UPVR050011152022

In The Court of Civil Judge (SD)/Fast Track Court, Varanasi
Original suit no.-712/2022
(CNR.NO.UPVR050010972022)
Bhagwan Adi Vishweshwar Virajman and others
vs.
State Of Uttar Pradesh throuth Secretary and others

Present- Mahendra Kumar Pandey, JO CODE-UP2271

Date-17.11.2022

Disposal of application paper no. 37C/ objection paper no.39C/ counter objection paper no. 41C-

Application no.39 C has been filed by defendant no. 4 'Anjuman Intjamiya Committee' under Order 7 Rule 11 of Civil Procedure Code(hereinafter CPC) stating that the disputed land is not situated on Aarazi no. 9130, ward-dashashwmedh, varanasi and no where any temple or idol was existing on this site. Law only permits to worship only visible dieties not for invisible dities, in such situation plaintiff has right only to offer worship for visible dieties. Plaintiffs are also not having any real cause of action. It is not permissible in the way the plaintiffs are stating that the Arazi no. 9130 and its 5 kosh adjoining land is vested in the god Bhagwan Adi vishweshwer virazman. The plaintiff has itself admitted the exitence of mosque on Araji no. 9130, so in the condition of such admission the suit is not maintainable. It is clear from the perusal of the plaint that the plaintiffs has filed this suit for the benifit of all Hindus but they have not taken permission from the court to file this suit, thus the suit is barred under Order 1 rule 8 CPC. The discription of the land, area and boundaries, mauja is incomplete, so in such a way suit is barred by Order 7 Rule 3 CPC. Suit is also barred by section 9 CPC because this Court has no power to hear the case as the plaintiffs are seeking through this suit 'Right to worship' under Article 25 of Indian Constitution. Case no. 693/20(whose new number is 18/2022) Rakhi singh and others vs State of Utter Pradesh is already pending in which the same reliefs are paryed befor the court, hence during pendency of that suit, the suit before this court is not maintainable under law, Plaintiffs has filed the suit with a clever drafting. The issues raised by plaintiffs in this suit are already decided in the **Case of 62/1936 Deen Mohammad Vs Secretary Of state**. The verdict given by the cout in this suit is prevailing at present, hence the suit of plaintiff is barred by Judicial Precedent. The suit is also

barred by **section 83 and 85 of Waqf Act 1995**.The suit is also barred by the provisions of **'The Places Of worship Act 1991.** The case is also barred by the provisions of 'The Uttar Pradesh Sri Kashi Vishwanaths Temple Act 1983'. The suit is also barred by the provisions of the 'Limitation Act'. The case of plaitiffs is false, vexatious and frivolous, plaitiffs has not any locus to present this suit, hence liable to rejected.

The plaintiffs have filed a written objection paper no. 39 C stating that the instant application is filed by Defendant No.4 with malicious intention of hinderring the proceedings of this Hon'ble Court. Instant application consists of certain purported facts alleged by Defendant No.4 to counter the averments of plaint, which is clearly beyond the purview of Order VII Rule 11 of CPC, 1908. That instant application is filed to obstruct the way of justice delivery system and to delay the trial of suit. Allegations made by the Defendant no. 4 in the instant application are purely beyond the law settled by Hon'ble Supreme Court of India in regard with Order VII Rule 11 of CPC, 1908 and also against the statutory intention of said provision. The isnstant application is manifest abuse of the process of law and accordingly, liable to be rejected with exemplary cost. It is not the case of plaintiff that there were never any visible or invisible deity/ idol at Plot Settlement No.9140 and Right to worship recognized for visible deity only under the law and there is no such right in case of invisible deity.At this stage as neither it is the case of plaintiff that there is no cause of action to file the present suit nor such allegation can be entertained under the ambit of Order VII Rule 11 of CPC, 1908. The case is based on question of fact which to be decided in due course of trial. The version of defendat is false, wrong and irrelevant as it is no where the case of plaintiff that there is any mosque over the plot settlement no.9130. Sufficient discription of suit property is comprehensively mentioned in the plaint. Suit is filed for declaration and injunction and not the writ of any sort as alleged to be by the defendant no.4. The nature and prayer of both suits are independent and unconnected and not as alleged by Defendant no.4. The version of the defedant is false, wrong and irrational as neither the deity i.e. plaintiff no.1 was party to the suit no. 62 of 1936 nor the interest of deity was presented before the Court during said suit proceedings and accordingly, the judgmet don't hold any binding over the interest of plaintiffs. Neither the suit property nor plaintiffs have any concern with Waqf act or any other Muslims personal law. Thrugh this suit nothing is affirmed or paryed in this suit in violation/contradiction of the Kashi Vishwanath Act,1983. Defendant has tried an attempt to create an attempt to fetch the suit under Order VII Rule 11 of CPC,1908. The locus Standi of plaintiffs is comprehensively stated in the plaint, hence suit is completely maintainable and deserves trial.

The Defendant No. 4 has also filed a conter objection paper no. 41C and denied the version of plaintiff stated through the objection paper no.39C. It is also stated by the defendant that in the plot number 9130,

there is Alamgiri masjid which is also known as Gyanvapi mosque, situated since so many years back, which is also recorded in the Khasra settlement 1291, Fasli 1883-84, not only this the property is registered as waqf property no. 100 in the U.P. Sunni Central Waqf Board Of Lucknow, which is also published by the Goverment of United Provinces, in its official gazette of 1942. The case is barred by section 23 and 85 of Waqf Act 1995. So in such a way defendant has paryed to allow their application paper no. 39C.

Defendant has filed in its support paper phothocopy of nakal Khasra for 1291 Fasli year 1883-84, araji no. 9130, 9131,9132,9133, mauja shahar khas, pargana dehat Amanat, tahsil and District-Varanasi paper no. 43C, its hindi and english version paper no. 44C, 45C,photocpy map paper no. 37C,

I have heard the learned counsel for the plaintiff no.1, learned counsel for the plaintiff nos.2 to 5, learned counsel for the defendant no.4, learned Special Goverment Counsel appointed for this matter on behalf of defendant nos. 1 to 3 & 5 at length and perused the whole record available.

From the perusal of the record it is very clear that defendant has filed the application no. 37C under Order VII Rule 11 of CPC, so first of all it is very pertinent to observe the provisions mentioned under this order.

Order VII Rule 11 of CPC

Rejection of plaint- the plaint shall be rejected in the following cases-

a- where it does not disclose a cause of action

b- where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so,

c- where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the court fails to do so.

d- where the suit appears from the statement in the plaint to be barred by any law.

e- where it is not filed in duplicate.

f- where the plaintiffs fails to comply with provision of rule 9

provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any caused of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

The defendant has mainly stated that the suit of the plaintiff is barred on the following ground -

1. Case is devoid of cause of action

2. Case is barred under the provisions of Order 1 Rule 8, Order 7 Rule 3, Order 9 of CPC.
3. Case is barred under provisions of Section 83 & 85 of the Waqf Act.
4. Case is barred under provisions of 'Places of worship Act, 1991
5. Case is barred under provisions of 'The Uttar Sri Kashi Vishwanath Temple Act ,1983'
6. Case is barred under provisions of 'Indian Limitation Act,1963
7. Case is also barred by Judicial precedent declared in case no. 63/1936 Deen mohammad vs. Secretary of State

So in the light of the provisions mentioned under Order VII Rule 11 CPC it is necessary to discuss and analise every point raised by the defendant no.4.

1. <u>Whether the case is barred as having no cause of action-</u>

In this regard learned counsel for defendant no.4 has stated that there is no real cause of action exists as the Mosque is already built at disputed place and muslims are also offering namaj in this mosque continuously and regularly. Plaintiff has tried to mislead the court because the so called temple of Kashi Vishwanath with 'Jyotirling' is already existing beside the Almagir Mosue (also known as Gyanvapi Mosque) and Hindus are performing well Darshan, Puja and rag bhog, Arti etc. in that temple. Muslims are not creating any hurdle to perform Puja, rag Bhog in this temple. So in this way no real cause of action arised and thereby the suit is liable to be rejected as want of cause of action.

Defendant no.4 has placed reliance on the law laid down by the Hon'ble Supreme court in the matter of -

T. Arivandandam vs T.V. Satyapal and another(1977) 4 Supreme Court Cases- " if on a meaningful-no formal-reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing **a clear right to sue**, it should exercise its power under Order VII Rule 11 C.P.C. taking care to see that the ground mentioned therein is fulfiled. if clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing.

The learned counsel for the defendant no.4 also cited **M/s Frost International Ltd. v. M/s Milan Developers and Builder Pvt. Ltd. & Anr. 2022 All. C.J. 1102** in which Hon'ble Supreme Court held that if on the perusal of the plaint averments, the plaintiff has made out a cause of action for filing the suit, the plaint can not be rejected under Order 7 Rule 11 C.P.C. In this judgment, Hon'ble Supreme Court cited D Ramchandran v. R. V. Janki Raman 1999 (3) SCC 367 in which it was held that if the allegations in the plaint prima facie show a cause of action, the court can not embark upon an inquiry whether the allegation are true in fact. However, on a meaningful reading of the plaint, if it is found that the suit is manifestly vexatious and without any merit and does not disclose a right to sue, the court would be justified in exercising the power under Order 7 Rule 11 C.P.C.

Plaintiff has stated they have real cause of action and the suit is liable to be tried on the evidence. Plaintiff also stated the cause of action should not be decided through a single fact. It may be decided only on the basis of bundle of facts. Plaintiff has also mentioned that at this stage only the averment of plaint should be considered and not the evidence led by the parties. Cause of action of plaintiff is much apparent from plaint and while considering an instant application no challenge as to veracity of cause of action can be considered as the mentioned cause of action is to be considered as true and undisputed as held by Hon'ble Apex Court and Hon'ble Highcourt of Allahabad.

Plaintiff has placed reliance on the law laid down by Hon'ble Supreme Court in the matter of-

Bhau Ram vs. Janak Singh and Others (2012) AIR SC 3023- while consideration application under Order 7, Rule 11 CPC, cout has to examine averments in plaint and pleas taken by defendants in its written statements would be irrelevant.

Urvashiben and another v. Krishnakant Manuprasad Trivedi 2019 All. C.J. 445, as for the purpose of deciding application under Order-7 Rule 11 CPC only averments in the plaint can be looked in to. Merits and demerits of the matter and allegations by the parties can not be gone in to.

Sri Hari Hanumandas Totala vs. Hemant vithal Kamat and others (2021) AIR (SC) 3802- In this case the following law has been propounded by the Supreme court-

i- to reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to,

ii- The defense made by the defendant in the suit must not be considered while deciding the merits of the applicatio.

Therefore, in the light of the law laid down by the Hon'ble Supreme court and Hon'ble Highcourt of Allahabad in these cases it is well settled that in exercising powers under Order 7 Rule 11 of CPC, the Court has to take into consideration only the averments made in the plaint and the defendant's case cannot be taken into consideration at this stage. Plaintiff has clearly mentioned in the para no.120 and in the other paras of the plaint that the cause of action for filing the suit is accruing continuously everyday as the plaintiffs and devotees are not been allowed to enter into the old temple complex to have Darshan and Pooja of Shri Jyotirling. The cause of action lastly arose on 17.05.2022 when the plaintiffs were not allowed to enter into old temple complex and the cause of action for filing the suit is accruing every day and every movement whihin the territorial jurisdiction of the Hon,ble Court.

Under above observations this court is agree with the pleadings of plaintiffs that wih regard to cause of action one should not be get

confused with a single fact mentioned in the plaint, but it should be derived through the bundle of facts. In this case the plaintiff has explained well as when and how the cause of action arose to file this suit lastly on 17.05.2022. Thus this suit is not barred by want of cause of action.

2. Whethe the suit is barred by the provisions mentioned under Order 1 Rule 8, Order 7 Rule 3, Order 9 of CPC-

Although the provisions mentioned under Order 1 Rule 8, Order 7 Rule 3, Order 9 of CPC. to be discussed seperately and it should not be drawn under the purview of Order 7 Rule 11 CPC. But in this case the defendant no. 4 has argued these provisions with regard to suit of plaintiff. Hence it is necessary to discuss these provisions in the light of contentions made by both the parties.

Order 1 Rule 8 of CPC states that prior necessary permission of court is required to file the suit in case where numerous persons having the same interest in one suit. Order 7 Rule 3 states of CPC states about necessacity of clear indentification of the suit property. whereas section 9 states about maintainability of the civil suit on the basis of its nature.

Defendant no.4 has stated that the plaintiff filed this suit for the benifit of all 'Hindus' but they have not taken prior permission from the court to file this suit, thus the suit is barred under Order 1 rule 8 CPC. The discription of the land, area and boundaries, mauja is incomplete, so in such a way the suit is barred by Order 7 Rule 3 CPC. Suit is also barred by section 9 CPC because this Court has no power to hear the case as the plaintiffs are seeking 'Right to worship' through this civil suit under Article 25 of Indian Constitution for which the law does not permit.

Counsel for defendant no. 4 has further stated that the plaintiff no.3 has mentioned to file the suit as next friend of plaintiff no. 1& 2 but the plaintiff no.4 and 5 has filed the in their personal capacity which shows that the suit filed by plaintiff no.3 as a next friend not only for plaintiff no.1& 2 but the plaintiff no.3 is also a representative of plaintiff no.4& 5.

In this regard learned counsel for plaintiff has stated that this suit is filed on behalf of deity which is considered minor as per law laid down by the Supreme Court in number of cases and such type of suits are permissible under Order 32 of CPC. Hence there is no need to take the permission of court before filing of this suit. Thus suit is not barred by Order 1 rule 8 of CPC. Plaintiff no.3 to 5 approached this court for enforcement of their religious and customary as well as civil and legal right in their individual capacity, as there is no claim mentioned in the plaint that they are claiming these rights on behalf of entire community and therefore , no adverse inference can be drawn baselessly at this stage. Plaintiff has also mentioned the sufficient description of the properties and in that way the suit property may be identified properly.

After analising the above mentioned plea stated by both the parties this court is of the view that the case is filed by plaintiff no.1&2 through next friend plaintiff no. 3 and the plaintiff no. 4 and 5 has arrayed in their personal capacity. From perusal of the case if reflects that the sufficient description of the suit property is mentioned by the plaintiff. And if any error is existing in marking of the description of disputed property, it may be corrected at later stage. On the basis of not marking the description of the disputed properties, the suit cannot be rejected at this stage.

The learned counsel for the plaintiffs cited **Sri Bapu Lal Mansukh Lal Thakkar Vs. The Additional District Judge (on 6th July, 2005)** in which the Hon'ble Allahabad High Court held that from a bare reading of Section 9 of CPC, it is clear that the Civil Courts, subject to provisions contained in the Code, have jurisdiction to try all the suits of civil nature except the suits of which cognizance is either expressly or impliedly barred. From the discussion made above, there can be no room for doubt to hold that if the infringement of any fundamental right, which includes in it civil right of individual being in respect of the religious relief or faith, is complained of, the Civil Court would not decline to entertain it merely because it pertains to religious right or ceremonies though the same is claimed as integral part of religious faith according to tenets of particular religious faith.
Thus law is very clear about the Scope of Section 9 CPC. Through this suit Plaintiffs have sought a relief of declaration, mandatory injunction and for permanant prohibitary injuction, for which a civil court has a full and proper jurisdiction. Thus I found no substance in the pleading of defendant no.4 in this regard.

3. <u>Whether the suit is barred by the provisions of 'The Waqf Act,1995-</u>

In this regard the defendant no.4 has argued that the Settlement Araji no. 9130 for the year 1883-84 and other relevant papers which shows that the subject matter of the suit property is a mosque property and it is also a Waqf property. If any dispute arises regarding this property, only waqf tribunal has the jurisdiction to try such suit. Accordingly it is barred by section 83 and 85 of the Waqf Act.

The learned counsel has also argued that at disputed site, a waqf by user is created because we are using this proerty since time immorial.

Learned counsel for the defendant no.4 has also mentioned the following provisions of The Waqf Act, 1995-

Section 2- Applicability of the Act- Save as otherwise expressly provided under this Act, this Act shall apply to all [Aukaf] whether created before or after the commencement of this Act.

Section 3 (r)- " Waqf means the permanent dedication by any person, of any movable or immovable property for any prpose recognised by the Muslim Law as pious, religious or charitable and includes-

(i)- a waqf by user but such Waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser,
(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record,
(iii) "grants" including masharat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and
(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purposes as recognised by Muslim Law.
In the Waqf Act, 1995 ' person interested in a **Waqf'** has been defined as any person who is entitled to receive any pecuniary or other benefits from the waqf and includes-
(i) any person who has a right to offer prayer or to perform any religious rite in a mosque, idgah, imambara, dargah, khanqah, peerkhana and karbala,
maqbara, graveyard or any other religious institution connected with the waqf or to participate in any religious or charitable institution under the waqf;
(ii) the waqif and any descendant of the waqif and the Mutawalli.
Waqif- The term waqif has been defined in Section 3(r) of the Waqf Act, 1995. As any person making the dedication of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable
Section 6- Disputes regarding [Auqaf]-(1) If any question arises whether a particular property specified as [waqf] property in the list of 'aukaf' is [waqf] proprerty of not or whether a [waqf] specified in such list is a Shia [waqf] or Sunni [waqf], the Board or Mutwalli of the [waqf] or any person aggrieved may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final.

provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of auqaf.

provided further that no suit shall be instituted before the Tribunal in rispect of such properties notified in a secon or subsequent survey prusuant to the provisions contained in sub-section (6) of Section 4.
(2) Notwith standing anything contained in sub-section (1), no proceeding under this Act in respect of any waqf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.
(3) The Survey commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.
(4) The list of auqaf shall, unless it is modified in pursuance of a decision of the Tribunal under sub-section (1) be final and conclusive.

(5) On and from the commencement this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that state in relation to any question referred to in sub-section(1)
Section 83 states about the **constitution of Tribunals**.
Section 85- Bar of jurisdiction of [Civil Court, revenue Court and other authority] Civil Courts- No suit or other legal proceeding shall lie in any [Civil Court, revenue Court and other authority] in respect of any dispute, question or other matter relationg to any Waqf property or other matter which is required by or under this Act to be determined by a tribunal.

The learned counsel of defendant no.4 has cited the decisions pronounced by Hon'ble Highcourt of Allahabad in the matter of-

Ballabh Das and others Vs Noor Mohammad and others AIR 1936 Privy council, in which it was held that Khasra itself create rights as instrument of title and it is not merely a historical material where the Khasra itself is the instrument which confers or embodies the right and there is no other document which creates title. The Khasra and the Map are instrument of title or otherwise the direct foundation of right.

Sagir Khan & Anr. v. Maqsood Husaain Khan & Anr. 2015 (5) AWC 4862,
In this case Hon'ble Allahabad High Court has held that after conjoint reading of Section 7 and 85, it is apparent that where ever there is dispute regarding nature of property or whether suit property is waqf property or not, it is tribunal constituted under Waqf Act which has exclusive jurisdiction to decide the same.

Board of Waqf West Bengal v. Anis Fatma Begum & Anr. 2011 All. C.J. 989, in which it has been held by Hon'ble Supreme Court that matter relating to Waqf at the first instance should be filed before the Waqf Tribunal and not before the Civil Court or High Court.

In the light of above noted provisions of Waqf Act and law laid down by the Hon,ble courts in the above mentioned different cases learned counsel of defendant has stated that the defendant no.4 has filed copy of office memorandum dated 08-10-2018 of U.P. Sunni Central Waqf Board regarding Waqf no.100, Banaras in which Masjidshahi Alamgiri, Halka Chowk Banaras alongwith houses is entered at serial no.100. The contention of the learned counsel for the defendant no.4 is that the disputed property is registered as Waqf property of Banaras at Sl.no.100. Hence under above law the suit of the plaintiffs is barred.

Learned counsel for the plaintiff has argued that the Waqf Act, 1995 is undoubtedly the law but whether the suit property is duly and legally registered as waqf or not is necessarily the question of fact to be dealt with at trial and not under Order VII Rule 11 of CPC,1908 and accordingly the Waqf Act, 1995 does not bar the suit of plaintiffs as suit property under plaint is undisputedly and admittedly not registered as

Waqf duly and legally and hence, the suit is exclusively triable before this court.

plaintiff also stated that the property in question does not belong to any Waqf. The property had already vested in deity Aadi vishewar lakhs of years before the start of British Calendar and is continuing to be the property of deity. No Waqf can be created on the land already vesting in a deity. In the historical books written during the Mughal regime and thereafter even Muslim historians have not claimed that Aurangzeb after demolishing the temple structure of Aadi Visheshwar had created any Waqf or thereafter any member of Muslim community or ruler was dedicated such property to Waqf. Waqf Board has no power or jurisdiction to register any part of the property in question as Waqf property and such registration cannot change the nature of the property from Hindu Temple in to a Mosque and notification if any, issued by Waqf Board registering the property in question as Waqf property is ultra vires, null and void.

The learned counsel for the plaintiffs also stated that a Mosque can be constructed over the property dedicated by waqif, who should be the owner of the property, A construction raised under the orders of any Muslim ruler or by any Muslim over the land of a temple cannot be construed as Mosque. A Waqf can be created only on the land dedicated to Waqf by wakif who is owner of the land. In the instant case it is clear that from the time immemorial the land and property belong to the deity and therefore there can be no Mosque thereat.

The learned counsel of the plaintiff has further stated that the Waqf Board before registering any property as waqf, is required to make an enquiry and give notice to all the persons who are affected or may be affected by the registration of waqf. In this case the Waqf Board before registering waqf No. 100 has not made any enquiry, did not serve any notice on any person who may be interested in the property being registered as Waqf property and even notice was not given to the persons residing in the vicinity. The state Government before notifying list of waqfs is required to make survey and enquiry and finalized the proceeding after giving an opportunity of hearing to the persons interested. it is specifically mentioned here that no notice to the interested persons or a general notice to the public has been issued for registering Waqf No. 100 in the list of waqfs by any surveyor or any surveyor or any authority working under the State Government for inclucing Waqf No.100 in the list of waqfs.

The learned counsel for the plaintiffs has cited the following law-

1. Ajodhya Prasad vs Additional Civil judge, Muradabad and others 1995 All. C.J. at page no. 1159, Allahabad Highcourt,- provisions of the waqf are not applicable to Hindu. who were claiming right, title and interest in the suit properties.

2. Ramesh Govindram vs Surgra Humayun Mirza Waqf (2010) 8 SCC 726- Hon'ble Supreme Court has held that a suit for eviction of tenants from what is admittedly a waqf property could be filed only before the civil court and not before the tribunal , this Court overruled the views of the High Courts of Andhra Pradesh, Rajasthan, Madhya Pradesh, Kerala and Punjab and Haryana. It was further held that the interest of those uninterested in the waqf(non muslims) will be put in jeopardy if section 6(1) is limited to only the muttavalli, board and those interested in waqf, hence the special limitation imposed by Section 6(1) is inapplicable to strangers.

3. Bhawar Lal & Anr. v. Rajasthan Board of Muslim Waqf & ors. (2014) 16 SCC 51 in which Hon'ble Supreme Court has held that disputes regarding property claimed to be Waqf property involving issues/reliefs in respect of which Waqf Tribunal concerned had exclusive jurisdiction, while raising other issues in respect of which Civil Court alone has jurisdiction and was competent to grant relief sought but the issues/reliefs were inextricably mixed up. It was held that in such a case, it is Civil Court which would have jurisdiction. Where suit for cancellation of sale of alleged Waqf property by Waqf Trustees, rent, for possession thereof, rendition of accounts and removal of Trustees was brought, it was held that it is Civil Court which gets jurisdiction to try such a matter even though some of the items come under Section 7 of the Waqf Act, as the issues were inextricably mixed up.

4. Board of Muslim Waqf Rajasthan v. Radha Kishan & Ors. 1979(2) SCC 468, in which Hon'ble Supreme Court has held the very object of the Wakf Act is to provide for better administration and supervision of wakfs and the Board has been given powers of superintendence over all wakfs which vest in the Board. This provision seems to have been made in order to avoid prolongation of triangular disputes between the Wakf Board, the mutawalli and a person interested in the Wakf who would be a person of the same community. **It could never have been intention of the legislature to cast a cloud on the right, title or interest of persons who are not Muslims. That is, if a person who is non- Muslim whether he be a Christian, a Hindu, a Sikh, a Parsi or of any other religious denomination and if he is in possession of a certain property his right, title and interest cannot be put in jeopardy simply because that property is included in the list published under sub-section (2) of Section 5**. The Legislature could not have meant that he should be driven to file a suit in a Civil Court for declaration of his title simply because the property in his possession is included in the list. Similarly, the legislature could not have meant to curtail the period of limitation available to him under the Limitation Act and to provide that he must file a suit within a year or the list would be final and conclusive against him. In our opinion, sub-section (4) makes the list final and conclusive only between the Wakf

Board, the mutawalli and the person interested in the Wakf as defined in Section 3 and to no other person. It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title within a period of one year. The special rule of limitation laid down in proviso to sub-section (1) of Section 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub-section (2) of Section 5 can be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises.

5. <u>Siraj Ahmad @ Sirajuddin and others v. Sanjeev Kumar and other 2020(1) CAR 109 (All.)</u>

In which Hon'ble Allahabad High Court has observed that where an application was filed by the defendant against the plaintiff on the ground that property in question being Waqf property, jurisdiction of Civil Courts would be barred. However, the trial court dismissed the application holding that petitioners have not been able to place any material on record that property in question, which according to them was entered in revenue record, as "kabristan" was waqf property, as per requirement under Act of 1995, by way of its inclusion in list of auqaf which is required to be published in Official Gazette or by way of its registration as a waqf before Board. Feeling aggrieved, the defendant filed a writ petition in the Hon'ble Allahabad High Court against the order of the lower court. Hon'ble Allahabad High Court held that orders passed by the court below can not be faulted with. It is setlled law that revenue records do not confer title. The Act, 1995 has been enacted to provide for better administration of auqaf for matters connected therewith or incidental thereto, and as per Section 85, bar of jurisdiction of Civil Courts is in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under Act, 1995 to be determined by Tribunal. Therefore, it is only those matters which are required-25- by or under Act, 1995 to be determined by Tribunal that bar under Section 85 would apply. It is also seen from scheme of Act, 1995 that jurisdiction of Civil Court is plenary in nature and unless same is ousted expressly or by necessary implication, it will have jurisdiction to try all types of suits. Order VII, Rule 11(d) being in nature of exception same must be strictly construed and embargo there under to maintainability of suit must be apparent from averments in plaint.

In the present case at this stage it is not clear that property in dispute ,when and how it was dedicated as Waqf property and as per the provisions of Waqf Act whether any notice regarding the dedication of such property was served to the peoples who were residing there or not. whether any mutawalli was appointed for the administration of this disputed property or not. Who was the waqif regarding dedication of this property and how that waqif got the ownership of this disputed property.

whether after commencement of the Waqf Act,1995 any fresh notice was given to the concerned parties or not , as at the time of commencement of this Act one of the suit no.610/1991 was also pending for trial before this court. Whether fresh publication regarding the such disputed property was made or not after commencement of this Act. Whether the suit property is actually dedicated by the real owner as waqf or the entries made in record mistakenly.These question can be decided during full course of trial of the case. Although the defedant no. 4 is claiming waqf by user since time immemorial over disputed property, but at this stage it is uncertain that whether the defendant were using this property peacefully of under protest of the Hindu community. It is the stage where the averment of plaint are considerable, none other facts are considerable at this stage.

Plaintiff has clearly mentioned that this property is solely belongs to deity since the time immemorial and it is well settled that the deity is considred minor under law. It is also the law that minor's property cannot be transfered in any manner. This law was also recognised by the Privy Council in the case of **Mohiri Bibi vs. Dhurmodas Ghosh-"A contract entered into by a minor is totally void." and lateron Hon,ble Supreme court has also confirmed the same.** Thus it is the total subject of the evidence as how and when the suit property was dedicated as waqf property or whether the wrong entries were made in the concerned record. The law is also very clear on this point that mutation entries in the Revenue Records neither create nor extinguish title over property. Mutation entries do not have any presumptive value of title. They only enable person, in whose favour entries have been made, to pay land revenue. It is also very clear that at the stage of Order 7 Rule 11 of CPC only the averment made in the plaint should be considered. And from perusal of the plaint it is clear that deity and some devotees has filed this suit seeking relief of declaratory decree, mandatory injuction, permanant prohibitory injunction etc. for which the civil court has proper jurisdiction. Law is very clear that the interest of those uninterested in the waqf(non muslims) will be put in jeopardy if section 6(1) is limited to only the muttavalli, board and those interested in waqf, hence the special limitation imposed by Section 6(1) is inapplicable to strangers. Thus under above observation this court finds proper jurisdiction to try this suit. Accordingly the suit is not barred by the provision of the Waqf Act,1995.

4. <u>Places of Worship (Special Provisions) Act, 1991 (Act no.42 of 1991):-</u>

The learned counsel for the defendant no.4 has stated that the plaintiff suit is barred by the section 3& 4 of the places of worship Act because this Act creates a restriction on changing the nature of a place of worship which was existing on 15th August of 1947.

Section 3 & 4 of the above mentioned Act are as follows:-

Section 3-Bar of conversion of places of worship:-
No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof.
Section 4- Declaration as to the religious character of certain places of worship and bar of jurisdiction of Courts, etc:-
(1) It is hereby declared that the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day.
(2) If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any Court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceedings with respect to any such matter shall lie on or after such commencement in any Court, tribunal or other authority:

Provided that if any suit, appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act, such suit, appeal or other proceeding shall not so abate and every such suit, appeal or other proceeding shall be disposed of in accordance with the provisions of sub-section(1).
(3) Nothing contained in sub-section (1) and sub-section(2) shall apply to,-
(a) any place of worship referred to in the said sub-sections which is an ancient and historical monument or an archaeological site or remains covered by the Ancient Monuments and Archaeological site or remains covered by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) or any other law for the time being in force;
(b) any suit, appeal or other proceeding, with respect to any matter referred to in sub-section (2), finally decided, settled or disposed of by a Court, tribunal or other authority before the commencement of this Act;
(c) any dispute with respect to any such matter settled by the parties amongst themselves before such commencement;
(d) any conversion of any such place effected before such commencement by acquiescence;
(e) any conversion of any such place effected before such commencement which is not liable to be challenged in any Court, tribunal or other authority being barred by limitation under any law for the time being in force.

Therefore, from the perusal of these provisions of Sections 3 & 4 of the Places of Worship (Special Provisions) Act, 1991, it is clear that conversion of any place of worship of any religious denomination or any section thereto into a place of worship of a different section of the same

religious denomination or of a different religious denomination is prohibited. It is also noteworthy that the religious character of place of worship as it existed on 15th August, 1947 shall remain same and it will not be allowed to be changed.

Now under above law we have to examine whether the reliefs claimed in the suit are barred by provisions of the Act or not?

In this suit, the plaintiffs have claimed following reliefs:-

A) that by means of a decree, the plaintiff no. 1 &2 be declared exclusive owner of the suit property, detailed an described at foot of the plaint.

B) that by means of a decree of mandatory injunction , the defendant no. 3&4 be ordered to remove the upper construction erected illegally over the temple of plaintiff no. 1 situated in land bearing Settlement Plot no. 9130 located in Ward and Police Station, Dashaswamedh, Varanasi City and to hand over its possession to the plaintiffs and in case they fail in compliance of the said decree the plaintiffs be put in possession through court process by dispossessing them in due course of law.

C) That by means of a decree of permanent prohibitory injunction the defendants, their workers, agent, officers, officials and the persons acting under them, from interferign with or creating any hindrance in the Darshan, Sewa-Pooja, Raga-Bhog, Aarti and other religious Activities desirours to be performed by the persons. belonging to Hindu Community toward the plaintiff deities over the suit property.

D) That any other relief may be granted in favour of the plaintiffs for which they are found entitled in the eye of law.

E) That the cost of suit be awarded against the defendants contesting the suit.

Thus plaintiffs seek reliefs with respect to suit property as for declaration of their ownership over the suit property and to removal of the superstructure imposed over suit property and decree of pemanant prohibitary injunction over the suit property against defedant as not to create any hurdle in the right of Darshan-puja etc.

The learned counsel for the plaintiff states that it is clearly mentioned in the plaint that suit property consists of old temple where the worship was being done till 1993 incessantly at plot settlement no.9130 and still possessed by Bhagwan Shri Aadi Vishweshwar Virajman in visible and invisible form as mentioned in Shiv Puran and Skand Puran and emphasis of both is also mentioned in plaint and also the term "alleged" is continuously accompanying Gyanvapi as no confirmation to the legality is being given by the plaintiffs. It is also mentioned that core structure is still in possession of Bhagwan Shri Aadi Vishweshwar Virajman and the structure and religious character remain intact at Core structure of plot Settlement No. 9130 and accordingly the claim of

defendant as to existence of Waqf or mosque is itself bogus and frivolous which will be countered at stage of trial under the light of evidence , exhibits and arguments as at this stage neither the evidence can be produced by plaintiffs nor be considered for disposal of Order VII Rule 11 of CPC, 1908. Since 15th August 1947 the character of the property in question was of Hindu Temple as the images of plaintiff deities and along with other associate deities was there and they were being worshiped incessantly till 1993. if any super structure has been created over the Temple land, by Muslims, same will be only a structure and cannot acquire the status of a Mosque for the reason that over a Hindu Temple already vested in the deity, no construction can be raised and such construction cannot change the nature of Temple property. It is established principle of law that in exercising powers under Order 7 Rule 11 of CPC, the Court has to take into consideration only the averments made in the plaint and the defendant's case cannot be taken into consideration at that stage. From the averments made in the plaint as mentioned above, it is clear that deities mentioned in the suit are existing within the suit property since before 15th August, 1947 and therefore, the provisions of the Act of 1991 could not be applicable in this case at all. Under the Hindu law, the property once vested in the deities shall continue to be deity's property and itsdestruction, if any, cannot change the nature of the property.

The learned counsel for the plaintiff cited the case of **M Siddiq Vs. Mahant Suresh Das** popularly known as Ayodhya Case reported in 2019 (15) SCALE, the Hon'ble Supreme Court has held that the idol constitutes the embodiment or expression of the pious purpose upon which legal personality is conferred. The destruction of the idol does not result in the termination of the pious purpose and consequently the endowment. Even where the idol is destroyed or the presence of the idol is intermittent or entirely absent, the legal personality created by the endowment continues to subsist.

The learned counsel for the plaintiff also argued that to find out the religious charecter of the property in question , one has to take in to consideration the historical and religious background of the entire Avimukt Area and also the nature of construction raised by Muslims thereat and the fact that deities continued to exist within the building complex were being worshiped by devotees and the sentimental attachment of the devotees with the deities and the Asthan and fact that worshippers have been undertaking Panch Koshi parikrama daily around the entire building complex performing all the rituals.

The learned counsel also argued that from the narration of the facts and available evidences, it is clear that Asthan of Aadi vishweshar Jyotirlingam is being worshiped in a radius of 5 kos and the entire area is sacred for the devotees of Lord Visheshwar and the entire 5 kos area is essential and integral part of worship overwhich the deity exists from the time immemorial. If any portion of a temple is demolished under the

orders of a ruler i.e. the sovereign of the time and a super structure is put thereon, the same will not change the religious character of the shrine.

The learned counsel for plaintiff also stated that in this case it is historically proved that Aurangzeb the ruler in the series of Moughal invaders, got demolished upper portion of temple of Aadi Visheshwar at the property in question in 1669 and there after a constrution was raised on the first floor in the madness of power, which Muslims call 'Gyan Vapi Mosque' but pooja and worship in other part of the temple complex including of the deity Goddess Maa Shringar Gauri, Lord Ganesh, Lord Sun and other God and Goddess continued within the old temple premises and throughout in the entire Shivligam are of 5 kosh.

The learned counsel for Plaintiff also mentioned in his plaint that the evidence recorded in Civil Suit no. 62 of 1936 in which it has been proved by the witnesses that worship of Gauri Shanker, Tarkeshwar, Nand kesheswar, Mahaoleshwar beneath the "Peepal Tree" at south east corner over the chabutara, then Gyan vapi well, Ganesh ji known as Madadi Panch vinayk then Maheshwar under third pipal tree the Mukteshwar in a hidden place and the south west corner then worship of Sringar Gauri in the western chabutara in the wall of the Kahndhar then panch Mandap near Shringar Gaurin then Ganesh ji image imbedded in the wall then Chandreshwar in the corner i.e. north west corner and thereafter worship of Avimukteshwar in hidden form at the northern gate over the chabutara was under taken bydevotees.

The learned counsel for the plaintiff has also mentioned in his plaint that in evidence of witnesses deposed in the Civil Suit no. 62/1936 it has also come that 'Tahkana' in the southern side was in possession of Hindus and managed by collector. it is also come in the evidence that there were shops at the northern gate of the compound. There is 'Naubat Khana' of the old temple above it. Geneally Naubat Kahanas are on the gates of temples and its doors open in three sides. The substance the witnesses have confirmed that ' The Worship is done all over the compound . the deities Goddess Sringar Gauri, Lord Sun , Nandiji and Gyanvapi including Gangeshwar, Shiva Parvati, Tarkeshwar , Badri Narayan, Panch Mandapa and invisible Gods were being worshiped within the old temple complex. Many places are worshiped because Gods existed there and of some gods the marks are in the walls. The wall in which the marks of the Gods is to the west. For the old Vishwanath also the Gyan Vapi well is worshiped.

From the above mentioned facts made in the plaint and argument submitted, it is clear that the plaintiffs are claiming that till the year 1993, they were allowed to have Darshan and Pooja of deities which were situated in the old temple daily but thereafter the District Administration, Varanasi restricted their entry within the disputed property on all days Therefore, according to the plaintiffs, even after 15th August, 1947 they were worshiping Maa Sringar Gauri, Lord Ganesh and Lord Hanuman and deities daily upto the year 1993 in the so called old temple complex

It is also clear that plaintiff are claiming that that Core structure of the old temple remain intact because the ruler Aurangzeb has destroyed the upper portion of the old temple. Only super structure was imposed thereon. If this contention is made proved by plaintiff ,then the suit is not barred by Section 4 of the Places of Worship (Special Provisions) Act, 1991. At this stage, the averments made in the plaint are to be seen and plaintiffs have a legal right to prove their averments by substantial and cogent evidence.

The learned counsel for the plaintiffs in support of his statement cited **Ram Jankijee Deities & Ors vs State Of Bihar And Ors 1999 (5) SCC 50** in which it was held that to constitute a temple it is enough if it is a place of public religious worship and if the people believe in its religious efficacy irrespective of the fact whether there is an idol or a structure or other paraphernalia. It is enough if the devotees or the pilgrims feel that there is some superhuman power which they should worship and invoke its blessings. Hon'ble Supreme Court also cited Bhupati Nath Smrititirtha v. Ram Lal Maitra ILR (1909) 37 Cal 128, in which Hon'ble Calcutta High Court observed that a Hindu does not worship the 'idol' or the material body made of clay or gold or other substance, as a mere glance at the mantras prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the mantras peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity.

The learned counsel for the plaintiff also cited the case of **Ugam Singh v. Kesari Mal 1970 (3) SCC 831,** Hon'ble Supreme Court has held that a right to worship is a civil right, interference with which raises a dispute of civil nature though as noticed earlier disputes which are in respect of rituals or ceremonies alone cannot be adjudicated by Civil Courts if they are not essentially connected with civil rights of an individual or a sect on behalf of whom a suit is filed.

The plaintiffs have also cited **In Re the Matter of Guruvayur Devaswom Board- (G.D.B.) DBP No.21 of 2021; 21st June, 2022 proceeding initiated,** in which Hon'ble Kerala High Court has held that worshipper is a person who shows reverence and adoration for a deity. Right to worship is a civil right of course in an accustomed manner and subject to the practice and tradition in each temple.

The learned counsel for the **defendant no. 4** argued that at the disputed property, Gyanvapi Mosque is situated. In plaint, it has been mentioned that Islamic ruler Aurangzeb got the temple demolished in the year 1669 and constructed a Mosque there which is situated at plot no. 9130. In the Khasra Bandobast, 1291 Fasali, Gyanvapi Masjid has been

shown at plot no.9130. The defendant no.4 filed Khasra Bandobasti of the year 1883-84.This Gyanvapi Masjid is registered as Waqf no.100, Varanasi in the gazette. Therefore, Gyanvapi Masjid is Waqf property and plaintiffs have no right to worship there.

The learned counsel for the defendant no.4 cited Ballabh Das & Anr. vs Nur Mohammad & Anr. AIR 1936 Privy Counsel 83, in which it was held that Khasra itself create rights as instrument of title and it is not merely a historical material where the Khasra itself is the instrument which confers or embodies the right and there is no other document which creates title. The Khasra and the Map are instrument of title or otherwise the direct foundation of right.

On analysing the abovementioned pleadings it is very clear that it is an admissible fact by both the parties that in the year 1669 the ruler Aurangzeb has demolished the temple. The defendant no. 4 Anjuman Intejamiya Masjid is claiming that at that place a new mosque was built by the ruler Aurangzeb. But the plaintiffs are claiming that only the upper portion of the old temple was demoslished and a superstructure was imposed thereon in the shape of mosque. The nature of a temple does not change merely on imposing a super structure thereon after demolishing its upper portion because the invisible deities which were existing at that time, are continuously existing there and these deities were worshiped by the devotees till 1993. Thus in the present suit a legal question arises that whether the religious charector of a temple changes with the forceful demolition of only upper portion of a temple (in case if base of the temple is intact) and on merely imposing a superstructure thereon.

Further, according to the pleadings of the plaintiffs, they were worshipping Maa Sringar Gauri, Lord Hanuman, Lord Ganesh at the disputed place incessantly since a long time till 1993. After 1993, they were allowed to worship the above mentioned Gods only once in a year under the regulatory of State of Uttar Pradesh. Thus, according to plaintiffs, they worshipped Maa Sringar Gauri, Lord Hanuman at the disputed place regularly even after 15th August, 1947.

So in the light of above contentions it is doubtful that what was the religious character of the disputed place existing on 15th August 1947. It is the place where plaintiffs are claiming that Core structure of the temple was remain intact and only the upper portion was demolished and superstructure was imposed thereon. Defendant no. 4 is claiming that they are offering Namaz at this place, where a mosque was built before 600 years ago after demolishing the temple. But at this stage it is very difficult to determine that what is the realty, it can not be determined without the substantial evidence. It may be proved after following due course of trial of the case. It is the legal right of every party to prove their case with help of best evidences available to them. If facts stated by the plaintiff is true the suit is not barred by the provisions of Places of worship Act,1991.Therefore, at this stage and in a situation of the doubtful religious nature of the disputed property, this court is of the

view that The Places of Worship (Special Provisions) Act, 1991 does not operate as bar on the suit of the plaintiffs. The Suit is liable to be tried accordingly.

5. The Uttar Sri Kashi Vishwanath Temple Act ,1983-

The learned counsel for the defendant no.4 argued that the suit of the plaintiffs is barred by the Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983 (Act no.29 of 1983).

In Section 4 (9), "Temple" has been defined as the Temple of Adi Visheshwar, popularly known as Sri Kashi Vishwanath Temple, situated in the city of Varanasi which is used as a place of public religious worship, and dedicated to or for the benefit of or used as of right by the Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temple, shrines, sub-shrines and the Asthan of all other images and deities, mandaps, wells, tanks and other necessary structures and land appurtenant thereto and additions which may be made thereto after the appointed date.

The learned counsel for the plaintiff argued that the U.P. state Legislature has recognezed the deity 'Adi Visheshwar' Jyotirling in its original form alongwith subsidiary deities existing from the time immemorial within old temple complex and the right of devotees to worship there. The entire property including " property in question" i.e. old temple complex vested in deity Aadi Visheshwar is to be managed by Board of Trustees. It is the duty of the State Government and the Board of Trustees to recover the entire property belonging to and dedicated to 'Adi Visheshwar ' and the 'Asthan' which has been usurped and encroached upon by Anjuman Intezamia Masaajid committee and its supporters and followers. But no bar is imposed on deity itself or any other person to recover the property from a encroacher.

In the above contentions and from perusal of the Section 5 which is about the ownership of the temple and its endowment shall vest in the deity of Shri Kashi Vishwanath. Section 6 provides that with effect from the appointed date, the administration and governance of the Temple and its endowments shall vest in a Board to be called the Board of Trustees for Shri Kashi Vishwanath Temple. In Section 4 (5) endowment includes all properties, movable or immovable, belonging to or given or endowed for the support or maintenance or improvement of the Temple or for the performance of any worship, service, ritual, ceremony or other religious observance in the Temple or any charity connected therewith and includes the idols installed therein, the premises of the Temple and gifts of property made or intend to be made for the Temple or the deities installed therein to any one within the precincts of the Temple. it is clear that no bar has been imposed by the Act regarding a suit claiming right to worship idols installed in the endowment within the premises of the

temple, or outside. Therefore, the suit of the plaintiffs is not barred by the U.P. Sri Kashi Vishwanth Temple Act, 1983.

6. Indian Limitation Act,1963-

The learned counsel for the defendant has argued that the plaintiff has itself mentioned in their plaint that ruler Aurangzeb was cruel ruler and he has demolished the temple in 1669 and after demolition built a mosque therewere, overwhich the Muslims are offering namaj without any restrction since 600 years ago. Since that time the Muslims are in possession of the Alamgir mosque (which is also known as Gyanvapi mosque). Thus in such a way the suit of the plaintiff is barred by Article 65 of Limitation Act becuse under limitation one can recover its property within 12 years since the date of illegal possession.

The learned counsel for plaintiff has argued that Muslims have not filed any suit so far asserting theit right or title, if any, against true owner i.e. the deity Plaintiff no.1 & 2. The provisions of Article 65 of Schedule in part 5th to the Limitation Act, 1963 cannot apply to a property vested in the deity. The provision of Limitation Act is applicable to the properties of human beings but not to devottar property. The devottar is immune from the law of Limitation. which is otherwise applicable to property possessed by human being. The property in question has vested in the deity and the Board of Trustees are under obligation to manage the entire temple property as defined under 1983 Act. The deity and the Trust have infeasible right in the property in question. No person , body of person, Trust or authority has any right to claim any part of the property in question on the ground that it has been in illegal possession for the last more than 12 years.

From the perusal of the above contentions of both the parties this court is agree with the logic of the counsel for the plaintiff that The deity and the Trust have infeasible right in the property in question. No person , body of person, Trust or authority has any right to claim any part of the property in question on the ground that it has been in illegal possession for the last more than 12 years. But it is a mixed question of fact and evidence that whether the disputed property is vested in the deity or not. which can not be detemined at this stage. It is question to be decided after completion of evidence in full trial. therefore the plea of limitation of defendant no.4 is not considerable at this stage.

7. Judicial precedent declared in case no. 63/1936 Deen mohammad vs. Secretary of State-

So far as the judicial precedent is concerned in **Suit No. 62 of 1936 Deen Mohammad & Ors. Vs. Secretary of the State,** the court of Civil Judge, Varanasi passed judgment and decree dated 24-08-1937. In this judgment and decree, the learned Civil Judge, Varanasi passed the following orders:

1. It is declared that only mosque and courtyard with the land underneath are Hanafi Muslim Wakf and that the plaintiffs and other Hanfi Muslims have a right of offering prayer and of doing other religious but legitimate acts only in the mosque and on the courtyard and that they have a right to celebrate urs. etc, once a year at the two graves to the west of mosque and also to use the Khandhar as passage for going over the roof of the mosque.

2. It is further declared that they have no right to offer ordinary, funeral or alvida prayer on any portion of the land marked red in the plaint map, which will be part of the decree.

3. They may if they like offer prayers on the roof of the mosque and of the dhobi's house and in the house over the northern gate and in the house to East of the gate and also over the Chabutara to the north of the mosque over which exists many graves. parties bear their own costs.
The learned counsel for the defendant no.4 further pleaded that against the judgment and decree dated 24-08-1937, appeal was filed in Hon'ble High Court bearing Civil Appeal No. 466 of 1937 Din Mohammad v. Secretary of State. The Hon'ble Allahabad High Court upheld the judgment and order dated 24-08-1937 passed by the Civil Judge (Sr. Div.), Varanasi and dismissed the first appeal. Therefore, by the order of the court of Civil Judge (Sr. Div.) and Hon'ble Allahabad High Court, the Mosque, courtyard, sahanland and land appurtenant to it is property of Hanfi Muslim Waqf and Hanfi Muslims have right to offer namaz and religious activities of Muslims.

The learned counsel for the plaintiff has argued that in case of Deen mohd. the plaintiffs were not impleaded as a party in that suit hence the ratio passed in that case is not applicable upon the plaintiffs. The learned Counsels also placed reliance on **Syed Mohd. Salie Labbai(Dead) By Lrs. and others vs. Mohd. Hanifa(dead) by Lrs. and others (1976) AIR (SC)1569-** In this case it was held that Civil Procedure Code,1908(CPC)-Section 11-Res Judicata- Ingredients of-Necessity to compare the pleadings-Mere recital of contention in the judgement is not sufficient. Before a plea of res judicata can be given effect, the following conditions must be proved:
1. that the litigation parties must be the same
2. that the subject-matter of the suit also must be indentical
3. that the matter must be finally decided between the parties
4. that the suit must be decided by a court of competent jurisdiction

The best method to decide the question of res judicata is first to determine the case of the parties as 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. Pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment.

After analysing the argument of both the parties I found that the Plaintiffs were not parties in the **Suit No. 62 of 1936** Deen moh. &others Vs secretary and their application for impleadment in the suit was also rejected. Therefore, the decree passed in the above mentioned suit cannot have binding effect against the plaintiffs or the Hindu community and their right to worship cannot be defeated on the strength of above mentioned decree.

In view of the above discussions,this court has come to the conclusion that the suit of the plaintiffs is not barred by the provisions of Order 1 Rule 8, Order 7 Rule 3 and Section 9 of CPC, Places of Worship (Special Provisions) Act, 1991 (Act no.42 of 1991), The Waqf Act 1995 (Act no.43 of 1995), the U.P. Shri Kashi Vishwanath Temple Act, 1983 (Act no.29 of 1983),The Indian Limitation Act and by the judicial dictum of **Suit No. 62 of 1936** Deen moh. &others Vs secretary and thereby the application 35C filed by the defendant no.4 is liable to be dismissed.

Order

The application 37C filed by the defendant no.4 under Order 7 Rule 11C.P.C. is hereby dismissed. Put up on 02.12.2022 for filing written statement and framing of issues.

Typed by- P.O. itself

(Mahendra Kumar Pandey)
Civil Judge(SD)/FTC
Varanasi
JO CODE-UP 2271