

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

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

AND

OTHER CONNECTED CIVIL APPEALS

NOTE ON METHODOLOGY

BY

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ADVOCATE-ON-RECORD: EJAZ MAQBOOL

METHODOLOGY

A 'GUESS METHOD'

1. **The Hon'ble Judges below have used a guess method while pronouncing the impugned judgment:-**

- i. Though Justice Khan gives a finding that no temple was demolished for constructing the mosque and that until the mosque was constructed, the premises in dispute was neither treated nor believed to be the birthplace of Lord Ram. However, while giving a finding *qua* the birthplace, he states that a *guess* will have to take the place of finding. The relevant portion of the judgment is extracted below :-

“The only thing which can be guessed, and it will be quite an informed guess taking the place of finding in a matter, which is centuries old, is that a very large area was considered to be birth-place of Lord Ram by general Hindus in the sense that they treated that somewhere in that large area Lord Ram was born however, they were unable to identify and ascertain the exact place of birth, and that in that large area there were ruins of several temples and at a random small spot in that large area Babar got constructed the mosque in question.” [Pg. 103/Vol. 1]

- ii. Justice Agarwal on the other hand decides to give findings in the matter on the basis of conjectures and preponderance of probabilities, as is evident from the following:-

a) *“Though it amounts to delving into some kind of conjectures but since here is a case which necessarily goes in history and particularly when for sufficiently long time the things are in dark, in the absence of anything contrary, we do not find it impermissible to think in this manner. It would come within the domain of preponderance of probability.” [Para 1643 @ pg. 1086/Vol. 1]*

b) *“The building in dispute, therefore, not constructed in 1528 AD or during the reign of Babar, the preponderance of probability lie in favour of the period when Aurangzeb was the Emperor since it is again nobody's case that such an action could have been taken during the*

reign of Humayun, Akbar or Shahjahan.....” [Para 1645 @ pg. 1086/Vol. 1]

c) *“In the above facts and circumstance, it is difficult to record a finding that the building in dispute was constructed in 1528 AD by or at the command of Babar since no reliable material is available for coming to the said conclusion. On the contrary the preponderance of probability shows that the building in dispute was constructed at some later point of time and the inscriptions thereon were fixed further later but exact period of the two is difficult to ascertain.”* [Para 1679 @pg. 1100/Vol. 1]

d) *“...However, applying the principle of informed guess, we are of the view that the building in dispute may have been constructed, probably, between 1659 to 1707 AD i.e. during the regime of Aurangzeb.”* [Para 1682 @pg. 1101/Vol. 1]

e) *“...By the process of elimination since it was never a case of Muslim parties that there existed any Islamic religious structure at the place in dispute before construction of the disputed structure or that there existed a religious structure other than Hindus, it leads to an inference as suggested by ASI and mere tidbits and minor infirmities in it, even it exist, in our view, are of no consequence, if any.”* [Para 3977 @pg. 2436/Vol. 2]

B RELIANCE ON DOCUMENTS, HISTORIANS ET AL.

2. Justice Sudhir Agarwal first attempts to resolve the dispute by relying on the Books written by various travellers [Para], then proceeds to look at the Historians’ evidence and have then ultimately calls for the ASI to tender a report:-

i. *“Court finds opinion of the Expert Historians so varying that no definite conclusion can be drawn therefrom...”* [Para 3635 @pg. 2117/Vol. 2]

ii. *“Considering a lot of material, some of which discussed above, as well as relevant facts, it was found expedient by this Court to have a scientific investigation at the disputed site but without disturbing the position of the*

"makeshift structure" in respect where to a status quo order was operating in various proceedings including the suits." [Para 3671 @pg. 2142/Vol. 2]

iii. *What lie underneath? This question is of extreme complication ranging in a period of more than 500 years' of history. No clear picture emerges from various history books etc. In fact, the contemporary record did not answer the issues, one or the other way, with certainty but some record, authored after about 200 years i.e., 18th Century, state about existence of temple, its demolition and the construction of the disputed building, while some well known historians dispute it and some history books are silent. The case of muslim parties was that the mosque was constructed on an unoccupied, vacant land. [Para 3672 @pg. 2142/Vol. 2]*

3. In view of the foregoing, Justice Agarwal proceeded to order the ASI to carry out excavation and submit its report. He observed as follows

i. *"Extraordinary situations demand extraordinary steps and strategy. In the peculiar circumstances, this Court decided to appoint an Expert body for scientific investigation, well recognized in the field of archaeology/history and ordered ASI to go for excavation at the site in question and submit report. The question formulated for ASI, was "whether there was any temple/structure which was demolished and a mosque was constructed on the disputed site". [Para 3673 @pg. 2142/Vol. 2]*

C INSCRIPTIONS

4. While considering the issue of inscriptions on the disputed site, Justice Sudhir Agarwal accepts that authors who have written historical write ups may not have cross checked their versions, creating confusion. This is evident from the following observation:-

i. *"1466.....We are constrained to observe at this stage that in the matter of historical events and that too, when it bears a religious importance and the matter has also seen serious disputes between two communities, the persons who are connected with history etc. must behave responsibly and before making any write up, should check up, cross check and verify very carefully what they are writing since the consequences of their write up may be dangerous and irreparable." [Para 1466 @ pg. 1006/Vol. 2]*

5. Further while considering the inscriptions, Justice Agarwal accepts that there is no way to ascertain the extent to which these Inscriptions were amended by these authors. This is relevant from the following observation:-

- i. *“1471. To what extent the corrections have been made and what was necessity thereof is not ascertainable. Why a verbatim reproduction could not be made is also not understandable. At least there is nothing on record enabling us to examine this aspect of the matter.....” [Para 1471 @ pg. 1007/Vol. 2]*

D EVENTS WHICH TOOK PLACE HUNDREDS OF YEARS AGO NOT DECIDABLE

6. Justice Agarwal in his judgment observes the difficulty in deciding upon events which happened about 500 years ago:

- i. *The concept of sovereignty, transfer of power, effect thereof as we know and understand in modern law in the light of the recent authorities whether actually as such was followed 500 years ago is difficult to answer. We have different texts of the past in respect to Hindu as well as Muslim law as to how a king/conqueror should behave and what ought to be the policy vis a vis the subject of conquered area, but these are all ideal situations. When someone from outside the territory attack and conquer and there is a change of authority/sovereignty. If the ideal situation is followed by him or observed, it is really appreciable but the conqueror is not always bound to follow those policies. The conquered territories subject have no authority, option or courage either in fact or in law or otherwise to raise voice against the conqueror. He is the sole paramount authority, can take and execute his decisions in the manner he like. After hundred of years it would not be safe for this Court to assume as to what ought or actually was done or followed by conqueror, in order to make an adjudication of dispute involving two different communities with different religious texts and practices. Whether Babar or Aurangzebe or anybody else was an ideal king observed laws of Shariyat etc. strictly, in an ideal manner, may be a matter of investigation and debate between historians, but neither such acts can be within the purview of judicial scrutiny of this Court nor we can decide the factual dispute on the presumption that he must have acted in a particular manner since the Shariyat laws say so. [Para 3387 @ pg. 1921/Vol. 2]*

E CONCLUSION

7. In view of the foregoing, it is clear that in the present case the Judges were at a loss to confirm much of the evidence because it was based on guesses, probabilities, conjectures and therefore, were constrained to resort to unconventional techniques like excavation by the Archaeological Survey of India.