(2018) 09 SC CK 0088

Supreme Court Of India

Case No: Civil Appeal Nos. 10866, 10867 Of 2010, Civil Appeal No. 4768¬4771, 2636, 821, 4739, 4905, 4908, 2215, 4740, 2894, 6965, 4192, 5498, 8096, 7226 Of 2011

M. Siddiq (D) Thr. Lrs		APPELLANT
	Vs	
Mahant Suresh Das And Others Etc		RESPONDENT

Date of Decision: Sept. 27, 2018

Acts Referred:

- Constitution Of India 1950 - Article 14, 15, 19(1)(d), 19(1)(e), 19(5), 25, 26, 32, 139A, 141, 143, 145(3), 226, 356
- Code Of Civil Procedure, 1908 - Section 11, 92
- Passport Rules, 1950 - Rule 3
- Code Of Criminal Procedure 1973 - Section 145
- Ayodhya Act, 199

Citation: (2018) 11 Scale 667 : (2018) 11 JT 133 : (2018) 7 SLT 567 : AIR 2018 SC 5134 : (2018) SCR 175

Hon'ble Judges: Dipak Misra, CJ; S. Abdul Nazeer, J; Ashok Bhushan, J

Bench: Full Bench

Advocate: R. C. Gubrele, Ejaz Maqbool

Judgement

Ashok Bhushan, J

1. These appeals were fixed for commencement of final arguments on 05.12.2017, when Dr. Rajeev Dhavan, learned senior counsel appearing for the

appellants (C.A. No. 10866Â10867 of 2010 and C.A. No. 2215 of 2011) submitted that the Constitution Bench Judgment of this Court in Dr. M.

Ismail Faruqui and Ors. Vs. Union of India and Ors., (1994) 6 SCC 360 (hereinafter referred to as â€œIsmail Faruquiâ€™s caseâ€) needs

reconsideration, hence the reference be made to a larger Bench. The above submission of Dr. Dhavan was opposed by learned counsel appearing for

the respondents. After completion of the pleadings, when matter was again taken on 14.03.2018, we thought it appropriate that we should hear Dr.

Dhavan as to whether the judgment in Ismail Faruquiâ€™s case requires reconsideration.

2. We have heard Dr. Rajeev Dhavan, learned senior counsel for the appellants, Shri K. Parasaran and Shri C.S. Vaidyanathan, learned senior

counsel for the respondents in Civil Appeal Nos. 4768Â4771 of 2011, Shri Tushar Mehta, learned Additional Solicitor General has appeared for the

State of U.P. We have also heard Shri P.N. Mishra, Shri S.K. Jain and several other learned counsels. Shri Raju Ramachandran, learned senior

counsel has also addressed submissions supporting the reference to larger Bench. Learned counsel for the parties have given their notes of

submissions.

3. Before we notice the respective submissions of learned counsel for the parties, we need to notice few facts, leading to the Constitution Bench

decision in Ismail Faruquiâ€™s case. The sequence of events which lead filing of these appeals be also noticed. The Constitution Bench in Ismail

Faruquiâ€™s case has extracted few facts from White Paper, which was published by Central Government. In Para 5 and 6 of the judgment, the

Constitution Bench noticed:Â

â€œ5. The â€˜Overviewâ€™ at the commencement of the White Paper in Chapter I states thus:

â€œ1.1 Ayodhya situated in the north of India is a township in District Faizabad of Uttar Pradesh. It has long been a place of holy pilgrimage because

of its mention in the epic Ramayana as the place of birth of Sri Ram. The structure commonly known as Ram Janma BhoomiÂBabri Masjid was

erected as a mosque by one Mir Baqi in Ayodhya in 1528 AD. It is claimed by some sections that it was built at the site believed to be the birthspot of

Sri Ram where a temple had stood earlier. This resulted in a longÂstanding dispute.

1.2 The controversy entered a new phase with the placing of idols in the disputed structure in December 1949. The premises were attached under

Section 145 of the Code of Criminal Procedure. Civil suits were filed shortly thereafter. Interim orders in these civil suits restrained the parties from

removing the idols or interfering with their worship. In effect, therefore, from December 1949 till 6Â12Â1992 the structure had not been used as a

mosque.â€

6. The movement to construct a Ram Temple at the site of the disputed structure gathered momentum in recent years which became a matter of

great controversy and a source of tension. This led to several parleys the details of which are not very material for the present purpose. These parleys

involving the Vishwa Hindu Parishad (VHP) and the All India Babri Masjid Action Committee (AIBMAC), however, failed to resolve the dispute. A

new dimension was added to the campaign for construction of the temple with the formation of the Government in Uttar Pradesh in June 1991 by the

Bhartiya Janata Party (BJP) which declared its commitment to the construction of the temple and took certain steps like the acquisition of land

adjoining the disputed structure while leaving out the disputed structure itself from the acquisition. The focus of the temple construction movement

from October 1991 was to start construction of the temple by way of kar sewa on the land acquired by the Government of Uttar Pradesh while

leaving the disputed structure intact. This attempt did not succeed and there was litigation in the Allahabad High Court as well as in this Court. There

was a call for resumption of kar sewa from 6Â12Â1992 and the announcement made by the organisers was for a symbolic kar sewa without violation

of the court orders including those made in the proceedings pending in this Court. In spite of initial reports from Ayodhya on 6Â12Â1992 indicating an

air of normalcy, around midday a crowd addressed by leaders of BJP, VHP, etc., climbed the Ram Janma BhumiÂBabri Masjid (RJMÂBM)

structure and started damaging the domes. Within a short time, the entire structure was demolished and razed to the ground. Indeed, it was an act of

â€œnational shameâ€. What was demolished was not merely an ancient structure; but the faith of the minorities in the sense of justice and fairplay of

majority. It shook their faith in the rule of law and constitutional processes. A fiveÂhundredÂyearÂold structure which was defenceless and whose

safety was a sacred trust in the hands of the State Government was demolished.â€

4. The Constitution Bench has noticed details of suits, which were filed in the year 1950 and thereafter, which suits were ultimately transferred to the

Allahabad High Court to be heard together in the year 1989. In Para 9 of the judgment, following has been noticed:Â

â€œ9. A brief reference to certain suits in this connection may now be made. In 1950, two suits were filed by some Hindus; in one of these suits in

January 1950, the trial court passed interim orders whereby the idols remained at the place where they were installed in December 1949 and their puja

by the Hindus continued. The interim order was confirmed by the High Court in April 1955. On 1Â2Â1986, the District Judge ordered the opening of

the lock placed on a grill leading to the sanctum sanctorum of the shrine in the disputed structure and permitted puja by the Hindu devotees. In 1959, a

suit was filed by the Nirmohi Akhara claiming title to the disputed structure. In 1981, another suit was filed claiming title to the disputed structure by

the Sunni Central Wakf Board. In 1989, Deoki Nandan Agarwal, as the next friend of the Deity filed a title suit in respect of the disputed structure. In

1989,the aforementioned suits were transferred to the Allahabad High Court and were ordered to be heard together. On 14Â8Â1989, the High Court

ordered the maintenance of status quo in respect of the disputed structure (AppendixÂI to the White Paper). As earlier mentioned, it is stated in para

1.2 of the White Paper that:

â€œâ€¦ interim orders in these civil suits restrained the parties from removing the idols or interfering with their worship. In effect, therefore, from

December 1949 till 6Â12Â1992 the structure had not been used as a mosque.â€

5. As a result of the happenings at Ayodhya on 06.12.1992, the President of India issued a proclamation under Article 356 of the Constitution of India

assuming to himself all the functions of the Government of Uttar Pradesh, dissolving the U.P. Vidhan Sabha. As a consequence of the events at

Ayodhya on 06.12.1992, the Central Government decided to acquire all areas in dispute in the suits pending in the Allahabad High Court. It was also

decided to acquire suitable adjacent area, which would be made available to two Trusts for construction of a Ram Temple and a Mosque respectively.

The Government of India has also decided to request the President to seek the opinion of the Supreme Court on the question whether there was a

Hindu temple existing on the site where the disputed structure stood. An ordinance was issued on 07.01.1993 namely â€œAcquisition of Certain Area

at Ayodhya Ordinanceâ€ for acquisition of 67.703 acres of land in the Ram Janam BhumiÂBabri Masjid complex. A reference to the Supreme Court

under Article 143 of the Constitution was also made on the same day, i.e. 07.01.1993. The Ordinance No. 8 of 1993 had been replaced by the

Acquisition of Certain Area at Ayodhya Act, 1993 (No. 33 of 1993) (hereinafter referred to as â€œAct, 1993â€). A Writ Petition Under Article 32

was filed in this Court challenging the validity of the Act No. 33 of 1993. Several writ petitions at Allahabad High Court were also filed challenging

various aspects of the Act, 1993. This Court exercising its jurisdiction under Article 139A had transferred the writ petitions, which were pending in the

High Court. The Writ Petitions under Article 32, transferred cases from High Court of Allahabad as well as Reference No.1 of 1993 made by

President under Article 143 were all heard together and decided by common judgment dated 24.10.1994, where the Constitution Bench had upheld the

validity of the Act except that of Section 4(3) of the Act, 1993 which was struck down.

6. After the judgment of this Court in the above Constitution Bench, all the suits, which had been transferred by the High Court to be heard by a Full

Bench of the High Court stood revived. One Mohd. Aslam, who was also one of the petitioners in Constitution Bench Judgment in Ismail

Faruquiâ€™s case filed a writ petition seeking certain reliefs with regard to 67.703 acres of land acquired under the Act, 1993. This Court on

13.03.2002 passed an interim order. Paras 4 and 5 of the interim order are as follows:Â

â€œ4. In the meantime, we direct that on 67.703 acres of acquired land located in various plots detailed in the Schedule to the Acquisition of Certain

Area at Ayodhya Act, 1993, which is vested in the Central Government, no religious activity of any kind by anyone either symbolic or actual including

bhumi puja or shila puja, shall be permitted or allowed to take place.

5. Furthermore, no part of the aforesaid land shall be handed over by the Government to anyone and the same shall be retained by the Government till

the disposal of this writ petition nor shall any part of this land be permitted to be occupied or used for any religious purpose or in connection

therewith.â€

7. The above writ petition was ultimately decided on 31.03.2003 by a Constitution Bench, which judgment is reported in (2003) 4 SCC 1, Mohd. Aslam

alias Bhure Vs. Union of India and Others. Before the Constitution Bench, both the parties had placed reliance on Ismail Faruquiâ€™s case. This

Court disposed of the writ petition directing that order of this Court dated 13.03.2002 as modified on 14.03.2002 should be operative until disposal of

the suits in the High Court of Allahabad. The Allahabad High Court after hearing all the suits on merits decided all the suits vide its judgment dated

30.08.2010. The parties aggrieved Â both plaintiffs and defendants in the original suits have filed these appeals in this Court.

8. Dr. Rajeev Dhavan submits that judgment in Ismail Faruquiâ€™s case had made observations that a mosque is not an essential part of the practice

of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open. The observations made by the Constitution Bench has

influenced the decisions under the appeal, the law laid down in Ismail Faruqui in relation to praying in a mosque not being an essential practice is

contrary to both, i.e. the law relating to essential practice and the process by which essential practice is to be considered. Whether essential practice

can be decided on a mere ipse dixit of the Court or whether the Court is obliged to examine belief, tenets and practices, is a pure question of law. The

Ismail Faruquiâ€™s judgment being devoid of any examination on the above issues, the matter need to go to a larger Bench.

9. Dr. Dhavan specifically referred to paras 78 and 82 of the judgment in Ismail Faruquiâ€™s case. He specifically attacked following observations in

Paragraph 78 :Â

â€œ78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an

essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral

part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion,

stand on a different footing and have to be treated differently and more reverentially.â€

10. In Para 82, following observation is specifically attacked:Â

â€œA mosque is not an essential part of the practice of the religion of Islam and namaz(prayer) by Muslims can be offered anywhere, even in

open.â€

11. He submits that essential practice of a religion requires a detailed examination. He has referred to various judgments of this Court to support his

submission that wherever this Court had to determine the essential practice of a religion, detailed examination was undertaken. He submits that Ismail

Faruquiâ€™s case does not refer to any material nor enters into any detailed examination before making the observations in Paragraphs 78 and 82 as

noticed above. Dr. Dhavan further submits that a broad test of essentiality as laid down by Seven Judges Bench in The Commissioner, Hindu

Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005 cannot be cut down by a later judgment of

lesser strength, which judgments have introduced the test of integrality. He submits that the test of integrality is interchangable with essentiality test.

Dr. Dhavan, during his submissions, has taken us to submissions made by various parties before the High Court, where reliance was placed on Ismail

Faruquiâ€™s case. He has also referred to various grounds taken in these appeals, which grounds rely on the judgment of Ismail Faruquiâ€™s case.

He submits that the above furnishes ample grounds for appellants to pray for reconsideration of Ismail Faruquiâ€™s case. Dr. Dhavan in his notes

'For reference to a larger Bench' has clarified that questionable aspects as noted above are not the ratio of Ismail Faruquiâ€™s case. Dr. Dhavan

submits that ratio in Ismail Faruquiâ€™s case can be summed up to the following effect:Â

(i) The suits revive in their entirety.

(ii) The acquisition was legally competent, traceable to List III and Entry 42 of the Seventh Schedule of the Constitution.

(iii) The word â€˜vestâ€™ has multiple meanings and implied that the status of the Central Government was that of a statutory receiver which would

dispense with the land (including the other areas acquired) in accordance with the judgment in the suits rather than the Reference which was declined.

(iv) Status quo as in Section 7(2) of the Act would be maintained, justified on the basis of comparative user since 1949.

(v) Secularism is a facet of equality and represents equal treatment of all religions in their own terms and with equal respect and concern for all.

12. Shri K. Parasaran, learned senior counsel refuting the submissions of Dr. Dhavan submitted that the prayer for reconsideration of the judgment in

Ismail Faruquiâ€™s case is not maintainable at the instance of the appellants. He submitted that those who were eo nomine parties to the proceedings

in the case in Ismail Faruqui, litigated bona fide in respect of a public right viz. the right of the Muslim public, all persons interested in such right shall,

for the purposes of Section 11 Civil Procedure Code, be deemed to claim under the persons so litigating and are barred by Res Judicata in view of

Explanation VI to Section 11 C.P.C. He submits that the interests of Muslim community were adequately represented before this Court in Ismail

Faruquiâ€™s case. He further submits that the judgment in Ismail Faruquiâ€™s case is binding on those who are eoÂ nomine parties thereto. Even

apart from the question of res judicata, the doctrine of representation binds those whose interests are the same in the subject matter of Ram Janam

BhumiÂBabri Masjid as those of eoÂnomine parties. He submitted that the appellants are not entitled to request for reconsideration of the said

judgment on the principle of doctrine of representation. Mr. Parasaran submitted that to reconsider the judgment in Ismail Faruquiâ€™s case will be

an exercise in futility as the judgment therein is binding on the present appellants. Assuming without admitting that by a further reference to a larger

bench Ismail Faruquiâ€™s case is overruled, nevertheless, in so far as â€œAyodhya Janmasthan Babri Masjidâ€ is concerned, the judgment in Ismail

Faruquiâ€™s case will still be binding on the appellants on the principle of finality. He submits that in the present case, the submissions made were a

reargument of the submissions made in Ismail Faruquiâ€™s case as if it were an appeal against the said judgment by canvassing the correctness of

the said judgment. He further submits that in addition to being binding on the parties, the judgment operates as a declaration of law under Article 141

of the Constitution.

13. Shri Parasaran further submits that observations in Ismail Faruquiâ€™s case that a mosque is not an essential part of the practice of Islam have to

be read in the context of validity of the acquisition of the suit property under the Act, 1993. He submits that this Court has not ruled that offering

namaz by Muslims is not an essential religious practice. It only ruled that the right to offer namaz at every mosque that exists is not essential religious

practice. But if a place of worship of any religion has a particular significance for that religion, enough to make it an essential or integral part of the

religion, then it would stand on a different footing and would have to be treated differently and more reverentially. Mr.Parasaran respectfully

submitted that the thrust of the reasoning of this Court has to be understood as to the freedom of religion under Articles 25 and 26 of the Constitution

in the context of the inherent sovereign power of the State to compulsorily acquire property in the exercise of its jurisdiction of eminent domain in a

secular democracy.

14. Shri Parasaran further submits that the fundamental right of the Muslim community under Article 25, to offer namaz, is not affected because the

Babri Masjid was not a mosque with particular significance for that religion. The faith/practice to offer namaz is an essential part of Muslim religion

and, therefore, it may be performed in any mosque at Ayodhya. Ayodhya is of particular significance to the Hindus as a place of pilgrimage because

of the ancient belief that Lord Ram was born there. He further submits that the impact of acquisition is equally on the right and interest of both the

communities. Shri Parasaran, during his submissions, has also tried to distinguish the cases relied by the appellants to support their submissions in

favour of reference.

15. Shri C.S. Vaidyanathan has submitted that present is not a case where judgment of Ismail Faruquiâ€™s case need any reference to a larger

Bench. He has adopted the submissions made by Shri Parasaran.

16. Shri Tushar Mehta, learned Additional Solicitor General, submits that Constitution Bench judgment of this Court in Ismail Faruquiâ€™s case is a

correct law, which does not deserves to be disturbed by referring it to a larger Bench. Shri Mehta further submits that the prayer made by the

appellants for referring to larger Bench deserves to be rejected on the ground of inordinate delay. He submits that judgment was rendered in 1994.

The judgment came for consideration in Mohd. Aslamâ€™s case, (2003) 4 SCC 1 where both the parties have relied on the judgments. Had there

been any genuine grounds, request for reference ought to have been made at that time. He further submits that a request is not a bona fide request

and has been made with the intent to delay the proceedings. Shri Tushar Mehta, learned Additional Solicitor General has reiterated his submissions

that State of U.P. is neutral in so far as merits of the case of either of the parties is concerned.

17. Shri Parmeshwar Nath Mishra, learned counsel appearing for one of the respondents submits that all Mosques of the World are not essential for

practice of Islam. During the submissions, he referred to various texts, sculptures of the religion of Islam. He further submits that the AlÂMasjid,

AlÂHaram i.e. Kaâ€˜ba in Mecca is a mosque of particular significance for the reasons that there is Quranic command to offer prayers facing

towards Kaâ€˜ba and to perform Haj as well as Umra in Kaâ€˜ba without which right to practise the religion of Islam is not conceivable. Two other

Mosques namely, AlÂ Masjid AlÂAqsa i.e. Baitul Muqaddas in Jerusalem and AlÂ Masjid of Nabi at Madina also have particular significances for

the reason that besides Kaâ€˜ba, pilgrimage to these two mosques have also been commanded by the sacred Hadiths. Shri Mishra in his submission

has referred to and relied on various texts and sculptures. He has referred to verses of Holy Quran and Hadiths, which are principal source of religion

of Islam, its beliefs, doctrine, tenets and practices.

18. Shri S.K. Jain, learned senior counsel appearing for Nirmohi Akhada has also refuted the submission of Dr. Dhavan that Ismail Faruquiâ€™s case

needs to be referred to a larger Bench.

19. Dr. Rajeev Dhavan in his submissions in rejoinder refutes the submission of Shri Parasaran that principle of res judicata is attracted in the present

case. He submits that Ismail Faruquiâ€™s case was about a challenge to the Act, 1993 and the Presidential Reference and the question as to whether

in the light of the Act, 1993 the suits abated due to Section 4(3) of the Act, 1993. The cases under these appeals are from suits, where the issues were

entirely different. He submits that for constituting a matter res judicata the following conditions must be satisfied, namely:Â

1. 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 in

the former suit;

2. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

3. The parties must have litigated under the same title in the former suit;

4. The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised;

and

5. 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. Further

Explanation I shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed

later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court

operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied.

20. He submits that matter, which was directly and substantially in issue in the suits is entirely different from the issues, which came for consideration

in the case of Ismail Faruqui. His submission is that Ismail Faruquiâ€™s case was concerned with the Act, 1993 and the Presidential Reference. He

further submits that issue of essentiality of a Mosque generally was not before the Court and emerged only in the judgment. He further submits that

pure questions of law are not res judicata. The ipse dixit of the Court that something is, or not the essential practice is contrary to law. He further

submits that in the Constitution Bench, the suits were not transferred rather it was the writ petitions, which were filed in the High Court challenging

the Act, 1993, were transferred. No transfer of the suit having been made in the Supreme Court to be heard alongwith Ismail Faruquiâ€™s case, the

judgment in Ismail Faruquiâ€™s case cannot be said to be judgment in the suits. What constitute an essential practice and how it is to be established is

a pure question of law and not amenable to res judicata. It is open to this court to examine the law relating to determination and application of the

essential practices test. The observations on prayer in a Mosque not being essential or concept of particular significance and comparative significance

are without foundation. Replying to the submission of Shri Tushar Mehta, Dr. Dhavan submits that State has not taken a nonÂneutral stance in the

present proceedings. He submits that there is no delay on the part of the appellants in praying for reconsideration of Ismail Faruquiâ€™s judgment. He

submits that impugned judgment of the High Court is affected by the observations made in the Ismail Faruquiâ€™s case. He submits that submission

of Shri Tushar Mehta that prayer is not bonafide and has been made only to delay the proceedings are incorrect and deserves to be rejected. Dr.

Dhavan has also referred to various observations made by judgment in High Court to support its submissions that judgment of Ismail Faruquiâ€™s

case has influenced the judgment of the High Court. He has further referred to various submissions made by the learned counsel for the parties

relying on judgment of Ismail Faruquiâ€™s case before the High Court. He further submits that in these appeals also, several grounds have been

taken by the different learned counsel relying on Ismail Faruquiâ€™s case.

21. Learned counsel for the parties have referred to and relied on various judgments of this Court, which shall be referred to while considering the

submissions in detail.

22. Before we enter into the submissions advanced by the learned counsel for the parties it is relevant to notice certain established principle on reading

of a judgment of the Court. The focal point in the present case being Constitution Bench judgment in Dr. M. Ismail Faruqui & Ors. vs. Union of India

& Ors. reported in (1994) 6 SCC 360. We have to find out the context of observations made in the judgment which according to the appellant are

questionable and to decide whether the said observations furnish any ground for reconsideration of the Constitution Bench judgment. The most

celebrated principle on reading of a judgment of a Court of law which has been approved time and again by this Court is the statement by LORD

HALSBURY in Quinn v. Leathem, 1901 AC 495, where following was laid down:

â€œBefore discussing the case of Allen v. Flood (1898) AC 1 and what was decided therein, there are two observations of a general character which

I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved,

or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are

governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for

what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning

assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. â€œ

23. The following words of LORD DENNING in the matter of applying precedents have become locus classicus:

â€œEach case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail

may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of

one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all

decisive.

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will

find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it.â€

The above passage has been quoted with approval by this Court in Sarva Shramik Sanghatana (KV), Mumbai vs. State of Maharashtra and others,

(2008) 1 SCC 494.

24. In the Constitution Bench judgment in Islamic Academy of Education and another v. State of Karnataka and others, (2003) 6 SCC 697, Chief

Justice V.N. Khare speaking for majority held:

â€œThe ratio decidendi of a Judgment has to be found out only on reading the entire Judgment. In fact the ratio of the judgment is what is set out in

the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation.

In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here

and there from, the judgment, one cannot find out the entire ratio decidendi of the judgment. We, therefore, while giving our clarifications, are deposed

to look into other parts of the Judgment other than those portions which may be relied upon.â€

25. Justice S.B. Sinha, J. in his concurring opinion has reiterated the principles of interpretation of a judgment in paragraphs 139 to 146. Following has

been held in paragraphs 139Â146:

â€œINTERPRETATION OF A JUDGMENT

139. A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading

the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the

manner adopted for its disposal.

[See Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [2001]2 SCC 721].

140. In Padma Sundara Rao v. State of T.N.,(2002) 3 SCC 533, it is stated: (SCC p. 540 paragraph 9)

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered

that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board (1972) 2

WLR 537 [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749. Circumstantial flexibility, one additional or different fact may make a

world of difference between conclusions in two cases.

[See also Haryana Financial Corporation v. Jagadamba Oil Mills (2002 3 SCC 496]

141. In General Electric Co. v. Renusagar Power Co., (1987) 4 SCC 137, it was held: (SCC p.157, paragraph 20)

As often enough pointed out by us, words and expressions used in a judgment are not to be construed in the same manner as statutes or as words and

expressions defined in statutes. We do not have any doubt that when the words ""adjudication of the merits of the controversy in the suit"" were used by

this Court in State of U.P. v. Janki Saran Kailash Chandra [1974]1SCR31 , the words were not used to take in every adjudication which brought to an

end the proceeding before the court in whatever manner but were meant to cover only such adjudication as touched upon the real dispute between the

parties which gave rise to the action. Objections to adjudication of the disputes between the parties, on whatever ground are in truth not aids to the

progress of the suit but hurdles to such progress. Adjudication of such objections cannot be termed as adjudication of the merits of the controversy in

the suit. As we said earlier, a broad view has to be taken of the principles involved and narrow and technical interpretation which tends to defeat the

object of the legislation must be avoided.

142. In Rajeshwar Prasad Mishra v. The State of West, Bengal, AIR 1965 SC 1887, it was held:

Article 141 empowers the Supreme Court to declare the law and enact it. Hence the observation of the Supreme Court should not be read as

statutory enactments. It is also well known that ratio of a decision is the reasons assigned therein.

(See also Amar Nath Om Prakash and Ors. v. State of Punjab[1985] 1 SCC 345 and Hameed Joharan v. Abdul Salam, 2001 (7) SCC 573).

143. It will not, therefore, be correct to contend, as has been contended by Mr. Nariman, that answers to the questions would be the ratio to a

judgment. The answers to the questions are merely conclusions. They have to be interpreted, in a case of doubt or dispute with the reasons assigned in

support thereof in the body of the judgment, where for, it would be essential to read the other paragraphs of the judgment also. It is also permissible

for this purpose (albeit only in certain cases and if there exist strong and cogent reasons) to look to the pleadings of the parties.

144. In Keshav Chandra Joshi v. Union of India, 1992 Supp (1) SCC 272, this Court when faced with difficulties where specific guidelines had been

laid down for determination of seniority in Direct Recruits Class II Engineering Officers' Association v. State of Maharashtra, (1990) 2 SCC 715, held

that the conclusions have to be read along with the discussions and the reasons given in the body of the judgment.

145. It is further trite that a decision is an authority for what it decides and not what can be logically deduced therefrom. [See Union of India v. Chajju

Ram, (2003) 5 SCC 568.

146. The judgment of this Court in T.M.A. Pai Foundations, (2002) 8 SCC 481, will, therefore, have to be construed or to be interpreted on the

aforementioned principles, The Court cannot read some sentences from here and there to find out the intent and purport of the decision by not only

considering what has been said therein but the text and context in which it was said. For the said purpose the Court may also consider the

constitutional or relevant, statutory provisions visÂaÂvis its earlier decisions on which reliance has been placed.â€

26. Justice Arijit Pasayat, J. speaking for the Court in Commissioner of Central Excise, Delhi vs. Allied AirÂ conditioning Corporation (Regd.), (2006)

7 SCC 735, held that the judgment should be understood in the light of facts of the case and no more should be read into it than what it actually says.

In paragraph 8 following has been laid down:

â€œ8.....A judgment should be understood in the light of facts of the case and no more should be read into it than what it actually says. It is neither

desirable nor permissible to pick out a word or a sentence from the judgment divorced from the context of the question under consideration and treat it

to be complete law decided by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the

light of the questions which were before this Court. (See Mehboob Dawood Shaikh v. State of Maharashtra , (2004) 2 SCC 362.....â€

27. In the light of the above principles, we now revert back to the Constitution Bench judgment in Ismail Faruqui. We need to notice the issues which

had come up for consideration before the Constitution Bench, the ratio of the judgment and the context of observations. We have noticed above that

the Constitution Bench in Ismail Faruqui case decided five transferred cases, two writ petitions filed under Article 32 and Special Reference No.1 of

1993. The Special Reference No.1 of 1993 made by the President of India under Article 143 was respectfully declined to be answered by the

Constitution Bench. The challenge in the writ petitions under Article 32 and transferred cases was to the Act, 1993. The Act, 1993 was enacted to

provide for the acquisition of certain area at Ayodhya and for matters connected therewith or incidental thereto. Section 2(a) defines the area as:

â€œ2(a) â€œareaâ€ means the area (including all the buildings, structures or other properties comprised therein) specified in the Schedule;

28. The Schedule of the Act contained the description of the area acquired. Apart from the other plots Revenue Plot Nos.159 and 160 situated in

village Kot Ramchandra wherein structure commonly known as Ram Janam BhumiÂ Babri Masjid was situated was also included. Several other plots

including all the building structure on other properties comprised therein were acquired.

29. The validity of Act, 1993 was challenged on several grounds. The ground for challenge has been noticed in paragraph 17 of the judgment which is

to the following effect:

â€œ17. Broadly stated, the focus of challenge to the statute as a whole is on the grounds of secularism, right to equality and right to freedom of

religion. Challenge to the acquisition of the area in excess of the disputed area is in addition on the ground that the acquisition was unnecessary being

unrelated to the dispute pertaining to the small disputed area within it. A larger argument advanced on behalf of some of the parties who have assailed

the Act with considerable vehemence is that a mosque being a place of religious worship by the Muslims, independently of whether the acquisition did

affect the right to practice religion, is wholly immune from the State's power of acquisition and the statute is, therefore, unconstitutional as violative of

Articles 25 and 26 of the Constitution of India for this reason alone. The others, however, limited this argument of immunity from acquisition only to

places of special significance, forming an essential and integral part of the right to practice the religion, the acquisition of which would result in the

extinction of the right to freedom of religion itself. It was also contended that the purpose of acquisition in the present case does not bring the statute

within the ambit of Entry 42, List III but is referable to Entry 1, List II and, therefore, the Parliament did not have the competence to enact the same.

It was then urged by learned Counsel canvassing the Muslim interest that the legislation is tilted heavily in favour of the Hindu interests and, therefore,

suffers from the vice of nonÂsecularism, and discrimination in addition to violation of the right to freedom of religion of the Muslim community.....â€

30. The challenge to the acquisition of the area in excess of area which is disputed area was on the ground that same was unnecessary, hence, ought

to be declared invalid. The challenge to excess area was laid by members of the Hindu community to whom the said plots belonged. One of the

grounds of attack was based on secularism. It was contended that Act read as a whole is antiÂsecular and against the Muslim community. A mosque

has immunity from State's power of acquisition. It was contended on behalf of the Muslim community that the defences open to the minority

community in the suits filed by other side including that of adverse possession for over 400 years since 1528 AD when the Mosque was constructed

have been extinguished by the acquisition. The suits have been abated without the substitution of an alternate dispute resolution mechanism to which

they are entitled in the Constitutional scheme.

31. The Constitution Bench held that acquisition of the properties under the Act affects the rights of both the communities and not merely those of the

Muslim community. In paragraph 49 following has been noticed:

â€œ49. The narration of facts indicates that the acquisition of properties under the Act affects the rights of both the communities and not merely those

of the Muslim community. The interest claimed by the Muslims is only over the disputed site where the mosque stood before its demolition. The

objection of the Hindus to this claim has to be adjudicated. The remaining entire property acquired under the Act is such over which no title is claimed

by the Muslims. A large part thereof comprises of properties of Hindus of which the title is not even in dispute.... â€œ

32. This Court also noticed that Ayodhya is said to be of particular significance to the Hindus as a place of pilgrimage because of the ancient belief

that Lord Rama was born there. The Court also noticed that equally mosque was of significance for the Muslim community as an ancient mosque built

by Mir Baqi in 1528 AD. In paragraph 51 of the judgment following has been noticed:

â€œ51. It may also be mentioned that even as Ayodhya is said to be of particular significance to the Hindus as a place of pilgrimage because of the

ancient belief that Lord Rama was born there, the mosque was of significance for the Muslim community as an ancient mosque built by Mir Baqi in

1528 A.D. As a mosque, it was a religious place of worship by the Muslims. This indicates the comparative significance of the disputed site to the two

communities and also that the impact of acquisition is equally on the right and interest of the Hindu community. Mention of this aspect is made only in

the context of the argument that the statute as a whole, not merely Section 7 thereof, is antiÂsecular being slanted in favour of the Hindus and against

the Muslims.â€

33. As noted above, one of the principal submission which was raised by the petitioners before the Constitution Bench was that mosque cannot be

acquired because of a special status in the Mohammedan Law. The Constitution Bench in Ismail Faruqui case by a separate heading â€œMOSQUE

â€" IMMUNITY FROM ACQUISITIONâ€ from paragraphs 65 to 82 considered the above ground.

34. The discussion from paragraphs 65 to 82 as per above heading indicates that the discussion and all observations were in the context of immunity

from acquisition of a mosque. In paragraph 65 of the judgment a larger question was raised at the hearing that there is no power in the State to

acquire any mosque, irrespective of its significance to practice of the religion of Islam. The Court after noticing the above observation has observed

that the proposition advanced does appear to be too broad for acceptance. We reÂ produce paragraph 65 which is to the following effect:

â€œ65. A larger question raised at the hearing was that there is no power in the State to acquire any mosque, irrespective of its significance to

practice of the religion of Islam. The argument is that a mosque, even if it is of no particular significance to the practice of religion of Islam, cannot be

acquired because of the special status of a mosque in Mahomedan Law. This argument was not confined to a mosque of particular significance

without which right to practice the religion is not conceivable because it may form an essential and integral part of the practice of Islam. In the view

that we have taken of limited vesting in the Central Government as a statutory receiver of the disputed area in which the mosque stood, for the

purpose of handing it over to the party found entitled to it, and requiring it to maintain status quo therein till then, this question may not be of any

practical significance since there is no absolute divesting of the true owner of that property. We may observe that the proposition advanced does

appear to us to be too broad for acceptance inasmuch as it would restrict the sovereign power of acquisition even where such acquisition is essential

for an undoubted national purpose, if the mosque happens to be located in the property acquired as an ordinary place of worship without any particular

significance attached to it for the practice of Islam as a religion. It would also lead to the strange result that in secular India there would be

discrimination against the religions, other than Islam. In view of the vehemence with which this argument was advanced by Dr. Rajeev Dhavan and

Shri Abdul Mannan to contend that the acquisition is invalid for this reason alone, it is necessary for us to decide this question. â€œ

35. Although in paragraph 65 the Court observed that the proposition is too broad for acceptance but in view of the vehemence with which argument

of the learned counsel appearing for the petitioners was put the Court proceeded to decide the issue.

36. The contention before the Constitution Bench was also that acquisition of a mosque violates the right given under Articles 25 and 26 of the

Constitution of India. After noticing the law in the British India, prior to 1950, and the law after enforcement of the Constitution, the Constitution

Bench came to the conclusion that places of religious worship like mosques, churches, temples etc. can be acquired under the State's sovereign power

of acquisition. Such acquisition per se does not violates either Article 25 or Article 26 of the Constitution. After noticing the various decisions following

was laid down in paragraph 74:

â€œ74.It appears from various decisions rendered by this Court, referred later, that subject to the protection under Articles 25 and 26 of the

Constitution, places of religious worship like mosques, churches, temples etc. can be acquired under the State's sovereign power of acquisition. Such

acquisition per se does not violate either Article 25 or Article 26 of the Constitution. The decisions relating to taking over of the management have no

bearing on the sovereign power of the State to acquire property. â€œ

37. The Constitution Bench further held that the right to practice, profess and propagate religion guaranteed under Article 25 of the Constitution does

not necessarily include the right to acquire or own or possess property. Similarly, this right does not extend to the right of worship at any and every

place of worship. Further, it was held that protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and

integral part of the religion. In paragraphs 77 and 78 following has been held:

â€œ77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practice, profess

and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property.

Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per

se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the

Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential

and integral part of practice of that religion.

78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential

or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part

thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on

a different footing and have to be treated differently and more reverentially. â€œ

38. With the above observation the Constitution Bench held that offer of prayer or worship is a religious practice, its offering at every location would

not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or

integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the

religion, stand on a different footing and have to be treated differently and more reverentially.

39. From what we have noticed above following are deducible:

(i) Places of religious worship like mosques, churches, temples, etc. can be acquired under the State's sovereign power of acquisition, which does not

violate Articles 25 or 26 of the Constitution.

(ii) The right to practice, profess and propagate religion guaranteed under Article 25 does not extend to the right of worship at any and every place of

worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the

Constitution.

(iii)The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential or integral part of the religion.

(iv) A practice may be a religious practice but not an essential and integral part of practice of that religion.

(v) While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential

or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part

thereof.

The Court itself has drawn a distinction with regard to the place of a particular significance for that religion where offer of prayer or worship may be

an essential or integral part of the religion.

40. The Court held that the mosques were subject to the provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in

a particular mosque. In paragraph 80 following was held:

â€œ80. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in

such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and

any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the

Namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the

provisions of statute of limitation there by extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over

that property.â€

41. The Constitution Bench unequivocally laid down that every immovable property be a temple, church or mosque etc. is liable to be acquired and a

mosque does not enjoy any additional protection which is not available to religious places of worship of other religions.

42. Now, we come to paragraph 82 of the judgment which is the sheet anchor of the submission raised by Dr. Rajiv Dhavan. Serious objections have

been raised by Dr. Rajiv Dhavan to some observations made in paragraph 82. Entire paragraph 82 is quoted below:

â€œ82. The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse

possession (See Mulla's Principles of Mahomedan Law, 19th Edn. by M. Hidaytullah Â Section 217; and AIR 1940 PC 116). If that is the position in

law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular

India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an essential part of the

practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited

by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition

by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the

same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of

worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger

national purpose keeping in view that such acquisition should not result in extinction of the right to practice the religion, if the significance of that place

be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to

worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part

of that right. â€œ

â€œA mosque is not an essential part of the practice of the religion of Islam and namaz(prayer) by Muslims can be offered anywhere, even in

open.â€

43. Dr. Dhavan submits that above observation in Para 82 of the Constitution Bench judgment in Ismail Faruquiâ€™s case is the reason for

reconsideration of the judgment. He submits that the above statements in paragraph 82 are wrong because it is wrong to say that

(vi) A mosque is not essential to Islam.

(vii) The essential practices doctrine does not protect places of worship other than those having particular significance.

44. Elaborating his submission, Dr. Dhavan relies on several judgments of this Court where what are the essential practice of a religion had been

elaborated and how the Court should determine the essential practice of a religion has been noticed. The submission is that above observations were

made by the Constitution Bench on its ipse dixit without consideration of any material due to which reason the statement is unsustainable.

45. Before we proceed to examine the nature and content of above statement, it is relevant to have an overview of the law laid down by this Court

with regard to essential practices of a religion. The locus classicus of the subject is Constitution Bench judgment of this Court in Commissioner, Hindu

Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282. The Mathadipati of Shirur Mutt filed a

writ petition in Madras High Court challenging various provisions of Madras Hindu Religious and Charitable Endowments Act, 1951. Challenge to the

Act was on various grounds including the ground that provisions of the Act violate the fundamental right guaranteed under Articles 25 and 26 of the

Constitution of India. The High Court had struck down various provisions of the Act against which appeal was filed by the Commissioner, Hindu

Religious Endowments, Madras. Justice B.K. Mukherjea speaking for the Constitution Bench held that it would not be correct to say that a religion is

nothing but a doctrine or belief. It was held that a religion may also lay down a code of ethical rules for its followers and it might prescribe rituals and

observances, ceremonies and modes of worship which are regarded as integral parts of religion. In Para 17, following was held:Â

â€œ17.....Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India

like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or

doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that

religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe

rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might

extend even to matters of food and dress.â€

46. Further, in Para 18, following was laid down:Â

18. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and

this is made clear by the use of the expression â€œpractice of religionâ€ in Article 25.....â€

47. The Court further held; what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion

itself. In Para 19, following has been laid down:Â

â€œ19. The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a

religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe

that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at

certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of

religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would

not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as

matters of religion within the meaning of Article 26(b).

What Article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution

except when they run counter to public order, health and morality but regulation of activities which are economic, commercial or political in their

character though they are associated with religious practices.....â€

48. Two other judgments were delivered in the same year, which had relied and referred to Madras judgment. In Ratilal Panachand Gandhi and

Others Vs. State of Bombay and Others, AIR 1954 SC 388, in paragraph Nos. 10 and 13 following was held:Â

â€œ10. Article 25 of the Constitution guarantees to every person and not merely to the citizens of India, the freedom of conscience and the right

freely to profess, practise and propagate religion. This is subject, in every case, to public order, health and morality. Further exceptions are engrafted

upon this right by clause (2) of the article. SubÂclause (a) of clause (2) saves the power of the State to make laws regulating or restricting any

economic, financial, political or other secular activity which may be associated with religious practice; and subÂclause (b) reserves the Stateâ€™s

power to make laws providing for social reform and social welfare even though they might interfere with religious practices.

Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such

religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned

by his religion and further to propagate his religious views for the edification of others.....

13. Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines.

Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular

manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of

money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of

religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the

trust estate.....â€

49. Another judgment, which followed the Shirur Mutt case was Sri Jagannath Ramanuj Das and Another Vs. State of Orissa and Another, AIR 1954

SC 400. The Constitution Bench in Sri Venkataramana Devaru and Others Vs. State of Mysore and Others, AIR 1958 SC 255 had occasion to

consider Articles 25 and 26 of the Constitution of India in context of Madras Temple Entry Authorisation Act, 1947 as amended in 1949. Referring to

Shirur Mutt case, following was stated in para 16(3):Â

â€œ16(3)....Now, the precise connotation of the expression ""matters of religion"" came up for consideration by this Court in The Commissioner, Hindu

Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (AIR 1954 SC 282), and it was held therein that it embraced

not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not merely its

Gnana but also its Bakti and Karma Kandas....â€

50. Another judgment, which needs to be noticed is Mohd. Hanif Quareshi and Others Vs. State of Bihar, AIR 1958 SC 731. A writ petition under

Article 32 was filed questioning the validity of three legislative enactments banning the slaughter of certain animals passed by the States of Bihar,

Uttar Pradesh and Madhya Pradesh respectively. One of the submissions raised by the petitioner was that banning of slaughter of cows infringes

fundamental right of petitioner to sacrifice the cow on BakraÂId. The Court proceeded to dwell with essential practice of the religion of Islam in

above context. The Court examined the material placed before it for determining the essential practice of the religion and made following observations

in paragraph 13:Â

â€œWhat then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam?

The materials before us are extremely meagre and it is surprising that on a matter of this description the allegations in the petition should be so vague.

In the Bihar Petition No. 58 of 1956 are set out the following bald allegations:

Xxxxxxxxxxxxxx

We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on

that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim

of the petitioners.â€

51. Next case to be considered is Sardar Syedna Taher Saifuddin Saheb Vs. State of Bombay, AIR 1962 SC 853.

The issue raised before this Court in the above case was regarding validity of law interfering with right of religious denomination to excommunicate its

members. Articles 25 and 26 came to be considered in the above context. In paragraph 34 of the judgment, referring to earlier decisions of this Court,

main principles underlying have been noticed, which is to the following effect:Â

â€œ34. The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in 1954 SCR 1005 : (AIR 1954 S.C. 282);

Ramanuj Das v. State of Orissa, 1954 SCR 1046 : (AIR 1954 SC 400); 1958 SCR 895 : (AIR 1958 S.C. 255); (Civil Appeal No. 272 of 1969 D/Â-

17Â3Â1961 : (AIR 1961 S.C. 1402) and several other cases and the main principles underlying these provisions have by these decisions been placed

beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in

pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of

religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the

doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.â€

52. Next judgment to be noticed is Constitution Bench judgment of Tikayat Shri Govindlalji Maharaj etc. Vs. State of Rajasthan and Others, AIR 1963

SC 1638. The validity of Nathdwara Temple Act, 1959 was challenged in the Rajasthan High Court. It was contended by Tilkayat that the idol of Shri

Shrinathji in the Nathdwara Temple and all the properties pertaining to it were his private properties and hence, the State Legislature was not

competent to pass the Act. It was also contended that if the temple was held to be a public temple, then the Act would be invalid because it

contravened the fundamental rights guaranteed to the denomination under Articles 25 and 26 of the Constitution. Gajendragadkar, J. speaking for the

Court in Paragraphs 58 and 59 laid down following:Â

â€œ58. In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is

regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of

a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is

an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion,

how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect

of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the

community decides which practice in an intergral part of its religion, because the community may speak with more than one voice and the formula

would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the

practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the

Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It

is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of Dungah Committee

Ajmer v. Syed Hussain Ali & Ors.18 and observed that in order that the practices in question should be treated as a part of religion they must be

regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of

religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26.

59. In this connection, it cannot be ignored that what is protected under Articles 25(1) and 26(b) respectively are the religious practices and the right to

manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and

absolutely secular in character, it cannot be urged that Article 25(1) or Article 26(b) has been contravened. The protection is given to the practice of

religion and to the denominationâ€™s right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an

individual citizen that the impugned statute contravenes his fundamental right to practise religion or a claim is made on behalf of the denomination that

the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice

in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion.

If the practice is a religious practice or the affairs are the affairs in matter of religion, then, of course, the right guaranteed by Article 25(1) and Article

26 (b) cannot be contravened.â€

53. The above decisions of this Court clearly lay down that the question as to whether particular religious practice is essential or integral part of the

religion is a question, which has to be considered by considering the doctrine, tenets and beliefs of the religion. What Dr. Dhavan contends is that

Constitution Bench in Ismail Faruquiâ€™s case without there being any consideration of essentiality of a religion have made the questionable

observations in paragraph 82 as noticed above.

54. We have to examine the observations made in paragraph 82 of the Constitution Bench judgment in the light of the above submission, law and the

precedents as noticed above. The statement â€œa mosque is not essential part of the practice of religionâ€¦..â€ is a statement which has been made

by the Constitution Bench in specific context and reference. The context for making the above observation was claim of immunity of a mosque from

acquisition. Whether every mosque is the essential part of the practice of religion of Islam, acquisition of which ipso facto may violate the rights under

Articles 25 and 26, was the question which had cropped up for consideration before the Constitution Bench. Thus, the statement that a mosque is not

an essential part of the practice of religion of Islam is in context of issue as to whether the mosque, which was acquired by Act, 1993 had immunity

from acquisition.

55. The above observation by the Constitution Bench has been made to emphasise that there is no immunity of the mosque from the acquisition. We

have noticed that Constitution Bench had held that while offer of prayer or worship is a religious practice, its offering at every location where such

prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that

religion so as to form an essential or integral part thereof. The above observation made in paragraph 78 has to be read along with observation made in

paragraph

82. What Court meant was that unless the place of offering of prayer has a particular significance so that any hindrance to worship may violate right

under Articles 25 and 26, any hindrance to offering of prayer at any place shall not affect right under Articles 25 and 26. The observation as made in

paragraph 82 as quoted above has to be understood with the further observation made in the same paragraph where this Court held:

â€œ82....Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose

keeping in view that such acquisition should not result in extinction of the right to practice the religion, if the significance of that place be such. Subject

to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any

and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right. â€œ

56. The Court held that if the place where offering of namaz is a place of particular significance, acquisition of which may lead to the extinction of the

right to practice of the religion, only in that condition the acquisition is not permissible and subject to this condition, the power of acquisition is available

for a mosque like any other place of worship of any religion. Thus, observation made in paragraph 82 that mosque is not an essential part of the

practice of the religion of Islam and namaz even in open can be made was made in reference to the argument of the petitioners regarding immunity of

mosque from acquisition.

57. The submission which was pressed before the Constitution Bench was that there is no power in the State to acquire any mosque, irrespective of

its significance to practice of the religion of Islam. The said contention has been noticed in paragraph 65 of the judgment as extracted above.

58. The sentence â€œA mosque is not essential part of the practice of the religion of Islam and namaz(prayer) by Muslims can be offered anywhere,

even in openâ€ is followed immediately by the next sentence that is â€œAccordingly, its acquisition is not prohibited by the provisions in the

Constitution of Indiaâ€ which makes it amply clear that the above sentence was confined to the question of immunity from acquisition of a mosque

which was canvassed before the Court. First sentence cannot be read divorced from the second sentence which immediately followed the first

sentence.

59. No arguments having been raised before the Constitution Bench that Ram Janam BhumiÂBabri Masjid is a mosque of a particular significance,

acquisition of which shall extinct the right of practice of the religion, the Court had come to the conclusion that by acquisition of mosque rights under

Articles 25 and 26 are not infringed. We conclude that observations as made by the Constitution Bench in paragraphs 78 and 82 which have been

questioned by the petitioners were observations made in reference to acquisition of place of worship and has to confine to the issue of acquisition of

place of worship only. The observation need not be read broadly to hold that a mosque can never be an essential part of the practice of the religion of

Islam.

Comparative significanceâ€ & â€œParticular significanceâ€.

60. Dr. Rajiv Dhavan submits that the Constitution Bench has entered into the comparative significance of both the places that is birth place of Ram

for Hindus and Ram Janam BhumiÂBabri Masjid for Muslims. He submits that India is a secular country and all religions have to be treated equal and

the Court by entering into comparative significance concept has lost sight of the secular principles which are embedded in the Constitution of India. It

is true that the Constitution Bench has used phrase â€œcomparative significanceâ€ but comparative significance of both the communities were noticed

only to highlight the significance of place which is claimed by both the parties and to emphasise that the impact of aquisition is equally on the right and

interest of the Hindu community as well as Muslim community. In paragraph 51 of the judgment following has been noticed:

â€œ51. It may also be mentioned that even as Ayodhya is said to be of particular significance to the Hindus as a place of pilgrimage because of the

ancient belief that Lord Rama was born there, the mosque was of significance for the Muslim community as an ancient mosque built by Mir Baqi in

1528 A.D. As a mosque, it was a religious place of worship by the Muslims. This indicates the comparative significance of the disputed site to the two

communities and also that the impact of acquisition is equally on the right and interest of the Hindu community. Mention of this aspect is made only in

the context of the argument that the statute as a whole, not merely Section 7 thereof, is antiÂsecular being slanted in favour of the Hindus and against

the Muslims. â€œ

61. Dr. Dhavan has also taken exception to the phrase 'particular significance' as is occurring in the Constitution Bench judgment. He submits that all

religions are equal and have to be equally respected by all including the State. All mosques, all churches and all temples are equally significant for the

communities practicing and professing such religions. The concept that some places are of particular significance is itself faulty. We have bestowed

our consideration to the above aspect of the matter. We have already noticed that the Constitution Bench held that acquisition is a sovereign or

prerogative power of the State to acquire property and all religious places, namely, church, mosque, temple etc. are liable to be acquired in exercise of

right of eminent domain of the State. The Constitution Bench also observed that acquisition of place of religious worship like church, mosque etc. per

se does not violate rights under Articles 25 and 26. The Court, however, has noticed one fetter on such acquisition. The Constitution Bench held that if

a particular place is of such significance for that religion that worship at such place is an essential religious practice and the extinction of such place

may breach their right of Article 25, the acquisition of such place is not permissible. A place of particular significance has been noticed by the

Constitution Bench in the above context. When acquisition of such place results in extinction of the right to practice the religion, there is violation of

Article 25, which was an exception laid by the Constitution Bench while laying down general proposition that acquisition of all places of worship is

permissible. Thus, no exception can be taken to the Constitution Bench having used expression 'place of particular significance' for carving out an

exception to the general power of acquisition of the State of religious places like church, mosque and temple or gurudwara. The above exception

carved out by the Constitution Bench is to protect the constitutional right guaranteed under Article 25.

'Particular significance' of place of birth of Lord Rama

62. Dr. Dhavan has taken exception to observation of Constitution Bench, where, place of birth of Lord Rama, has been held to be of particular

significance. He submits that the above observation was uncalled for since there cannot be any comparison between two religions. We have observed

above that phrase â€œparticular significanceâ€ was used by the Constitution Bench only in context of immunity from acquisition. What the Court held

was that if a religious place has a particular significance, the acquisition of it ipso facto violates the right of religion under Articles 25 and 26, hence the

said place of worship has immunity from acquisition. It is another matter that the place of birth of Lord Rama is referred as sacred place for Hindu

community, which has been pleaded throughout. In any view of the matter acquisition under Act, 1993 having been upheld, the use of expression

â€œparticular significanceâ€ has lost all its significance for decision of the suits and the appeals.

RESÂJUDICATA

63. Shri Parasaran submits that appellants are precluded from questioning the Ismail Faruquiâ€™s judgment. The petitioner in Ismail Faruquiâ€™s

case represented the right of the Muslim public, hence, all persons interested in such rights for the purposes of Section 11 be deemed to claim under

the persons so litigating and are barred by resÂjudicata in view of Explanation VI to Section 11, CPC. He further submits that judgment in Ismail

Faruquiâ€™s case is part of the judgment in the suit itself, in view of the fact that IA in suits were transferred and decided alongwith petitions under

Article 32. The appellants are thus clearly bound by the judgment in Ismail Faruquiâ€™s case.

64. Dr. Dhavan replying the submissions of Shri Parasaran submits that Ismail Faruquiâ€™s case was about a challenge to the Act,1993, the

Presidential reference and further as to whether in the light of Act, 1993 the suits abated due to Section 4(3) of the Act. The cases under appeal are

from suits where the issues are entirely different. The suits having never been transferred to be decided with Ismail Faruquiâ€™s case, the decision

rendered in Ismail Faruquiâ€™s case cannot be said to be part of the judgment in suits. He submits that the issues which were raised in Ismail

Faruquiâ€™s case were not the issues which are directly and substantially in issue in the suits. He further submits that res judicata is not attracted in

the present proceedings.

65. The principle of res judicata as contained in Section 11 of Civil Procedure Code as well as the general principles are well settled by several

judgments of this Court. For applicability of the principle of res judicata there are several essential conditions which need to be fulfilled. Shri

Parasaran, in support of his submission, states that the parties in Ismail Faruquiâ€™s case represented the interest of Muslim community and those

petitioners bonafidely litigated in respect of public rights, hence, all persons interested in such rights be deemed to claim under the person so lititgating

attracting the applicability of Explanation VI of Section 11, CPC. He placed reliance on judgment of this Court in Ahmed Adam Sait & others versus

Inayathullah Mekhri & others, 1964 (2) SCR 647. In the above case, in suit under Section 92, CPC, a scheme had already been framed by Court of

Competent Jurisdiction. Another suit was instituted under Section 92 of CPC praying for settling a scheme for proper administration of the Jumma

Masjid. The plea of res judicata was urged. Upholding the plea of res judicata, following was laid down:Â

â€œ... In assessing the validity of this argument, it is necessary to consider the basis of the decisions that a decree passed in a suit under s.92 binds all

parties. The basis of this view is that a suit under s.92 is a representative suit and is brought with the necessary sanction required by it on behalf of all

the beneficiaries interested in the Trust. The said section authorises two or more persons having an interest in the Trust to file a suit for claiming one

or more of the reliefs specified in clauses (a) to (h) of subÂsection (1) after consent in writing there prescribed has been obtained. Thus, when a suit

is brought under s.92, it is brought by two or more persons interested in the Trust who have taken upon themselves the responsibility of representing all

the beneficiaries of the Trust. In such a suit, though all the beneficiaries may not be expressly impleaded, the action is instituted on their behalf and

relief is claimed in a representative character. This position immediately attracts the provisions of explanation VI to s.11 of the Code. Explanation VI

provides that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons

interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It is clear that s.11 read with its

explanation VI leads to the result that a decree passed in a suit instituted by persons to which explanation VI applies will bar further claims by persons

interested in the same right in respect of which the prior suit had been instituted. Explanation VI thus illustrates one aspect of constructive res judicata.

Where a representative suit is brought under s.92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as

the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by res judicata from reagitating

the matters directly and substantially in issue in the said earlier suit.â€

66. Learned Counsel for both the parties have referred to and relied on Constitution Bench Judgment of this Court in Gulabchand Chhotalal Parikh

versus State of Gujarat, AIR 1965 SC 1153. Whether a decision of High Court on merits on certain matters after contest in a writ petition under

Article 226 of the Constitution operates as res judicata in regular suit with respect to the same matter between the same party was the issue

considered by this court. This Court after referring to almost all relevant judgments on the subjects laid down following in paragraphs 60 and 61:Â

â€œ60. As a result of the above discussion, we are of opinion that the provisions of S.11, C.P.C., are not exhaustive with respect to an earlier decision

operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of

res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their

case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter

formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subjectÂmatter. The nature

of the former proceeding is immaterial.

61. We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under Arts. 226 and 32 of the

Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give

limited effect to the principle of the finality of decisions after full contest. We therefore, hold that, on the general principle of res judicata, the decision

of the High Court on a writ petition under Art.226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit

between the same parties with respect to the same matter.â€

67. In Daryao and others versus State of U.P. & others, AIR 1961 SC 1457, this Court held that on general consideration of public policy there seems

to be no reason by which the rule of res judicata should be treated as not admissible or irrelevant in deciding writ petition filed under Article 32.

68. A Constitution Bench of this Court in Sheodan Singh versus Daryao Kunwar, AIR 1966 SC 1332, after elaborately considering the principles

underlined under Section 11 of the CPC, held that there are five essential conditions which must be satisfied before plea of res judicata can be

pressed. In paragraph 9 of the judgment, the conditions have been enumerated which are to the following effect:Â

â€œ9. A plain reading of S.11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely Â(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 in the formar

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; (III) The parties

must have litigated under the same title in the former suit; (IV) The court which decided the former suit must be a Court competent to try the

subsequent suit or the suit in which such issue is subsequently raised; and (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. Further Explanation I shows that it is not the date on which the suit is decided, so

that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals

dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied.â€

69. One of the submissions put on forefront by Dr. Dhavan is that issues which were involved in Ismail Faruquiâ€™s case are not issues which are

directly and substantially involved in the suits giving rise to these appeals, hence, the plea of res judicata should fail on this ground alone. One of the

conditions as enumerated by this Court in Sheodan Singhâ€™s case(supra) is that â€œthe matter directly and substantially in issue, in subsequent suit

must have been heard and finally decided by the Court in the first suit.â€ Dr. Dhavan elaborating the principle of directly and substatially in issue has

relied on judgment of this court in Sajjadanashin Sayed vs. Musa Dadabhai Ummer, (2000) 3 SCC 350. This Court while considering the condition of

â€œdirectly and substantially in issueâ€ in reference to Section 11 laid down following principles in paragraph 12, 13 & 14:Â

â€œ12. It will be noticed that the words used in Section 11 CPC are â€œdirectly and substantially in issueâ€. If the matter was in issue directly and

substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have

however held that if a matter was only â€œcollaterally or incidentallyâ€ in issue and decided in an earlier proceeding, the finding therein would not

ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

13. As pointed out in Halsburyâ€™s Law of England(Vol.16, para 1538, 4th edition), the fundamental rule is that a judgment is not conclusive if any

matter came collaterally in question[R.v.knaptoft Inhabitants; Heptulla Bros. v. Thakore WLR at p.297(PC)]; or if any matter was

incidentallycognizable [Sanders(otherwise Saunders)v. Sanders (otherwise Saunders) All ER at p.771].

14. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxillary issue and the latter the principal

issue. The expression â€œcollaterally or incidentallyâ€ in issue implies that there is another matter which is â€œdirectly and substantiallyâ€ in

issue(Mullaâ€™s Civil Procedure Code, 15th edn.,p.104).Difficulty in distinguishing whether a matter was directly in issue or collaterally or

incidentally in issue and tests laid down in various courts.

70. In Mahila Bajrangi(dead) through Lrs. Versus Badribai w/o Jagannath and another, (2003) 2 SCC 464, above principle was reiterated in following

words in paragraph 6 which is to the following effect:Â

â€œ6.....That apart, it is always the decision on an issue that has been directly and substantially in issue in the former suit between the same parties

which has been heard and finally decided that is considered to operate as res judicata and not merely any finding on every incident or collateral

question to arrive at such a decision that would constitute res judicata.â€

71. The impugned judgment has also categorically held that issues, which have been raised in the suits are not the issues, which can be said to have

been noticed and adjudicated by this court in Ismail Faruquiâ€™s case. The High Court has clearly held that the authority of the Superior Court laying

down a law is binding on the courts below provided a matter has been decided by the court. In Para 4054, following has been held:Â

â€œ4054. The mere fact that some facts have been noticed by the Government of India in White Paper and those facts have simply been noticed by

the Apex Court while referring to the facts mentioned in the White Paper, it cannot be said that those facts can be construed as if they have been

accepted by the Apex Court to be correct and stand adjudicated. The law of precedent is well known. The authority of the superior Court laying down

a law is binding on the Courts below provided a matter has been decided by the Court. An issue can be considered to be decided by a superior Court

when it was raised, argued and decided and only then it is a binding precedent for the other courts.â€

72. We have noticed above that the issues which were involved in Ismail Faruquiâ€™s case were validity of Act, 1993. One of the issues which was

taken up by Ismail Faruquiâ€™s case was as to whether by virtue of Section 4 subÂsection (3) of Act, 1993 suits pending in Allahabad High Court

stands abated. The Presidential Reference No.1 of 1993 was also heard along with the writ petitions and transferred cases. The issues which have

been framed in the suits giving rise to these appeals are different issues which cannot be said to be directly and substantially in issue in Ismail

Faruquiâ€™s case. NonÂfulfilment of this condition itself is sufficient to reject the plea of res judicata as raised by Shri Parasaran.

73. We may further notice submissions of Shri Parasaran that IA which was filed in the suit was also taken up along with the Ismail Faruquiâ€™s

case, hence, the judgment rendered in Ismail Faruquiâ€™s case shall be treated to be the part of judgment in the suits which preclude the appellant to

reagitate the same issue. For appreciating the above submissions we need to look into as to what matters were before this Court in Ismail

Faruquiâ€™s case.

74. The Act, 1993 was preceded by an ordinance which was issued on 07.01.1993. Section 4(3) of the Ordinance contemplated that suit, appeal or

other proceeding in respect of right, title or interest having to any property vested in Central Government under Section 3 shall abate. After the

ordinance plaintiff had applied for amendment of plaints challenging the legality and validity of the Ordinance. High Court in the suits framed the issue

namely â€œwhether the suits have abated or surviveâ€. Many writ petitions were also filed in the High Court challenging the Ordinance. Writ Petition

No.208 of 1993, Mohd. Aslam versus Union of India & Ors. was also filed under Article 32 in this Court. The Union of India had filed transfer

petitions under Article 139A for transferring of writ petitions filed in Allahabad High Court. By an Order dated 24.09.1993 passed in Union of India &

Others versus Dr. M.Ismail Faruqui and others, (1994) 1 SCC 265, this Court allowed the transfer application transferring five writ petitions to be

heard alongwith the Presidential Reference and writ petitions filed under Article 32. The preliminary issue which was framed by the High Court in

both the suits was stayed. It is useful to extract paragraph 4 and 7 of the order:Â

â€œ4. After the issuance of the Ordinance it appears that in the pending suits renumbered O.O.S. Nos. 3 and 4 of 1989 the plaintiffs applied for

amendment of the plaints challenging the legality and validity of the Ordinance by which the suits abated. The Full Bench of the High Court heard the

said applications and passed an order on March 15, 1993. By the said order the High Court framed the question â€˜whether the suit has abated or

survivesâ€™ and since the said issue necessarily touched upon the validity of the Ordinance, the Court ordered notice to the Attorney General and

listed the case for hearing of the issue on April 26, 1993. Although this order was passed in Suit O.O.S. No. 4 of 1989, it was also to govern the

amendment application in Suit O.O.S. No. 3 of 1989. It also appears that in the meantime as many as five Writ Petition Nos. 552, 925, 1351, 1532 and

1809 of 1993 came to be filed in the High Court challenging the validity of the Ordinance, now the Act. Besides these proceedings in the High Court a

Writ Petition No. 208 of 1993 also came to be filed in this Court under Article 32 of the Constitution challenging the legality and validity of the very

same law.

7. In the result, we allow this application by ordering the withdrawal of the five Writ Petition Nos. 552, 925, 1351, 1532 and 1809 of 1993 to this Court

to be heard along with the Presidential reference and Writ Petition No. 208 of 1993 pending in this Court. The hearing of the preliminary issue framed

by the High Court â€˜whether the suit has abated or survivesâ€™ in both the suits will stand stayed till further orders. In order to expedite the hearing

we direct as under:â€

75. From the above, it is clear that suits which were pending in the High Court were never transferred to be heard alongwith Presidential Reference

and writ petition filed under Article 32. This Court had only stayed the hearing of preliminary issue framed by the High Court as to whether the suits

have abated or survive. It is also relevant to notice that in Special Reference No. 1 of 1993, individual notices were issued to the parties to the

proceeding which stood abated by virtue of Section 4(3) of the Ordinance but mere issuance of notice when the suits were not transferred by this

Court to be heard alongwith Presidential Reference is not sufficient to conclude that the judgment of Ismail Faruqui should be treated as part of

judgment in suits. We, thus, also do not accept the submissions of Shri Parasaran that judgment of Ismail Faruqui is part of the judgment in the suit

itself. We, thus, do not find any substance in the above submissions raised by Shri Parasaran.

Reliance on the judgment of Ismail Faruqui

76. Dr. Dhavan submits that Ismail Faruquiâ€™s judgment goes to the core of the issues in these appeals and it permeates throughout the impugned

judgment in the suits. He submits that observations concerning comparative significance of the disputed site and the observation that a mosque is not

an essential part of the practice of the religion of Islam, have permeated the impugned judgment as the Hindu parties have successfully claimed that

the disputed site, which is allegedly the birthplace of Lord Ram is protected by Articles 25 and

26. Dr. Dhavan has referred to various observations of the HIGH Court in the impugned judgment to support his submission. He has also referred to

various grounds taken in the appeals filed against the judgment of the High Court.

77. Shri Parasaran and Shri Tushar Mehta refuting the above submission contend that even if the judgment of Ismail Faruqui has been referred to in

the submission of the counsel for the parties before the High Court and has been noticed in the impugned judgment, the impugned judgment in no way

is affected by the observations made in Ismail Faruquiâ€™s case.

78. It is relevant to notice some of the observations made by the High Court in the impugned judgment and certain grounds taken in some of the

appeals, which are before us. Justice S.U.Khan referring to Ismail Faruquiâ€™s case in his judgment made following observations:Â

â€œA mosque even if its construction remains as a mosque cannot be treated to be mosque if no prayers are offered in it and it is in the possession,

occupation and use of nonÂMuslims as held by the Privy Council in Mosque known as Masjid Shahid Ganj Vs. S.G.P.C. Amritsar, AIR 1940 P.C.

116 approved in Dr. M. Ismail Farooqi Vs. Union of India, 1994 (6) S.C.C. 360. Accordingly, unless it is proved that prayers were being offered in the

premises in dispute, or the Hindus had not exclusively possessed the constructed portion and inner court yard it cannot be held to be a mosque or a

continuing mosque uptil 22nd/ 23rd December, 1949. The case set up and the argument of some of the Hindu parties that till 1855 no prayers (Namaz)

were offered in the mosque is not at all acceptable. If a mosque is referred to as mosque in several gazetteers, books etc. and nothing else is said then

it means that it is a mosque in use as such. A defunct mosque where prayers are not at all offered, whenever mentioned as mosque, is bound to be

further qualified as defunct and not in use. If construction of mosque could not be obstructed, how offering of prayer in it could be obstructed.

Moreover, there was absolutely no sense in dividing the premises in dispute by railing in 1856 or 1857 if Muslims were not offering Namaz in the

constructed portion till then. In the riot of 1855 seventy Muslims were killed while taking shelter in the premises in dispute. After such a huge defeat

Namaz could not be for the first time started thereat.â€

79. Justice Sudhir Agarwal in his judgment has also noticed Ismail Faruquiâ€™s case. Dr. Dhavan referred to the submissions made by Shri Ravi

Shankar Prasad in Paras 3501 and 3502 of the impugned judgment:Â

â€œ3501. Sri Prasad argued that belief of Hindus that Lord Ram as incarnation of Vishnu having born at Ayodhya forms an integral part of Hindu

religion which cannot be denied to be practised, observed and performed by them and refers to Commissioner of Police and others v. Acharya

Jagadishwarananda Avadhuta and another, (2004) 12 SCC 770 (para 9) and Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi (supra). In

order to show what constitutes public order under Article 25 of the Constitution, he also placed reliance on Dalbir Singh and others v. State of Punjab,

AIR 1962 SC 1106 (para 8).

3502. Next he submits that applying the doctrine of Eminent Domain, the place in dispute, having special significance for Hindus, cannot be touched at

all either by any particular person or even by State and the provisions of even acquisition would not apply to it though with respect to the alleged

mosque, it has been already held and observed by the Apex Court that the disputed building could not be shown to be of any special significance to

Muslims. He refers to Dr. M. Ismail Faruqui and others v. Union of India and others, (1994) 6 SCC 360 (para 65, 72, 75 and 96); Acharya

Maharajshri Narendra Prasadji Anandprasadji Maharaj and others v. State of Gujarat and others, (1975) 1 SCC 11. The relief sought by the plaintiff

(SuitÂ4) is barred by Section 34 Specific Reliefs Act, 1963 and reliance is placed on Executive Committee of Vaish Degree College, Shamli and

others v. Lakshmi Narain and others, (1976) 2 SCC 58 (para 20 and 27); American Express Bank Ltd. v. Calcutta Steel Co. and others, (1993) 2 SCC

199 (pare 22).â€

80. Justice Sudhir Agarwal has noticed Ismail Faruquiâ€™s case in Para 2723 in following manner:Â

â€œ2723. In Ismail Farooqui (supra), Supreme Court has considered the plea of validity of acquisition of land under Land Acquisition Act that once a

waqf of mosque is created, the property vests in almighty and it always remain a waqf hence such a property cannot be acquired. While negativing

this plea, the Apex Court said that a plea in regard to general religious purposes cannot be said to be an integral part of religion which will deprive the

worshippers of the right of worship at any other place and therefore, such a property can be acquired by the State. However, the position would be

otherwise if the religious property would have been of special significance and cannot be one of several such kind of properties. It will be useful to

reproduce the relevant observation in this regard:

â€œ78. lt appears from various decisions rendered by this Court, referred later, that subject to the protection under Articles 25 and 26 of the

Constitution, places of religious worship like mosques, churches, temples etc. can be acquired under the Stateâ€™s sovereign power of acquisition.

Such acquisition per se does not violate either Article 25 or Article 26 of the Constitution. The decisions relating to taking over of the management

have no bearing on the sovereign power of the State to acquire property.â€

â€œ82. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an

essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral

part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion,

stand on a different footing and have to be treated differently and more reverentially.â€

81. There are references of judgments of Ismail Faruquiâ€™s case in various other places in the judgment of Justice Sudhir Agarwal like Para 5 in

the judgment where it has been observed that area of the land in dispute, which is to be adjudicated by this Court (High Court) is now restricted to

what has been referred to in Ismail Faruquiâ€™s case. Para 5 of the judgment is as follows:Â

â€œ5. In view of the decision of the Apex Court in Dr. M. Ismail Faruqui etc. v. Union of India and others, (1994) 6 SCC 360 : AIR 1995 SC 605, the

area of land in dispute which is to be adjudicated by this Court is now restricted to what has been referred to in para 4 above, i.e. main roofed

structure, the inner Courtyard and the outer Courtyard. In fact, the area under the roofed structure and Sahan, for the purpose of convenience shall be

referred hereinafter as â€œinner Courtyardâ€ and rest as the â€œouter Courtyardâ€. Broadly, the measurement of the disputed area is about 130X80

sq. feet.â€

82. Dr. Dhavan, in his written submissions, has mentioned details of several other places, where Justice Sudhir Agarwal has referred to Ismail

Faruquiâ€™s case in the impugned judgment.

83. Justice Dharam Veer Sharma, while giving a dissenting judgment has referred to submission of parties in Ismail Faruquiâ€™s case at Paras 3038

and 3039 of Volume III, following observations have been made while considering the Issue No.19(d):Â

â€œOn behalf of defendants it is contended that the building in question was not a mosque under the Islamic Law. It is not disputed that the structure

has already been demolished on 6.12.1992. According to Dr. M. Ismail Faruqui and others v. Union of India and others, (1994) 6 SCC 360, the

Honâ€™ble Apex Court held at para 70 that the sacred character of the mosque can also be lost. According to the tenets of Islam, minarets are

required to give Azan. There cannot be a public place of worship in mosque in which Provision of Azan is not available, hence the disputed structure

cannot be deemed to be a mosque.â€

84. Further, Justice Dharam Veer Sharma while noticing submission of Shri H.S. Jain has observed as follows:Â

â€œShri H.S. Jain, advocate relied upon para 78 of Ismail Faruquiâ€™s judgment to argue that since birth place of Lord Ram was considered as a

place of worship which was integral part of religious practice of Hindu from times immemorial. The deity stood on a different footing and had to be

treated reverentially.â€

85. Justice Sharma has observed that, in para 78 of the Ismail Faruquiâ€™s judgment, the Apex Court held that the place of birth has a particular

significance for Hindus and should be treated on a different footing. At page 3455, following observations have been made by Justice Sharma while

referring to Ismail Faruquiâ€™s case:Â

â€œHon'ble Apex Court upheld the validity of provisions of Acquisition of Certain Area at Ayodhya, 1993 in Dr. Ismail Faruqui case (supra) and held

that the Central Government can acquire any place of worship. At paraÂ78 Apex Court held that the place of birth has a particular significance for

Hindus and it should be treated on different footing, which reads as under:

â€œ78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an

essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral

part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion,

stand on a different footing and have to be treated differently and more reverentially.â€

On behalf of Hindus it is urged that the plaintiffs are not entitled for the relief claimed and as such the relief is barred by the provisions of Section 42

of the Specific Relief Act, 1877 which is at par with Section 34 of the Specific Relief Act,1963 on the ground that they have superior fundamental

rights. Contentions of Hindus are as under:

The Hindus have superior fundamental right than the Muslims under articles 25 & 26 of the Constitution of India for the reasons that performing

customary rituals and offering services worship to the lord of universe to acquire merit and to get salvation as such it is integral part of Hindu Dharma

& religion in view whereof it is humbly submitted that the instant suit is liable to be dismissed with exemplary cost:â€

86. Dr. Dhavan further submits that Justice Sharma has relied on submissions advanced by Shri P.N. Mishra, who had relied on paragraphs 77, 78, 80

and 82 of Ismail Faruquiâ€™s case. Dr. Dhavan has also referred to submission of Shri Ravi Shankar Prasad, which was noticed by Justice Sharma

that the right of Hindus to worship at the Rama Janam Bhumi, continuing since times immemorial was an integral part of their religious right and faith

and was also sanctified by judicial orders since 1949. This right has concretised and has to be protected.

87. Although Dr. Dhavan has referred to various passages from impugned judgment, where reference has been made of Ismail Faruquiâ€™s case but

main paragraphs where findings have been returned in reference to Ismail Faruquiâ€™s case are Paragraphs 4049 to 4054 (Vol. II) of judgment of

Justice Sudhir Agarwal, as has been pointed out by Shri Tushar Mehta, learned Additional Solicitor General.

88. Paragraphs 4049 and 4050 are to the following effect:Â

â€œ4049. Some of the learned counsel for the parties sought to rely on the Constitution Bench decision in Dr. M. Ismail Faruqui (supra) by reading

certain passages in a manner as if the Apex Court has expressed its opinion on certain aspects which are contentious issues before this Court in the

suits pending before us and said that the said observations are binding on this Court and, therefore, those aspects cannot be looked into.

4050. Sri Iyer, Senior Advocate sought to read the aforesaid judgement where the contents of the White Paper issued by the Central Government

quoted to suggest that these are the findings of the Government of India having taken note by the Apex Court and, therefore, should be treated to be

concluded. It is suggested that the issues, if any, in those matters should be deemed to be concluded by the judgement of the Apex Court.â€

89. The above submission was noted and expressly rejected by the High Court in Paragraph 4051, which is to the following effect:Â

â€œ4051. We, however, find no force in the submission. The Constitution Bench considered the validity of Ayodhya Act, 1993 whereby certain land

at Ayodhya including the land which was subject matter in these suits sought to be acquired by the Government of India. Further, the Apex Court was

considering the special reference made by the President of India on 7th January, 1993 under Article 143 of the Constitution seeking opinion of the

Apex Court on the following question: ""Whether a Hindu temple or any Hindu religious structure existing prior to the construction of Ram Janma

BhumiÂBabari Masjid (including the premises of the inner and outer courtyard of said structure) in the area on which the structure stood.

90. The High Court has clearly held that mentioning of certain facts in Ismail Faruquiâ€™s case does not mean that those facts stood adjudicated by

this Court for the reason that those facts were neither in issue before the Supreme Court nor had been adjudicated. The relevant discussion in the

above context is contained in Paragraph 4053, which is to the following effect:Â

â€œ4053. It is in this context that certain facts place on record are mentioned therein but it cannot be said that those facts stood adjudicated by the

Apex Court for the reason that those facts neither were in issue before the Court nor actually have been adjudicated. The only one question which has

specifically been considered and decided that was necessary in the light of challenge thrown to the power of acquisition of land over which a mosque

existing. It appears that proÂmosque parties raised a contention that a mosque cannot be acquired because of special status in Mohammedan Law

irrespective of its significance to practice of the religion of Islam. This argument in the context of acquisition of land was considered from para 68

(AIR) and onwards in the judgement. The Court has held that the right to worship of Muslims in a mosque and Hindus in a temple was recognised

only as a civil right in British India. Relying on the Full Bench decision of Lahore High Court in Mosque Known as Masjid Shahid Ganj Vs. Shiromani

Gurdwara Prabandhak Committee, Amritsar, AIR 1938 Lahore 369 where it was held that a mosque if adversely possessed by non muslims it will

loose its sacred character as mosque, the Apex Court held that, ""the view that once a consecrated mosque, it remains always a place of worship as a

mosque was not the Mahomedan Law of India as approved by Indian Courts."" The Lahore High Court also held that, ""a mosque in India was an

immovable property and the right of worship at a particular place is lost when the right to property on which it stands is lost by adverse possession.

Both these views were approved by the Privy Council and the Apex Court followed the said view. Besides, independently also the Court took the

view that the sovereign power of the State empowers it to acquire property. It is a right inherent in every sovereign to take an appropriate private

property belonging to individual citizens for public use. This right is described as eminent domain in American Law and is like the power of taxation of

offering of political necessity and is supposed to be based upon an implied reservation by the Government that private property acquired by its citizens

under its protection may be taken or its use can be controlled for public benefit irrespective of the wishes of the owner. The Court also considered the

right of worship whether a fundamental right enshrined under Article 25 or 26 of the Constitution and observed, ""while offer of prayer or worship is a

religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice

unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion

having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated

differently and more reverentially"". Ultimately the law has been laid down by the Constitution Bench by majority that under the Mohammedan Law

applicable in India title to a mosque can be lost by adverse possession. If that is the position in law, there can be no reason to hold that a mosque as a

unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of

the sovereign or prerogative power of the State. A mosque is not an essential part of the practice of religion of Islam and namaz (prayer) by Muslims

can be offered anywhere even in open. The Court also held that unless the right to worship at a particular place is itself an integral part of that right,

i.e., the place is of a particular significance, its alienability cannot be doubted. The Apex Court having answered the various questions on the validity of

the Act 1993 decline to answer the reference and returned the same as such as it is. The suits having been revived due to striking down of Section

4(3) of the Act, this Court trying the original suits has to decide the entire matter on merits unless it can be shown that a particular issue which is

engaging attention of this Court in trial of the original suit has already been raised, argued and decided by the Apex Court. The learned counsels for

the parties have not been able to show any such finding in respect to the matters which are involved in various issues before this Court and, therefore,

we are not in agreement with the counsels for the parties as argued otherwise.â€

91. The High Court has clearly held that an issue can be considered to be decided by a superior Court only when it was raised, argued and decided.

Following was held in Paragraph 4054:Â

â€œ4054. The mere fact that some facts have been noticed by the Government of India in White Paper and those facts have simply been noticed by

the Apex Court while referring to the facts mentioned in the White Paper, it cannot be said that those facts can be construed as if they have been

accepted by the Apex Court to be correct and stand adjudicated. The law of precedence is well known. The authority of the superior Court laying

down a law is binding on the Courts below provided a matter has been decided by the Court. An issue can be considered to be decided by a superior

Court when it was raised, argued and decided and only then it is a binding precedent for the other courts.â€

92. The above view expressed by majority judgment in appeal, thus, makes it clear that the High Court has held that judgment of Ismail Faruqui's case

does not decide any of the issues which are subject matter of the suit. Whatever observations have been made in the judgment of Ismail Faruqui are

not to govern the decision in suits and the suits were to be decided on the basis of the evidence on record. The questionable observations made in

Ismail Faruqui's case have to be treated as only observations and not for the purpose of deciding suits and these appeals, they are not to be treated as

governing factor or relevant. The said observations are to be understood solely as observation made in context of land acquisition and nothing more.

93. It is due to above finding of the High Court that in several appeals filed against impugned judgment by the plaintiff of Suit Nos.1 and 5 grounds

have been taken which grounds have been referred to and relied by Dr. Rajiv Dhavan in his submission as noted above. The grounds taken in the

appeal, to which exception is being taken by Dr. Dhavan are:

(i) Partition of the site would effectively extinguish the right of Hindus to worship at the site protected by Article 25 being a site which is integral and

essential part of Hindu religion;

(ii) The purported Muslim structure on the area was never pleaded to be an essential or integral part of the Islamic religion.

94. The above grounds are yet to be looked into and considered by this Court in these appeals.

95. We have already dealt with and noticed the extent and nature of the observations made by this Court in Paragraphs 78 and 82 of Ismail

Faruquiâ€™s case. The expression â€œparticular significanceâ€ and â€œcomparative significanceâ€ as occurring in the judgment in Ismail

Faruquiâ€™s case has also been noted and explained by us in foregoing paragraphs. The observations of this Court in Ismail Faruquiâ€™s case has

to be understood as above. The question as to whether in the impugned judgment, reliance on Ismail Faruquiâ€™s case affects the ultimate decision

of the High Court and needs any clarification or correction is a task, which we have to undertake with the assistance of learned counsel for the parties

in the present appeals. We, thus, conclude that reliance on the judgment of Ismail Faruqui by the High Court in the impugned judgment and reliance by

learned counsel for the appellants and taking grounds in these appeals on the strength of judgment of Ismail Faruquiâ€™s case are all questions, on

the merits of the appeals, which need to be addressed in these appeals. Thus, the above submission does not help the appellant in contending that

judgment of Ismail Faruquiâ€™s case needs reconsideration.

Additional grounds for reference to larger Bench

96. Shri Raju Ramachandran, learned senior counsel appearing for some of the parties has pressed for the reference to larger Bench for

reconsideration of Ismail Faruquiâ€™s case on some additional grounds in addition to what has been canvassed by Dr. Rajeev Dhavan. Shri Raju

Ramachandran submits that looking to the importance of the case the matter should be referred to the Constitution Bench for reconsideration of Ismail

Faruquiâ€™s judgment. He submits that there are various instances, where this court had made reference to larger Bench looking to the importance

of the matter. He submits that High Court vide its order dated 10.07.1989 had withdrawn the suits to be tried by the High Court by Full Bench looking

to the importance of the case. The case being very important and appeals having been filed by all the sides, the case is of such magnitude that it is

appropriate that matter may be referred to a Bench of a larger strength to consider the case. Shri Ramachandran has referred to and relied on several

judgments of this Court, which shall be noted by us hereinafter.

97. The submission of Shri Raju Ramachandran has been refuted by Shri K. Parasaran, learned senior counsel and Shri C.S. Vaidyanathan. They

submit that if there are constitutional principles involved, the matter can be referred to a larger bench, but present is not a case where any principle of

constitutional interpretation is involved, hence reference of the case to a larger bench needs to be refused. Shri Parasaran submits that present appeals

arise out of a suit where for deciding the issues in a suit, the evidence is to be appreciated, which need not be done by five judges. He submits that

five judges are to appreciate the evidence only in case of Presidential Election.

98. Before we enter into submission of learned counsel for the parties, the constitutional provision regarding reference of a case for hearing by the

Constitution Bench consisting of five judges need to be looked into. Article 145(3) of the Constitution provides that minimum number of judges, who

are to sit for purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution or for the purpose of

hearing any reference under article 143 shall be five. The proviso to Article 145(3) provides:Â

â€œProvided that, where the Court hearing an appeal under any of the provisions of this Chapter other than Article 132 consists of less than five

Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation

of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court

constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the

appeal in conformity with such opinionâ€

99. As per proviso, the reference to a bench of five judges can be made by judges sitting in lesser strength than five judges while hearing an appeal, on

fulfilment of following two conditions:Â

(i) The Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution;

(ii) The determination of which is necessary for the disposal of the appeal.

100. The proviso to Article 145(3) as noted above, thus, clearly indicate that on fulfilment of both the conditions as noticed above, a bench of smaller

strength than five judges can make a reference of a case to be heard by a Bench strength of five judges. This Court in Abdul Rahim Ismail C.

Rahimtoola Vs. State of Bombay, AIR 1959 SC 1315 had occasion to consider Article 145(3). In the above case, question pertaining to Article 19(1)

(d), (e) and subÂsection (5) of Article 19 came for consideration. A five Judge Bench in Ebrahim Vazir Mavat Vs. State of Bombay and others, AIR

1954 SC 229 had already held that requirement that an Indian citizen to produce a passport before entering into India is a proper restriction upon

entering India. Before two judge bench in Abdul Rahim Ismail (supra), challenge was made to Rule 3 of Passport Rules, 1950, which provided that no

person, proceeding from any place outside India, shall enter, or attempt to enter, India by water, land or air unless he is in possession of a valid

passport. Contention raised was that Section 3 of the Act and Rule 3 of the Rules in so far as it purported to relate to an Indian citizen is ultra vires the

Constitution, as they offended against the provisions of Articles 19(1)(d) and (e). This Court had held that issue having already been decided by a five

judges Bench no substantial question of law as to the interpretation of the Constitution arises. In Para 6, following was held:Â

â€œ6....It was, however, urged that as a constitutional question has been raised this matter cannot be decided by Judges less than five in number.

Therefore, the case should be referred to what is described as the Constitution Bench. Article 145(3) of the Constitution states that the minimum

number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution

or for the purpose of hearing any reference under Article 143 shall be five. It is clear that no substantial question of law as to the interpretation of the

Constitution arises in the present case as the very question raised has been decided by a Bench of this Court consisting of five Judges. As the question

raised before us has been already decided by this Court it cannot be said that any substantial question of law arises regarding the interpretation of the

Constitution.â€

101. In Bhagwan Swarup Lal Bishan Lal Vs. State of Maharashtra, AIR 1965 SC 682, this Court held that a substantial question of interpretation of a

provision of the Constitution cannot arise when the law on the subject has been finally and effectively decided by this Court. In Para 11, following has

been laid down:Â

â€œ11. ....Learned counsel suggests that the question raised involves the interpretation of a provision of the Constitution and therefore the appeal of

this accused will have to be referred to a Bench consisting of not less than 5 Judges. Under Article 145(3) of the Constitution only a case involving a

substantial question of law as to the interpretation of the Constitution shall be heard by a bench comprising not less than 5 Judges. This Court held in

State of Jammu and Kashmir v. Thakur Ganga Singh, AIR 1960 SC 356 that a substantial question of interpretation of a provision of the Constitution

cannot arise when the law on the subject has been finally and effectively decided by this Courtâ€¦â€¦â€¦â€¦â€¦â€¦â€¦

XXXXXXXXXXXXXXX

As the question raised has already been decided by this Court, what remains is only the application of the principle laid down to the facts of the

present case. We cannot, therefore, hold that the question raised involves a substantial question of law as to the interpretation of the Constitution

within the meaning Article 145(3) of the Constitution.â€

102. A three Judge Bench in Peopleâ€™s Union for Civil Liberties (PUCL) and Another Vs. Union of India and Another, (2003) 4 SCC 399 had also

occasion to consider Article 145(3). Submission was made that a substantial question of law as to the interpretation of the Constitution has arisen,

hence, the matter may be referred to a Bench consisting of Five Judges. Three Judge Bench notices that question raised having already been decided

in Union of India Vs. Association for Democratic Reforms and Another, (2002) 5 SCC 294 â€" (A Three Judge Bench Judgment), no other

substantial question of law regarding interpretation of Constitution survives, following was laid in Paragraph Nos. 28, 32 and 78:Â

â€œ28. Mr Arun Jaitley, learned Senior Counsel and Mr Kirit N. Raval, learned SolicitorÂ General submitted that the question involved in these

petitions is a substantial question of law as to the interpretation of the Constitution and, therefore, the matter may be referred to a Bench consisting of

five Judges.

32. From the judgment rendered by this Court in Assn. for Democratic Reforms1 it is apparent that no such contention was raised by the learned

SolicitorÂGeneral, who appeared in appeal filed on behalf of the Union of India that question involved in that matter was required to be decided by a

fiveÂ Judge Bench, as provided under Article 145(3) of the Constitution. The question raised before us has been finally decided and no other

substantial question of law regarding the interpretation of the Constitution survives. Hence, the matter is not required to be referred to a fiveÂJudge

Bench.

78. What emerges from the above discussion can be summarised thus:Â

Xxxxxxxxxxxxxx

(C) The judgment rendered by this Court in Assn. for Democratic Reforms has attained finality, therefore, there is no question of interpreting

constitutional provision which calls for reference under Article 145(3).â€

103. On question of reference to a larger bench, one more Constitution Bench judgment of this Court needs to be noticed, i.e. Central Board of

Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, (2005) 2 SCC 673. Constitution Bench of this Court while noticing

provisions of Supreme Court Rules, 1966 and Articles 141 and 145(2) noticed in Paragraph 12 of the judgment that the law laid down by this Court in

a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength. A bench of lesser quorum cannot

disagree or dissent from the view of the law laid down by a Bench of larger quorum. In case of doubt, the Bench of lesser quorum can do is to invite

the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision

has come for consideration. Two exceptions were also noticed to the above noted principles in Para 12(3), which is to the following effect:Â

â€œ(3) The above rules are subject to two exceptions: (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power

of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of

the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the

view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as

a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with

the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh and

Ors. and Hansoli Devi and Ors. (supra). â€œ

104. In the present case, since the submission of Shri Raju Ramachandran and Dr. Dhavan is for a reference to a Constitution Bench to reconsider

Ismail Faruquiâ€™s case, the question needs to be considered in view of the law laid down by this Court in reference to Article 145(3) as noticed

above. Both Shri Raju Ramachandran and Dr. Dhavan have placed heavy reliance on order passed by this Court on 26.03.2018 in W.P. (C) No. 222

of 2018 â€" Sameena Begum Vs. Union of India & Ors. Learned counsel submit that reference to the Constitution Bench has been made by a three

Judge Bench of this Court looking to the importance of the issue. A perusal of the order dated 26.03.2018 indicates that challenge in those writ

petitions pertains to the prevalent practice of polygamy including Nikah Halala; Nikah Mutah; and Nikah Misyar on the ground that they are

unconstitutional. Referring to a five Judges Constitution Bench judgment of this Court in the case of Shayara Bano etc. Vs. Union of India & Ors.

etc., (2017) 9 SCC 1, where this Court declared that practice of talaqÂeÂbiddat or triple talaq is not protected by Article 25 and it is not an essential

religious practice, it was contended that the five Judges Bench judgment in Shayara Bano (supra) has not dealt with the aspect of Nikah Halala; Nikah

Mutah; and Nikah Misyar. Thus, the question as to those religious practices are protected by Article 25 was very much involved in the Writ Petition

before three Judge Bench. The three Judge Bench also came to the conclusion that the above noted concepts have not been decided by the

Constitution Bench, hence the reference was made to the Constitution Bench, looking to the importance of the issue. The reference made by order

dated 26.03.2018 was in the facts as noted above and does not support the submissions made by Shri Raju Ramachandran in the present case.

105. Now, we come to those cases, which have been relied by Shri Raju Ramachandran in support of his submission.

106. The Judgment of this Court in Hyderabad Industries Ltd. And Another Vs. Union of India And Others, (1995) 5 SCC 338 was a case where a

three Judge Bench had doubted the correctness of an earlier judgment, i.e., Khandelwal Metal and Engineering Works and Another Vs. Union of

India and Others, (1985) 3 SCC 620. Similarly, S.S. Rathore Vs. State of M.P., 1988 (Supp.) SCC 522 was also a case where correctness of a five

Judges decision in Sita Ram Goel Vs. Municipal Board, Kanpur and Others, AIR 1958 SC 1036 was doubted. Further, judgments of this Court due to

difference of opinion in two judgments or conflict of opinion in judgments insisted reference, which are cases of this court in Ashwani Kumar and

Others Vs. State of Bihar and Others, (1996) 7 SCC 577 and Balasaria Construction (P) Ltd. Vs. Hanuman Seva Trust and Others, (2006) 5 SCC

662, hence these cases also does not support the submission. The judgment of this Court in Acchan Rizvi (I) Vs. State of U.P. and Others, (1994) 6

SCC 751 and Acchan Rizvi (II) Vs. State of U.P. and Others, (1994) 6 SCC 752 are the cases where interlocutory applications in contempt petitions

were filed and decided. No principle regarding reference was noticed, the said judgments have no relevance with regard to issue of reference of

larger Bench. Similarly, judgment of this Court in Mohd. Aslam alias Bhure Vs. Union of India and Others, (2003) 2 SCC 576 was a case where an

interim order was passed by this Court with regard to acquisition of 67.703 acres of land as was noticed in Ismail Faruquiâ€™s case. This judgment

has no relevance with regard to reference to larger Bench. Judgment of this Court in Mohd. Aslam alias Bhure Vs. Union of India and Others, (2003)

4 SCC 1, has been relied, which was a case decided by a five Judges Bench. A public interest writ petition under Article 32 was filed with regard to

manner in which the adjacent land, i.e., adjacent land to the disputed structure should be preserved till the final decision in the suit pending in the High

Court, which was revived consequent to judgment in Ismail Faruquiâ€™s case. The five Judges Bench noticed various observations and directions

passed in Ismail Faruquiâ€™s case and ultimately had directed that interim order passed by this Court on 13.03.2002 as modified on 14.03.2002 should

be operative until disposal of the suits in the High Court of Allahabad not only to maintain communal harmony but also to fulfil other objectives of the

Act. The Writ Petition was disposed of accordingly. No principle regarding reference to larger Bench was laid down in the said case, which may

support the submission of learned counsel.

107. A two Judge Bench judgment in Vinod Kumar Shantilal Gosalia Vs. Gangadhar and Others, 1980 (Supp.) SCC 340 has also been relied, in which

following order was passed:Â

â€œAfter having heard counsel for the parties we reserved judgment. On going through the judgment of the Judicial Commissioner and the documents

and after a careful consideration of the arguments of the parties, we find that these appeals involve a substantial question of law of great importance

which is likely to govern a number of cases arising out of mining leases in the present territory of Goa, Daman & Diu. We, therefore, direct that this

case be placed before a larger Bench. Let these appeals be placed before the Honâ€™ble the Chief Justice for orders.â€

108. The above order was passed by two Judge Bench, which had directed the appeal to be placed before Chief Justice for hearing the matter by a

larger Bench due to the fact that appeal involves a substantial question of law of great importance. The said matter cannot be read as an order

directing the matter to be placed before a Constitution Bench nor any proposition regarding reference to Constitution Bench is decipherable from the

above order, which may help the learned counsel. Another judgment, which was relied by Shri Ramachandran is an order passed by Justice E.S.

Venkatramiah â€" Vacation Judge in Ram Jethmalani Vs. Union of India, (1984) 3 SCC 696. The above order was passed in a Writ Petition

(Criminal). Issue in the above case involves release of Sikh leaders detained after Punjab action. One of the issues noticed in the order was that it

relates to personal liberty of a sizeable section of the community. Court was of the view that question involved are too large and complex for the

shoulders of a Single Judge. The Court opined that these and other cases of like nature should be heard by a seven Judges Bench of this Court. The

above order was passed in the peculiar circumstances as noticed in the judgment and no principle of law has been laid down in context of reference of

a case to a Constitution Bench. The above order was, thus, in peculiar facts of the case.

109. In Krishan Kumar Vs. Union of India and Others, (1989) 2 SCC 504, the Court noticed that on the issue, there are no decided cases of this

Court, hence the Court observed that in the above view, the matter should be referred to a larger Bench. That again was a judgment of two Judge

Bench and there was no direction that reference should be made to a larger Bench contemplated in the order, which might have been a Bench of

three Honâ€™ble Judges deciding the issue. In Union of India Vs. M. Gopalakrishnaiah, 1995 Supp. (4) SCC 81, an earlier Constitution Bench

judgment in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, 1991 Supp (1) SCC 600 was noticed and the question as to

whether the reasoning of the decision in the Delhi Transport Corporation (supra) and Central Inland Water Transport Corporation Limited and

Another Vs. Brojo Nath Ganguly and Another, (1986) 3 SCC 156, which applied to permanent employees can be extended to the Director on their

fixed tenure in the Scheme should be considered. Thus, whether the Constitution Bench Judgment applied in aforesaid case was the question referred,

which is again an order passed in the peculiar facts of the case and does not contain any ratio pertaining to reference to larger Bench.

110. Similarly, in Syndicate Bank Vs. Prabha D. Naik and Another, (2002) 10 SCC 686, a two Judge Bench made a reference to larger Bench to

consider the interpretation of Article 535 of the Portuguese Civil Code and applicability of the Limitation Act. The reference was not to a Constitution

Bench and was only to a larger Bench, which might be to a three Judge Bench. Similarly, in Charanjeet Singh Vs. Raveendra Kaur, (2008) 17 SCC

650 looking to the importance of the question, a two Judge Bench had made reference to a larger Bench. Two Judge Bench reference was not to a

Constitution Bench, hence, does not support the submission. To the similar effect is the judgment of this Court in Telecom Regulatory Authority of

India Vs. Bharat Sanchar Nigam Limited (2014) 3 SCC 304, where two Judge Bench has made a reference to a larger Bench. In Securities and

Exchange Board of India Vs. Sahara India Real Estate Corporation Limited and Others, (2014) 8 SCC 751, an earlier order passed by three Judge

Bench was sought to be enforced, hence reference was made to a Three Judge Bench, which again was not a case for reference to a Constitution

Bench of five Judges. Judgment of this Court in Rajeev Dhavan Vs. Gulshan Kumar Mahajan and Others, (2014) 12 SCC 618 was a case pertaining

to a contempt petition, which is not relevant for the present controversy. Last judgment relied by Shri Ramachandran is Vivek Narayan Sharma Vs.

Union of India, (2017) 1 SCC 388. The three Judge Bench was considering the issue of notification dated 08.11.2016 demonetizing currency notes of

Rs. 500/Â and Rs. 1000/Â. Various aspects of demonetization came for consideration in the writ petition filed under Article 32 and the transfer

petitions, where this Court noticed following in Paragraph 3:Â

3. Keeping in view the general public importance and the farÂreaching implications which the answers to the questions may have, we consider it

proper to direct that the matters be placed before the larger Bench of five Judges for an authoritative pronouncement. The Registry shall accordingly

place the papers before the Hon'ble the Chief Justice for constituting an appropriate Bench.â€

111. In the above background, the three Judge Bench has directed the matter to be placed before larger bench of five judges.

112. Present is a case where appeals have been filed against judgment dated 30.09.2010 of Allahabad High Court by which Four Original Suits, which

were transferred by the High Court to itself have been decided. Four Civil Suits were filed claiming title to the disputed structure. Parties lead

elaborate evidences running in several thousands pages. The Court, after marshalling the evidences before it has decided the Civil Suits giving rise to

these appeals. The issues, which have arisen in these appeals are no doubt important issues, which have to be heard and decided in these appeals.

Normally appeals arising out of suits are placed before a Bench of Two Judges but looking to the importance of the matter, the present appeals have

already been placed before three Judge Bench. For the aforesaid reasons, we do not agree with the submission of Shri Raju Ramachandran that these

appeals be referred to Constitution Bench of Five Judges to reconsider the Constitution Bench judgment in Ismail Faruquiâ€™s case.

113. Before we close we remind us as well as members of both the major communities of this country, Hindus and Muslims, the thoughtful message

given by Justice S.U. Khan in his judgment as well as the words of Justice J.S. Verma, speaking for majority in Ismail Faruquiâ€™s case. Justice

S.U. Khan made following appeal:

'Muslims must also ponder that at present the entire world wants to know the exact teaching of Islam in respect of relationship of Muslims with

others. HostilityÂpeaceÂ friendshipÂtoleranceÂopportunity to impress others with the MessageÂopportunity to strike wherever and whenever

possibleÂor what? In this regard Muslims in India enjoy a unique position. They have been rulers here, they have been ruled and now they are sharers

in power (of course junior partners). They are not in majority but they are also not negligible minority (Maximum member of Muslims are in huge

majority which makes them indifferent to the problem in question or in negligible minority which makes them redundant. Indian Muslims have also

inherited huge legacy of religious learning and knowledge. They are therefore in the best position to tell the world the correct position. Let them start

with their role in the resolution of the conflict at hand.â€

114. Justice J.S. Verma in paragraph 156 of the judgment expressed great hope into Hinduism which is a tolerant faith. In paragraph 156 it was

observed:

156.Before we pass final orders, some observations of a general nature appear to be in order. Hinduism is a tolerant faith. It is that tolerance that has

enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land. We have no doubt that

the moderate Hindu has little taste for the tearing down of the place of worship of another to replace it with a temple. It is our fervent hope that that

moderate opinion shall find general expression and that communal brotherhood shall bring to the dispute at Ayodhya an amicable solution long before

the courts resolve it.â€

115. We are also reminded of rich culture and heritage of this ancient country which has always been a matter of great learning and inspiration for the

whole world.

116. The great King Asoka in 245 B.C. (Before Christ), had given several messages to the world which are engraved in rock edicts which shows

reverence towards faith of others. The Twelfth Rock Edict of the great King Asoka stated:

'The King, beloved of the Gods, honours every form of religious faith, but considers no gift or honour so much as the increase of the substance of

religion; whereof this is the root, to reverence one's own faith and never to revile that of others. Whoever acts differently injures his own religion while

he wrong's another's.' 'The texts of all forms of religion shall be followed under my protection.'â€œ

117. Dr. S. Radhakrishnan, most Learned and respected former President of India, in his celebrated book â€œThe Hindu View of Lifeâ€ while

dealing with the subject of â€œconflict of religionâ€ has expressed great hope with Hindu view of life. Dr. Radhakrishnan in prophetic words states:

â€œThat the Hindu solution of the problem of the conflict of religions is likely to be accepted in the future seems to me to be fairly certain. The spirit

of democracy with its immense faith in the freedom to choose one's ends and direct one's course in the effort to realize them makes for it. Nothing is

good which is not selfÂchosen; no determination is valuable which is not selfÂ determination. The different religions are slowly learning to hold out

hands of friendship to each other in every part of the world. The parliaments of religions and conferences and congresses of liberal thinkers of all

creeds promote mutual understanding and harmony. The study of comparative religion is developing a fairer attitude to other religions. It is impressing

onus the fundamental unity of all religions by and the need of the hour determine the emphasis in each religion. We are learning to think clearly about

the interÂrelations of religions. We tend to look upon different religions not as incompatibles but as complementaries, and so indispensable to each

other for the realization of the common end. Closer contact with other religions has dispelled the belief that only this or that religion has produced men

of courage and patience, selfÂdenying love and creative energy. Every great religion has cured its followers of the swell of passion, the thrust of

desire and the blindness of temper. The crudest religion seems to have its place in the cosmic scheme, for gorgeous flowers justify the muddy roots

from which they spring.â€

118. We are confident that observations made by Justice S.U. Khan of Allahabad High Court as quoted above as well as observations of Justice J.S.

Verma made in paragraph 156 of the judgment are observations which shall guide both the communities in their thought, deed and action.

119. To conclude, we again make it clear that questionable observations made in Ismail Faruqui's case as noted above were made in context of land

acquisition.

Those observations were neither relevant for deciding the suits nor relevant for deciding these appeals.

120. In view of our foregoing discussions, we are of the considered opinion that no case has been made out to refer the Constitution Bench judgment

of this Court in Ismail Faruqui case (supra) for reconsideration.

121. We record our appreciation to the valuable assistance rendered by the learned counsel for both the parties, especially Shri Ejaz Maqbool and

P.V. Yogeswaran who have rendered great assistance to the Court in compiling various volumes in orderly manner which had been of great help to

the Court, both, in hearing and deciding the issue.

122. The appeals which are awaiting consideration by this Court for quite a long period, be now listed in week commencing 29th October, 2018 for

hearing.

S.Abdul Nazeer, J

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

questionable observations made in paragraph 82 of the judgment in Dr. M. Ismail Faruqui and Ors. v. Union of India and Ors. (1994) 6 SCC 360 (for

short 'Ismail Faruqui') are not relevant for deciding these appeals. Therefore, His Lordship has concluded that no case has been made out seeking

reference of these appeals to a Constitution Bench of this Court. I am unable to accept this view expressed by my learned Brother. However, I am in

respectful agreement with his opinion on the question of res judicata contained in paragraphs 63 to 75 of the Judgment and have restricted this

judgment to the other issues.

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

them. Therefore, I have stated only certain relevant facts.

3. In Ismail Faruqui, the Court started by elucidating the background of the case leading to the Acquisition of Certain Area at Ayodhya Act, 1993 (No.

33 of 1993) (for short '1993 Act') and the reasons for making Special Reference to this Court by the President of India in exercise of his power in

clause (1) of Article 143 of the Constitution of India. Herein the Special Reference mentioned, had the following question for consideration and

opinion:

Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the

premises of the inner and outer courtyards of such structure) in the area on which the structure stood?

4. After narrating the facts, the Court went on to examine the constitutional validity of the 1993 Act. On this issue, the Court concluded that the

Parliament has the legislative competence to enact the said legislation and except for Section 4(3), the entire 1993 Act is constitutionally valid. While

deciding so, the Court in paragraph 51 went on to discuss the ""comparative significance"" of the disputed site to the two communities. The following is

reproduced as under:

51. It may also be mentioned that even as Ayodhya is said to be of particular significance to the Hindus as a place of pilgrimage because of the

ancient belief that Lord Rama was born there, the mosque was of significance for the Muslim community as an ancient mosque built by Mir Baqi in

1528 AD. As a mosque, it was a religious place of worship by the Muslims. This indicates the comparative significance of the disputed site to the two

communities and also that the impact of acquisition is equally on the right and interest of the Hindu community. Mention of this aspect is made only in

the context of the argument that the statute as a whole, not merely Section 7 thereof, is anti-secular being slanted in favour of the Hindus and against

the Muslims.

5. After the aforementioned conclusion, in paragraphs 65 to 82 the Court examined the question as to whether a mosque is immune from acquisition.

Among these paragraphs, the observations in paragraphs 77, 78 and 80 are important for the matter in hand and are reproduced as under:-

77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess

and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property.

Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per

se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the

Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential

and integral part of practice of that religion.

78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential

or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part

thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on

a different footing and have to be treated differently and more reverentially.

80. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such

a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any

person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the

namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the

provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that

property.

(Emphasis supplied)

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

82. The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse

possession (See Mulla's Principles of Mahomedan Law, 19th Edn., by M. Hidayatullah - Section 217; and Shahid Ganj v. Shiromani Gurdwara [AIR

1940 PC 116, 121]. If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the

places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State.

A mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open.

Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country

for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular

ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is

neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in

unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to

practise the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other

place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to

worship at a particular place is itself an integral part of that right.

(Emphasis supplied)

7. Dr. Rajeev Dhavan, learned senior counsel, submits that the observations made in the above mentioned paragraph, reading ""A mosque is not an

essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open."" is contrary to law and

the Court was obliged to examine the faith to make this statement. He further contends that the observations on the concepts of particular significance

and comparative significance are without foundation. Moreover, he contends that what constitutes the essential part of a religion is primarily to be

ascertained with reference to the doctrine of that religion itself as has been done by the Seven-Judge Constitution Bench of this Court in, the

Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005 (for short 'Shirur Mutt').

It has also been submitted that the broad test of ""essentiality"" in Shirur Mutt cannot be cut down by later Five and Two Judges' decisions. ""Integral"" is

interchangeable with ""essential"". The latter cannot be short circuited by the use of the former. This may lie at the root of many mal-understandings

and needs to be clarified. Further, it is precisely this error of integrality that Ismail Faruqui uses when it speaks of ""particular significance"". He also

submits that the test used in paragraph 78 of Ismail Faruqui was essential and integral even though the word ""or"" was used. The Court has failed to

examine the tenets of faith and proceeded in its own intuitive understanding to make ipse dixit observations. Learned senior counsel has also relied on

certain decisions of this Court in support of his contentions. Ismail Faruqui being devoid of any examination on this issue, the matter needs to go to a

larger Bench. Dr. Dhavan further submits that the impugned judgment was affected by the questionable observations in Ismail Faruqui. He has taken

us through various paragraphs in the impugned judgment in this regard. Dr. Dhavan has also referred to various observations made in the impugned

judgment to support his submission that Ismail Faruqui has influenced the said judgment.

8. On the other hand, Shri Parasaran, learned senior counsel submits that the questionable observations in Ismail Faruqui that a mosque not being an

essential part of the practice of Islam have to be read in the context of the validity of the acquisition of the suit property under the 1993 Act. He

submits that this Court has not ruled that offering Namaz by Muslims is not an essential religious practice. It only ruled that right to offer Namaz at

every mosque that exists is not essential religious practice. But if a place of worship of any religion has a particular significance for that religion,

enough to make an essential or integral part of the religion, then it would stand on a different footing and would have to be treated differently and more

reverentially. It is argued that the fundamental right of Muslim community under Article 25, to offer namaz is not affected in the present case as the

Babri Masjid was not a mosque with particular significance for that religion.

9. We have also heard S/Shri C.S. Vaidyanathan, Raju Ramachandran, S.K. Jain, learned senior counsel and Shri Tushar Mehta, learned Additional

Solicitor General and Shri P.N. Mishra, learned advocate.

10. Learned counsel for the parties have also produced Islamic religious texts on mosque, relevant excerpts of the holy Quran and illuminating

discourses on the holy Quran in support of their respective contentions on whether a mosque is an essential part of the practice of the religion of

Islam.

11. It is evident from Ismail Faruqui that the principal submission of the petitioners was that mosque cannot be acquired because of a special status in

Mahomedan Law. The Constitution Bench has discussed this aspect under a separate heading ""Mosque â€" Immunity from Acquisition"" from

paragraph 65 of the judgment. Specifically in paragraph 74, the Court observed that subject to protection under Articles 25 and 26 of the Constitution,

places of religious worship, like mosques, churches, temples, etc. can be acquired under the State's sovereign power of acquisition. Such acquisition

per se does not violate either Article 25 or Article 26 of the Constitution. Further, the Court in paragraph 77 noted that Article 25 does not contain any

reference to property unlike Article 26 of the Constitution. The right to practice, profess and propagate religion guaranteed under Article 25 of the

Constitution does not necessarily include right to acquire or own or possess property. Similarly, this right does not extend to the right of worship at any

and every place of worship so that any hindrance to worship at a place per se may infringe the religious freedom guaranteed under Articles 25 and 26

of the Constitution. Additionally, in paragraph 78, it noted that places of worship of any religion having particular significance for that religion, to make

it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially. While summarizing

the position, in paragraph 82, the Court has observed that a mosque is not an essential part of practice of religion of Islam and namaz by Muslims can

be offered anywhere even in open.

12. What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrine, tenets and beliefs of that religion itself.

This has been laid down at page 1025 in Shirur Mutt :

â€¦â€¦..The learned Attorney-General lays stress upon clause (2)(a) of the article and his contention is that all secular activities, which may be

associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is

primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that

offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain

periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion

and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not

make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters

of religion within the meaning of Article 26(b). What Article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the

freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which

are economic, commercial or political in their character though they are associated with religious practices.

(Emphasis supplied)

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

Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and

ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in

such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of

property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent

legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and

ceremonies.

(Emphasis supplied)

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

It may be noted that 'religion' is not necessarily theistic and in fact there are well known religions in India like Buddhism and Jainism which do not

believe in the existence of God or of any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs and doctrines which are

regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been

suggested by one of the learned Judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious

belief.

xxx xxx xxx

â€¦.. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to

restrict or prohibit them in any manner they like under the guise of administering the trust estate.

(Emphasis supplied)

15. In Sri Venkataramana Devaru and Ors. v. The State of Mysore and Ors. 1958 SCR 895, a Constitution Bench of this Court had the opportunity to

consider Articles 25 and 26 of the Constitution of India in the context of Madras Temple Entry Authorisation Act, 1947 as amended in 1949. After

referring to Shirur Mutt, this Court has held as under:

16(3)â€¦. Now, the precise connotation of the expression â€œmatters of religionâ€ came up for consideration by this Court in The Commissioner,

Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [(1954) SCR 1005] and it was held therein that it

embraced not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not

merely its Gnana but also its Bhakti and Karma Kandas. â€¦.

16. In The Durgah Committee, Ajmer and Anr. v. Syed Hussain Ali and Ors. (1962) 1 SCR 383, a Constitution Bench of this Court, after considering

the historical background of the dispute, has held thus:-

Having thus reviewed broadly the genesis of the shrine, its growth and the story of its endowments and their management, it may now be relevant to

enquire what is the nature of the tenets and beliefs to which Soofism subscribes. Such an enquiry would serve to assist us in determining whether the

Chishtia sect can be regarded as a religious denomination or a section thereof within Art 26.

(Emphasis supplied)

17. In Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay 1962 Supp (2) SCR 496, this Court was considering the validity of the law

interfering with the right of religious denominations to ex-communicate its members. In this context Articles 25 and 26 came to be considered. After

referring to the various decisions a Constitution Bench of this Court has held as under:-

The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments

Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt; Mahant Jagannath Ramanuj Das v. The State of Orissa; Sri Venkatamana Devaru v.

The State of Mysore; Durgah Committee; Ajmer v. Syed Hussain Ali and several other cases and the main principles underlying these provisions have

by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they

extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship

which are integral parts of religion.

The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine

of a particular religion and include practices which are regarded by the community as a part of its religion.

(Emphasis supplied)

18. In Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors. (1964) 1 SCR 561, a Constitution Bench of this Court was considering the

validity of Nathdwara Temple Act, 1959 (No. XIII of 1959). The same was challenged on behalf of the denomination of followers of Vallabha. The

case originally involved challenge to the Nathdwara Ordinance, 1959 (No. II of 1959) which was issued on February 6, 1959. Subsequently, this

Ordinance was repealed by the Act and the petitioner was allowed to amend his petition. It was contended that if the temple was held to be a public

temple then the Act is to be invalid because it contravenes the fundamental rights guaranteed to the denomination under Articles 25 and 26 of the

Constitution. After considering the rival contentions, the Court has held as under:

In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is

regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of

a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is

an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion,

how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect

of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the

community decides which practice in an integral part of its religion, because the community may speak with more than one voice and the formula

would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the

practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the

Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It

is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of Durgah Committee

Ajmer v. Syed Hussain Ali [(1962) 1 SCR 383 at p. 411] and observed that in order that the practices in question should be treated as a part of

religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential

or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the

meaning of Article 25(1).

(Emphasis supplied)

19. It is clear from the aforesaid decisions that the question as to whether a particular religious practice is an essential or integral part of the religion is

a question which is to be considered by considering the doctrine, tenets and beliefs of the religion. It is also clear that the examination of what

constitutes an essential practice requires detailed examination as reflected in the aforesaid judgments.

20. At this juncture, it is also pertinent to note the observations in Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors. v. State of

U.P. and Ors. (1997) 4 SCC 606, at paragraph 28, where it is stated:

â€¦.The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular

matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are

considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in

character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that

it is an integral or essential part of the religion, Article 25 accords protection to itâ€¦.

(Emphasis supplied)

21. As mentioned above, parties have produced various texts in Islam in support of their respective contentions. For the present, we are concerned

with the approach of the Court in concluding questionable observations without examining the doctrine, tenets and beliefs of the religion. The

conclusion in paragraph 82 of Ismail Faruqui that ""A mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by

Muslims can be offered anywhere, even in open"" has been arrived at without undertaking comprehensive examination.

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

impugned judgment shows that learned advocates appearing for the parties have repeatedly quoted various paragraphs of Ismail Faruqui while arguing

the case and have also placed strong reliance on the questionable observations made in Ismail Faruqui.

23. A few paragraphs mentioned at page Nos. 3038-3039, 3061, 3392, 3429 and 3439 of the impugned judgment delivered by Justice D.V Sharma

wherein Ismail Faruqui is quoted have been reproduced as under:

ISSUE NO. 19 (d): Whether the building in question could not be a mosque under the Islamic Law in view of the admitted position that it did not have

minarets?

FINDINGS:

On behalf of defendants it is contended that the building in question was not a mosque under the Islamic Law. It is not disputed that the structure has

already been demolished on 6.12.1992. According to Dr. M. Ismail Faruqui and others v. Union of India and others, case, 1994 (6) SCC 360, the

Hon'ble Apex Court held at para 70 that the sacred character of the mosque can also be lost. According to the tenets of Islam, minarets are required

to give Azan. There cannot be a public place of worship in mosque in which Provision of Azan is not available, hence the disputed structure cannot be

deemed to be a mosque.

According to Islamic tenets, there cannot be a mosque without place of Wazoo andsurrounded by a graveyard on three sides. Thus, in view of the

above discussions, there is a strong circumstance that without any minaret there cannot be any mosque. Issue No. 19(d) is decided accordingly,

against the plaintiffs and in favour of the defendants.

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

Defendants further claim that the property in suit was not in exclusive possession of Muslims right from 1858. It is further submitted that in view of

the possession of Hindus from 1858 and onwards which is evident from Ext. 15, 16, 18, 19, 20, 27 and 31, the outer Courtyard was exclusively in

possession of Hindus and the inner Courtyard was not exclusively in possession of Muslims but also in joint possession of Hindus and Muslims till

1934. Muslims were dispossessed from the inner Courtyard also in 1934 and plaintiffs admit that Muslims were dispossessed on 22/23December 1949

from the inner Courtyard. Thus, on the basis of Islamic tenets the Muslims claim that the property shall be construed as a Mosque. In this reference

the controversy has already been set at rest by the Privy Council in the decision of Masjid Shahid Ganj v. Shiromani Gurudwara Prabandhak

Committee, Amritsar, AIR 1940 PC 116. The aforesaid view has been approved in Dr. M. Ismail Faruqui v. Union Of India, 1994 (6) SCC 360, Para

70 of the ruling is relevant which reads as underâ€¦â€¦

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

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

â€œWhile offer of prayer or worship is are religious practice, its offering at every location where such prayers can be offered would not be an

essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral

part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion,

stand on a different footing and have to be treated differently and move reverentially.

Sri H.S. Jain, Advocate has further argued that since birth place of Lord Ram was considered as a place of worship which was integral part of

religious practice of Hindu from times immemorial. It is deity and it stands on a different footing and have to be treated reverentially. Sri Jain has

further urged that in view of the constitutional mandate as provided under Article 25 of the Constitution this place which was all the time being

worshipped has be treated by this Court as a place of worship because of the belief of the Hindu based on religious book and religious practice to be

birth place of Lord Ram as the temple was constructed in the 12th century. It is expedient to say that prior to 12th century there is evidence that

earlier temples were also constructed at the site. Thus, according to Sri H.S. Jain, Advocate there is overwhelming evidence to establish the site of

Ram Janambhumi and the Court has to recognize the same. Thus, the suit of the plaintiffs which causes hindrance for worship of Hindu is liable to be

dismissed on this count as no relief can be granted under Section 42 of the Specific Relief Act, 1877, now Section 34 of the Specific Relief Act, 1963.

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

LORD RAM AS THE AVATAR OF VISHNU HAVING BEEN BORN AT AYODHYA AT THE JANMASTHAN IS ADMITTEDLY THE

CORE PART OF HINDU BELIEF AND FAITH WHICH IS IN EXISTENCE AND PRACTICED FOR THE LAST THOUSANDS OF

YEARS. THE HINDU SCRIPTURES ALSOS SANCTIFY IT. ARTICLE 25 OF THE CONSTITUTION BEING A FUNDAMENTAL RIGHT

ENSUES ITS PRESERVATION AND NO RELIEF CAN BE TAKEN BY THE COURT WHICH SEEKS TO RESTRICT OR ALTOGETHER

EXTINGUISH THIS RIGHT.

The fact that Ram Janambhumi is an integral part of Hindu Religion and the right to worship there is a fundamental right of the Hindu religion and can

be enforced through a suit can be clearly made out through a number of decisions of the Hon'ble Supreme Court.

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

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

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

It is well-known that the Constitution of India was enacted, i.e. given to ourselves, w.e.f. 26th January, 1950. Before it, the right of Hindus to worship

was duly sanctified and recognized by judicial orders.

In fact, the Supreme Court records in the Ismail Faruqui case above the contention in paragraph 1.2 of the White Paper of the Government of India as

recorded in Paragraph 9, Page 380, of the said judgment. It reads as follows: ""Interim orders in these civil suits restrained the parties from removing

the idols or interfering with their worship. In effect, therefore, from December 1949 till 6.12.1992 the structure had not been used as a mosque.

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

1961.

Therefore, the right of the Hindus to worship at the Rama Janma Bhumi, continuing since times immemorial as an integral part of their religious right

and faith was also sanctified by judicial orders from 1949 continuously. This right has concretised and remains an integral part of Hindu religion and

has to be protected.

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

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

judgment, which is as under:

3501. Sri Prasad argued that belief of Hindus that Lord Ram as incarnation of Vishnu having born at Ayodhya forms an integral part of Hindu religion

which cannot be denied to be practised, observed and performed by them and refers to Commissioner of Police & others v. Acharya

Jagadishwarananda Avadhuta& another, (2004) 12 SCC 770 (para 9) and Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi (supra). In

order to show what constitutes public order under Article 25 of the Constitution, he also placed reliance on Dalbir Singh & others v. State of Punjab,

AIR 1962 SC 1106 (para 8).

3502. Next he submits that applying the doctrine of Eminent Domain, the place in dispute, having special significance for Hindus, cannot be touched at

all either by any particular person or even by State and the provisions of even acquisition would not apply to it though with respect to the alleged

mosque, it has been already held and observed by the Apex Court that the disputed building could not be shown to be of any special significance to

Muslims. He refers to Dr. M. Ismail Faruqui and others v. Union of India & others, (1994) 6 SCC 360 (para 65, 72, 75 and 96); Acharya Maharajshri

Narendra Prasadji Anand prasadji Maharaj and others v. State of Gujarat & others, (1975) 1 SCC 11. The relief sought by the plaintiff (Suit-4) is

barred by Section 34 Specific Reliefs Act, 1963 and reliance is placed on Executive Committee of Vaish Degree College, Shamli and others v.

Lakshmi Narain and others, (1976) 2 SCC 58 (para 20 and 27); American Express Bank Ltd. v. Calcutta Steel Co. and others, (1993) 2 SCC

199(para 22).

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

2722. The Fourth angle: It is a deity which has filed the present suit for enforcement of its rights. The religious endowment in the case in hand so far

as Hindus are concerned, as they have pleaded in general, is a place of a peculiar and unique significance for them and there cannot be any other

place like this. In case this place is allowed to extinguish/extinct by application of a provision of statutes, may be of limitation or otherwise, the

fundamental right of practicing religion shall stand denied to the Hindus permanently since the very endowment or the place of religion will disappear

for all times to come and this kind of place cannot be created elsewhere.

2723. In Ismail Farooqui (supra), Supreme Court has considered the plea of validity of acquisition of land under Land Acquisition Act that once a waqf

of mosque is created, the property vests in almighty and it always remain a waqf hence such a property cannot be acquired. While negativing this plea,

the Apex Court said that a plea in regard to general religious purposes cannot be said to be an integral part of religion which will deprive the

worshippers of the right of worship at any other place and therefore, such a property can be acquired by the State. However, the position would be

otherwise if the religious property would have been of special significance and cannot be one of several such kind of properties. It will be useful to

reproduce the relevant observation in this regard:

78. It appears from various decisions rendered by this Court, referred later, that subject to the protection under Articles 25 and 26 of the Constitution,

places of religious worship like mosques, churches, temples etc. can be acquired under the State's sovereign power of acquisition. Such acquisition per

se does not violate either Article 25 or Article 26 of the Constitution. The decisions relating to taking over of the management have no bearing on the

sovereign power of the State to acquire property.

82. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential

or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part

thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on

a different footing and have to be treated differently and more reverentially.

2724. The above observations show if the religious endowment is of such nature, which is of specific significance or peculiar in nature, could not have

been found elsewhere, the acquisition of such property by the Government will have the effect of depriving the worshippers their right of worship

under Article 25 of the Constitution and such an acquisition even under the statutory provision, cannot be permitted. We find sufficient justification to

extend this plea to the statute of limitation also, inasmuch as, if the statute pertaining to acquisition cannot be extended to a religious place of special

significance which may have the effect of destroying the right of worship at a particular place altogether, otherwise the provision will be ultra vires,

the same would apply to the statute of limitation also and that be so, it has to be read that the statute of limitation to this extent may not be availed

where the debutter's property is of such a nature that it may have the effect of extinction of the very right of worship on that place which is of

peculiar nature and specific significance. This will be infringing the fundamental right under Article 25 of the Constitution.

2725. In fact this reason could have been available to the plaintiffs (Suit-4) also had it been shown by them that the mosque in question for them was a

place of special significance but this has already been observed by the Apex Court in respect to this particular mosque that like others it is one of the

several mosques and by acquisition of the place it will not have the effect of depriving such fundamental right of Muslims. It is always open to them to

offer prayer at any other place like they could have done here but Hindus are not placed on similar footing.

According to Hindus, this is a place of birth of lord Rama and that be so, there cannot be any other place for which such belief persists since time

immemorial. Once this land is allowed to be lost due to the acts of persons other than Hindus, the very right of this Section of people, as protected by

Article 25, shall stand destroyed. This is another reason for not attracting the provisions of limitation in the present case.

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

A SOVEREIGN GOVERNMENT EVEN BY EXERCISING THE POWER OF EMINENT DOMAN CANNOT EXERCISE THE POWER OF

ACQUISITION OF LAND OR PROPERTY WHICH EXTINGUISHES THE CORE OF THE FAITH OR THE PLACE OR THE

INSTITUTION WHICH IS HELD TO BE SACRED.

What clearly follows is that a sovereign Government cannot extinguish the core of the Hindu religion which is the Ram Janambhumi, let alone the

same be extinguished through a suit, by transferring the same to some other party in this case the plaintiff thereby ensuring that the said fundamental

right to worship at the Ram Janambhumi is extinguished forever.

RELEVANT CASE LAWâ€¦

(b) Dr. M. Ismail Faruqui and Others v. Union of India & Others, 1994 (6) SCC Para 76, Page 416 â€" Acharya Maharajshri Narendra Prasadji

Anand Prasadji Maharaj v. State of Gujarat, (1976) 2 SCR 317 at pages 327-328: (AIR 1974 SC 2098 at p. 2103), has held :

One thing is, however, clear that Article 26 guarantees inter alia the right to own and acquire movable and immovable property for managing religious

affairs. This right, however, cannot take away the right of the State to compulsorily acquire property .....If, on the other hand, acquisition of property

of a religious denomination by the State can be proved to be such as to destroy or completely negative its right to own and acquire movable and

immovable property for even the survival of a religious institution the question may have to be examined in a different light.

Para 82 - A mosque is not an essential part of the practice of religion of Islam and Namaz by Muslims can be offered anywhere, even in the open.

Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Obviously, the acquisition of any religious place is to be made

only in unusual and extraordinary situations for a larger national purpose. Keeping in view that such acquisition should not result in extinction of the

right to practice the religion if the significance of that place be such.

Note (i) Ram Janmasthan in Ayodhya where Ram Lala is Virajman is a place of religious significance as described in the above judgment. If the

sovereign authority, under the power of eminent domain, cannot acquire it, can a plea at the instance of plaintiffs who are private persons in Suit No. 4

be entertained, upholding of which would lead to denial of such sacred place altogether to the Hindus.

Note (ii) At page 413, Para 65 of Ismail Faruqui â€" No argument made about a mosque of special significance which forms an essential part of

Islam. Hence, no question raised about Baburi Mosque as integral to Islam and it has not been raised in the plaint here or evidence laid or any

contention ever made that the said mosque was of any significance to the practice of Islam as a religionâ€¦â€¦.

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

FINDINGS â€¦.. Hon'ble Apex Court upheld the validity of provisions of Acquisition of Certain Area at Ayodhya, 1993 in Dr. Ismail Faruqui case

(supra) and held that the Central Government can acquire any place of worship. At para- 78 Apex Court held that the place of birth has a particular

significance for Hindus and it should be treated on different footing, which reads as under:-

â€œ78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an

essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral

part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion,

stand on a different footing and have to be treated differently and more reverentially.â€

On behalf of Hindus it is urged that the plaintiffs are not entitled for the relief claimed and as such the relief is barred by the provisions of Section 42

of the Specific Relief Act, 1877 which is at par with Section 34 of the Specific Relief Act,1963 on the ground that they have superior fundamental

rights. Contentions of Hindus are as under:

The Hindus have superior fundamental right than the Muslims under articles 25 & 26 of the Constitution of India for the reasons that performing

customary rituals and offering service worship to the lord of universe to acquire merit and to get salvation as such it is integral part of Hindu Dharma

& religion in view whereof it is humbly submitted that the instant suit is liable to be dismissed with exemplary cost: â€¦

2. In M. Ismail Faruqui (Dr.) v. Union of India, (1994) 6 SCC 360, the Honâ€™ble Supreme Court has held that the Right to Practise, Profess and

Propagate Religion guaranteed under Article 25 of the Constitution does not extend to the Right of Worship at any and every place of worship so that

any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution of

India. The protection under Articles 25 and 26 is to religious practice which forms integral part of practice of that religion. While offer of prayer or

worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such

religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of

any religion having particular significance of that religion to make it an essential or integral part of the religion stand on a different footing and have to

be treated differently and more reverentially. Relying on said judgment it is submitted that Sri Ramjanamsthan has particular significance for the

Hinduism as visiting and performing customary rites confer merit and gives salvation it is firm belief of the Hindus based on their sacred Divine Holy

Scriptures which belief neither can be scrutinized by any Court of Law nor can be challenged by the persons having no faith in Hinduism as this is

conscience of the Hindus having special protection under Article 25 of the Constitution of India. Relevant paragraph 77 and 78 of the said judgment

read as follows:

77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and

propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property.

Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per

se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the

Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential

and integral part of practice of that religion.

78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential

or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part

thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on

a different footing and have to be treated differently and more reverentially.

3. In M. Ismail Faruqui (Dr.) v. Union of India (supra) the Honâ€™ble Supreme Court held that a mosque is not an essential part of the practice of

the religion of Islam and namaz (prayer) by Muslims can be offered any where even in open. The Right to Worship is not at any and every place so

long as it can be practised effectively, unless the Right to Worship at a particular place is itself an integral part of that right. Relying on said ratio of

law it is submitted that without offering prayer at Sri Ramjanamsthan described as Babri mosque in the plaint it can be practised somewhere else but

offering prayer instead of Sri Ramjanamsthan at any other place cannot be practised because the merit which is obtained by worshiping at the birth

place of Sri Ram cannot be obtained by doing so at other places and it will be contrary to the holy Divine Sacred Scripture of the Hindus and will

cause extinction of a most sacred shrine of the Hindus. Relevant paragraph Nos. 80 to 87 of the said judgment read as follows:

80. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such

a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any

person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the

namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the

provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that

property.

81. Section 3(26) of the General Clauses Act comprehends the categories of properties known to Indian Law. Article 367 of the Constitution adopts

this secular concept of property for purposes of our Constitution. A temple, church or mosque etc. are essentially immovable properties and subject to

protection under Articles 25 and 26. Every immovable property is liable to be acquired. Viewed in the proper perspective, a mosque does not enjoy

any additional protection which is not available to religious places of worship of other religions.

82. The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession

(See Mullaâ€™s Principles of Mahomedan Law, 19th Edn., by M. Hidayatullah â€" Section 217; and Shahid Ganj v. Shiromani Gurdwara. If that is

the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other

religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an

essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its

acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose

of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India

under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor

less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and

extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the

religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of

worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a

particular place is itself an integral part of that rightâ€¦â€

[Printed volume of the judgment at page Nos.3454-3458]

27. Hence, it is clear that the questionable observations in Ismail Faruqui have certainly permeated the impugned judgment. Thus, the impugned

judgment can be claimed to be both expressly and inherently affected by the questionable observations made in Ismail Faruqui. Further, Ismail Faruqui

prima facie leads a different approach regarding the application of essential and/or integral test which also needs to be resolved as a matter of

constitutional significance. In my view, Ismail Faruqui needs to be brought in line with the authoritative pronouncements in Shirur Mutt and other

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

28. The importance and seriousness of the matter can be better understood by the observations made by Justice S.U. Khan in the impugned judgment

itself, in the following words:-

Here is a small piece of land (1500 square yards) where angels fear to tread. It is full of innumerable land mines. We are required to clear it. Some

very sane elements advised us not to attempt that. We do not propose to rush in like fools lest we are blown. However, we have to take risk. It is said

that the greatest risk in life is not daring to take risk when occasion for the same arises.

Once angels were made to bow before Man. Sometimes he has to justify the said honour. This is one of those occasions. We have succeeded or

failed? No one can be a judge in his own cause.

Accordingly, herein follows the judgment for which the entire country is waiting with bated breath.

29. It is relevant here to state that by an order dated 26.3.2018 a three-Judge Bench of this Court in Sameena Begum v. Union of India & Ors. [Writ

Petition (Civil) No. 222 of 2018] has referred the matter relating to polygamy including Nikah Halala; Nikha Mutah; and Nikah Misya to a Constitution

Bench. The order of reference in the said case reads as under:

It is submitted by learned counsel for the petitioners that the challenge in these writ petitions pertains to the prevalent practice of polygamy including

Nikah Halala; Nikah Mutah; and Nikah Misyar as they are unconstitutional. Various grounds have been urged in support of the stand as to how these

practices, which come within the domain of personal law, are not immune from judicial review under the Constitution. It is urged by them that the

majority opinion of the Constitution Bench in the case of Shayara Bano etc. v. Union of India & Ors. etc. (2017) 9 SCC 1 has not dealt with these

aspects. They have drawn our attention to various paragraphs of the judgment to buttress the point that the said issues have not been really addressed

as there has been no delineation on these aspects.

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

decided by the Constitution Bench.

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At this juncture, a submission has been advanced at the Bar that keeping in view the importance of the issue, the matter should be placed before the

Constitution Bench. Accepting the said submission, it is directed that the matter be placed before Hon'ble the Chief Justice of India for constitution of

appropriate Constitution Bench for dwelling upon the issues which may arise for consideration from the writ petitions.

(Emphasis supplied)

30. Moreover, a two-Judge Bench of this Court on 6.7.2018 in Jyoti Jagran Mandal v. NDMC & Anr. [Civil Appeal No. 5820 of 2018] has referred

the matter in relation to the policy decision permitting Ram Leela and Puja once in a year in public parks to a Constitution Bench holding as under:

Application seeking exemption from filing certified copy of the impugned order is allowed.

Appeal admitted.

The order of the National Green Tribunal, Principal Bench, New Delhi has rejected an application made by the appellant to have what is known as

â€œMata-ki-Chowkiâ€ in a public park. The appellant has expressly relied upon earlier orders, including a policy decision, which permits Ram Leela

and Puja to be allowed once in a year in such public parks.

The appeal raises a question of great constitutional importance as to whether such activities can be allowed in state owned premises in view of our

Constitution being secular in nature. The Honâ€™ble Chief Justice is, therefore, requested to constitute an appropriate Bench to hear the aforesaid

matter.

(Emphasis supplied)

31. In Sunita Tiwari v. Union of India & Ors. {Writ Petition (Civil) No. 286 of 2017} a Three-Judge Bench of this Court was considering the question

relating to banning the practice of Female Genital Mutilation (FGM) or Khatna or Female Circumcision (FC) or Khafd. It was submitted by the senior

counsel appearing for the contesting respondent that the matter should be referred to a larger Bench for an authoritative pronouncement because the

practice is an essential and integral practice of the religious sect. Learned Attorney General for India also submitted that it deserves to be referred to

a larger Bench. By Order dated 24.09.2018, the matter was referred to a larger Bench, the relevant portion of which is as under:

Regard being had to the nature of the case, the impact on the religious sect and many other concomitant factors, we think it apposite not to frame

questions which shall be addressed to by the larger Bench. We also think it appropriate that the larger Bench may consider the issue in its entirety

from all perspectives.

In view of the aforesaid, we are of the view that the matter should be placed before a larger Bench. The Registry is directed to place the papers of

the instant matter before the Honâ€™ble Chief Justice of India for obtaining appropriate directions in this regard.

(Emphasis supplied)

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

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

beliefs, tenets and practice of the faith in question?

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

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

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

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