

NOTE ON HEARING DATED 17.05.2018

A. ARGUMENTS OF MR. PARASARAN, SENIOR ADVOCATE

1. Mr. Parasaran, Senior Advocate began his arguments by submitting that the prayer for reconsideration of observations in *Ismail Faruqui* is not maintainable as such reconsideration is: -
 - i. barred by principles of res judicata
 - ii. barred by doctrine of representation
 - iii. not permissible since the issue raised in the suit with respect to abatement of the said suit was also referred to this Court in *Ismail Faruqui* and this Hon'ble Court while rendering its judgment in the *Ismail Faruqui* case also decided the issues accordingly. This is apparent from para 158 of the judgment, wherein Justice Bharucha categorically recorded that "*The issues in the suits in the Allahabad High Court withdrawn for trial to this Court are answered accordingly.*"

2. He cited the following authorities to buttress his submission that the Doctrine of Representation precludes from resuscitation interests which were represented in a judgment tendered, in the light of the appellants seeking a reconsideration of the 1994 Ismail Farooqui judgment by a larger bench:-
 - i. *Ahmed Adam Sait & Others vs Inayathullah Mekhri* 1964 (2) SCR 647[**@ pgs. 1-27 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate**]
 - a) He read the head note and explained that this case arose in context of a suit filed under section 92 of the CPC by plaintiffs claiming to represent the Sunni Muslim population of Bangalore and praying that a scheme should be settled for the proper administration of the Jumma Masjid, Bangalore. In this background, this Hon'ble Court observed that a reading of section 11 and its Explanation VI, section 92 and

Order 1 Rules 6 and 8 of the CPC confirms that to ascertain if a decree in a representative suit creates the bar of res judicata against persons claiming an interest not represented, it is essential to inquire which interests were represented by the plaintiffs or the defendants in the suit.

b) He further submitted that Section 11 of the CPC and Explanation VI appended thereto, Section 92 and Order 1 Rules 6 and 8 of the CPC are on the Doctrine of Representation and that this Hon'ble Court must examine as to whose interests are represented in the *Ismail Faruqui case*.

ii. *Surayya Begum v. Mohd. Usman* (1991) 3 SCC 114 [**@ pgs. 28-32 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate**]

a) Cited Para 9 @ pg. 117-118 [**@ pgs. 31-32 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate**]

iii. *Singailal Chend Jain v. Rashtriya Swayamesewak Sangh Panna* (1996) 3 SCC 149 [**@ pgs. 33-38 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate**]

a) Cited paras 8-10 @ pgs. 152[**@ pgs. 36 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate**] and paras 13-14 @ pg. 154 [**@ pgs. 38 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate**]

iv. *N.K. Mohammad Sulaiman v. N.C. Mohammad Ismail* 1966 (1) SCR 937 [**@ pgs. 56-59 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate**]

- a) The question that arose for consideration was whether, in a suit to enforce a mortgage, instituted after the death of a Muslim debtor, wherein one or more of his heirs are not impleaded and a decree is obtained, what passes to the auction-purchaser is only the interest of the heirs who were impleaded, because each heir is, under Mohammedan law, liable to satisfy the debts of the deceased proportionate to his share in the estate
- b) Cited pages 937 (placitum E-G), 939 (placitum G-H), 940 (last 10 lines), 941 and 947. [**@ pgs. 57(placitum E-G),59 (placitum G-H),60 (last 10 lines),61 and 67 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**
- c) He then submitted that the *Ismail Faruqui* judgment clarifies that in the context of eminent domain all religions/ religious places have to be treated equally. He averred that according to the *Ismail Faruqui* Judgment, only 1 exception is carved out and that is whether the religious place being acquired is of "special importance" for that particular religion.
- v. *Shenoy & Co. v. CTO* (1985) 2 SCC 512 [**@ pgs. 70-82 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**
- a) In this case numerous petitions challenging the constitutionality of the Karnataka Tax on Entry of Goods into Local Areas for consumption, use or sale therein Act, 1979 were disposed off by a common judgment of the High Court, and the state of Karnataka had preferred appeal against only one petitioner. It was held that all the writ petitioners shall be bound by the verdict of the Supreme Court repealing the challenge to the Act, in view of the expanse and all-pervasiveness of Article 141.

- b) Cited page 513 (headnote), para 22 @ pgs. 521-522 and para 26 @ pg. 523. [**@ pg. 71 (headnote), para 22 @ pg. 79-80 and para 26 @ pg. 81 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**]
- vi. *Daryao v. State of Uttar Pradesh* 1962 (2) SCR 574 [**@ pgs. 83-104 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**]
- a) Where the High Court dismisses a writ petition under Article 226 after hearing the matter on the merits on the ground that no fundamental right was contravened or that its contravention was constitutionally justified, a subsequent petition to the Supreme Court under Article 32 of the Constitution on the same facts and for the same reliefs filed by the same party would be barred by the general principle of *res judicata*.
- b) Cited page 574 (headnote) and 588-589 [**@ pg. 83 (headnote), pgs. 96-97 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**]
- vii. *Gulabchand Chhotalal Parikh v. State of Gujarat* 1965 (2) SCR 547 [**@ pgs. 105-134 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**]
- a) On general principles of *res judicata*, the decision of the High Court on a Writ Petition under Article 226 on the merits of a matter, after full contest, will operate as *res judicata* in a subsequent regular suit between the same parties with respect to the same matter. If the subject matter is the same, the distinction of a writ petition and a suit is immaterial.

- b) Cited pgs. 547 (headnote), 574 [**@ pg. 105 (headnote), pg. 132 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**

- viii. *State of U.P. v. Nawab Hussain* (1977) 2 SCC 806 [**@ pgs. 135-143 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**
 - a) The principles of res judicata and constructive res judicata operate in respect of issues decided in a litigation as well as issues which are clearly a part of the subject matter of the litigation.
 - b) Cited pg. 807 [**@ pg. 136 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**

- ix. *Bhanu Kumar Jain v. Archanan Kumar* (2005) 1 SCC 787 [**@ pgs. 144-158 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**
 - a) Cited pgs. 788 & 796-797 [**@ pgs. 145, 153-154 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**

- x. *Ishwar Dutt v. Land Acquisition Officer* (2005) 7 SCC 190 [**@ pgs. 159-171 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**
 - a) Cited pgs.191 & 192 [**@ pgs. 160-161 of the Compilation of Judgments submitted by Mr. K. Parasaran, Senior Advocate]**

- 3. He referred to the order dated January 27, 1993 of the Supreme Court five judge bench in connection with the Presidential Reference for opinion on the existence of a Hindu religious structure on the disputed site in Ayodhya reported in (1993) 1 SCC 642 [**@ pgs. 1-4/ Volume of List of Dates & Compilation of Relevant Documents- Relevant portion @**

para 6-9/pg. 644-645 (pg. 3-4/ Volume of List of Dates & Compilation of Relevant Documents)]. Although the bench, in Ismail Farooqui, eventually declined to answer the reference, public notice to all interested parties was issued, besides individual notices to the Union of India, the state of Uttar Pradesh, the Advocates General of all states, as well as the parties to the suits ultimately adjudicated by the Allahabad High Court in the impugned judgment.

4. He further averred that even though in the Presidential Reference, where there is no right of audience, notice was issued to all parties.
5. He then referred to the Application for amendment of Plaintiff of Suit 4 [**@ pgs. 5-14/ Volume of List of Dates & Compilation of Relevant Documents]** and referred to the prayer clause at page 13 and the proposed amendment number 24(C) at page 13.
6. He then referred to the Application for amendment of Plaintiff of Suit 3 [**@ pgs. 15-22/ Volume of List of Dates & Compilation of Relevant Documents]**
7. He then referred to a copy of the order dated March 15, 1993, passed by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench [**@ pgs. 23-28/ Volume of List of Dates & Compilation of Relevant Documents]** and pointed that a specific issue was framed with respect to the abatement of suit [**@ pg. 24 or typed copy at pg. 27/ Volume of List of Dates & Compilation of Relevant Documents]**.
8. He then referred to the Transfer Petition filed by Union of India under Article 139A [**@ pgs. 29-62/ Volume of List of Dates & Compilation of Relevant Documents]** and pointed out pages 30-31 to show that all the parties to the suit were made parties to the Transfer petition. Further at pages 43-44 he referred to the question which was referred to this Hon'ble Court under Article 143 (1) and also read the prayer sought. In addition to the forgoing he read out page 47 wherein the particulars of the cases sought to be transferred were produced.

9. He then referred to order dated May 14,1993 passed by this Hon'ble Court in TP (C) Nos. 669-675 of 1993. [**@ pgs. 69-72/ Volume of List of Dates & Compilation of Relevant Documents**]
10. He also referred to the judgment dated September 24,1993 rendered by this Hon'ble Court allowing the TP (C) Nos. 669-675 of 1993[**@ pgs. 73-76/ Volume of List of Dates & Compilation of Relevant Documents**] and read out the headnote @ pgs. 73 and paras 6-9 @pgs. 75-76.
11. He then submitted that the Plaintiffs in Suit 4 amended their plaint after the judgment in *Ismail Faruqui*, they accepted the part of acquisition, so they cannot now complain about certain observations in that very judgment.
12. He further submitted that whole matter in issue was limited by the issues transferred and decided by his Hon'ble Court.
13. He stated that the essential and integral are interchangeable expressions. He submitted that the earlier submissions of the Muslim parties concerned religious practices vs. secular practices and the current argument concerns essential vs. integral. While the argument regarding religious practice vs. secular practice was negative earlier, the argument concerning essential vs. integral is not in issue at the present stage.
14. He submitted that arguments of the pro-Mosque parties were two-fold: -
 - i. The observations are anti-secular
 - ii. The inter play of essential- integral
15. He read out his Written Submissions: -
 - i. Para 11 @ pg. 7
 - ii. Para 13 @ pg. 8
 - iii. Pages 8-18
 - iv. Para 40-41 @ pg. 21-22
 - v. Order dated 23.2.1996 considering recasting of issues @ pg. 30.

16. In the light of *Ismail Faruqi*, he elaborated, "*To offer the Namaz is an essential practice, but to offer it at the Mosque may not necessarily an essential practice, though it is a practice...this is the distinction...prayer is essential, but the structure may not be essential...*", drawing the attention of the bench to the right under Article 25 being 'subject to public order'.
17. He then read out the amendment in the Plaint of Suit 4 from Volume 3 of the Impugned Judgment at pg. 3591 – Paras 21A, 21B and 21C.
18. He submitted that the land on which the mosque was built was wrongly taken by conquest and hence the pro-mosque parties have no title and consequently, the pro-mosque parties are relying on the grant of the British Government.

B. ARGUMENTS OF MR. VAIDYANATHAN, SENIOR ADVOCATE

19. Mr. Vaidyanathan, Senior Advocate submitted that use of term 'questionable observation' by Dr. Dhavan was contemptuous. In reply, Dr. Dhawan submitted that his usage of the term 'questionable', in context of the *Ismail Farooqui* judgment, be substituted by 'controversial questions of law'. The matter is next scheduled for hearing on July 6.

C. ARGUMENTS OF MR. P.N. MISHRA, SENIOR ADVOCATE

20. Mr. P.N Mishra, Advocate also submitted that Mosque was not essential to the religion of Islam and he sought to make submissions based on Historical facts, including Firman issued during the time of Shahjahan, however the Bench refused to hear such arguments and requested him to restrict his submissions to the constitutional issue of whether the matter should be referred to a larger bench.