REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

M. SIDDIQ (D) THR. LRS. ... APPELLANT(S)

VERSUS

MAHANT SURESH DAS AND ORS. ETC. ... RESPONDENT(S)

WITH

CIVIL APPEAL NOS. 4768-4771 OF 2011
CIVIL APPEAL NO. 2636 OF 2011
CIVIL APPEAL NO. 821 OF 2011
CIVIL APPEAL NO. 4739 OF 2011
CIVIL APPEAL NOS. 4905-4908 of 2011
CIVIL APPEAL NO. 2215 of 2011
CIVIL APPEAL NO. 4740 of 2011
CIVIL APPEAL NO. 2894 of 2011
CIVIL APPEAL NO. 6965 of 2011
CIVIL APPEAL NO. 4192 of 2011
CIVIL APPEAL NO. 5498 of 2011
CIVIL APPEAL NO. 7226 of 2011
CIVIL APPEAL NO. 8096 of 2011
DIARY NO. 22744 OF 2017

J U D G M E N T

S.ABDUL NAZEER, J.

1. I have had the privilege of reading the erudite Judgment of my learned Brother Justice Ashok Bhushan. My learned Brother has

held that the questionable observations made in paragraph 82 of the judgment in **Dr. M. Ismail Faruqui and Ors.** v. **Union of India and Ors.** (1994) 6 SCC 360 (for short '**Ismail Faruqui**') are not relevant for deciding these appeals. Therefore, His Lordship has concluded that no case has been made out seeking reference of these appeals to a Constitution Bench of this Court. I am unable to accept this view expressed by my learned Brother. However, I am in respectful agreement with his opinion on the question of *res judicata* contained in paragraphs 63 to 75 of the Judgment and have restricted this judgment to the other issues.

2. Since the facts of the case and the rival contentions of the parties have been set out by my learned Brother in detail, it is not necessary to reiterate them. Therefore, I have stated only certain relevant facts.

3. In **Ismail Faruqui**, the Court started by elucidating the background of the case leading to the Acquisition of Certain Area at Ayodhya Act, 1993 (No. 33 of 1993) (for short '1993 Act') and the reasons for making Special Reference to this Court by the President of India in exercise of his power in clause (1) of Article 143 of the

Constitution of India. Herein the Special Reference mentioned, had the following question for consideration and opinion:

> "Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?"

4. After narrating the facts, the Court went on to examine the constitutional validity of the 1993 Act. On this issue, the Court concluded that the Parliament has the legislative competence to enact the said legislation and except for Section 4(3), the entire 1993 Act is constitutionally valid. While deciding so, the Court in paragraph 51 went on to discuss the "comparative significance" of the disputed site to the two communities. The following is reproduced as under:

> "51. It may also be mentioned that even as Ayodhya is said to be of particular significance to the Hindus as a place of pilgrimage because of the ancient belief that Lord Rama was born there, the mosque was of significance for the Muslim community as an ancient mosque built by Mir Baqi in 1528 AD. As a mosque, it was a religious place of worship by the Muslims. This indicates the comparative significance of the disputed site to the two communities and also that the impact of acquisition is equally on the right and interest of the Hindu

> community. Mention of this aspect is made only in the context of the argument that the statute as a whole, not merely Section 7 thereof, is anti-secular being slanted in favour of the Hindus and against the Muslims."

5. After the aforementioned conclusion, in paragraphs 65 to 82 the Court examined the question as to whether a mosque is immune from acquisition. Among these paragraphs, the observations in paragraphs 77, 78 and 80 are important for the matter in hand and are reproduced as under:-

> "**77.** It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.
>
> **78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of**

such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

80. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that property."

(Emphasis supplied)

6. In paragraph 82 this Court summarised the position as under:

"**82.** The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See *Mulla's Principles of Mahomedan Law*, 19th Edn., by M.

Hidayatullah - Section 217; and *Shahid Ganj* v. *Shiromani Gurdwara* [AIR 1940 PC 116, 121]. If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. **A mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere, even in open**. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right."

(Emphasis supplied)

7. Dr. Rajeev Dhavan, learned senior counsel, submits that the observations made in the above mentioned paragraph, reading "A mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere, even in open." is contrary to law and the Court was obliged to examine the faith to make this statement. He further contends that the observations on the concepts of particular significance and comparative significance are without foundation. Moreover, he contends that what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrine of that religion itself as has been done by the **Seven-Judge Constitution Bench** of this Court in, **the Commissioner, Hindu Religious Endowments, Madras** v. **Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** 1954 SCR 1005 (for short '**Shirur Mutt**'). It has also been submitted that the broad test of "essentiality" in **Shirur Mutt** cannot be cut down by later Five and Two Judges' decisions. "Integral" is interchangeable with "essential". The latter cannot be short circuited by the use of the former. This may lie at the root of many mal-understandings and needs to be clarified. Further, it is precisely this error of integrality that **Ismail Faruqui** uses when it

speaks of "particular significance". He also submits that the test used in paragraph 78 of **Ismail Faruqui** was essential and integral even though the word "or" was used. The Court has failed to examine the tenets of faith and proceeded in its own intuitive understanding to make *ipse dixit* observations. Learned senior counsel has also relied on certain decisions of this Court in support of his contentions. **Ismail Faruqui** being devoid of any examination on this issue, the matter needs to go to a larger Bench. Dr. Dhavan further submits that the impugned judgment was affected by the questionable observations in **Ismail Faruqui**. He has taken us through various paragraphs in the impugned judgment in this regard. Dr. Dhavan has also referred to various observations made in the impugned judgment to support his submission that **Ismail Faruqui** has influenced the said judgment.

8. On the other hand, Shri Parasaran, learned senior counsel submits that the questionable observations in **Ismail Faruqui** that a mosque not being an essential part of the practice of Islam have to be read in the context of the validity of the acquisition of the suit property under the 1993 Act. He submits that this Court has not ruled that offering Namaz by Muslims is not an essential religious

practice. It only ruled that right to offer Namaz at every mosque that exists is not essential religious practice. But if a place of worship of any religion has a particular significance for that religion, enough to make an essential or integral part of the religion, then it would stand on a different footing and would have to be treated differently and more reverentially. It is argued that the fundamental right of Muslim community under Article 25, to offer namaz is not affected in the present case as the Babri Masjid was not a mosque with particular significance for that religion.

9. We have also heard S/Shri C.S. Vaidyanathan, Raju Ramachandran, S.K. Jain, learned senior counsel and Shri Tushar Mehta, learned Additional Solicitor General and Shri P.N. Mishra, learned advocate.

10. Learned counsel for the parties have also produced Islamic religious texts on mosque, relevant excerpts of the holy Quran and illuminating discourses on the holy Quran in support of their respective contentions on whether a mosque is an essential part of the practice of the religion of Islam.

11. It is evident from **Ismail Faruqui** that the principal submission of the petitioners was that mosque cannot be acquired

because of a special status in Mahomedan Law. The Constitution Bench has discussed this aspect under a separate heading "Mosque – Immunity from Acquisition" from paragraph 65 of the judgment. Specifically in paragraph 74, the Court observed that subject to protection under Articles 25 and 26 of the Constitution, places of religious worship, like mosques, churches, temples, etc. can be acquired under the State's sovereign power of acquisition. Such acquisition *per se* does not violate either Article 25 or Article 26 of the Constitution. Further, the Court in paragraph 77 noted that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practice, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include right to acquire or own or possess property. Similarly, this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a place *per se* may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. Additionally, in paragraph 78, it noted that places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated

differently and more reverentially. While summarizing the position, in paragraph 82, the Court has observed that a mosque is not an essential part of practice of religion of Islam and namaz by Muslims can be offered anywhere even in open.

12. What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrine, tenets and beliefs of that religion itself. This has been laid down at page 1025 in **Shirur Mutt** :

> ".....The learned Attorney-General lays stress upon clause (2)(*a*) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.
>
> The contention formulated in such broad terms cannot, we think, be supported. **In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of**

> **priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(*b*). What Article 25(2)(*a*) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices**."
>
> (Emphasis supplied)

13. Further, at pages 1028-1029 it is stated that,

> "**Under Article 26(*b*), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.** Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies."
>
> (Emphasis supplied)

14. In **Ratilal Panachand Gandhi** v. **The State of Bombay and Ors.** 1954 SCR 1055, a Constitution Bench of this Court has held thus:

> "It may be noted that 'religion' is not necessarily theistic and in fact there are well known religions in India like Buddhism and Jainism which do not believe in the existence of God or of any Intelligent First Cause. **A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been suggested by one of the learned Judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious belief**.
>
> xxx xxx xxx
>
> ..... **No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate**."
>
> (Emphasis supplied)

15. In **Sri Venkataramana Devaru and Ors.** v. **The State of Mysore and Ors.** 1958 SCR 895, a Constitution Bench of this

Court had the opportunity to consider Articles 25 and 26 of the Constitution of India in the context of Madras Temple Entry Authorisation Act, 1947 as amended in 1949. After referring to **Shirur Mutt**, this Court has held as under:

> "16(3).... Now, the precise connotation of the expression "matters of religion" came up for consideration by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [(1954) SCR 1005] and it was held therein that it embraced not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not merely its *Gnana* but also its *Bhakti* and *Karma Kandas*. ...."

16. In **The Durgah Committee, Ajmer and Anr.** v. **Syed Hussain Ali and Ors.** (1962) 1 SCR 383, a Constitution Bench of this Court, after considering the historical background of the dispute, has held thus:-

> "**Having thus reviewed broadly the genesis of the shrine, its growth and the story of its endowments and their management, it may now be relevant to enquire what is the nature of the tenets and beliefs to which Soofism subscribes**. Such an enquiry would serve to assist us in determining whether the Chishtia sect can be regarded as a religious

> denomination or a section thereof within Art 26."
>
> (Emphasis supplied)

17. In **Sardar Syedna Taher Saifuddin Saheb** v. **The State of Bombay** 1962 Supp (2) SCR 496, this Court was considering the validity of the law interfering with the right of religious denominations to ex-communicate its members. In this context Articles 25 and 26 came to be considered. After referring to the various decisions a Constitution Bench of this Court has held as under:-

> "The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in the *Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt; Mahant Jagannath Ramanuj Das v. The State of Orissa; Sri Venkatamana Devaru v. The State of Mysore; Durgah Committee; Ajmer v. Syed Hussain Ali* and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion.

> **The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion**."
>
> (Emphasis supplied)

18. In **Tilkayat Shri Govindlalji Maharaj** v. **State of Rajasthan and Ors**. (1964) 1 SCR 561, a Constitution Bench of this Court was considering the validity of Nathdwara Temple Act, 1959 (No. XIII of 1959). The same was challenged on behalf of the denomination of followers of Vallabha. The case originally involved challenge to the Nathdwara Ordinance, 1959 (No. II of 1959) which was issued on February 6, 1959. Subsequently, this Ordinance was repealed by the Act and the petitioner was allowed to amend his petition. It was contended that if the temple was held to be a public temple then the Act is to be invalid because it contravenes the fundamental rights guaranteed to the denomination under Articles 25 and 26 of the Constitution. After considering the rival contentions, the Court has held as under:

"In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice in an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. **This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion**. It is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of *Durgah Committee Ajmer* v. *Syed Hussain Ali* [(1962) 1 SCR 383 at p. 411] and

> observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 25(1)."
>
> (Emphasis supplied)

19. It is clear from the aforesaid decisions that the question as to whether a particular religious practice is an essential or integral part of the religion is a question which is to be considered by considering the doctrine, tenets and beliefs of the religion. It is also clear that the examination of what constitutes an essential practice requires detailed examination as reflected in the aforesaid judgments.

20. At this juncture, it is also pertinent to note the observations in **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors.** v. **State of U.P. and Ors.** (1997) 4 SCC 606, at paragraph 28, where it is stated:

> *"....***The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are**

> **an integral part of the religion.** It must be decided whether the practices or matters **are considered integral** by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it…."
>
> (Emphasis supplied)

21. As mentioned above, parties have produced various texts in Islam in support of their respective contentions. For the present, we are concerned with the approach of the Court in concluding questionable observations without examining the doctrine, tenets and beliefs of the religion. The conclusion in paragraph 82 of **Ismail Faruqui** that "A mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open" has been arrived at without undertaking comprehensive examination.

22. Now, the question is whether the impugned judgment has been affected by the questionable observations in **Ismail Faruqui**. A perusal of the impugned judgment shows that learned advocates

appearing for the parties have repeatedly quoted various paragraphs of **Ismail Faruqui** while arguing the case and have also placed strong reliance on the questionable observations made in **Ismail Faruqui**.

23. A few paragraphs mentioned at page Nos. 3038-3039, 3061, 3392, 3429 and 3439 of the impugned judgment delivered by Justice D.V Sharma wherein **Ismail Faruqui** is quoted have been reproduced as under:

> "ISSUE NO. 19 (d): Whether the building in question could not be a mosque under the Islamic Law in view of the admitted position that it did not have minarets?
>
> FINDINGS:
>
> On behalf of defendants it is contended that the building in question was not a mosque under the Islamic Law. It is not disputed that the structure has already been demolished on 6.12.1992. According to *Dr. M. Ismail Faruqui and others* v. *Union of India and others*, case, 1994 (6) SCC 360, the Hon'ble Apex Court held at para 70 that the sacred character of the mosque can also be lost. According to the tenets of Islam, minarets are required to give Azan. There cannot be a public place of worship in mosque in which Provision of Azan is not available, hence the disputed structure cannot be deemed to be a mosque.
>
> According to Islamic tenets, there cannot be a mosque without place of Wazoo and

surrounded by a graveyard on three sides. Thus, in view of the above discussions, there is a strong circumstance that without any minaret there cannot be any mosque. Issue No. 19(d) is decided accordingly, against the plaintiffs and in favour of the defendants."

[Printed volume of the judgment at page Nos. 3038-3039]

"Defendants further claim that the property in suit was not in exclusive possession of Muslims right from 1858. It is further submitted that in view of the possession of Hindus from 1858 and onwards which is evident from Ext. 15, 16, 18, 19, 20, 27 and 31, the outer Courtyard was exclusively in possession of Hindus and the inner Courtyard was not exclusively in possession of Muslims but also in joint possession of Hindus and Muslims till 1934. Muslims were dispossessed from the inner Courtyard also in 1934 and plaintiffs admit that Muslims were dispossessed on 22/23December 1949 from the inner Courtyard. Thus, on the basis of Islamic tenets the Muslims claim that the property shall be construed as a Mosque. In this reference the controversy has already been set at rest by the Privy Council in the decision of Masjid Shahid Ganj v. Shiromani Gurudwara Prabandhak Committee, Amritsar, AIR 1940 PC 116. The aforesaid view has been approved in Dr. M. Ismail Faruqui v. Union Of India, 1994 (6) SCC 360, Para 70 of the ruling is relevant which reads as under……"

[Printed volume of the judgment at page Nos. 3061]

"Sri Jain has relied upon para 78 of *Dr. M. Ismail Faruqui and others* v. *Union of India and others* 1994(6) SCC 360, which is reproduced as under :

> "While offer of prayer or worship is are religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and move reverentially."

Sri H.S. Jain, Advocate has further argued that since birth place of Lord Ram was considered as a place of worship which was integral part of religious practice of Hindu from times immemorial. It is deity and it stands on a different footing and have to be treated reverentially. Sri Jain has further urged that in view of the constitutional mandate as provided under Article 25 of the Constitution this place which was all the time being worshipped has be treated by this Court as a place of worship because of the belief of the Hindu based on religious book and religious practice to be birth place of Lord Ram as the temple was constructed in the 12th century. It is expedient to say that prior to 12th century there is evidence that earlier temples were also constructed at the site. Thus, according to Sri H.S. Jain, Advocate there is overwhelming

evidence to establish the site of Ram Janambhumi and the Court has to recognize the same. Thus, the suit of the plaintiffs which causes hindrance for worship of Hindu is liable to be dismissed on this count as no relief can be granted under Section 42 of the Specific Relief Act, 1877, now Section 34 of the Specific Relief Act, 1963."

[Printed volume of the judgment at page Nos. 3392]

"LORD RAM AS THE AVATAR OF VISHNU HAVING BEEN BORN AT AYODHYA AT THE JANMASTHAN IS ADMITTEDLY THE CORE PART OF HINDU BELIEF AND FAITH WHICH IS IN EXISTENCE AND PRACTICED FOR THE LAST THOUSANDS OF YEARS. THE HINDU SCRIPTURES ALSOS SANCTIFY IT. ARTICLE 25 OF THE CONSTITUTION BEING A FUNDAMENTAL RIGHT ENSUES ITS PRESERVATION AND NO RELIEF CAN BE TAKEN BY THE COURT WHICH SEEKS TO RESTRICT OR ALTOGETHER EXTINGUISH THIS RIGHT.

The fact that Ram Janambhumi is an integral part of Hindu Religion and the right to worship there is a fundamental right of the Hindu religion and can be enforced through a suit can be clearly made out through a number of decisions of the Hon'ble Supreme Court."

[Printed volume of the judgment at page Nos. 3429]

"THE RELIGIOUS RIGHT OF HINDUS TO WORSHIP RAM LALA AT THE JANMASTHAN BECAME CONCRETISED BEFORE THE

CONSTITUTION CAME INTO BEING AND THE SAME REQUIRES TO BE PROTECTED.

It is well-known that the Constitution of India was enacted, i.e. given to ourselves, w.e.f. 26th January, 1950. Before it, the right of Hindus to worship was duly sanctified and recognized by judicial orders.
In fact, the Supreme Court records in the Ismail Faruqui case above the contention in paragraph 1.2 of the White Paper of the Government of India as recorded in Paragraph 9, Page 380, of the said judgment. It reads as follows: "Interim orders in these civil suits restrained the parties from removing the idols or interfering with their worship. In effect, therefore, from December 1949 till 6.12.1992 the structure had not been used as a mosque."

It is further very significant to note that the Muslims for the first time, after 1949, assert their right howsoever unsustainable, only in 18th December, 1961.

Therefore, the right of the Hindus to worship at the Rama Janma Bhumi, continuing since times immemorial as an integral part of their religious right and faith was also sanctified by judicial orders from 1949 continuously. This right has concretised and remains an integral part of Hindu religion and has to be protected."

[Printed volume of the judgment at page Nos. 3439]

24. Similarly, in the judgment rendered by Justice Sudhir Agarwal, **Ismail Faruqui** has been quoted at page No. 2015 in the printed volume of the judgment, which is as under:

> "3501. Sri Prasad argued that belief of Hindus that Lord Ram as incarnation of Vishnu having born at Ayodhya forms an integral part of Hindu religion which cannot be denied to be practised, observed and performed by them and refers to *Commissioner of Police & others* v. *Acharya Jagadishwarananda Avadhuta& another*, (2004) 12 SCC 770 (para 9) and Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi (supra). In order to show what constitutes public order under Article 25 of the Constitution, he also placed reliance on *Dalbir Singh & others* v. *State of Punjab*, AIR 1962 SC 1106 (para 8).
>
> 3502. Next he submits that applying the doctrine of Eminent Domain, the place in dispute, having special significance for Hindus, cannot be touched at all either by any particular person or even by State and the provisions of even acquisition would not apply to it though with respect to the alleged mosque, it has been already held and observed by the Apex Court that the disputed building could not be shown to be of any special significance to Muslims. He refers to *Dr. M. Ismail Faruqui and others* v. *Union of India & others*, (1994) 6 SCC 360 (para 65, 72, 75 and 96); *Acharya Maharajshri Narendra Prasadji Anand prasadji Maharaj and others* v. *State of Gujarat & others*, (1975) 1 SCC 11. The relief sought by the plaintiff (Suit-4) is barred by Section 34 Specific Reliefs Act, 1963 and

> reliance is placed on *Executive Committee of Vaish Degree College, Shamli and others* v. *Lakshmi Narain and others*, (1976) 2 SCC 58 (para 20 and 27); *American Express Bank Ltd.* v. *Calcutta Steel Co. and others*, (1993) 2 SCC 199(para 22)."

25. After considering **Ismail Faruqui,** Justice Sudhir Agarwal in paragraphs 2722 to 2725 has opined as under:

> "2722. The Fourth angle: It is a deity which has filed the present suit for enforcement of its rights. The religious endowment in the case in hand so far as Hindus are concerned, as they have pleaded in general, is a place of a peculiar and unique significance for them and there cannot be any other place like this. In case this place is allowed to extinguish/extinct by application of a provision of statutes, may be of limitation or otherwise, the fundamental right of practicing religion shall stand denied to the Hindus permanently since the very endowment or the place of religion will disappear for all times to come and this kind of place cannot be created elsewhere.
>
> 2723. In *Ismail Farooqui* (supra), Supreme Court has considered the plea of validity of acquisition of land under Land Acquisition Act that once a waqf of mosque is created, the property vests in almighty and it always remain a waqf hence such a property cannot be acquired. While negativing this plea, the Apex Court said that a plea in regard to general religious purposes cannot be said to be an integral part of religion which will deprive the worshippers of the right of worship at any other place and therefore, such a property can

be acquired by the State. However, the position would be otherwise if the religious property would have been of special significance and cannot be one of several such kind of properties. It will be useful to reproduce the relevant observation in this regard:

> "78. It appears from various decisions rendered by this Court, referred later, that subject to the protection under Articles 25 and 26 of the Constitution, places of religious worship like mosques, churches, temples etc. can be acquired under the State's sovereign power of acquisition. Such acquisition per se does not violate either Article 25 or Article 26 of the Constitution. The decisions relating to taking over of the management have no bearing on the sovereign power of the State to acquire property."
>
> "82. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially."

2724. The above observations show if the religious endowment is of such nature, which

is of specific significance or peculiar in nature, could not have been found elsewhere, the acquisition of such property by the Government will have the effect of depriving the worshippers their right of worship under Article 25 of the Constitution and such an acquisition even under the statutory provision, cannot be permitted. We find sufficient justification to extend this plea to the statute of limitation also, inasmuch as, if the statute pertaining to acquisition cannot be extended to a religious place of special significance which may have the effect of destroying the right of worship at a particular place altogether, otherwise the provision will be ultra vires, the same would apply to the statute of limitation also and that be so, it has to be read that the statute of limitation to this extent may not be availed where the debutter's property is of such a nature that it may have the effect of extinction of the very right of worship on that place which is of peculiar nature and specific significance. This will be infringing the fundamental right under Article 25 of the Constitution.

2725. In fact this reason could have been available to the plaintiffs (Suit-4) also had it been shown by them that the mosque in question for them was a place of special significance but this has already been observed by the Apex Court in respect to this particular mosque that like others it is one of the several mosques and by acquisition of the place it will not have the effect of depriving such fundamental right of Muslims. It is always open to them to offer prayer at any other place like they could have done here but Hindus are not placed on similar footing.

According to Hindus, this is a place of birth of lord Rama and that be so, there cannot be any other place for which such belief persists since time immemorial. Once this land is allowed to be lost due to the acts of persons other than Hindus, the very right of this Section of people, as protected by Article 25, shall stand destroyed. This is another reason for not attracting the provisions of limitation in the present case."

26. Similarly, Justice D.V. Sharma has stated thus:

"A SOVEREIGN GOVERNMENT EVEN BY EXERCISING THE POWER OF EMINENT DOMAN CANNOT EXERCISE THE POWER OF ACQUISITION OF LAND OR PROPERTY WHICH EXTINGUISHES THE CORE OF THE FAITH OR THE PLACE OR THE INSTITUTION WHICH IS HELD TO BE SACRED.

What clearly follows is that a sovereign Government cannot extinguish the core of the Hindu religion which is the Ram Janambhumi, let alone the same be extinguished through a suit, by transferring the same to some other party in this case the plaintiff thereby ensuring that the said fundamental right to worship at the Ram Janambhumi is extinguished forever.

RELEVANT CASE LAW…

(b) *Dr. M. Ismail Faruqui and Others* v. *Union of India & Others*, 1994 (6) SCC Para 76, Page 416 – *Acharya Maharajshri Narendra Prasadji Anand Prasadji Maharaj* v. *State of Gujarat*, (1976) 2 SCR 317 at pages 327-328: (AIR 1974 SC 2098 at p. 2103), has held :

> "One thing is, however, clear that Article 26 guarantees inter alia the right to own and acquire movable and immovable property for managing religious affairs. This right, however, cannot take away the right of the State to compulsorily acquire property .....If, on the other hand, acquisition of property of a religious denomination by the State can be proved to be such as to destroy or completely negative its right to own and acquire movable and immovable property for even the survival of a religious institution the question may have to be examined in a different light."

Para 82 - A mosque is not an essential part of the practice of religion of Islam and Namaz by Muslims can be offered anywhere, even in the open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose. Keeping in view that such acquisition should not result in extinction of the right to practice the religion if the significance of that place be such.

Note (i) Ram Janmasthan in Ayodhya where Ram Lala is Virajman is a place of religious significance as described in the above judgment. If the sovereign authority, under the power of eminent domain, cannot acquire it, can a plea at the instance of plaintiffs who are private persons in Suit No. 4 be entertained, upholding of which would lead to denial of such sacred place altogether to the Hindus.

Note (ii) At page 413, Para 65 of Ismail Faruqui – No argument made about a mosque of special significance which forms an essential part of Islam. Hence, no question raised about Baburi Mosque as integral to Islam and it has not been raised in the plaint here or evidence laid or any contention ever made that the said mosque was of any significance to the practice of Islam as a religion……."

[Printed volume of the judgment at page Nos.3438-3439]

"FINDINGS ….. Hon'ble Apex Court upheld the validity of provisions of Acquisition of Certain Area at Ayodhya, 1993 in Dr. Ismail Faruqui case (supra) and held that the Central Government can acquire any place of worship. At para- 78 Apex Court held that the place of birth has a particular significance for Hindus and it should be treated on different footing, which reads as under:-

> "78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially."

On behalf of Hindus it is urged that the plaintiffs are not entitled for the relief claimed and as such the relief is barred by the provisions of Section 42 of the Specific Relief Act, 1877 which is at par with Section 34 of the Specific Relief Act,1963 on the ground that they have superior fundamental rights. Contentions of Hindus are as under:

"The Hindus have superior fundamental right than the Muslims under articles 25 & 26 of the Constitution of India for the reasons that performing customary rituals and offering service worship to the lord of universe to acquire merit and to get salvation as such it is integral part of Hindu Dharma & religion in view whereof it is humbly submitted that the instant suit is liable to be dismissed with exemplary cost: …

2. In *M. Ismail Faruqui (Dr.)* v. *Union of India*, (1994) 6 SCC 360, the Hon'ble Supreme Court has held that the Right to Practise, Profess and Propagate Religion guaranteed under Article 25 of the Constitution does not extend to the Right of Worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution of India. The protection under Articles 25 and 26 is to religious practice which forms integral part of practice of that religion. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion

having particular significance of that religion to make it an essential or integral part of the religion stand on a different footing and have to be treated differently and more reverentially. Relying on said judgment it is submitted that Sri Ramjanamsthan has particular significance for the Hinduism as visiting and performing customary rites confer merit and gives salvation it is firm belief of the Hindus based on their sacred Divine Holy Scriptures which belief neither can be scrutinized by any Court of Law nor can be challenged by the persons having no faith in Hinduism as this is conscience of the Hindus having special protection under Article 25 of the Constitution of India. Relevant paragraph 77 and 78 of the said judgment read as follows:

> 77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an

> essential and integral part of practice of that religion.
>
> 78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

3. In *M. Ismail Faruqui (Dr.)* v. *Union of India* (supra) the Hon'ble Supreme Court held that a mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered any where even in open. The Right to Worship is not at any and every place so long as it can be practised effectively, unless the Right to Worship at a particular place is itself an integral part of that right. Relying on said ratio of law it is submitted that without offering prayer at Sri Ramjanamsthan described as Babri mosque in the plaint it can be practised somewhere else but offering prayer instead of Sri Ramjanamsthan at any other place cannot be practised because the merit which is obtained by worshiping at the birth place of Sri Ram cannot be obtained by doing so at other places and it will be contrary to the holy Divine Sacred Scripture of the Hindus and will cause extinction of a most sacred shrine of the

Hindus. Relevant paragraph Nos. 80 to 87 of the said judgment read as follows:

> 80. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that property.
>
> 81. Section 3(26) of the General Clauses Act comprehends the categories of properties known to Indian Law. Article 367 of the Constitution adopts this secular concept of property for purposes of our Constitution. A temple, church or mosque etc. are essentially immovable properties and subject to protection under Articles 25 and 26. Every immovable property is liable to be acquired. Viewed in the proper perspective, a mosque does not enjoy any additional protection which is not

available to religious places of worship of other religions.

82. The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See Mulla's Principles of Mahomedan Law, 19th Edn., by M. Hidayatullah — Section 217; and Shahid Ganj v. Shiromani Gurdwara. If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to

> be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right….."
>
> [Printed volume of the judgment at page Nos.3454-3458]

27. Hence, it is clear that the questionable observations in **Ismail Faruqui** have certainly permeated the impugned judgment. Thus, the impugned judgment can be claimed to be both expressly and inherently affected by the questionable observations made in **Ismail Faruqui**. Further, **Ismail Faruqui** *prima facie* leads a different approach regarding the application of essential and/or integral test which also needs to be resolved as a matter of constitutional significance. In my view, **Ismail Faruqui** needs to be brought in line with the authoritative pronouncements in **Shirur Mutt** and other

decisions referred to in paragraphs 14 to 18 and 20 of this judgment.

28. The importance and seriousness of the matter can be better understood by the observations made by Justice S.U. Khan in the impugned judgment itself, in the following words:-

> "Here is a small piece of land (1500 square yards) where angels fear to tread. It is full of innumerable land mines. We are required to clear it. Some very sane elements advised us not to attempt that. We do not propose to rush in like fools lest we are blown. However, we have to take risk. It is said that the greatest risk in life is not daring to take risk when occasion for the same arises.
> Once angels were made to bow before Man. Sometimes he has to justify the said honour. This is one of those occasions. We have succeeded or failed? No one can be a judge in his own cause.
> Accordingly, herein follows the judgment for which the entire country is waiting with bated breath."

29. It is relevant here to state that by an order dated 26.3.2018 a three-Judge Bench of this Court in **Sameena Begum** v. **Union of India & Ors.** [Writ Petition (Civil) No. 222 of 2018] has referred the matter relating to polygamy including Nikah Halala; Nikha Mutah; and Nikah Misya to a Constitution Bench. The order of reference in the said case reads as under:

"It is submitted by learned counsel for the petitioners that the challenge in these writ petitions pertains to the prevalent practice of polygamy including Nikah Halala; Nikah Mutah; and Nikah Misyar as they are unconstitutional. Various grounds have been urged in support of the stand as to how these practices, which come within the domain of personal law, are not immune from judicial review under the Constitution. It is urged by them that the majority opinion of the Constitution Bench in the case of *Shayara Bano etc. v. Union of India & Ors. etc.* (2017) 9 SCC 1 has not dealt with these aspects. They have drawn our attention to various paragraphs of the judgment to buttress the point that the said issues have not been really addressed as there has been no delineation on these aspects.

On a perusal of the judgment, we find the submission of the learned counsel for the parties/petitioners is correct that these concepts have not been decided by the Constitution Bench.

xxx xxx xxx

xxx xxx xxx

At this juncture, a submission has been advanced at the Bar that keeping in view the importance of the issue, the matter should be placed before the Constitution Bench. Accepting the said submission, it is directed that the matter be placed before Hon'ble the Chief Justice of India for constitution of appropriate Constitution Bench for dwelling upon the

> **issues which may arise for consideration from the writ petitions**."
>
> (Emphasis supplied)

30. Moreover, a two-Judge Bench of this Court on 6.7.2018 in **Jyoti Jagran Mandal** v. **NDMC & Anr.** [Civil Appeal No. 5820 of 2018] has referred the matter in relation to the policy decision permitting Ram Leela and Puja once in a year in public parks to a Constitution Bench holding as under:

> "Application seeking exemption from filing certified copy of the impugned order is allowed.
>
> Appeal admitted.
>
> The order of the National Green Tribunal, Principal Bench, New Delhi has rejected an application made by the appellant to have what is known as "Mata-ki-Chowki" in a public park. The appellant has expressly relied upon earlier orders, including a policy decision, which permits Ram Leela and Puja to be allowed once in a year in such public parks.
>
> **The appeal raises a question of great constitutional importance as to whether such activities can be allowed in state owned premises in view of our Constitution being secular in nature. The Hon'ble Chief Justice is, therefore, requested to constitute an appropriate Bench to hear the aforesaid matter**."
>
> (Emphasis supplied)

31. In **Sunita Tiwari** v. **Union of India & Ors**. {Writ Petition (Civil) No. 286 of 2017} a Three-Judge Bench of this Court was considering the question relating to banning the practice of Female Genital Mutilation (FGM) or Khatna or Female Circumcision (FC) or Khafd. It was submitted by the senior counsel appearing for the contesting respondent that the matter should be referred to a larger Bench for an authoritative pronouncement because the practice is an essential and integral practice of the religious sect. Learned Attorney General for India also submitted that it deserves to be referred to a larger Bench. By Order dated 24.09.2018, the matter was referred to a larger Bench, the relevant portion of which is as under:

> "**Regard being had to the nature of the case, the impact on the religious sect and many other concomitant factors, we think it apposite not to frame questions which shall be addressed to by the larger Bench. We also think it appropriate that the larger Bench may consider the issue in its entirety from all perspectives**.
> In view of the aforesaid, we are of the view that the matter should be placed before a larger Bench. The Registry is directed to place the papers of the instant matter before the Hon'ble Chief Justice of India for obtaining appropriate directions in this regard."
>
> (Emphasis supplied)

32. Considering the Constitutional importance and significance of the issues involved, the following need to be referred to a larger Bench:

(a) Whether in the light of **Shirur Mutt** and other aforementioned cases, an essential practice can be decided without a detailed examination of the beliefs, tenets and practice of the faith in question?

(b) Whether the test for determining the essential practice is both essentiality and integrality?

(c) Does Article 25, only protect belief and practices of particular significance of a faith or all practices regarded by the faith as essential?

(d) Do Articles 15, 25 and 26 (read with Article 14) allow the comparative significance of faiths to be undertaken?

33. The Registry is directed to place this matter before the Hon'ble Chief Justice of India for appropriate orders.

.....J.
(S. ABDUL NAZEER)

New Delhi;
September 27, 2018.