the Monuments Act, 1958. The Court therefore cannot sit as a mute spectator, when admittedly inaction or abdication of statutory duty by the ASI mandated under Section 16 is palpably visible. The order dated 07.04.2003 issued by the DG, ASI has been stated to be without any prior survey or study undertaken by the ASI under Section 16 of the Monument Act, 1958. The ASI in their counter affidavit vide 'Paras 1 to 5 of Parawise Reply' have not denied that no exercise under Section 16 the Monument Act, 1958 was ever carried prior to issuance of the impugned order of April 2003. Even on the Court's oral query during the hearing, the Counsel for the ASI was not in a position to answer the said straight question about prior survey under Section 16 of the Monuments Act, 1958. From the specific stand of the ASI through its counter affidavit, it is thus clear that the order was issued without any prior survey or study under section 16 the Monument Act, 1958. The Court therefore is of the prima-facie opinion that order dated 07.04.2003 is in the teeth of and contrary to the mandate of Section 16 the Monument Act, 1958 , whereunder the primary postulate is the ascertainment of the nature and character of the place of worship or a shrine.

14. On a specific query being put to the counsel the ASI for pointing out the material taken into consideration by them, or the State Government, prior to passing of the order dated 07.04.2003, there was no satisfactory answer meeting the mandatory, indispensable requisites of Section 16 the Monument Act, 1958. The Court therefore cannot be oblivious to the deliberate dereliction of duty on the part of ASI, especially when the controversy has been brewing for decades now. The Court finds substance in the argument of the petitioners that even though the impugned order was issued in April 2003, the constant inaction and disdainful attitude of the ASI in neglecting the spite of Bhojshala Temple cum Kamal Maula Mosque and violation of the provisions of Section 16 the Monument Act, 1958, specifically Section 16(2) constitutes a continuing cause of action. If any place of worship or a shrine is subjected to a usage through an order issued contrary to the statutory provisions to the mandate of the Ancient Monuments Act, 1958, then the continuation of the activity by any community (Hindu or Muslim), amounts to a continuing illegality falling in the category of perpetual wrong and thus, a continuing cause of action. Therefore the plea of limitation,

delay and laches as raised by Mr. Bagadia seems prima-facie unpalatable to the Court. A lot will turn upon the outcome of the survey or study to be undertaken by the ASI, which would further scan the spine of the impugned order dated 07.04.2003.

15. So far as, other objection relating to res judicata raised by Shri Bagadia is concerned, it is a trite law that the same cannot always be decided as a preliminary issue or an issue to be dealt at the threshold for determining the maintainability of proceedings. It can be determined both by considering the facts as well as the law, being a mixed question of fact and law. However, for the purposes of deciding the application for interim directions preferred by the petitioners, the Court's opinion is that res judicata cannot be argued to be attracted in the present case, specifically in the context of adjudication of the present application. It is because the proceedings of W.P. No. 4216/2003 taken up before the Principal Seat at Jabalpur never had the prayer or the reliefs as sought for in the present writ petition or in the interim application. The relief that is sought in the present petition is for carrying out survey and study in terms of statutory responsibility enshrined under Section 16 read with Section 21 of the Monuments Act, 1958. Though the documents relied upon and the submissions made are overlapping in both the proceedings, however the relief that is sought is entirely different and stands on a different footing.

16. A bare reading of the final order dated 18.09.2023 passed in W.P. No. 4216/2003 (Qazi Zakullah and Ors. v State of Madhya Pradesh and Ors.), shows that the relief sought therein was only a restraint order against Hindus entering and worshipping in the said Bhojshala temple cum Kamal Maula Mosque. It was argued that the site in question is a mosque where Hindus have no right to worship, and that entry of Hindus should therefore be barred. In the said context, the Single Bench of this Court held the submissions to be not worthy of scrutiny in writ proceedings, but relegated the parties to the civil suit. However in the present case, the primary contention of the petitioners is of the examination of the true nature and character of the site of Bhojshala Temple cum Kamal Maula Mosque.

17. On a complete perusal of the writ petition as also the interlocutory application filed on behalf of the petitioners, this Court is of the firm opinion that the nature of relief sought for in the present proceedings is differently drawn from the one sought for in the previously filed W.P. No. 4216/2003 at the Principal Seat at Jabalpur. Both the parties informed the Court in the course of arguments that the matter is pending consideration before the Division Bench vide W.A. No. 784/2006 with no effective interim order staying the operation and effect of the impugned circular cum office order dated 07.04.2003 by the Division Bench. Whilst dismissing the writ petition, the Single Bench has left the question of territorial jurisdiction also open, which implies that issue of maintainability of the writ petition on the ground of jurisdiction was never adjudicated, for which reason also this Court is of the firm view that the present proceedings shall not

be barred on the grounds of res judicata.

18. This Court finds support in its view by the judgment of the Apex Court rendered in the case of *Jamia Masjid v. Sri K.V. Rudrappa* reported in (2022) 9 SCC 225. Paras 17 to 19 are reproduced below:

"18. In order to attract the principles of res judicata, the following Ingredients must be fulfilled:

(i) The matter must have been directly and substantially in issue in the former suit;

(ii) The matter must be heard and finally decided by the Court in the former suit;

(iii) The former suit must be between the same parties or between parties under whom they or any of them claim, litigating under the same title; and

(iv) The Court in which the former suit was instituted is competent to try the subsequent suit or the suit in which such issue has been subsequently raised.

19. In *Syed Mohd. Salie Labbai v. Mohd. Hanifa, S. Murtaza Ali, J.* speaking for a Bench of two Judges observed that before a plea of res judicata can be given effect, the following conditions must be proved : (SCC p. 790, para 7)

"7.... (1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction."

The Court noted that "the best method" to decide the question of res judicata is first to determine the case of the parties as they are put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata. In that case, it was held that the judgment in the previous suit was confined to two points:

(i) The plaintiffs claimed certain rights for the performance of ceremonies in the properties and a share in the income accruing to the mosque from the worshippers; and

(ii) A claim, insofar as the graveyard was concerned for receiving pit fees for burials. Consequently, it was held that the trial court had not decided upon either the public character of the mosque or the mode and manner or the effect of the dedication of the site for the purpose of the mosque or the graveyard."

19. There are five essential conditions, which must be satisfied before a plea of res judicata can be pressed to oust any plaintiff/petitioners in any civil proceedings at the threshold. In the matter of *Sheodan Singh v. Daryao Kunwar* reported in AIR 1966 SC 1332, the Constitution Bench of the Apex Court in Para 9 explicating the 5 conditions held thus :

"9. A plain reading of Section 11 shows that to constitute a matter *res judicata*, the following conditions must be satisfied, namely-(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(II) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (III) The parties must have litigated under the same title in the former suit;

(IV) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further Explanation I shows that it is not the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as *res judicata* it will have to be seen whether all the five conditions mentioned above have been satisfied."

20. Thus, the necessity of determination of the form, nature and character of the site in question was not an issue directly and substantially involved in the previous proceedings in W.P. No. 4216/2003. When the very question of territorial jurisdiction was left open by the Single Bench, the same cannot act as an impediment to this Court in dealing with the issue, more so when all the parties admitted that it is the reason of mystery and unsolved questions. The argument therefore relating to maintainability of present proceedings being barred by *res judicata*, holds no water and is liable to be rejected at this stage as a preliminary bar.

21. Apart from the above, the Courts have always been invariably inclined for survey, study and examination of any place of worship or shrine by the expert body only, viz. ASI, whenever questions about the exact nature or character of the same have arisen. Recent most example and case at hand being the one relating to claims in relation to Gyanvapi Mosque cum Shivlinga in Varanasi. The Allahabad High Court in the matter of Committee of Management, Anjuman Intezamia Masjid, Varanasi v Rakhi Singh and Ors. (through its Order dated 03.08.2023) reported in AIR 2023 Allahabad 279, permitted the ASI survey of Gyanvapi Mosque cum Shivlinga despite oppositions in abundance by the other side.

22. The Apex Court affirmed the aforesaid judgment of the Allahabad High Court further through its order dated 04.08.2023 passed in Committee of Management, Anjuman Intezamia Masjid, Varanasi v Rakhi Singh and Ors. Reported in 2023 SCC Online SC 980. It was held by the Apex Court that wherever any issue in the suit involves any scientific investigation, which cannot be in the opinion of the Court be conveniently conducted by it, the Court may, if it thinks necessary and expedient in the interests of justice, issue a Commission through such person to

enquire into such question and report thereon to the Court. Paras 13 & 14 are worthy of reference which are as follows :

"13. Order XXVI Rule 10A stipulates that where any issue in a suit involves any scientific investigation which cannot in the opinion of the Court be conveniently conducted before the court, the court may, if it thinks necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit directing them to inquire into such question and report thereon to the court. Under sub-rule (2) of Rule 10A, the provisions of Rule 10 of the order shall, as far as may be, apply in relation to a Commissioner appointed under the rule as they apply to a Commissioner appointed under Rule 9. Rules 9 and 10 of Order XXVI therefore assume relevance and are extracted below:

"9. Commissions to make local investigations.-In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner.-(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit.-The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Commissioner may be examined in person-Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

10-A. Commission for scientific investigation -

(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court the Court may, if it thinks it necessary or expedient in the Interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of Rule 10 of this Order shall, as far as may be, apply in

relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9.”

14. In terms of Order XXVI Rule 10, the Commissioner has to submit a report in writing to the court. The report of the Commissioner and the evidence taken by him constitute evidence in the suit and form a part of the record. However, the court and, with its permission, any of the parties may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in the report or as regards the report including the manner in which the investigation has been made. The court is also empowered to direct such further inquiry if it is dissatisfied with the proceedings of the Commissioner. The evidentiary value of any report of the Commissioner is a matter to be tested in the suit and is open to objections including cross- examination. A report of the Commissioner does not by and of itself amount to a substantive finding on matters in dispute and is subject to the process of the court during the course of the trial.”

23. Further survey and study through scientific investigations and various techniques accompanying it like carbon dating, GSR – GPS survey, etc. aid and facilitate the process of arriving at the truth and ascertaining the actual state of affairs. With the advent of modern techniques of investigation, scientific ways of empirical study under the guidance of responsible officers of ASI and advanced ways of excavation, truth can be examined and ascertained by the experts of the field, especially when ASI as the expert body is constituted statutorily under a Parliamentary enactment.

24. On the similar lines, the Constitution Bench of the Supreme Court in the matter of *M Siddique v Mahant Suresh Das* reported in (2020) 1 SCC 1, held that archaeology is a science that draws on multidisciplinary or transdisciplinary approaches and in considering the nature of archaeological evidence. It is important to remember that archaeology as a branch of knowledge draws sustenance from the science of learning, it is the wisdom and experience and the vision which underlines the process of interpretation. Therefore the Court can safely rely upon the conclusions derived on the basis of such multidisciplinary scientific studies by the ASI. It was observed in paras 679 to 683, in the context of scientific investigations constituting the basis of archaeology, which are as follows :

“679. Archaeology as a science draws on multidisciplinary or trans- disciplinary approaches. In considering the nature of archaeological evidence, it is important to remember that Archaeology as a branch of knowledge draws Sustenance from the science of learning, the wisdom of experience and the vision which underlies the process of interpretation. As a discipline, it nurtures a trained mind. It relies on a cross-fertilisation with other disciplines such as history, sociology and anthropology. This is not a weakness but a strength. Archaeology combines both science and art. As a science, it is based on the principle of objective evaluation. As an art, it relies on a vision which is realised through years of commitment to

the pursuit of knowledge based on the histories of eras. Archaeology as a discipline cannot be belittled as unreliable. The value of Archaeology cannot be diluted in the manner which has been suggested by laying a claim to its being a weak form of evidence.

680. While considering archaeological evidence within the framework of Section 45 of the Evidence Act and the court-ordered excavation in the context of the provisions of Rule 10-A of Order 26 CPC, it is nonetheless necessary for the Court to appreciate both the strength and the limits of the discipline. Archaeology is no exception. A distinguished archaeologist, Sir Mortimer Wheeler summarised the experience which he gained in his work titled *Archaeology from the Earth* 258. Dealing with stratigraphy, Sir Mortimer notes:

"an ancient city in the East is never level, Very rarely is a city completely destroyed and completely rebuilt at one moment and at one horizon. Normally, a house is reconstructed or replaced as it decays, or at the whim of its owner. The town as a whole is constantly in a state of differential destruction and construction. Individual building sites rise above their neighbours; the town site itself rises and assumes the contour of a hill: buildings on its slopes are contemporary with buildings on its summit. A doorway or a potsherd may be found at one spot 10 ft below a doorway or a potsherd of precisely the same date at another spot."

681. Excavation in layers is in and of itself a complex exercise. Interpreting the findings in turn involves navigating through layered complexities. Sir Mortimer notes:

"Well, there are examples of various kinds of stratigraphical evidence: of layers that are contemporary with one another layers that are separated by greater or lesser time intervals, layers that have accumulated in unbroken succession. The reading of a section is the reading of a language that can only be learned by demonstration and experience. A word of advice to the student. However practised, do not read too hastily. Be your own devil's advocate before passing judgment. And wherever possible, discuss your diagnosis with others with colleagues, with pupils, with your foreman. ('The testimony of one person is no testimony'; declares Hywel Dda, the wise Welsh lawgiver) Be humble. Do not ignore the opinion of the uninstructed. Everyone knows is much less than the savant. The walls of rude minds are scrawled all over with facts, with thoughts." Emerson said so, and he was right. Even if you do not accept the views of those you question, and the mere act of questioning is at the same time a restraint and a stimulus."

Sir Mortimer's caution would apply as much to the law as to Archaeology: something that we as Judges would do well to bear in mind in arriving at our conclusion in these appeals.

682. In his book titled *The Logic of Scientific Discovery* 259, Karl Popper distinguishes the work of a scientist with that of a philosopher. Popper quotes

Lord Acton when he states:

"there is nothing more necessary to the man of science than its history and the logic of discovery....: the way error is detected, the use of hypothesis, of imagination, the mode of testing."

683. The supposed distinction between science as embodying absolute truth and Archaeology as unguided subjectivity is one of degree not of universes. Yet as in other disciplines of its genre, Archaeology is as much a matter of process as it is of deduction. The archaeologist must deal with recoveries as much as the "finds" from them. Interpretation is its heart, if not its soul. Interpretations do vary and experts disagree. When the law perceives an exercise of interpretation it must recognise margins of error and differences of opinion. Archaeological findings are susceptible of multiple interpretations. This may in part be a function of the archaeologist's perception of the past and what about the past the archaeologist seeks to decipher Tradition based Archaeology may seek facts about the past. An archaeologist, on the other hand, may set about to validate a belief about the past, Anarchaeologist may approach the task with an open mind to unravel features that are unknown. Guided by the underlying approach to the discipline, the archaeologist will bring to bear on the task at hand the purpose underlying its own origin. So long as we understand the limits and boundaries of the discipline, we can eschew extreme positions and search for the often elusive median."

25. The Court therefore can safely place reliance upon any survey report with conclusions arrived after undertaking elaborate scientific investigations involving multidisciplinary approaches of archaeology by the ASI. Ascertainment of the nature and character of the site would also lend credibility to the existence of juristic person/entity of deity of the Vaagdevi/ Saraswati with a temple (if found to exist). The deity as argued by the petitioners being the Vageshwari Devi (Goddess Saraswati) is a juristic person/entity in her own rights to be protected, preserved from being desecrated, polluted on one hand and also to be served with rituals and religious practices by the people of that belief on the other. Rights of a deity as a juristic person/entity have also been well defined and time-tested through various judicial precedents. The Apex Court in the judgment of *M Siddique v Mahant Suresh Das* (Supra) has reiterated the said right of the deity of a temple. However, this is just a prima facie view of the Court, wherein the primary relief of direction to the ASI for a scientific survey and study is to be issued.

26. That apart, the submissions of the petitioners are worthy of acceptance pertaining to their fundamental rights under Articles 25 and 29 of the Constitution of India. Every Government has the constitutional obligation to ensure preservation and protection of not only the ancient monuments and structures including temples of archaeological and historical importance, but also of sanctum sanctorum as well as the deity of spiritual importance. There is a constitutional duty even to sanction funds for providing basic amenities to

pilgrims, proper arrangements for shelter places, maintenance of law and order and the preservation of purity and pristine character of the deity. The Apex Court interpreting Article 25 and 26 of the Constitution of India in the judgment rendered in the case of *Sarika v. Administrator, Shri Mahakaleshwar Mandir Committee, Ujjain* reported in (2018) 17 SCC 112, (Mahakaleshwar Temple judgment), held thus:

"15. There is a constitutional obligation to preserve the religious practices of all religions, culture and there is also a corresponding duty to act in that direction. Similarly, such acts which are necessary for the preservation of such historical monuments/deities. The State is duty-bound to spend the amount so that not only the archaeological, historical and ancient monuments are preserved but sanctum sanctorum, as well as the deity otherwise no useful purpose would be served by spending so much amount on Simhastha/Kumbh Melas in case deity, is itself permitted to be deteriorated as it has happened at other places particularly nearby Omkareshwar Jyotirlingani by offerings and rubbing it, etc. has deteriorated and now barricades have been erected around the lingam and nobody is permitted to touch it. Same is true with respect to other important temples of which reports have been filed. It is apparent from the reports published about Omkareshwar that the administration had banned offering of milk, ghee, water, curd and other traditional materials to save the Jyotirlingam from further erosion. It is regrettable that we have not been able to preserve and protect our Jyotirlingas of immense importance and there was a proposal to install new Lingam at Omkareshwar in place of the original."

27. On the same lines, the Division Bench of Madras High Court in the matter of *Periyambadi Narasimha Gopalan v. Secretary to Government and Anr.*, reported in [(2021) 5 Mad LJ 413; (2021) SCC OnLine Mad 2091] , has also recently reiterated the constitutional obligation of the State and ASI in the context of religious places that state is the custodian of most temples and property including the idols belonging to them. It is their primary duty to protect, maintain and safeguard not only the temple, but also valuable idols and antiques. The protection of the concerned religious site implies the protection of the land, as well as the rituals, religious practices and traditions associated with it. Article 49 Constitution of India occurring under Part IV of the Constitution lays down the Directive Principles of the State Policy, which read thus:

"Article 49. Protection of monuments and places and objects of national importance: It shall be the obligation of the State to protect every monument or place or object of artistic or historic interests, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be."

28. From the above discussion, this Court has drawn only one conclusion that Constitutional as well as statutory obligation of the ASI to have a scientific survey, study convened at the earliest of the Bhojshala Temple cum Kamal Maula Mosque.

29. Accordingly, I.A. No. 986/2024 is allowed and the following directions are issued to the Director, ASI relating to the entire site of Bhojshala Temple cum Kamal Maula Mosque:

- a) Complete scientific investigation, survey and excavation , through adoption of latest methods, techniques and modes of GPR-GPS survey of the site in question constituting the disputed Bhojshala Temple cum Kamal Maula Mosque complex, as also the entire 50m of peripheral ring area surrounding/constituting the circular periphery from the boundary of the complex be conducted .
- b) A detailed scientific investigation be conducted by adopting carbon dating method for ascertaining the age, life of various structures both above and beneath the ground; permanent, movable and immovable structures both beneath as well as above the ground, constituting the walls, pillars, floors, surfaces, upper top, sanctum sanctorum of the entire complex.
- c) A proper documented comprehensively drafted report prepared by a Expert Committee of not less than five(5) senior most officers of ASI headed by the Director General/Additional Director General of the ASI himself be submitted before this Court within a period of six weeks from the date of receipt of certified copy of this order. Efforts should be made to have a representation of Officers of both the contesting communities (if available of the said position & rank) in the said Expert Committee;
- d) To photograph and videograph the entire survey proceedings in the presence of two (2) nominated representatives each of both the petitioners as well as respondent no.8 in the present petition;
- e) To unlock and open the locked/ sealed rooms, halls of the whole complex and prepare a complete inventory of each and every artifact, idol, deity, or any structure found in the said locked, sealed halls and rooms, and submit the same along with the respective photographs. Such artifacts, idols, structures all must be subjected to the very same exercise of scientific investigation, carbon dating and survey as stipulated above vide points (a) to (c) and be included separately in the report to be filed before this Court.
- f) Any other study, investigation or inquiry, which the said five(5) member committee of the ASI feels necessary to be undertaken, without destroying, defacing, destructing the original nature of the whole complex be undertaken, towards ascertaining the true nature and character of the Bhojshala Temple cum Kamal Maula Mosque for arriving at the truth.

30. All other issues and submissions relating to the relief as claimed by the petitioners or the right to worship and perform rituals in the disputed premises shall be considered and determined only after receipt of the aforementioned report from the Expert Committee. The issue relating to validity of the wakf created on the disputed complex; that of granting the relief in the writ proceedings or relegating the petitioners to the Civil Suit for claiming those

reliefs will all be determined and adjudicated post the receipt of report from the Five Member Committee of the ASI as aforementioned.

31. I.A. No. 986/2024 stands disposed off and closed.

32. List the case on 29th April, 2024 alongwith W.P. No. 6514/2013, W.P. No. 28334/2019 and W.P. No. 10484/2022.