Neutral Citation No. - 2024:AHC:32769

AFR

Reserved

Court No. - 06

Case :-	FIRST APPEAL FROM ORDER No. - 226 of 2024
Appellant :-	Committee Of Management Anjuman Intezamia Masajid Varanasi
Respondent :-	Shailendra Kumar Pathak Vyas And Another
Counsel for Appellant:-	Syed Ahmed Faizan, Zaheer Asghar
Counsel for Respondent :-	Prabhash Pandey,Pradeep Kumar Sharma,Vineet Sankalp

with

Case :-	FIRST APPEAL FROM ORDER No. - 227 of 2024
Appellant :-	Committee Of Management Anjuman Intezamia Masajid Varanasi
Respondent :-	Shailendra Kumar Pathak Vyas And Another
Counsel for Appellant:-	Syed Ahmed Faizan, Senior Counsel
Counsel for Respondent :-	Prabhash Pandey,Pradeep Kumar Sharma,Vineet Sankalp

Hon'ble Rohit Ranjan Agarwal,J.

1. These two appeals filed under Order XLIII Rule 1 (s) of Civil Procedure Code, 1908 (hereinafter called as 'CPC') arise out of order dated 17.01.2024 and order dated 31.01.2024 passed by the District Judge, Varanasi on application 9-C filed under Order XL Rule 1 CPC in Original Suit No. 34 of 2023 (Shailendra Kumar Pathak Vs. Committee of Management Anjuman Intezamia Maszid and another).

2. F.A.F.O. (Defective) No. 136 of 2024 (New Number 226 of 2024) was nominated to this Court by orders of Hon'ble Acting Chief Justice dated 01.02.2024. F.A.F.O. (Defective) No. 156 of 2024 (New Number 227 of 2024) was nominated to this Court by the orders of Hon'ble the Chief Justice dated 06.02.2024. F.A.F.O. No. 227 of 2024 arises out of order dated 17.01.2024, while F.A.F.O. No. 226 of 2024 arises out of order dated 31.01.2024 passed by the District Judge, Varanasi.

3. Both these appeals are heard together with the consent of both the parties and are being decided together by a common judgment and order.

FACTS

4. The facts leading to filing of these two appeals are, that plaintiff respondent no. 1, Shailendra Kumar Pathak 'Vyas' filed an Original Suit No. 844 of 2023 before the Court of Civil Judge (Senior Division), Varanasi against the appellant defendant no. 1 and Board of Trustees of Sri Kashi Vishwanath Temple as defendant no. 2 claiming following reliefs;

> "(a) Decree the suit for declaration declaring that Plaintiff is entitled to perform all the rituals of Maa Sringar Gauri, Lord Ganesh, Lord Hanuman and other visible and invisible deities within old temple complex and also within the cellar (Tehkhana) existing within temple of Lord Adi Visheshwar (alleged Gyanvapi Mosque) at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) Ward and P.S. Chowk District Varanasi,
>
> (b) Decree the suit for permanent injunction restraining the Defendants from creating any obstacle, hindrance or interference in performance of daily Pooja, Aarti, Bhog and observance of all the rituals of Maa Sringar Gauri, Lord Ganesh, Lord Hanuman and other visible and invisible deities within the cellar (Tehkhana) existing within old temple of Lord Adi Visheshwar (alleged Gyanvapi Mosque) existing at Settlement Plot No. 9130(Nine Thousand One Hundred Thirty) Ward and P.S. Chowk District Varanasi;
>
> (c) Deerce the suit for permanent injunction restraining the Defendants from demolishing, damaging, destroying or causing any damage to the images of deities Goddess Maa Sringar Gauri at

Asthan of Lord Adi Visheshwar along with Lord Ganesh, Lord Ganesh, Lord Hanuman, Nandiji and other visible and invisible deities within the cellar (Tehkhana) existing within old temple of Lord Adi Visheshwar (alleged Gyanvapi Mosque) existing at Settlement Plot No. 9130(Nine Thousand One Hundred Thirty) Ward and P.S. Chowk District Varanasi;

(d) Decree the suit for mandatory injunction directing Shri Kashi Vishwanath Trust Board to allow the Plaintiff, co-Pujaris and the devotees to perform Pooja and rituals within the cellar (Tehkhana) within old temple of Lord Adi Visheshwar (alleged Gyanvapi Mosque) existing at Settlement Plot No.9130 (Ninety One Hundred and Thirty) within the area of P.S. Chowk, Varanasi after making suitable provisions and if required, making appropriate changes in the iron fencing for the said purpose within the time provided by the Hon'ble Court;

(e) Decree the suit for mandatory injunction directing the Shri Kashi Vishwanath Trust Board to act in accordance with Section 13 (Thirteen) and 14 (Fourteen) of Shri Kashi Vishwanath Temple Act, 1983 (Nineteen Hundred Eighty-Three) and to make provisions for pooja and worship within cellar (Tehkhana) existing within settlement plot No.9130 (Ninety-One Hundred and Thirty) of Shri Adi Visheshwar Temple Complex (alleged Gyanvapi mosque);

(f) Grant such other relief for which the Plaintiff may be found entitled to or which may be deem fit and necessary in the interest of justice; and

(g) Decree the suit with costs in favour of Plaintiff and against the Defendants;"

5. The plaint case is that there is a Jyotirlinga established by Lord Shiva himself in Kashi since time immemorial where stands temple of Lord Adi Visheshwar which was constructed, and is situated at settlement plot no. 9130. The said temple is called by the defendant appellant as Gyanwapi Mosque. There is a tehkhana (cellar) in the southern side of subject building which is the principal seat of hereditary pujari of Vyas family i.e. predecessors in interest of the plaintiff respondent no. 1 from time immemorial. According to them, plaintiff is entitled to perform puja and other rituals in the same manner which was being performed till the year 1993 within and outside the tehkhana (cellar). The suit was filed against the action of the State Government and district administration

restricting the plaintiff to enter into the temple and fundamental right granted under Article 25 of the Constitution of India being infringed.

6. The plaintiff is hereditary pujari of Sri Vyaspeeth situated within the temple and has been in continuous possession over the same from time of his ancestors performing various puja, rituals, katha and other religious functions. The puja was abruptly stopped by oral orders in November and December 1993 and the temple complex was iron-fenced.

7. The family pedigree of Vyas family has been given in paragraph no. 4 of the plaint. The plaintiff by virtue of Will deed dated 28.02.2000 executed by Sri Somnath Vyas and Will deed dated 21.01.2014 executed by Pt. Chandra Nath Vyas is entitled to continue in hereditary office of pujari and perform the function at Vyaspeeth.

8. It is further averred that the temple of Sri Adi Visheshwar Jyotirlinga which stood from time immemorial was damaged/destroyed and defiled number of times by the invaders. Pt. Narayan Bhatt, the Guru of Raja Todarmal, got constructed and restored the temple which includes mandaps, subsidiary deities, shrines, peepal tree and several other objects of worship including the creation of Vyaspeeth for due performance of rituals, puja and worship of deities. It was in pursuance of Farman issued by Aurangzeb in the year 1669 that Sri Adi Visheshwar temple complex was substantially damaged. The Muslims forcibly and without any authority of law occupied the first floor of building to use same as Mosque and since then it is called Gyanwapi Masjid. After demolition, the Hindus continued to worship over the major portion including lower portion which is called tehkhana (cellar) of the temple complex.

9. It was in the year 1780-1790 that Rani Ahilyabai Holkar of Indore constructed a temple of Lord Shiva and established a Shivalingam adjacent to old temple which is called new temple and Sri Adi Visheshwar temple as old temple.

10. In paragraph no. 16 of the plaint, it has been averred that Case No. 30 was decided in favour of predecessors-in-interest of plaintiff from the Court of Assistant Magistrate on 11.08.1843, which was contested between Jai Gopal 'Mukhtar' of Musammat Rukmin Vs. Amanat Ali and Wahid Ali. In paragraph no. 18 reference has been given of Case No. 04 of 1852 decided on 12.05.1852 between Mahadeo Beas (Vyas), Grandson of Musammat Rukmin Vs. Amanat Ali. Further, in paragraph no. 19 reference of Case No. 28 decided on 18.02.1886 by the District Magistrate between Mutawalli Gyanwapi Mosque and Laxmi Narayan Vyas in regard to opening of doors and setting up staircase, has been given. Paragraph no. 20 speaks about copy of order dated 02.05.1906 forming part of record of Misc. Case No. 3 has been given for complying the order dated 26.03.1906.

11. Paragraph no. 21 of the plaint discloses the order passed by the District Magistrate, Varanasi in Case No. 65 dated 10.06.1925 relating to tehkhana (cellar) possessed by Baba Raghunath Vyas and also regarding tehkhana (cellar) within northern side of the subject building. Paragraph no. 26 of the plaint defines Section 4 (9) of Sri Kashi Vishwanath Temple Act 1983 (hereinafter referred as the 'Temple Act of 1983'), which means Temple of Adi Vishweshwar 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 temples, shrines, subshrines and the ashthan of all other images and deities, mandaps, wells, tanks and other necessary structures and land appurtenant thereto.

12. In paragraph no. 33, it has been alleged that in December 1993 the then Pujari Sri Somnath Vyas was directed by then District Magistrate not to enter into the premises. Having no option left he locked the door and tehkhana (cellar). It has been further alleged that in Civil Suit No. 637 of 1996, Civil Judge, Varanasi on 27.07.1996 had appointed an Advocate

Commissioner to make survey. The survey was conducted on 30.07.1996 and a report was submitted in the Court. It was mentioned in the report that two locks were put on the western side of tehkhana (cellar), one by the district administration and another by Sri Somnath Vyas. The City Magistrate could not open the lock as there was no order of the Court to do so while Sri Somnath Vyas having one key opened the lock.

13. In paragraph no. 45 of the plaint it has been averred that the plaintiff and his brother had executed a registered Shebaitnama in favour of Mandir Trust on 25.02.2016 to the extent of half share of the temple. In paragraph no. 66 it has been stated that the cause of action arose on 17.09.2023, when the Muslim community threatened that as soon as ASI team goes they will capture the entire tehkhana (cellar) of southern side of old temple and would damage/destroy everything of Hindu worship lying there.

14. An application under Order XL Rule 1 CPC was filed by the plaintiff for appointing Receiver of tehkhana (cellar) in the southern side of building situated on settlement plot no. 9130 and also a direction was sought to direct the Receiver to allow the plaintiff, co-pujaris, nominee of Sri Kashi Vishwanath Trust Board and devotees to perform pooja and rituals within the same.

15. On 07.11.2023 an objection was filed by the appellant defendant no. 1 to application 9-C moved for appointing Receiver on the ground that Vyas family had never performed any puja in the said premises. Further, no question arises as to stopping them from performing their religious rights since December 1993. It was further averred that the tehkhana (cellar) was in possession of the appellant and there is no image of any God or Goddess in the said tehkhana (cellar). In paragraph no. 9 of the objection, it has been stated that a Mosque exists on settlement plot no. 9130 and is in possession of the appellant from thousands of years.

16. In paragraph no. 10, it has been stated that in the suit filed by one Din Mohammad in the year 1936 being Suit No. 62 of 1936 which was decided on 25.08.1937 by the Additional Civil Judge the property in dispute has been declared as Mosque and the courtyard with land underneath are Hanafi Muslim Waqf. The said decision exist till date and no question arises for appointing any Receiver. In paragraph no. 12, it has been stated that the plaintiff who succeeded the shebiatship in view of Will deed dated 28.02.2000 transferred their right in favour of temple trust on 08.07.2016, thus, have no *locus standi* to proceed with the matter. Moreover, in view of the decision rendered in the year 1937 in case of Din Mohammad no right of Vyas family survives over the property in dispute.

17. By the orders of 27.10.2023 the suit was transferred to the Court of District Judge, Varanasi as Civil Suit No. 34 of 2023. The District Judge vide order dated 17.01.2024 allowed the application 9-C and appointed District Magistrate, Varanasi as Receiver for tehkhana (cellar) situated on the southern side of the building on settlement plot no. 9130 with the direction that he will take the property in his custody and control, and preserve the same during pendency of suit without any change in the nature of property. By the order dated 31.01.2024 the relief (b) sought in application 9-C was added and the District Magistrate, Varanasi/Receiver was directed for arranging worship and rituals by priest appointed by plaintiff and Kashi Vishwanath Trust Board of the deities, in the cellar. Hence, these appeals.

ARGUMENTS FROM THE APPELLANT SIDE

18. Sri S.F.A. Naqvi, learned Senior Counsel appearing for the appellant, while laying challenge to both the appeals submitted that final relief cannot be granted in a suit at initial stage, when neither issues have been framed, nor written statement has been filed and the evidences are yet to be led by the parties. Reliance has been placed upon the decision of Apex Court in case of **Bharat Sanchar Nigam Limited Vs. Prem Chandra Premi, 2005 (13) SCC 505**.

19. He next contended that the Court below could not have passed the order dated 17.01.2024 appointing Receiver under Order XL Rule 1 CPC as there was no cause of action at all for the plaintiff. According to him the order appointing Receiver was in teeth of orders dated 24.09.1993 passed in Writ Petition (Civil) No. 611 of 1993 and order dated 14.03.1997 passed by the Apex Court in Writ Petition (Civil) No. 131 of 1997 as well as the order dated 17.08.1995 passed in Writ Petition (Civil) No. 541 of 1995 (Mohd. Aslam @ Bhure Vs. Union of India & Others) 1997 (5) SCC 575.

20. According to him the matter relating to mosque and courtyard with the land underneath already stood settled as Hanafi Muslim Waqf in the judgment rendered in Civil Suit No. 62 of 1936 (Din Mohammad & Others Vs. The Secretary of State for India in Council) decided on 25.08.1937. Once the cellar has been declared as Hanafi Muslim Waqf, the application 9-C could not have been entertained and Receiver could not have been appointed. The question regarding cellar has already attained finality in view of the decision in case of **Din Mohammad (Supra)**. He further contended that the Order XL Rule 1 CPC does not apply in the present case. Reliance has been placed upon a decision of Madras High Court in case of **T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty**, **AIR 1955 Mad 430**.

21. He next contended that once the application 9-C was disposed off on 17.01.2024, appointing the District Magistrate, Varanasi as Receiver of the property in dispute, subsequent order dated 31.01.2024 passed by the Court below was illegal once application stood disposed off, and no application was moved by the plaintiff under Section 151 or 152 of CPC for amending the judgment, decree or order. Further, there was no clerical, arithmetical mistake in the order or errors arising therein from any accidental slip or omission which the Court could have corrected on its own motion. Reliance has been placed upon the decision of Apex Court in

case of **Dwaraka Das Vs. State of M.P. & Another, 1999 (3) SCC 500**. Relevant paragraph no. 6 is extracted here as under;

> "6. Section 152 C.P.C. provides for correction of clerical arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the Section cannot be pressed into service to correct an omission which is intentional, how erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective order in the Us pending before them. No Court can under the cover of the aforesaid sections modify, alter or add to the terms of its original judgment, decree or order. In the instant case, the trial court had specifically held the respondents-State liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the court had rejected the claim of the appellant in so far as pendente lite interest was concerned. The omission in not granting the pendente lite interest could not be held to be accidental omission or mistake as was wrongly done by the trial court vide order dated 30th November, 1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State."

22. Reliance has been placed upon the decision of Apex Court rendered in case of **My Palace Mutually Aided Copperative Vs. B. Mahesh, 2022 LiveLaw (SC) 698**, and upon decision in case of **UPSRTC Vs. Imtiaz Hussain, 2006 (1) SCC 380**, relevant paragraph nos. 7 and 8 are extracted here as under;

> "7. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the

judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very Court or the tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party if at all is to file appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the Section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of Code even after passing of effective orders in the lis pending before them. No Court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this Court in Dwaraka Das v. State of Madhya Pradesh and Anr. (1999 (3) SCC 500 and Jayalakshmi Coelho v. Oswald Joseph Coelho (2001 (4) SCC 181).

8. The basis of the provision under Section 152 of the Code is founded on the maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law", said Cresswell J. in Freeman v. Tranah (12 C.B. 406). An unintentional mistake of the Court which may prejudice the cause of any party must and alone could be rectified. In Master Constitution Co. (P) Ltd. v. State of Orissa (AIR 1966 SC 1047) it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the Court which may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as

> to, in effect, pass an effective judicial order after the judgment in the case."

23. Reliance has also been placed upon a decision of Apex Court rendered in case of **Plasto Pack, Mumbai Vs. Ratnakar Bank Ltd. 2001 (6) SCC 683**. Relevant paragraph no. 12 is extracted here as under;

> "12. By order dated 3.3.1995 relief (a) set out in the plaint was granted 'as it was', without specifying the exact decretal amount and the rate of interest allowed by the Court. Such of the prayers as were not granted by decree dated 3.3.1995 would be deemed to have been refused and to that extent the suit shall be deemed to have been dismissed. More than two years and eight months later the Court could not have, on a mere notice of motion, substituted almost a new decree in place of the old one by granting such reliefs as were not granted earlier and that too without noticing the defendant-appellants. As held in K. Rajamouli Vs. AVKN Swamy, (2001) 5 SCC 37 power to amend a decree cannot be exercised so as to add to or subtract from any relief granted earlier. A case for setting aside the decree was earlier made out. In the facts and circumstances of the case the Division Bench ought to have taken a liberal view of the events and entertained the appeal for consideration on merits by condoning the delay in filing the same. However, that was not done. We are satisfied that grave injustice has been done to the appellants by denying them an opportunity of hearing and contesting the suit on its merits. We are also of the opinion that the respondent-bank ought to have taken a reasonable stand and should have sympathetically considered the proposal of the appellants which was not lacking in bona fides and in the interest of avoiding litigation and early recovery of outstanding debts the respondent should have compromised the suit. Even if the appellants' proposal was not acceptable to the respondent, at least a counter-proposal should have been made in which case across the table discussion between the parties with the assistance of their learned counsel would have brought out a mutually accepted resolution and an end to the litigation. We are constrained to observe that this litigation is being perpetuated because of the unreasonable and rigid attitude of the respondent-bank."

24. Reliance has been placed upon a decision of Apex Court rendered in case of **Metro Marines & Another Vs. Bonus Watch Co. (P) Ltd. & Others, 2004 (7) SCC 478**. Relevant paragraph no. 9 is extracted here as under;

> "9. Having considered the arguments of the learned counsel for the parties and having perused the documents produced, we are satisfied that the impugned order of the Appellate Court cannot be sustained either on facts or in law. As noticed by this Court in the case of Dorab Cawasji

> Warden vs. Coomi Sorab Warden (supra) has held that an interim mandatory injunction can be granted only in exceptional cases coming within the exceptions noticed in the said judgment. In our opinion, the case of the respondent herein does not come under anyone of those exceptions and even on facts it is not such a case which calls for the issuance of an interim mandatory injunction directing the possession being handed over to the respondent. As observed by the learned Single Judge the issue whether the plaintiff is entitled for possession is yet to be decided in the Trial Court and granting of any interim order directing handing over of a possession would only mean decreeing the suit even before trial. Once the possession of the appellant either directly or through his agent (caretaker) is admitted then the fact that the appellant is not using the said property for commercial purpose or not using the same for any beneficial purpose or the appellant has to pay huge amount by way of damages in the event of he loosing the case or the fact that the litigation between the parties is a luxury litigation are all facts which are irrelevant for changing the status-quo in regard to possession during the pendency of the suit."

25. According to learned Senior Counsel the provisions of Section 152 CPC cannot be invoked to modify, alter or add to the terms of original order or decree as to in fact pass an effective order after the order or judgment in a case. Liberal use of Section 152 CPC is beyond the scope of and has been deprecated by the Apex Court in case of **Jayalakshmi Coelho v. Oswald Joseph Coelho 2001 (4) SCC 181**.

26. He then contended that appointment of District Magistrate, Varanasi, who being ex officio Member of Board of Trustees as per Section 6 (2) (i) of the Temple Act of 1983 creates clash of interest in between the office of District Magistrate, Varanasi, who hold overall control over the city being executive head as well as in-charge of revenue district. He also contended that executive committee is constituted under Section 19 (1) of the Temple Act of 1983 which is to work subject to direction of Board or the State Government and is responsible for the superintendence, direction and control of the affairs of the temple. Section 19 (2) provides for the Members of the Executive Committee and the District Magistrate, Varanasi is a Member of the Executive Committee.

27. Sri Naqvi then contended that once it is a settled position that mosque and courtyard with the land underneath are Hanafi Muslim

'Waqf' any claim seeking any relief regarding the land underneath has to be decided in a proper suit and not by the interim orders. According to him the present suit was entertained after a delay of 31 years without any explanation for such a long delay as provided under Order VII Rule 6 CPC and the Limitation Act.

28. The case set up by the plaintiff that State Government had removed them from disputed place by some oral order is a fact, which raises a question that since year 1993 the plaintiff sat tight over the matter and has not adjudicated the issue before any forum or Court of law. According to learned Senior Counsel the suit has been filed seeking relief of declaration and mandatory injunction for restoring an alleged right from which they were evicted in the year 1993 without seeking any exemption as provided under Order VII Rule 6 CPC. Once the Trial Court proceeds the first question will be that whether the suit is barred because it was filed beyond the limitation as provided under the Limitation Act. Reliance has been placed upon a decision of Madras High Court **AIR 1940 Madras 617 Subramania Gurukul Abhinav Poornpriya A. Sriniwas Rao Saheb** and the judgment of Apex Court in case of **M. Sadiq Vs. Suresh Das, 2020 (1) SCC 1**, relevant paragraph nos. 472, 473 and 479.

29. He next contended that the suit is liable to be dismissed for non-joinder of necessary party i.e. State of U.P. against whom reliefs were sought and also on the ground of joinder of unnecessary party i.e. appellant. According to him it is admitted that right of Shebaitship was transferred by the plaintiff to defendant no. 2 on 25.02.2016 and also by transfer of surrender deed dated 08.07.2016, hence plaintiff himself has voluntarily surrendered his rights to suit. The appellant has no role assigned in the alleged removal of Shebait from the place in question, in such circumstances any relief sought against the defendant no. 1 is nothing but a futile exercise and the suit itself is barred by unnecessary joinder of parties and also non-joinder of necessary party i.e. the State. Reliance has been placed upon a decision of Apex Court rendered in case

of Kasturi Vs. Iyyamperumal, 2005 (6) SCC 733. Reliance has also been placed upon decision of Apex Court rendered in case of **Moreshar Yadaorao Mahajan Vs. Vyankatesh Sitaram Bhedi (D) throguh LRs & Others, 2022 Supreme (SC) 986**.

30. It was then contended that the suit is barred under Order VII Rule 11 (d) CPC by operation of law i.e. Section 4 of the Places of Worship (Special Provision) Act 1991. According to him the mosque and its underneath portion were always there and were never disturbed since time immemorial. On 15.08.1947 the mosque and its underneath portion alongwith appurtenant land were existing, hence, provisions of the Act No. 42 of 1991 are applicable and the suit is barred by operation of law. The application under Order VII Rule 11 (d) CPC has been filed on 30.01.2024. The Act No. 42 of 1991 in its opening statement defines the purpose of the Act, which prohibits conversion of any place of worship and to provide for the maintenance of religious character of any place of worship as it existed on the 15th date of August 1947. Thus, the present suit is barred by this Act and same cannot be proceeded. Reliance has been placed upon a decision of Apex Court rendered in case of **Prem Kishore & Others Vs. Brahm Prakash & Others, 2023 LiveLaw (SC) 266**.

31. It was lastly contended that the order dated 17.01.2024 appointing Receiver was modified on 31.01.2024 i.e. last date of working of the Court concerned as he was going to superannuate on the said date, and such modification could not have been made by him on the last day of his working.

32. Sri Puneet Gupta, learned counsel, also appearing for the appellant, submitted that the order appointing Receiver dated 17.01.2024 and the order dated 31.01.2024 is in form of relief of interlocutory mandatory injunction which the Court could not have granted as it would amount to granting of final relief. According to him relief (e) in the plaint is for a decree of mandatory injunction directing Shri Kashi Vishwanath Trust

Board to act in accordance with Section 13 and 14 of the Temple Act of 1983 and to make provisions of Puja and worship within tehkhana (cellar). The order dated 31.01.2024 is in form of interlocutory mandatory injunction which has provided for the worship and rituals under the custodianship of Receiver appointed on 17.01.2024, which is a final relief and cannot be granted.

33. According to him the grant of interlocutory mandatory injunction cannot be in a routine manner and unless and until the plaintiff make out a strong case only then it can be granted. Reliance has been placed upon the decision of Supreme Court in case of **Dorab Cawasji Warden Vs. Coomi Sorab Warden & Others, 1990 (2) SCC 117**. Reliance has also been placed upon another decision of Apex Court in case of **Gurunanak Dev University Vs. Parminder Kumar Bansal & Another, 1993 Supreme (SC) 458**. Relevant paragraph no. 6 is extracted here as under;

> "6. Sri Gambhir is right in his submission. We are afraid that this kind of administration of interlocutory remedies, more guided by sympathy quite often wholly misplaced, does no service to anyone. From the series of orders that keep coming before us in academic matters, we find that loose, ill-conceived sympathy masquerades as interlocutory justice exposing judicial discretion to the criticism of degenerating into private benevolence. This is subversive of academic discipline, or whatever is left of it, leading to serious impasse in academic life. Admissions cannot be ordered without regard to the eligibility of the candidates. Decisions on matters relevant to be taken into account at the interlocutory stage cannot be deferred or decided later when serious complications might ensue from the interim order itself. In the present case, the High Court was apparently moved by sympathy for the candidates than by an accurate assessment of even the prima facie legal position. Such orders cannot be allowed to stand. The Courts should not embarrass academic authorities by itself taking over their functions."

34. Reliance has also been placed upon a decision of Supreme Court in case of **Samir Narain Bhojwani Vs. Aurora Properties and Investments & Another, 2018 (17) SCC 203**. Relevant paragraph nos. 24, 25 and 26 are extracted here as under;

> "24. That apart, the learned Single Judge as well as the Division Bench have committed fundamental error in applying the principle of moulding of relief which could at best be resorted to at the time of consideration of

final relief in the main suit and not at an interlocutory stage. The nature of order passed against the appellant is undeniably a mandatory order at an interlocutory stage. There is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the status quo and not to establish a new set of things differing from the state which existed at the date when the suit was instituted. This Court in Dorab Cawasji Warden Versus Coomi Sorab Warden and Others,2 has had occasion to consider the circumstances warranting grant of interlocutory mandatory injunction. In paragraphs 16 & 17, after analysing the legal precedents on the point as noticed in paragraphs 11-15, the Court went on to observe as follows:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

25. The Court, amongst others, rested its exposition on the dictum in Halsbury"s Laws of England, 4th edition, Volume 24, paragraph 948, which reads thus:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one

> which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."
>
> 26. The principle expounded in this decision has been consistently followed by this Court. It is well established that an interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction."

35. Reliance has also been placed upon a decision of Supreme Court in case of State of **U.P. & Others Vs. Ram Sukhi Devi, 2005 (9) SCC 733**, relevant paragraph no. 8 is extracted here as under;

> "8. To say the least, approach of the learned Single Judge and the Division Bench is judicially unsustainable and indefensible. The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned Single Judge as to why the Government Order dated 26.10.1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This Court has on numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government Order has to be ignored. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations."

36. Learned Counsel heavily relied upon a decision of Apex Court in case of **Mohd. Mehtab Khan & Others Vs. Khushnuma Ibrahim Khan & Others, 2013 (9) SCC 221**. Relevant paragraph nos. 18 and 19 are extracted here as under;

> "18. There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the Appellate Bench of the High Court in the present case is a mandatory direction to handover possession to the plaintiffs. Grant of mandatory interim relief

requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in Dorab Cawasji Warden vs. Coomi Sorab Warden and Others has come to be firmly embedded in our jurisprudence.

19. Paras 16 and 17 of the judgment in Dorab Cawasji Warden (supra), extracted below, may be usefully remembered in this regard:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

37. He next contended that after passing of the order impugned dated 17.01.2024 the Trial Court became *functus officio* as the purpose of jurisdiction of application 9-C has been completed and another relief claimed in application 9-C, which is not expressly granted, deemed to have been refused, hence, another order passed on 31.01.2024 is barred by Explanation II and V of Section 11 CPC. Reliance has been placed upon a

decision of Apex Court in case of **Deputy Director Land Acquisition Vs. Malla Atchinaidu & Others, MANU/SC/0121/2006**. Relevant paragraph no. 45 is extracted here as under;

> "45. The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be. That can only be done on appeal, Section 189 of Civil Procedure Code of Ceylon, which embodies the provisions of Or 28 R. 11 of the English Rules of the Supreme Court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass. The Section does not take away any right of appeal which the parties may possess' it merely provides a simple and expeditious means of rectifying an obvious error. In the present case there was no clerical error or accidental omission in the decree and the case of the Appellants is based on an alleged variance between the Judgment of the Court and the decree based upon it. In such a case the variation should appear on a perusal of the Judgment and decree. No such variation is apparent in the present case."

SUBMISSIONS OF RESPONDENTS

38. Sri Hari Shanker Jain and Sri Vishnu Jain, learned counsel appearing for the plaintiff-respondent no.1 submitted that oral aspersions have been cast upon District Judge who passed the order impugned on 31.01.2024, as application 9-C stood decided on 17.01.2024, and omissions in order dated 17.01.2024 could not have been corrected within the power conferred under Section 151 read with Section 152 CPC. According to them, the aspersions cast upon the Court below is ill-founded and without any basis. It has contemptuous and reckless remarks made by a party against the Presiding Judge without any basis.

39. A mention was made by the plaintiff to rectify the omissions exercising power under Sections 151 and 152 CPC before the Court on 29.01.2024. Application 9-C contained two prayers while allowing the application, no direction has been issued on prayer no.2. On 29.01.2024, the appellant counsel sought adjournment and the matter was fixed for 30.01.2024. On 30.01.2024, the defendant no.1-appellant argued the matter on merit, but no objection was raised to the effect that the Court

cannot pass an order if there has been any omission. It was after hearing both the parties that the order was passed on 31.01.2024. Reliance has been placed upon catena of judgments of various Courts passed on the last date of the working, which are in the cases of **Manohar Lal Sharma Vs. Narendra Damodardas Modi, (2019) 3 SCC 25, Supreme Court of India Vs. Subhash Chandra Agrawal, (2020) 5 SCC 481, Rojer Mathew Vs. South Indian Bank Ltd., (2020) 6 SCC 1, Supriyo Vs. Union of India, (2023) SCC OnLine SC 1348, Aishat Shifa Vs. State of Karnataka and Others, (2022) LiveLaw SC 842, Maharao Sahib Shri Bhim Singhji Vs. Union of India, (1986) 4 SCC 615, Justice K.S. Puttaswamy (Retd.) Vs. Union of India, (2017) 10 SCC 1** and **Kesavananda Bharati Sripadagalvaru and Ors Vs. State of Kerala and Another, AIR 1973 SC 1461.**

40. It was next contended that application under Order VII Rule 11 CPC was filed on 30.01.2024 after closing of the arguments for passing order on relief no.2 prayed in application 9-C. Once, the application under Order VII Rule 11 (d) CPC was filed after the appointment of the Receiver on 17.01.2024, the Court below could not be faulted for not deciding the said application on the first hand and proceeding to decide the application under Order XL Rule 1 CPC.

41. It was next contended that in the instant case, there was an accidental slip or omissions on the part of Court below while passing the order dated 17.01.2024 for appointing the Receiver, as the application 9-C was allowed intoto, but directions as prayed in prayer no.2 could not be issued. Section 152 CPC empowers the Court to correct its own error in a judgment, decree, or order from any accidental slip or omission. The principle behind the said provision is *"Actus Curiae Neminim Gravabit" i.e.* nobody shall be prejudiced by act of the Court. The Court has inherent power under Section 151 CPC to rectify any omission in any order *suo motu.* Reliance has been placed upon the decision of the Apex Court rendered in case of **Niyamat Ali Molla Vs. Sonargon Housing**

Cooperative Society Ltd. and Ors., 2007 (13) SCC 421. Relevant paragraphs 18 and 19 are extracted here as under:-

> "18. Section 152 of the Code of Civil Procedure empowers the Court to correct its own error in a judgment, decree or order from any accidental slip or omission. The principle behind the said provision is actus curiae nemenim gravabit, i.e., nobody shall be prejudiced by an act of court.
>
> 19. Civil Procedure Code recognises the inherent power of the court. It is not only confined to the amendment of the judgment or decree as envisaged under Section 152 of the code but also inherent power in general. The courts also have duty to see that the records are true and present the correct state of affair. There cannot, however, be any doubt whatsoever that the court cannot exercise the said jurisdiction so as to review its judgment. It cannot also exercise its jurisdiction when no mistake or slip occurred in the decree or order. This provision, in our opinion, should, however, not be construed in a pedantic manner. A decree may, therefore, be corrected by the Court both in exercise of its power under Section 152 as also under Section 151 of the Code of Civil Procedure. Such a power of the court is well recognized."

42. He next contended that there is specific averment in the suit that worship was going on continuously till 1993 in Vyas Ji tehkhana (cellar). Defendant no.1-appellant have no right over tehkhana and they were never in possession over it. In the objection, filed to application under Order XL Rule 1 CPC by the defendants, there is no specific averment that any religious activity was being performed in the tehkhana (cellar) by the Muslim community. Only vague assertions are made to the effect that defendant no.1 is in possession of entire property. More than 120 days have passed, but defendant no.1 have not filed their written statement as envisaged in Order VIII Rule 1 CPC, and there is nothing on record to establish even remotely that the property in question is a Waqf property. By order impugned, no new right has been created by the plaintiff-respondent no.1 and the worship and rituals have taken place within the forecorners of tehkhana (cellar), and not beyond it.

43. It was further submitted that in **Din Mohammad (supra)**, a map was filed on behalf of the Secretary to the State of India (the defendant of that suit). In the map so filed, there is clear mention of Vyas tehkhana, the

map was exhibited in the suit. It was next contended that during the survey being made in Settlement Plot No.9130, pursuant to the order dated 21.07.2023 having been confirmed by Supreme Court of India on 24.08.2023 in Original Suit No.18 of 2022 (Rakhi Singh and Another Vs. State of U.P. and Ors.), it was revealed that doors of tehkhana (cellar) premises in question had been removed and number of articles for worship including idols were lying there.

44. The plaintiff apprehended that defendant no.1 might capture tehkhana (cellar) in question, or they could destroy the objects of worship lying there after exit of Archaeology Survey of India team. In these circumstances, the prayer for appointment of Receiver was made. Only a temporary arrangement was made for performing worship in Vyas Ji tehkhana during pendency of suit as it was going on till 1993 and was reduced to one day in a year after 1993 when the entire area was barricaded by iron-fence. The counsel through an application filed under Section 107 CPC has brought on record the documents from the year 2014 to 2023 to establish that 'navahan path' is being observed in Vyas Ji tehkhana every year. The documents have been signed by Jitendra Nath Vyas, Deputy Magistrate, C.O. Security, Duty Officer, CRPF, S.H.O. Chowk, I/c LIU also. The action of the State Government depriving the plaintiff and other priest to perform worship within the tehkhana (cellar) is in violation of Section 3(1) of the 1991 Act and also in violation of the Article 25 of the Constitution of India.

45. Sri Jain, learned counsel then contended that there is no clash of interest of District Magistrate performing his duties as a Receiver and also as Member of Board of Trustees. According to him, the District Magistrate is also a Member of Executive Committee of the Trust under Section 19(2)(b) of the Temple Act, 1983. The Supreme Court on 17.05.2022 in Special Leave to Appeal (C) No.9388 of 2022 in the SLP filed by the appellant against the judgment and order dated 21.04.2022 of this Court in suit of Rakhi Singh had directed that the District Magistrate,

Varanasi shall ensure that the area where the Shiva Linga is stated to have been found, as indicated in the order, shall be duly protected.

46. The Supreme Court further on 20.05.2022 while transferring the Civil Suit No.693 of 2021 which was pending before the Civil Judge (Senior Division), Varanasi to the Court of District Judge, Varanasi further directed the District Magistrate to make adequate arrangement for ensuring the due observance of Waju for religious observance.

47. According to him, the District Magistrate has been rightly appointed as Receiver of premises in question. He works in different capacities, *namely,* as Executive Member under the Act of 1983, as administrative head of the District, and Collector while discharging revenue duties. By appointing him Receiver, no harm will be caused to defendant no. 1-appellant and no new rights or obligations have been conferred to the District Magistrate by the order impugned. It is under Section 14 (a) of the Temple Act, 1983 that the Trust Board has to make arrangement for due and proper performance of worship, service and rituals, daily or periodically, general or special along with other deities of the temple in accordance with the Hindu Shastras and scriptures and usage.

48. It was lastly contended that a perusal of the suit would show that relief granted by impugned order are different from main relief claimed in the suit. It is noteworthy that no relief has been granted to the plaintiff, but direction has been issued to District Magistrate to make arrangement of worship within the tehkhana (cellar) prevalent till 1993 and thereafter in reduced form *i.e.* once in a year. According to him, if relief is prayed to direct the statutory authority to perform its duties cast upon it under law and by interim order, Court directs such statutory authority to carry out legal obligations under the statute, such an order cannot be questioned that it amounts to granting final relief.

49. Sri C.S. Vaidyanathan, learned Senior Counsel appearing for respondent no.2 confined his argument to the appointment of Receiver under Order XL Rule 1 of CPC. According to him, the Court is empowered to appoint a Receiver of any property whenever it is just and convenient to do so. The expressions "just and convenient" is a practical, non-technical standard that permits the Court to take into account the factual consideration of a particular case to farther the interest. Simply put the standard is of a varying nature, giving the Court a wide discretion in the appointment of a Receiver. Typically, it would be just for the Court to appoint a Receiver when the evidence, on the basis of which, the Court is to act is very clearly in favour of the plaintiff and risk of eventual injury to the defendant is very small. In other words, if the plaintiff makes an application for the appointment of Receiver, the plaintiff must, *prima facie*, show that it has a very good chance for succeeding in the suit. In the instant case, based on the evidence on record, it is submitted that the standard for appointment of the Receiver stands satisfied.

50. The material on record, *prima facie*, demonstrates that tehkhana (cellar) has been under ownership of the Vyas Ji family. The evidence of ownership is established from the map that was filed by the State (Secretary of State), defendant no.1, in the suit registered as Original Suit No.62 of 1936 between **Din Mohammad and Others Vs. Secretary of State**, which describes the tehkhana (cellar), at issue, as the tehkhana owned by Vyas Ji. The map was exhibited as 'Ex-FF', and admitted against the plaintiff in that particular suit under the signature of IInd Additional Sub Judge of Varanasi. In the said suit, Vyas Ji was not impleaded as a party, nor plaintiff therein contested the map, demarcation of the structure related to the property in question. Thus, the issue of 'possession' of the structure known as tehkhana owned by Vyas Ji *vis-a-vis,* the plaintiff in Civil Suit No.844 of 2023 cannot be challenged in the current legal proceedings and stands settled against the appellant therein. The appellant, therefore, does not have any right to object the entry of the

structure by the plaintiff consequently, *prima facie*, issue of possession of property in question dedicated to the deity stands established in favour of the plaintiff in the suit, out of which, the present appeal has arisen. This aspect not only negates the very basis of appellant's plea regarding its possession of the property in question, but also provide strong *prima facie* inaccessible evidence of possession in favour of the predecessors of the plaintiff in the present suit. This possession continued until the State denied access to the predecessor of the plaintiff to the property in question by means of placing a blockage or barricading. The predecessors of the plaintiff had locked the property in question prior to the barricading and the Commissioner's report dated 30.07.1996 filed in Civil Suit No.637 of 1996 before the Court of Civil Judge, Varanasi amply demonstrates the presence of the locked place by a predecessor of the plaintiff on the gate of the property in question and supports the appointment of a Receiver. Reliance has been placed upon the decision rendered in case of **Madan Lal Vs. Sneh Gupta, AIR 2001 Del 433**. Relevant paragraph nos. 5, 8, 12, 13 and 14.

51. It was then contended that appointment of Receiver in the instant case is also supported by social situation which is the worshipping of deities inside the tehkhana by the plaintiff and lakhs of worshippers, a social situation of this immense gravity is a relevant consideration to examine the justness and convenience under Order XL Rule 1 of the Code. Reliance has been placed upon the decision of the Bombay High Court in case of **Syed Khuwaja Syed Ahmed Vs. Maharashtra Housing and Area Development Authority, 1983 Mah LJ 120.**

52. Lastly, it was contended that there was no conflict in the function of District Magistrate, while performing the duty as Receiver as per the orders of the Court, being an Ex-officio Member of Board of Trustees under the Temple Act, 1983. As the Receiver, the Court had directed the District Magistrate to arrange for worship of deities present inside the tehkhana (cellar), at issue, through a priest nominated by the Board of

Trustees. The functions to be performed by the Receiver, the District Magistrate are consisting with the duties of the Board of Trustees under Section 13 and 14 of the Temple Act, 1983. Thus, in reality, the there is no conflict between the two. In any event, no malice in law or malice, in fact, can be, or has been imputed to the District Magistrate in the present case.

ANALYSIS

53. Having heard the respective counsel for the parties and after perusing the material on record, I proceed to analyse the submissions made from both the sides.

54. Primarily, through both the appeals the appellant had questioned the appointment of Receiver by the Court below on 17.01.2024 and subsequently by the order dated 31.01.2024 directing the Receiver for arranging worship and rituals of the deities by the priest appointed by plaintiff and Shri Kashi Vishwanath Trust Board in tehkhana (cellar). Besides this some other question has been raised by the appellant for consideration and determination by this Court.

55. I will first take up the issues in regard to the appointment of District Magistrate, Varanasi as Receiver of Vyas Ji tehkhana (cellar) by order dated 17.01.2024 and order dated 31.01.2024 directing the Receiver for arranging worship of deities situated in tehkhana (cellar) by the priest appointed by plaintiff and Shri Kashi Vishwanath Trust Board.

56. Plaintiff respondent no. 1 filed a civil suit seeking relief of declaration, permanent injunction, mandatory injunction for the property in dispute alleged as ‘Vyas Ji Tehkhana’ (cellar) situated in Settlement Plot No. 9130, arraying the appellant as defendant no. 1 and Shri Kashi Vishwanath Trust as defendant no. 2. Relief for mandatory injunction has been sought directing the defendant no. 2 to allow the plaintiff, co-pujaris and devotees to perform puja and rituals within the cellar and also a direction upon the defendant no. 2 to act in accordance with the Section

13 and 14 of the Temple Act of 1983 and make provision for worship within the cellar.

57. An application 9-C under Order XL Rule 1 CPC was also filed in the month of September 2023 for appointing Receiver, as plaintiff apprehended that post survey done by ASI, Receiver needs to be appointed to protect the property in dispute from being dissipated by defendant no. 1, and the worship, which was conducted by Vyas family till the month of December 1993, and stopped by the oral orders of State Government, should continue under the control and supervision of Receiver by a priest appointed by the plaintiff, co-pujaris, the nominee of defendant no. 2 Shri Kashi Vishwanath Trust Board. Both the prayers were made in the application as prayer (a) and (b).

58. Objections were filed by the defendant no. 1 alleging that averment made in the application were totally false and baseless and they are in possession over the disputed plot. Heavy reliance was placed upon the decision rendered in Suit No. 62 of 1936 decided in the year 1937. The Court below allowed the application 9-C on 17.01.2024 and appointed the District Magistrate, Varanasi as the Receiver. Pursuant to the order, the District Magistrate took over the charge as Receiver on 24.01.2024. Thereafter, the Court below on 31.01.2024 granted relief (b) exercising power under Section 151/152 CPC.

59. The appellant has assailed both the orders appointing Receiver on 17.01.2024 and directing for worship in Vyas Ji tehkhana (cellar) on 31.01.2024 on the ground that the Court below could not have appointed Receiver under Order XL Rule 1 CPC as the property stood settled as Hanafi Muslim Waqf by the judgment dated 25.08.1937 in case of **Din Mohammad (Supra)**. Further, the right to worship could not have been granted under Section 151 or 152 CPC amending the judgment, decree or order as there stood no clerical, arithmetical mistake in the order or errors arising therein from any accidental slip or motion. The Court had become *functus officio* once application 9-C stood decided on 17.01.2024.

60. Both the questions of appointment of Receiver under Order XL Rule 1 CPC and order passed on 31.01.2024 under Section 151/152 CPC are inter twined and needs adjudication simultaneously.

61. Order XL Rule 1 CPC provides for appointment of Receiver where it appears to the Court to be just and convenient, the Court may by order :- (a) appoint a Receiver of any property, whether before or after the decree, (b) remove any person from the possession or custody of the property, (c) commit the same to the possession, custody or management of the Receiver; and (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such those powers as the Court thinks fit.

62. The object of appointing a Receiver is to protect, preserve and manage the property during the pendency of a suit. The words "to be just and convenient" have been substituted for the words "to be necessary for the realization, preservation or better custody, or management of any property, movable or immovable, subject of a suit or attachment". The effect of this amendment is that the Court may now appoint a Receiver not only in a particular case specified in the old section, but in every case in which it appears to the Court to be just and convenient to do so.

63. The power of the Court to appoint a Receiver under this order is subject to the controlling provision of Section 94 and is to be exercised for preventing the ends of justice from being defeated. Section 94 CPC reads as under;

> "**94. Supplemental Proceedings.-**In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—
>
> (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

> (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
>
> (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
>
> (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
>
> (e) make such other interlocutory orders as may appear to the Court to be just and convenient."

64. The source of power of the Court to grant interim relief is under Section 94. However, exercise of that power can only be done if the circumstances of the case fall under the rules. Therefore, when a matter comes before the Court, the Court has to examine the facts of each case and ascertain whether the ingredients of Section 94 read with rules, in an order, are satisfied and accordingly grant an appropriate relief.

65. In **Vareed Jacob Vs. Sosamma Geevarghese and Ors., 2004 (6) SCC 378,** the Apex Court held that it is only in cases where circumstances do not fall under any of the rules prescribed that the Court can invoke its inherent power under Section 151 CPC.

66. In **Mulji Umershi Shah Vs. Paradisia Builders Private Limited, AIR 1998 Bombay 87**, Bombay High Court held that appointment of Receiver can be made on the application of either parties to the litigation as well as *suo moto* and therefore, absence of application shall not preclude the Court from passing such orders if it is just and convenient.

67. In **S.B. Industries Vs. United Bank of India, AIR 1978 189**, Division Bench of this Court while considering the appointment of Receiver held that in order to justify the appointment of Receiver , the plaintiff must establish a reasonable possibility that the plaintiff will ultimately succeeds in obtaining the relief claimed in the suit. The requirement, thus, is that he must establish a good *prima facie* case. The Court further held that appointment of a Receiver is, as a general rule, discretionary, and not a matter of right. The Court also observed that a

Receiver has no power except such as are conferred upon him by the orders by which he is appointed.

68. In **Satyanarayan Banerji & Another Vs. Kalyani Prosad Singh Deo Bahadur & Others, AIR 1945 CAL 387**, the Court held that object and purpose of appointment of a Receiver may generally be stated to be the preservation of subject matter of the litigation pending, a judicial determination of the rights of the parties thereto. The Receiver is appointed for the benefit of all concerned, he is the representative of the Court and of all parties interested in the litigation, wherein he is appointed. The appointment of a Receiver is an act of Court and made in the interest of justice. He is an officer or representative of the Court subject to its order. His possession is the possession of the Court.

69. In **T. Krishnaswamy Chetty (Supra)** Madras High Court had laid five principles which can be described as "panch sadachar" of our Courts exercising equity jurisdiction in appointing Receivers. Relevant paragraph no. 13 of the judgment is extracted here as under;

> "**13.** The five principles which can be described as the 'panch sadachar' of our Courts exercising equity jurisdiction in appointing receivers are as follows:
>
> (1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding: — '*Mathusri* v. *Mathusri*,' 19 Mad 120 (PC) (Z5); — '*Sivagnanathammal* v. *Arunachallam Pillai*', 21 Mad LJ 821 (Z6); — '*Habibullah* v. *Abtiakallah*', AIR 1918 Cal 882 (Z7); — '*Tirath Singh* v. *Shromani Gurudvvara Prabandhak Committee*', AIR 1931 Lah 688 (Z8); — '*Ghanasham* v. *Moraba*', 18 Bom 474 (Z9); — '*Jagat Tarini Dasi* v. *Nabagopal Chaki*', 34 Cal 305 (Z10); — '*Sivaji Raja Sahib* v. *Aiswariyanandaji*', AIR 1915 Mad 926 (Z11); — '*Prasanno Moyi Devi* v. *Beni Madhab Rai*', 5 All 556 (Z12); — '*Sidheswari Dabi* v. *Abhayeswari Dabi*', 15 Cal 818 (Z13); — '*Shromani Gurudwara Prabandhak Committee, Amritsar* v. *Dharam Das*', AIR 1925 Lah 349

(Z14); — '*Bhupendra Nath* v. *Manohar Mukerjee*', AIR 1924 Cal 456 (Z15).

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the S. suit. — '*Dhumi* v. *Nawab Sajjad Ali Khan*', AIR 1923 Lah 623 (Z16); — '*Firm of Raghubir Singh Jaswant* v. *Narinjan Singh*', AIR 1923 Lah 48 (Z17); — '*Siaram Das* v. *Mohabir Das*', 27 Cal 279 (Z18); — '*Muhammad Kasim* v. *Nagaraja Moopanar*', AIR 1928 Mad 813 (Z19); — '*Banwarilal Chowdhury* v. *Motilal*', AIR 1922 Pat 493 (Z20).

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. — '*Manghanmal Tarachand* v. *Mikanbai*', AIR 1933 Sind 231 (Z21); — '*Bidurramji* v. *Keshoramji*', AIR 1939 Oudh 61 (Z22); — '*Sheoambar Ban* v. *Mohan Ban*', AIR 1941 Oudh 328 (Z23).

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. — '*Nilambar Das* v. *Mabal Behari*', AIR 1927 Pat 220 (Z24); — '*Alkama Bibi* v. *Syed Istak Hussain*', AIR 1925 Cal 970 (Z25); — '*Mathuria Debya* v. *Shibdayal Singh*', 14 Cal WN 252 (Z26); — '*Bhubaneswar Prasad* v. *Rajeshwar Prasad*', AIR 1948 Pat 195 (Z27). Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court

> with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc."

70. In the instant case the plaintiff claims to derive his title of Vyas Ji tehkhana (cellar) from his predecessors in interest. Vyas Ji tehkhana (cellar), according to family pedigree given in paragraph no. 4 of the plaint, is in possession of Vyas family since the year 1551 and the plaintiff succeeded through one Som Nath Vyas, who had executed a Will in his favour and his brother, on 28.02.2000 and also to the share of Pt. Chandra Nath Vyas, who had executed a Will on 21.01.2014 in favour of plaintiff and his brother. Both, Som Nath Vyas and Pt. Chandra Nath Vyas succeeded pursuant to the Will executed on 01.07.1968 by Baijnath Vyas.

71. Reliance placed by the appellant on the decision of **Din Mohammad (Supra)** does not help their case principally on the ground that in Suit No. 62 of 1936 a map was filed by the State (Secretary of State) defendant no. 1 of that suit, which was admitted by the Court against the plaintiff Din Mohammad on 14.05.1937 and exhibited as "Ex: FF", wherein the tehkhana owned by Vyas family has been shown, meaning thereby that Court in the year 1937 admitted the existence of Vyas family and the tehkhana (cellar) owned by them. The map filed by Secretary of State is part of record of the judgment of year 1937, heavily relied upon by the appellant.

72. The existence of Vyas tehkhana (cellar) owned by Vyas family in the year 1937 is a *prima facie* proof of the continues possession claimed by the plaintiff till the year 1993.

73. Five principles laid down in Chetty's case clearly provide that Court should not appoint a Receiver except upon proof by plaintiff that *prima facie* he has a very excellent chance of succeeding in suit. Further, it was held that appointing a Receiver will not be made where it has the effect of depriving a defendant '*de facto*' possession since that might cause irreparable wrong. Here the appellant failed to make out a *prima*

facie case, either through pleading or by document regarding their *prima facie* possession over the disputed property except bald assertions in the objections.

74. Neither appellant nor plaintiff were a party in the suit of Din Mohammad. The rights of appellant were never regarded by the Court, but on the other hand map filed by the State demonstrating tehkhana (cellar) owned by Vyas family have been admitted against Din Mohammad, makes out a strong case for the appointment of a Receiver. Moreover, the judgment in Din Mohammad's case takes note of various orders passed in cases of Vyas family right from 1852 to 1906.

75. Plaintiff's contention cannot be discarded at the stage of appointment of Receiver in view of documents placed demonstrating worship being carried out in Vyas Ji tehkhana (cellar) by Vyas family since British era having been abruptly stopped in December 1993, when the disputed area of Settlement Plot No. 9130 was barricaded and iron-fenced subsequent to the demolition of Babri Mosque in the year 1992.

76. The argument of appellant, not questioning the action of the State after 1993 by plaintiff, has to be seen in the light of the fact that Som Nath Vyas, as next friend of Adi Visheshwar, from whom the plaintiff succeeded, had filed a Civil Suit No. 610 of 1991 in respect of Settlement Plot No. 9130, 9131 and 9132 claiming relief of declaration, prohibitory and mandatory injunction against the defendant therein. As the worship was going on, Som Nath Vyas never questioned the action of the State and the further proceedings of that suit was stayed by this Court in the year 1998. The right of Shebaitship was transferred in favour of plaintiff by Som Nath Vyas in the year 2000 and by Pt. Chandra Nath Vyas in the year 2014.

77. The Commissioner's report dated 30.07.1996 filed in Civil Suit No. 637 of 1996 before the Court of Civil Judge, Varanasi, amply demonstrate the presence of lock put by the predecessors of plaintiff on the gate of

property in question, which again provides a strong *prima facie* evidence of possession in favour of plaintiff and supports the appointment of Receiver. Thus both, the map, part of Original Suit No. 62 of 1936, and Commissioner's report dated 30.07.1996 filed in Civil Suit No. 637 of 1996, not only negates the very basis of appellant's plea regarding possession of property in question, but also advances *prima facie* evidence of possession in favour of predecessors of plaintiff.

78. Now coming to the second aspect of the case, which is the order passed on application 9-C on 31.01.2024, alleged to have been passed by the Court below exercising power under Section 151/152 CPC.

79. It has been vehemently submitted by the appellant that only clerical and arithmetical mistakes in the order or error arising therein from any accidental slip or omission, could be corrected by the Court on its own motion or on the application made by a party and not otherwise.

80. Section 151 CPC is inherent power of Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court while Section 152 provides for the amendment of judgments, decree or orders. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either on its own motion or on the application of any of the parties.

81. As the Code of Civil Procedure is not exhaustive, the simple reason being that the Legislature is incapable of contemplating of all the possible circumstances which may arise in any future litigation and consequently, for providing the procedure for them. It is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the Court can come to its aid for doing real and substantial justice between the parties.

82. The basic principle of Section 151 is to act *ex debito justitiae*. In **Jet Ply Wood (P) Ltd. Vs. Madhukar Nowlakha, 2006 (3) SCC 699**,

the Apex Court had the occasion to consider the scope of inherent power of the Court under Section 151 and held that in cases where the procedure has not been provided, inherent power of Court can come to its aid for doing real and substantial justice between the parties.

83. In **Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Ji Seth Hira Lal, AIR 1962 (SC) 527**, the Apex Court, while dealing with Sections 94, 151 and order XXXIX Rule 1 in regard to grant of temporary injunction, held that nothing in the Court shall be deemed to limit, or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. It was further held that Section 94 does not control Section 151, or the inherent power is limited. According to Apex Court, the inherent power under Section 151 has not been conferred upon the Court; it is power inherent in the Court by virtue of its duty to do justice between the parties before it.

84. Section 152 CPC is based on two principles, namely, that the act of Court should not prejudice any party and that the Courts have the duty to see that records are true and present the correct state of affairs. An arithmetical mistake is a mistake in calculation while a clerical mistake is a mistake of writing or typing error from an accidental slip or omission or an error due to careless mistake or omission may unintentionally and unknowingly also.

85. Those matter which require elaborate argument or evidence from question of fact or law for its discovery cannot be said to be an error arising out of accidental slip or omission to bring within the ambit of Section 152. The basis of provision under Section 152 CPC is founded on maxim *"actus curiae niminem gravabit"*, i.e. an act of Court shall not prejudice no man.

86. In **Freeman Vs. Tranah (12 CB 406) Cresswell J.** said that the *maxim* is founded upon justice and good sense which serves a safe and certain guide for the administration of law. An unintentional mistake of

the Court which may prejudice cause of any party must and alone could be rectified.

87. In **Master Construction Company (P) Ltd. Vs. State of Orissa, AIR 1966 SC 1047**, Apex Court observed that arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate this point, it was said that in a case where the order contains which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the Court which may say something or omit to say something which it did not intend to say or omit.

88. The Division Bench of Bombay High Court in **Delta Products (P) Ltd. Vs. Industrial Credit & Investment Corporation of India Ltd. 1980 MLJ 156**, considering the provisions of Section 151 and 152 CPC held that while considering the principle on which the provisions of Section 151 and 152 CPC are based, a broad view must be taken of provisions of Section 151 and 152 CPC. The procedural laws are primarily meant to do justice between the parties. If, therefore, there are mistakes that are capable of being rectified and they answer the description of mistakes in Section 152, the Court should normally be inclined to rectify the mistake and do justice between the parties. Mistakes can be corrected under Section 152 CPC with a view to bring about the real meaning and extent of the decree that was passed by the Court. For that purpose not only mistakes committed by the Court in its own proceedings but the mistakes having accidentally crept in the pleadings of the parties can also be corrected.

89. In **Sampuran Singh Vs. Nandu, AIR 2004 P&H 239**, the Court held that Section 152 CPC is based on a laudable principle that an act of the Court shall prejudice no party and that the Courts have a duty to see that their records are true and represent the correct state of affairs. It is

well settled that power of the Court under Section 152 CPC is not restricted to correction of errors in decree drawn up by ministerial staff only, rather it can be exercised even to correct the judgments pronounced and signed by the Court. It cannot be overlooked that the procedural laws are primarily meant to do justice between the parties. If there are mistakes which are capable of being rectified and they answer the description of mistakes under Section 152 CPC, the Court should invariably rectify the mistakes and do justice between the parties.

90. In **Tulsipur Sugar Company Vs. State of U.P. AIR 1970 SC 70**, Apex Court held that the basis of the power to amend decrees and orders is on the principle that no party should suffer any detriment on account of a mistake or an error committed by adjudicating authority.

91. In **Mellor Vs. Swire (1885) 3030 ChD 239, 247**, it was held "it would be perfectly shocking if the Court could not rectify an error which is real the error of its own minister".

92. Lord Penzance in **Lawrie Vs. Lees (1881) 7 AppCas PP 34** said "I cannot doubt that under the original powers of the Court independent of any order i.e. made under the judicature act, every Court has the power to vary its own order which are drawn up mechanically in the registry or in the office of the Court, to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful to make it plain. I think that power is inherent in every Court".

93. Full Bench of this Court in **Ganesh Vs. Sri Ram Lalaji Mahraj Birajman Mandir, AIR 1973 All 116,** while dealing with Sections 151 and 152 CPC relying upon the earlier decision of this Court in case of **Aziz Ullah Khan Vs. Court of Wards, AIR 1932 All 587** held that power of the Court for correcting mistake are not restricted to Section 152, but can be exercised under Sections 151 and 153, where there is an accidental mistake occurring in the order of the Court.

94. In **State of Punjab Vs. Darshan Singh, 2004 (1) SCC 328**, the Apex Court while dealing with Section 152 held that power under the said section are neither to be equated with power of review, nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions or mistakes which might have been committed by the Court while passing the judgment, decree or order. The Omissions sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which proper remedy for the aggrieved party if at all is to file an appeal or revision before higher forum. An unintentional mistake of Court which may prejudice the cause of any party must and alone could be rectified.

95. In the instant case application filed under Order XL Rule 1 CPC was with a combined prayer for appointment of Receiver as well as for direction to the Receiver to allow plaintiff, co-pujaris, nominees of Shri Kashi Vishwanath Trust Board and the devotees to perform worship and rituals within the cellar after making suitable provisions by making changes in the iron-fencing.

96. Prayer (a) made in the application was granted on 17.01.2024 while application 9-C was allowed. Noticing the accidental slip/omission of non mentioning relief (b) in the order, the Court was informed on 29.01.2024 and after hearing the appellant, who did not raise any objection as to relief (b), it was granted on 31.01.2024.

97. It was an omission on the part of Court below while allowing the application 9-C in entirety on 17.01.2024 that second relief was not mentioned. The order dated 31.01.2024 stands covered under the powers of Court given in Section 151 and 152 CPC, as it is neither reviewing the order, nor the Court under the guise of invoking Section 152 is granting any further relief after the result of the judgment was rendered earlier.

98. The omission/mistake, which was sought to be corrected does not affect the merit of the case, as application 9-C was allowed in entirety on 17.01.2024, where both the prayers were made by the plaintiff, and only first prayer finds mention in the order.

99. The maxim '*actus curiae neminem gravabit*' i.e. an act of Court shall prejudice no man, shall be applicable in the instant case, as it is founded upon justice and good sense which serves a safe and certain guide for the administration of the law. Once the Court had allowed the application 9-C and appointed Receiver, the relief (b) which was part of that application, stood granted and only rectification was made on 31.01.2024.

100. Reliance placed upon the decision of Apex Court in case of **Dwaraka Das (Supra)** is not applicable in the instant case, as in that case an application was subsequently moved under Section 152 CPC after decree of the Trial Court for awarding of interest from the date of suit till the date of decree by correcting the judgment and the decree. In the instant case, application 9-C stood allowed on 17.01.2024 and only relief (b) was not incorporated in the order, which was subsequently done on 31.01.2024.

101. In **Imtiaz Hussain (Supra)** the award of Labour Court was modified subsequently, and the Apex Court while dealing with the power under Section 152 CPC found that the Court had become functus officio and the Labour Court was not justified in amending the award as was originally made. The said case is distinguishable in the present set of case.

102. Reliance placed upon **Plasto Pack (Supra)** by the appellant is distinguishable in the facts of present case, as in that case the decree passed by the learned Single Judge was modified on the motion moved by one of the party and the decree was amended without issuing notice to the other side. In the instant case the appellant had appeared and heard on 29.01.2024 and 30.01.2024 before the order was passed on 31.01.2024.

103. Argument raised from the appellant side that Section 152 CPC cannot be invoked to modify, alter or add to the term of original order or decree as to in fact pass an effective order after an order has been passed, has no legs to stand in view of the various decisions of the Apex Court as well as the other High Courts dealing with the power and scope of Section 152 CPC.

104. It has already been held that a broad view must be taken of provisions of Section 152 CPC as the procedural laws are primarily meant to do justice between the parties, thus, if any mistakes that have crept are capable of being rectified and answer the description of mistakes enumerated in Section 152 CPC. In Section 152 the Court should normally be inclined to rectify such mistakes and do justice between the parties.

105. It is not a case where an appeal or review lies, as application 9-C was allowed in entirety but omission in the order was in regard to relief (b) which was added later by another order. It is a case where two reliefs were sought by a common application which was granted by the Court but due to accidental slip or omission only relief (a) was incorporated, while relief (b) was left out. Perusal of the order dated 17.01.2024 clearly reflects the granting of relief in favour of plaintiff and there being no denial as to relief (b). It was by subsequent order that the second relief was made part of that order.

106. An attempt has been made from the appellant side that the order dated 31.01.2024 is not a *suo moto* exercise by the Court nor on any application by the plaintiff, thus Section 152 is not attracted.

107. Section 152 is an enabling provision for getting the judgment, decree or order corrected by the Court where a clerical or arithmetical mistake has arisen, or there are errors arising from any accidental slip or omission.

108. The word "either on its own motion" not only encompasses those cases which come to the notice of the Court on its own, but also includes cases brought to the notice of the Court. Once plaintiff on 29.01.2024 brought to the notice of the Court the omission which occurred in the order dated 17.01.2024, the Court below after hearing both the parties proceeded to incorporate relief (b).

109. Both the action of the Court appointing Receiver and adding relief subsequently by another order are the issues intertwined and are thus decided on the basis of reasons given above.

110. Thus, I find that there is no illegality or mistake committed by the Court below while appointing Receiver under Order XL Rule 1 CPC on 17.01.2024 and, thereafter, directing for arranging worship in Vyas Ji tehkhana (cellar) on 31.01.2024 in view of the application 9-C having been allowed earlier and forming part of the earlier order.

111. The appointment of Receiver in no way affects the right or title of any of the party during pendency of the suit as Receiver is appointed to protect the property being a representative of the Court and of all the parties interested in litigation. He being the officer or representative of the Court is subject to the orders of the Court, and his possession is the possession of the Court.

112. Failure of appellant to establish *prima facie* possession over the disputed property, and plaintiff succeeding in building up a strong *prima facie* case negating the stand of appellant, leads to undeniable situation that stopping worship and performance of rituals by the devotees in the cellar would be against their interest.

113. *Prima facie* I find that act of the State Government since year 1993 restraining Vyas family from performing religious worship and rituals and also by the devotees was a continues wrong being perpetuated.

114. The second ground of challenge to orders impugned rest on the ground that by way of interlocutory mandatory injunction, the Court

below has permitted worship in the cellar under the supervision of Receiver, so appointed, which amounts to final relief.

115. Before adverting to decide this issue, a glance of some of the provisions of the Temple Act, 1983 are necessary for better appreciation of the case. Section 4 (9) defines "Temple" which is as under:-

> "Temple" means the Temple of Adi Vishweshwar, popularly know 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 temples, shrines subshrines and the asthan of all other images and deities, mandapas, wells, tanks and other necessary structures and land appurtenant thereto and additions which may be made thereto after the appointed date;"

116. Chapter II of the Temple Act, 1983 provides for the Board of Trustees. Section 5 deals with the vesting of Temple and its endowment. The ownership of the Temple and its endowment shall vest in the deity of Shri Kashi Vishwanath. Section 6 deals with the constitution of Board of Trustees. Section 6(1) provides that from the appointed date, the administration and governance of the Temple and its endowment shall vest in a Board to be called the Board of Trustees for Shri Kashi Vishwanath Temple. Sub-Section 2 of Section 6 enumerates the list of Board of Trustees. Section 6 (2) (i) provides the District Magistrate, Varanasi to be ex-officio Member of Board of Trustees.

117. Section 13 provides Board to be in possession of the Temple and its properties, while Section 14 details the duties of the Board. Sub-Section (a) of Section 14 provides that the Board shall arrange for due and proper performance of worship, service and rituals, daily or periodical, general or special, of Sri Kashi Vishwanath and others deities in the Temple, ceremonies and other religious observances in accordance with the Hindu Shastras and scriptures and usage. Thus, from the conjoint reading, it is clear that after the enforcement of the Temple Act, 1983 on 12.10.1983, a Board of Trustees was constituted for providing proper and better

administration of Sri Kashi Vishwanath Temple, Varanasi and its endowment and for matters connected therewith or incidental thereto.

118. The definition of Temple means the Temple of Adi Vishweshwar, popularly known as Shri 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 Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temples, shrines, sub-shrines and the asthan of all other images of deities, mandapas, wells, tanks and other necessary structures and land appurtenant thereto.

119. Sub-Section (a) of Section 14 clearly spells out the duties of the Board of Trustees which has to arrange for due and proper performance of worship service and rituals, daily or periodically, general or special of Shri Kashi Vishwanath and other deities in the Temple according to Hindu Shastras and scriptures and usage.

120. Entire case of plaintiff hinges around the map filed in Suit No. 62 of 1936 by the Secretary of State, which was admitted against Din Mohammad on 14.05.1937 describing the cellar as Vyas tehkhana. Primarily, plaintiff succeeded from pleading and his documents regarding possession over the cellar since British era, till it was barricaded and iron-fenced.

121. On the contrary appellant miserably failed to demonstrate his *prima facie* possession over the cellar, and over reliance placed on **Din Mohammad's** case where they were deleted from the array of parties inevitably leads to *prima facie* conclusion regarding Vyas family possession over the cellar in dispute.

122. Appellant having not claimed the cellar at any point of time from Vyas family after 1937 till December 1993 leads to adverse inference against them as to possession over the cellar. Plaintiff has been successful

in *prima facie* establishing their possession through Vyas family since 1551.

123. Apex Court in **Dorab Cawasji (surpa)** had laid down the parameters for the grant of equitable relief of interlocutory mandatory injunction. The Court proceeded to lay the guidelines for granting interim mandatory injunction that where; (a) the plaintiff has a strong case for trial *i.e.* it shall be a higher standard than a *prima facie* case *i.e.* normally required for a prohibitory injunction; (b) it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money; (c) the balance of convenience is in favour of one seeking such relief.

124. The Court further held that interlocutory mandatory injunctions are granted generally to preserve or restore the *status quo* of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted, or to compel the undoing those acts that have been illegally done, or the restoration of that which was wrongfully taken from the party complaining.

125. Entire case of the plaintiff rest on the premise that the State Government illegally in 1993 stopped the worship and rituals in the cellar. The mandatory injunction sought as relief (e) in the suit is that Shri Kashi Vishwanath Trust Board to act in accordance with Sections 13 and 14. By grant of permission to worship and carry out rituals in the cellar is only to restore the *status quo* of the last non-contested status, and does not amount to final relief.

126. Plaintiff has complained of the wrongful action of the State and for restoring the *status quo ante.* Map exhibited as "Ex-FF" in Suit No. 62 of 1936 and admitted against Din Mohammad on 14.05.1937, is a conclusive proof of the cellar owned and in possession of Vyas family in 1937. No litigation was brought by Din Mohammad or the present appellant

challenging the status of plaintiff which leads to inevitable conclusion that Vyas family continued in possession of cellar since British era till 1993.

127. Judgment relied by the appellant actually helps the case of the plaintiff as not only a strong case for trial has been made out, but also the balance of convenience tilts in favour of the plaintiff. The worship and rituals which continued to be performed in the cellar by Vyas family till 1993 was stopped by illegal action of State without there being any order in writing. Submission that grant of interlocutory mandatory injunction amounts to granting of final relief is misplaced. Appellant could not establish *prima facie* possession over the property when area was iron-fenced and barricaded in 1993.

128. Article 25 of the Constitution of India grants freedom of religion. The Vyas family who continued performance of religious worship and rituals in the cellar could not be denied access by oral order. A citizen right guaranteed under Article 25 cannot be taken away by arbitrary action of State.

129. In the instant case grant of interlocutory mandatory injunction is not a final relief, and rights of appellant will not be prejudiced as they failed to prima facie establish their possession. Reliance placed on **Metro Marines (supra)** and **Mohd. Mehtab Khan (supra)** render no help to the appellant as these cases were decided on the basis of guidelines set out by the Apex Court in case of **Dorab Cawasji (surpa).**

130. Considering the above, I find that allowing worship and rituals in the cellar under the supervision of Receiver appointed by the Court below requires no interference by this Court. The possession of cellar was already taken by the Receiver on 24.01.2024 and the worship and rituals have already started from 01.02.2024.

131. Next comes for consideration the argument regarding clash of interest in view of Section 6 (2) (i) and Section 19 (1) of the Temple Act, 1983 and the District Magistrate having been appointed as the Receiver.

132. Chapter II of the Temple Act, 1983 provides for the Board of Trustees. District Magistrate, Varanasi is in the list of Board of Trustees as an ex-officio Member. Sub-Section (2) (i) of Section 6 enlist the District Magistrate as ex-officio Member along with other Members given in sub-Section (2) of Section 6.

133. Further, Section 13 provides for the Board to be in possession of the Temple and its properties. Section 14 provides for the duties of the Board. Chapter III deals with the Temple establishment. An Executive Committee is constituted under Section 19 (1) which is to work under the direction of Board, or the State Government and is responsible for the superintendence, direction and control of the affairs of the temple. District Magistrate, Varanasi is a Member of the Executive Committee under sub-Section (2) of Section 19 along with other officers of the district, and Commissioner being the Chairman.

134. A Receiver under Order XL Rule 1 CPC is appointed by the orders of the Court for preservation of the subject matter of litigation pending, judicial determination of the rights of the parties thereto. He is appointed for the benefit of all and is a representative of the Court and all the parties interested in litigation. His appointment has an act of Court made in the interest of justice. Being an officer or representative of the Court subject to its order, his possession is the possession of the Court.

135. Argument regarding clash of interest in between the office of the District Magistrate and the Receiver appointed by the Court is totally ill-founded. The Temple Act, 1983 clearly provides the District Magistrate who being the ex-officio Member of the Board of Trustees and also Member of the Executive Committee to act as per the duties of the Board and also to comply the directions of the Board and State Government being the Member of Executive Committee responsible for the superintendence, direction and control of the affairs of the Temple.

136. Once, the District Magistrate, Varanasi is performing his duties enumerated under the Temple Act, 1983, his appointment as Receiver by the Court who has to act on the direction and supervision of the Court would not lead to any clash of interest.

137. As in **Satyanarayan Banerji (supra),** it has already been held that possession of a Receiver is the possession of the Court, and he acts as an officer of the Court subject to its order. The Receiver so appointed cannot act independently, and his appointment is purposely for the preservation of the subject matter of litigation.

138. In view of above, I find that there is no force in the argument led from the appellant side as to the appointment of the District Magistrate, Varanasi as a Receiver of the property in question pending litigation. Moreover, no malice in law or malice in fact, can be or has been imputed to the District Magistrate, Varanasi in the instant case.

139. Another ground raised in the appeal is that the suit is barred in view of Order VII Rule 6 CPC as it has been filed after a delay of 31 years without there being any ground of exemption from limitation law.

140. The issue of limitation is a mixed question of law and fact and the plaint cannot be rejected simplicitor. In the instant case the appellant till date has not filed his written statement and no issues till date have been framed under order XIV CPC.

141. In **Balasaria Construction (P) Ltd. Vs. Hanuman Sewa Trust & Others, 2006 (5) SCC 658** the Apex Court held question of limitation to be a mixed question of law and fact and without proper pleading, framing of an issue of limitation and taking of evidence the plaint cannot be rejected. Relevant paragraph no. 8 is extracted here as under;

> "**8.** After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a

> mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure."

142. In **Kamlesh Babu & Others Vs. Lajpat Rai Sharma, 2008 (12) SCC 577**, the Apex Court considering its earlier judgment in **Balasaria Constitution (Supra)** and **Narne Rama Murthy Vs. Ravula Somasundaram, 2005 (6) SCC 614** held that question of limitation is a mixed question of law and fact and can only be decided after the issues are framed.

143. In view of the above, I find that the question of limitation is a mixed question of law and fact, and once the appellant has not filed his written statement and issues have not been framed, this Court cannot go into the such question leaving it open to the appellant to raise such question when the issues are framed.

144. The question as to non-joinder of necessary party and mis-joinder of defendant no. 1 as a party in the suit has to be raised by the appellant by filing written statement and once the issues are settled under Order XIV the Court below will proceed to decide the same. At this stage, the plea taken by the appellant as to non-joinder of necessary party cannot be taken into consideration, and only after the issue in regard to the same is decided by the Court below, the same can be dealt with. Reliance placed upon the decision of Apex Court is distinguishable in the present set of case.

145. A feeble attempt has been made by the appellant's counsel that application under Order XL Rule 1 CPC has been decided by the Court below, while application under Order VII Rule 11 (d) is pending consideration.

146. This Court finds that application under Order VII Rule 11 (d) CPC was filed on 30.01.2024 when the orders were reserved on the application

9-C for amendment of the order passed on 17.01.2024. While the application under Order XL Rule 1 CPC was moved by the plaintiff on 25.09.2023 and was hotly contested by the appellant. I find that the argument raised has no merits as the application under Order VII Rule 11 (d) was filed subsequent to the reserving of the order by the Court below on 30.01.2024.

147. Argument of Sri Gupta that order dated 31.01.2224 is barred by *res judicata* has to be tested on the alter of explanation II and V of Section 11 CPC. The principle of *res judicata* is based on the need of giving finality to judicial decisions i.e. once a *res judicata*, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation when a matter, whether on question of fact or on a question of law has been decided between two parties in one suit or proceeding and decision is final, either because no appeal was taken to higher Court or because appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding to canvass the matter again.

148. In **Subramanian Swamy Vs. State Of Tamil Nadu, 2014 (5) SCC** 75, Supreme Court explained the doctrine of *res judicata* in the following words;

> "The literal meaning of 'res' is 'everything that may form an object of rights and includes an object, subject-matter or status' and 'res judicata' literally means 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments'. Res judicata pro veritate accipitur is the full maxim which has, over the years, shrunk to mere 'res judicata", which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence interest reipublicae ut sit finis litium (it concerns the State that there be an end to law suits) and partly on the maxim nemo A debet bis vexari pro una et eadem causa (no man should be vexed twice over for the same cause)."

149. The doctrine of res judicata rest on the premise that it is a plea available in civil proceedings in accordance with Section 11 of CPC. It is a doctrine applied to give finality to '*lis*' in original or appellate proceedings. The doctrine in substance means that an issue or a point

decided and attaining finality should not be allowed to be reopened and re-agitated twice over.

150. In **Escorts Farms Ltd. Vs. Commissioner, Kumauon Division, Nainital, 2004 (4) SCC 281**, Supreme Court held that the literal meaning of '*res*' is 'everything that may form an object of rights and includes an object, subject-matter or status' and *res judicata* literally means 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment'.

151. Section 11 of CPC engrants this doctrine with a purpose that a final judgment rendered by a Court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

152. The leading case on *res judicata* is **"Duchess of Kingstone's case, 2 Smith's LC, 13th Edn, PP 644-45**. A classic passage from the judgment of Sir William de Grey is a statement of the leading principles of *res judicata,* which extracted as under:

> "From the variety of cases relative of judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court, of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

153. In **Ghulam Abbas Vs. State of U.P. 1982 (1) SCC 71**, Supreme Court held that Section 11 is not exhaustive of the general doctrine of *res judicata* and that the rule of *res judicata* as enacted in Section 11 has some technical aspects, i.e. the general doctrine is founded on

consideration of high public policy to achieve two objectives namely, that there must be a finality to litigation and that the individual should not be harassed twice over on account of the same litigation. Technical aspects of Section 11, as for instance, pecuniary or subject-wise competence or earlier form to adjudicate the subject matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of *res judicata* is to be invoked.

154. In order to decide the question whether a subsequent proceeding is barred by *res judicata*, it is necessary to examine the question with reference to : (i) the form or a competence of the Court; (ii) the party and the representatives; (iii) matters in issue; (iv) matters which ought to have been made ground for defence or attack in the former suit and (v) the final decision. In order that a defence of *res judicata* may succeed, it is necessary to not only show that the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the subsequent proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of earlier suit or proceedings.

155. In **Jaswant Singh Vs. Custodian of Evacuee Property, 1985 (3) Scc 648**, Supreme Court held that the cause of action for a proceeding has no relation whatsoever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other words, to the media upon which plaintiff or the applicant asked the court to arrive at a conclusion in his favour.

156. In **Deva Ram Vs. Ishwar Chand, 1995 (6) SCC 733**, the Apex Court explained that Section 11 contains the rule of the conclusiveness of the judgment based upon the maxim of Roman jurisprudence '*Interest reipublicae ut sit finis litium*' (it concerns the state that there be an end to law suits) and, partly on the maxim '*Nemo debet bis vexari pro una at*

eadam causa' (no man should be vexed twice over for the same cause). The section does not effect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly or substantially in issue in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit.

157. In **Mahadeo Mahto Vs. Hira Lal Verma, AIR 1991 Patna 235**, the High Court held that principle of *res judicata* applies at different stages of the suit, but it is also well known that interlocutory orders do not operate as *res judicata*.

158. In **Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993**, Apex Court held that a decision or direction in an interlocutory proceedings of the type provided for by Order IX Rule 7 is not of the kind which can operate as *res judicata* so as to bar the hearing on merits on an application under Order IX Rule 13.

159. In **S. Labbai Vs. Hanifa, AIR 1976 SC 1569**, Apex Court held that it is not every matter decided in a former suit that can be pleaded as *res judicata* in a subsequent suit. To constitute a matter *res judicata* the following conditions must concur:

> ***Essentials of Res Judicata***
>
> (i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (explanation III) or constructively (explanation IV) in the former suit.
>
> (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Explanation VI is to be read with this condition.
>
> (iii) The parties as aforesaid must have litigated under the same title in the former suit.
>
> iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue has been subsequently raised. Explanation II is to be read with this condition.

> (v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Explanation V is to be read with this condition.

160. In the instant case, by order dated 17.01.2024 the composite prayer made in application filed under Order XL Rule 1 CPC was allowed, but only relief (a) was incorporated appointing Receiver. Relief (b) was added on 31.01.2024 after it was brought to the notice of the Court and order stood modified/amended in terms of Sections 151/152 CPC. The bar of Section 11, as pleaded, is not attracted in the instant case in view of doctrine of *res judicata* and the conditions having been laid down in catena of judgments by Apex Court and other High Courts. It was only an act of omission/mistake on the part of the Court that order appointing Receiver was amended/corrected by the Court exercising inherent power vested in it.

161. Thus, I find that the challenge made to the order dated 31.01.2024 on the plea of *res judicata* is totally unfounded as the relief prayed by the plaintiff was granted on 17.01.2024 but part of it was not incorporated in the order which was subsequently modified/amended.

162. Lastly, an attempt has been made to malign the image and impute motive to the order passed by the Court below on 31.01.2024 on the ground that the officer concerned had passed the order on last day of working.

163. This Court finds that application 9-C was allowed on 17.01.2024 and the District Magistrate, Varanasi had taken over the possession on 24.01.2024. It was on mention made by the plaintiff on 29.01.2024 that the matter was taken up and after hearing the appellant on 30.01.2024 that the order was passed on 31.01.2024 amending the order dated 17.01.2024 by inserting relief (b). The appellant had not filed any objection before the Court below and had contested the matter on merits only. It was the mistake/omission on the part of the Court when application 9-C was allowed on 17.01.2024, and relief (b) was not incorporated in the order,

which subsequently was added by the order dated 31.01.2024. The officer concerned had neither reviewed his order nor had granted any further relief in the garb of powers conferred under Section 151/152 CPC. It was only accidental slip/omission which was corrected to meet the ends of justice.

164. Considering the overall submissions advanced by the respective counsel of the parties and after analysing the material on record, I find that the appellant has not made out any case for interfering in the order dated 17.01.2024 and 31.01.2024 appointing the District Magistrate, Varanasi as Receiver and arranging to carry out worship and rituals in Vyas tehkhana (cellar) under his supervision by the priest, so appointed. Moreover, worship has already started in the cellar since 01.02.2024.

CONCLUSION

165. For the reasons given above, I find that both the appeal filed under Order XLIII Rule 1 (s) CPC fails which questions the order dated 17.01.2024 and 31.01.2024 passed by the District Judge, Varanasi on application 9-C filed under Order XL Rule 1 CPC appointing District Magistrate, Varanasi as Receiver of Vyas tehkhana (cellar) and arranging for worship and performance of rituals by the priest, nominated by the plaintiff and Shri Kashi Vishwanath Trust Board.

166. Thus, both the appeal are hereby **dismissed**.

167. However, no order as to cost.

Order Date :- 26.02.2024
Shekhar / SK Goswami

[Rohit Ranjan Agarwal, J.]