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Court No. - 9

Case :- CIVIL REVISION No. - 4 of 2025

Revisionist :- Committee Of Management, Jami Masjid Sambhal Ahmed Marg Kot Sambhal
Opposite Party :- Hari Shankar Jain And 12 Others
Counsel for Revisionist :- Syed Ahmed Faizan,Sr. Advocate,Zaheer Asghar
Counsel for Opposite Party :- A.S.G.I.,C.S.C.,Manoj Kumar Singh,Prabhash Pandey

Hon'ble Rohit Ranjan Agarwal,J.

1. The present revision filed under Section 115 of Code of Civil Procedure (*hereinafter called as the 'CPC'*) questions the order dated 19.11.2024 passed on application paper no. 3C filed by plaintiff respondent nos. 1 to 8 for grant of leave to institute the suit before expiry of period of notice under Section 80 (2) CPC, and the order dated 19.11.2024 for appointment of Commission for local investigation paper no. 8C under Order XXVI Rule 9 and 10 CPC.

2. Facts, leading to filing of present revision, are that plaintiff respondent nos. 1 to 8 instituted a Civil Suit No. 166 of 2024, which was later numbered as Original Suit No. 182 of 2024, claiming relief of declaration and permanent injunction against revisionist/defendant no. 6 and respondent nos. 9 to 13.

3. Relief 'A' was for declaration to the effect that plaintiffs have right to access into Sri Harihar Temple/alleged Jami Masjid situated in city Sambhal as described in paragraph nos. 1 and 2 of the plaint and declared as protected monument on 18.11.1920 under Section 3 of the Ancient Monuments Preservations Act, 1904 (*hereinafter referred as the 'Act of 1904'*). Relief 'B' was for declaration to the effect that Archaeological Survey of India (*hereinafter referred as the 'ASI'*) is under legal obligation to manage and to have complete control over Sri Harihar

Temple/alleged Jami Masjid in view of notification dated 18.11.1920. Relief 'C' was sought for mandatory injunction commanding defendant nos. 1 to 5 of the suit to make appropriate provision for giving access to the members of public within Sri Harihar Temple/alleged Jami Masjid situated in city Sambhal, and lastly relief 'D' was sought for permanent injunction restraining the defendants, their officers, workers and every person acting under them from creating any hurdle/obstacle in entering the plaintiffs and members of the public into the disputed place.

4. According to the plaint, there is a centuries old Sri Harihar Temple dedicated to Lord Kalki in the heart of city of Sambhal which is being forcibly and unlawfully used by the committee known as Jami Masjid Committee, Sambhal. Sambhal is a historical city and holds unique signs deeply routed in Hindu Shastras according to which it is a sacred site wherein incarnation of Lord Vishnu known as Kalki manifest in future, a divine figure yet to make an appearance. Kalki is believed to be 10th and last incarnation of Lord Vishnu destined to arrive in Kalyug.

5. The old city of Sambhal is situated at the banks of Mahismat river. In Satyug it was named as Sabrit or Sabrat and also Sambleswar, in Tretayug Mahadgiri, in Dwapar – Pingla and in Kalyug it is named as Sambhal. It is further alleged that in ancient times an unique vigrah constituting of Lord Vishnu and Lord Shiva emerged and due to this reason it was called 'Sri Harihar Temple'.

6. According to plaint version Sri Harihar Temple of Sambhal was made by Lord Vishwakarma himself in the beginning of universe. Further, it is alleged that during invasion of Babar in 1526 AD, he had destroyed number of Hindu temples. In 1527-28 one Hindu Beg lieutenant of Babar partly demolished Sri Harihar Temple at Sambhal which was occupied by Muslims for use as mosque.

7. Babarnama is said to be the diary written by Babar in Turkish

language which was translated by one Annette Susannah Beveridges in which there is a mention about Babar coming to Sambhal in July 1529. Further, it has been stated that the Hindus had subsequently reoccupied the temple from Muslims and temple was restored, which is proved from the history written by Abul Fazal in Persian language during reign of Akbar in his book Ain-e-Akbari composed between 1589 to 1600. Further, the plaint reveals that a report was prepared by ASI relating to the city of Sambhal about its ancient antiquities after undertaking survey of area by Major General A. Cunningham, the then Director General of ASI and the same was published in book titled as 'Tours in Central Deob-Gorakhpur, 1874-75 and 1875-76'.

8. By a notification No. 1412-M issued under Section 3 (1) of the Act of 1904 by Lt. Governor of United Province of Agra and Oudh declaring ancient monuments to be protected monuments. The Juma Masjid at Sambhal, District Moradabad was mentioned at serial no. 3. Plaintiffs are claiming right of access to protected monument under Section 18 of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (hereinafter referred as the 'Act of 1958') which is now governing the field after repeal of the Act of 1904.

9. On 21.7.2024 some of the plaintiffs went to visit the property in dispute, but they were not allowed to enter into the monument, and as ASI is not taking any action and is silent spectator, present suit was filed on 19.11.2024. The plaintiffs had filed an application paper no. 3C under Section 80 (2) CPC for granting leave to institute the suit before expiry of period of notice which was given on 21.10.2024 and also application 8C for appointment of Commission under Order XXVI Rule 9 and 10 CPC. The suit was registered on 19.11.2024 and application paper no. 3C was allowed granting leave to institute the suit. The matter was posted post lunch for consideration of application 8C for Commission which was allowed and a report was sought from an Advocate Commissioner. Hence,

the present revision.

10. Sri S.F.A. Naqvi, learned Senior Counsel, has questioned the action of court below in passing the order dated 19.11.2024 on application paper no. 3C granting leave to institute the suit before expiry of period of notice and allowing application 8C for Commission filed under Order XXVI Rule 9 and 10 CPC on the ground that there arose no urgency for the court to have granted the leave on 19.11.2024 and on the same day allowing the application for Commission.

11. He submitted that Section 80 CPC mandates for giving notice of two months prior to the institution of the suit. As per the plaint version the notice was given on 21.10.2024 and the suit was filed and leave was granted on 19.11.2024, as there stood no urgency in granting the leave it is evident from the order impugned. According to him, the court below has not recorded any finding as to why the leave was granted for exempting the period of notice as period of two months have not expired. He also submitted that non filing of caveat on behalf of defendants clearly shows that there was no urgency in the matter and plaint should have been returned back for presentation afresh after expiry of statutory period under Section 80 (1) CPC.

12. He next contended that the trial court committed another gross error in allowing the application under Order XXVI Rule 9 and 10 CPC for Commission which was moved on the same date and taken post lunch session. The action of the court speaks about some collusiveness between the parties and there was no urgency in the matter for ordering for Advocate Commissioner, the date when the suit was instituted and leave was granted exempting the statutory period.

13. He also contended that survey was conducted on 19.11.2024 and, thereafter, again on 24.11.2024. The second survey of 24.11.2024 is illegal as the court below never ordered for such survey and Advocate

Commissioner would have conducted such survey only after the leave of the court. According to him, once the survey was done on 19.11.2024 the matter came to an end and report should have been submitted to the court, but the Advocate Commissioner illegally conducted the second survey on 24.11.2024 which is in the teeth of the order dated 19.11.2024.

14. He then contended that Rule 68 and 69 of the General Rules Civil, 1957 provides for particulars to be given in the order for local investigation. In the order dated 19.11.2024 the court has not defined the point on which Advocate Commissioner has to report. Further, no time has been fixed for execution of the Commission and unless and until the time is extended the Commission cannot be carried out.

15. Sri Naqvi also contended that the monument in question which is called as Jami Masjid or Juma Masjid is a protected monument under the Act of 1904. An agreement was executed between the Collector of Moradabad acting on behalf of Secretary of State for India in Council and Mutawallis of Juma Masjid in the year 1927, and the agreement, so executed, governs the field. He has also relied upon the judgment rendered on 2.8.1877 in Suit No. 4 of 1877 between **Mohd. Afzalyar Vs. Chheda Singh** and the decision rendered by this Court on 1.5.1878 in **First Appeal No. 112 of 1878 (Chheda Singh Vs. Mohd. Afzalyar)**. The dispute in regard to the said masjid stood already settled in the year 1878 and cannot be adjudicated in the instant suit instituted by plaintiff nos. 1 to 8. Further, after the Place of Worship (Special Provisions) Act, 1991 (*hereinafter referred as the 'Act of 1991'*) came into force there is a prohibition for conversion of any place of worship and the religious character of place of worship, as it existed on 15.8.1947, has to be maintained. Thus, the present suit is barred by the provisions of the Act of 1991.

16. Sri Naqvi has put great emphasis on Sections 5 and 6 of the Act of

1958 according to which the protected monument is under the guardianship of ASI, while the ownership is of the revisionist. The agreement executed in the year 1927 is protected by Rule 3 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 (hereinafter referred as the 'Rules of 1959'). Reliance has been placed upon the decision of coordinate Bench of this Court rendered in **Civil Revision No. 47 of 2022 (Khwaja Moinuddin Chishti Language University Through Registrar and others Vs. Dr. Arif Abbas and others), Writ-C No. 41940 of 2013 (Lalti Devi and another Vs. Bindu Bihari Verma and 10 others), Rama Shanker Tiwari Vs. Mahadeo and others, Laws (ALL)-1967-12-21** and the judgment of Andhra Pradesh High Court rendered in case of **Durgam Mangamma Vs. P. Mohan and another, 1991 (1) ALT 269**.

17. Sri Hari Shankar Jain, plaintiff respondent no. 1, has appeared in person through video conferencing and submitted that plaintiffs had sent an application through e-mail and registered post on 29.7.2024 to the defendant nos. 1 to 4 demanding that ASI to have complete control over the subject property and make appropriate provision giving access to the members of public within the monument which figures at serial no. 250 in the list of Agra circle governed by the Act of 1958. The notice was received in the office of defendant nos. 1 to 3 on 2.8.2024, while the same was received in the office of defendant no. 4 on 1.8.2024. When no steps were taken for implementing the provisions of Section 18 of the Act of 1958, notice under Section 80 CPC was sent via registered post on 21.10.2024 to defendant nos. 1 to 5.

18. The urgency arose in filing the suit and application under Section 80 (2) CPC was moved for granting leave to institute the suit before period expired, as plaintiffs had reason to believe that revisionist had come to know about the application dated 29.7.2024 and were intending to remove the artefacts, signs and symbols of Hindu Temple hurriedly.

The order exempting the notice period cannot be challenged by any private party as it does not have *locus standi* to challenge the exemption of remaining period of notice. Reliance has been placed upon the decision of Full Bench of this Court in case of **Gopal Singh Visharad Vs. Zahoor Ahmad, 2010 SCC OnLine (ALL) Page 1927**, which has been affirmed by Apex Court in case of **Mohd. Siddiq Vs. Mahant Suresh Das, 2020 (1) SCC 1**.

19. He then contended that plaintiffs had reason to believe that after committee of management had come to know about the application dated 29.7.2024 and notice dated 21.10.2024, they were intending to remove artefacts, signs and symbols of Hindu Temple hurriedly, while property in dispute was in possession of the defendant no. 6 and they had locked a portion of the property which necessitated for the appointment of Advocate Commissioner to make inspection of the entire subject property after serving notice to both the parties and submit report in regard to existing situation from inside and outside.

20. The order passed on application under Order XXVI Rule 9 and 10 CPC cannot be challenged in proceedings under Section 115 CPC as it does not decide any *lis* or issue between the parties. He next contended that on 19.11.2024 Advocate Commissioner after serving notice to the representatives of revisionist at about 6 PM started inspection, a large crowd had gathered, who had entered into the property in dispute and asked the Advocate Commissioner to stop the Commission work. Sri Zafar Ali, Advocate of Masjid Committee, stopped the inspection on the ground that it was the time for Namaz and, thus, proceeding of Commission was stopped at about 7.15 PM. As the Commission work could not be completed, therefore, Advocate Commissioner on 23.11.2024 had send notice to the concerned parties that remaining survey would be completed on 24.11.2024 from 7 AM to 11 AM.

21. According to him, the remaining survey work was carried out on 24.11.2024 from 7 AM to 11 AM. According to him, only one survey has been done by the Advocate Commissioner appointed by the court on 19.11.2024. As the Commission work could not be completed on 19.11.2024, it was completed on 24.11.2024 and it is wrong to say that two surveys have been conducted by the Advocate Commissioner. He also submitted that the order dated 19.11.2024 clearly reflects that provision of Rule 68 and 69 of the General Rules Civil was complied and the court had directed the Commission defining the points on which it has to report. The application 8C was allowed on the condition that the Advocate Commissioner, so appointed, shall conduct photography and videography while conducting survey.

22. He then contended that the present dispute is covered by the Act of 1904, which has now been substituted by the Act of 1958 and shall not be governed by the provisions of the Act of 1991, as only right to access under Section 18 of the Act of 1958 has been claimed, as the monument in question is a protected monument declared under Section 3 of the Act of 1904 by ASI in the year 1920, much before the enactment of the Act of 1991 and the cut of date mentioned therein.

23. Sri Rajeshwar Tripathi, learned Chief Standing Counsel, appearing for the State has submitted that the alleged agreement of the year 1927 is not in the custody of the District Magistrate, Sambhal, and on 10.3.2025 a letter was written to the District Magistrate, Moradabad requiring to furnish the said alleged agreement. According to him, the city of Sambhal was initially part of the district Moradabad and subsequent in time new district Sambhal was carved out. The property in dispute is admittedly a protected monument under the Act of 1904 and finds place in gazette notification dated 22.12.1920. Reliance has been placed upon the Sections 4 and 5 of the Act of 1958.

24. It is further submitted that the building alleged to be situated on the land as per the revenue records is a government land, which is recorded in the record as Gata No. 33 category 15 (2) non-agricultural land. In the Khewat it is recorded as Milkiyat Sahi Mundarja. After the enforcement of U.P.ZA. & L.R. Act, 1950 the land in question, recorded under the said category, has vested in the State Government. Now no person or organization can claim any right over the said land.

25. On the question of survey conducted by the Advocate Commissioner, he submitted that survey proceedings could not be completed on 19.11.2024 and in pursuance of letter dated 20.11.2024, Superintendent of Police, Sambhal has informed that since large force has been deployed in by-assembly election of Kundarki constituency to be held on 20.11.2024 police force cannot be provided for survey work and request was made for fixing another date. 22.11.2024 being Friday and Namaz was to be held, the survey was deferred for that date also. 23.11.2024 was fixed for counting of votes of Kundarki by-election and police force was deployed there, therefore, survey could not be conducted on the said date. Therefore, 24.11.2024 was fixed for survey on the basis of letter written by the Advocate Commissioner fixing the time 7 AM to 11 AM in the morning. According to him it is not the second survey but was a continuance of proceedings initiated on 19.11.2024. He lastly contended that the State has no objection as to waiver of the period of notice under Section 80 (2) CPC.

26. Learned ASGI has submitted that the property in dispute is a protected monument under Section 3 of the Act of 1904 substituted by the Act of 1958. It is under the control of ASI but the entry of officers into the monument has been objected by the masjid management. Prior to directions of this Court, an inspection was done on 25.6.2024 with the help of district administration, report of which has been brought on record. He then contended that defendant nos. 1 to 4, present respondent

nos. 9 to 12, have already filed their written statement before the trial court. According to him, the survey was conducted on 27.2.2025 on the directions of this Court and a report has already been submitted before this Court, which is part of record alongwith pen-drive of the videography done. The report categorically reveals that interior of masjid has been painted with thick layer of enamel paint of sharp colours like golden, red, green and yellow concealing the original surface of monument. The same report further reveals that exterior of monument has some signs of flacking of the paint but the condition doesn't require the immediate treatment at the moment.

27. He accepted that Section 18 of the Act of 1958 provides for public access to the monument but there is obstructions from the masjid committee. He also contended that centrally protected monument cannot be characterized as a place of worship as there was no mention found in gazette notification No. 1645/1133-M dated 22.12.1920. He also submitted that information has been sought by ASI regarding listing of centrally protected monument as waqf property from Shia Central Waqf Board and Sunni Central Waqf Board vide letter dated 17.10.2024 which till date has remained unattended. Reliance has been placed upon the decision rendered in **Civil Appeal No. 16899 of 1996, Karnataka Board of Waqf Vs. Government of India and others**, wherein it was held that the suit property is a government property and not of a waqf character. On Section 80 (2) CPC, he submitted that no such objection was taken in the written statement filed by the answering defendant respondents and, thus, it amounts to waiver.

28. I have heard respective counsel for the parties and perused the material on record. The questions placed before the Court for consideration are:-

> "I. Whether the court below was correct in granting leave to institute the suit before expiry of period of notice under Section 80 (2) CPC?

II. Whether the court below was correct to direct for local investigation and appoint Commission exercising power under Order XXVI Rule 9 and 10 CPC, and necessary compliance of Rule 68 and 69 of the General Rules Civil was made or not?

III. Whether the court below could have proceeded with the matter under the Act of 1958, once the institution of suit was barred by the Act of 1991?"

Question No. I

29. Revisionist has primarily questioned the order impugned dated 19.11.2024 on the ground that trial court could not have granted leave to institute the suit before expiry of period of notice under Section 80(2) CPC as there was no emergent need in doing so.

30. Before delving into this question, a brief history and legislative changes of Section 80 CPC is necessary for better appreciation of the case.

31. Act No. V of 1908 (CPC) received assent of Governor General on 21.03.1908. The said Act No. V was enacted to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature. Section 1(1) provided that "this Act may be cited as The Code of Civil Procedure, 1908". Sub-section (2) provided "it shall come into force on the first day of January, 1909".

32. Section 80 modified upto 1st January 1937 stood as under:-

> *"**80.** No suit shall be instituted against the Secretary of State for India in Council or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."*

33. In 1937, the words "the crown" were substituted by the A.O. 1937 for the words "the Secretary of State for India in Council".

34. By amendment made in the year 1948, Section 80 was again amended and was substituted as under:-

> *"**80.** No suit shall be [instituted against the Government] or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been [delivered to, or left at the office of –*
>
> > *(a) in the case of a suit against the Central Government, [except where it relates to a railway], a Secretary to that Government;*
> >
> > *[[(b)] in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;]*
> >
> > * * *******
> >
> > *(c) in the case of a suit against a [State] Government, a Secretary to that Government or the Collector of the District, ***]*
>
> *and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."*

35. By the Civil Procedure (Amending) Act, 1963 : (i) the words 'including the Government of the State of Jammu and Kashmir' (ii) Clause (bb) were inserted; and (iii) in Clause (c), the words 'any other' were substituted for 'a'. Thus, after the amending Act of 1963, Section 80 stood as under:-

> *"**80.** No suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of —*
>
> > *(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;*
> >
> > *(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway.*
> >
> > * * *

> *(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Secretary to that Government or any other officer authorised by that Government in this behalf;*
>
> *(c) in the case of a suit against any other Government, a Secretary to that Government or the Collector of the district;*
>
> * * *
>
> *and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."*

36. From the amended provision, the desired result was not achieved and hardly any matter was settled by Government or public officer concerned making use of opportunity afforded, and in most cases, notice remained unanswered. The Law Commission in its 14th Report noted that provision of Section 80 had worked great hardship in large number of cases. Immediate relief by way of injunction against Government or a public officer was necessary in the interest of justice, it recommended omission of the section. The Joint Committee of Parliament did not agree with the suggestion of the Law Commission and recommended retention of Section 80 with necessary modification/relaxation and Section 80 was amended by Amending Act 104 of 1976 which came into effect from 01.02.1977 and Section 80 was renumbered as Section 80(1) and sub-section (2) and (3), which are as under:-

> *"**80. Notice.** – [(1)] [Save as otherwise provided in sub-section (2), no suit shall be instituted] against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of –*
>
> *(a) in the case of a suit against the Central Government, [except where it relates to a railway,] a Secretary to that Government;*
>
> *[(b)] in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;]*
>
> *[(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorized by that Government in this behalf;]*
>
> *(c) in the case of a suit against [any other State Government], a*

Secretary to that Government or the Collector of the district;

[* *]*

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

[(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (I), if in such notice –

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated.]"

37. The applicability of Section must be determined on the law as it stood on the date of suit. The object of notice required under the Section is to give the Government or the public officer concerned, an opportunity to reconsider the legal position and to make amends or settle the claim, if so advised, without litigation. This was held by Hon'ble Apex Court in **Raghunath Das Vs. Union of India, AIR 1969 SC 674**.

38. When a statutory notice is issued to a public authority, they must take the notice in all seriousness, and should not sit with it and force the citizen to the factories of litigation. They are expected to let the claimant (who has given notice), know what stand they take within statutory

period, or in any case before plaintiff embarks upon litigation. The whole object of serving a notice under Section 80 is to give sufficient warning of the case proposed to be instituted so that the Government if it so wishes, can settle the claim without litigation or afford restitution without recourse to Court of law. In **Ghanshyam Dass Vs. Dominion of India, (1984) 3 SCC 46**, the Apex Court observed as above.

39. Section 80 has been enacted as a measure of public policy, with the object of ensuring that before a suit is instituted against Government or a public officer, Government or the officer concerned is afforded an opportunity to scrutinise the claim and if it is found a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay.

40. Public purpose underlying the provision of Section 80 is advancement of justice and securing of public good by avoidance of unnecessary litigation. Prior to the amendment of the year 1976, Section 80 clearly mandated that no suit shall be instituted against Government or against a public officer, until the expiration of two months next after notice in writing has been delivered to, or left at the office.

41. The provision was mandatory with no exception to it. The Courts were bound to give plain and simple meaning to the said provision faithfully implementing the mandate of Legislature. In **Bihari Chowdhary and another Vs. State of Bihar and others, (1984) 2 SCC 627**, the Hon'ble Apex Court had the occasion to consider Section 80 CPC as it stood prior to its amendment of 1976 and held as under:-

> *"**4.** When the language used in the statute is clear and unambiguous, it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the Legislature.*
>
> ***5.** The Judicial Committee of the Privy Council had occasion to*

consider the scope and effect of Section 80 CPC in an almost similar situation in Bhagchand Dagadusa v. Secretary of State [AIR 1927 PC 176 : 54 IA 338, 357] . In that case though a notice had been issued by the plaintiffs under Section 80 CPC on June 26, 1922, the suit was instituted before the expiry of the period of two months from the said date. It was contended before the Privy Council, relying on some early decisions of High Court of Bombay, that because one of the reliefs claimed in the suit was the grant of a perpetual injunction and the claim for the said relief would have become infructuous if the plaintiffs were to wait for the statutory period of two months prescribed in Section 80 CPC before they filed the suit, the rigour of the section should be relaxed by implication of a suitable exception or a qualification in respect of a suit for emergent relief, such as one for injunction. That contention did not find favour with the Privy Council and it was held that Section 80 is express, explicit and mandatory and it admits no implications or exceptions. The Judicial Committee observed:

> *"To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while Section 80 is mere procedure, is fallacious, for Section 80 imposes a statutory and unqualified obligation upon the Court...."*
>
> *This decision was subsequently followed by the Judicial Committee in Vellayan v. Madras Province [AIR 1947 PC 197 : (1946-47) 74 IA 223] . The dictum laid down by the Judicial Committee in Bhagchand Dagadusa v. Secretary of State for India [AIR 1927 PC 176 : 54 IA 338, 357] , was cited with approval and followed by a Bench of five Judges of this Court in Sawai Singhai Nirmal Chand v. Union of India [AIR 1966 SC 1068 : (1966) 1 SCR 986 : 1966 Mah LJ 371] .*

***6.** It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80 CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."*

42. After the amendment of 1976, sub-section (2) and (3) were inserted w.e.f. 01.02.1977. Sub-section (2) is an exception to the mandatory provision that unless notice before two months is served upon the Government or its officer, the suit cannot be instituted. It has mitigated the rigours of sub-section (1) of Section 80. Now, a suit can be instituted against Government or its officer with the leave of the Court. Further, proviso to sub-section (2) provides that in case Court is not satisfied after hearing the parties that no urgent or immediate relief need be granted in a suit, return the plaint for presentation to it after complying the

requirements of sub-section (1).

43. Thus, leave of a Court is a condition precedent for the institution of the suit. The Hon'ble Apex Court had an occasion to consider the merit of Section 80(1) and sub-section (2) in case of **State of A.P. Vs. Pioneer Builders, (2006) 12 SCC 119**. The Court held as under:-

> *"**17.** Thus, from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by the court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the court. Leave of the court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though Section 80(2) does not specify how the leave is to be sought for or given, yet the order granting leave must indicate the ground(s) pleaded and application of mind thereon. A restriction on the exercise of power by the court has been imposed, namely, the court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit.*
>
> ***18.** Having regard to the legislative intent noticed above, it needs little emphasis that the power conferred on the court under sub-section (2) is to avoid genuine hardship and is, therefore, coupled with a duty to grant leave to institute a suit without complying with the requirements of sub-section (1) thereof, bearing in mind only the urgency of the relief prayed for and not the merits of the case. More so, when want of notice under sub-section (1) is also made good by providing that even in urgent matters relief under this provision shall not be granted without giving a reasonable opportunity to the Government or a public officer to show cause in respect of the relief prayed for. The provision also mandates that if the court is of the opinion that no urgent or immediate relief deserves to be granted it should return the plaint for presentation after complying with the requirements contemplated in sub-section (1)."*

44. The Hon'ble Apex Court in case of **Bajaj Hindustan Sugar & Industries Ltd. Vs. Balrampur Chini Mills Ltd., (2007) 9 SCC 43** again had the occasion to consider the purport of Section 80(2). It followed the earlier decision of **Pioneer Builders (Supra)** and held as under:-

> *"**31.** From the above, it would be evident that a suit may be filed against the Government or a public officer without serving notice as required by sub-section (1) with the leave of the court. When such leave is refused, the question of institution of the suit does not arise and accordingly, no interim relief could also be granted at that stage.*

> ***33.*** *The decisions cited by Mr Shanti Bhushan on the question of implied leave was countered by Mr Mukul Rohatgi with the decision of this Court in State of A.P. v. Pioneer Builders, A.P [(2006) 12 SCC 119 : (2006) 9 Scale 520] wherein in para 16 it has been observed as follows: (SCC p. 126, para 17)*
>
> > *"17. Thus, from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by the court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the court. Leave of the court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though Section 80(2) does not specify how the leave is to be sought for or given, yet the order granting leave must indicate the ground(s) pleaded and application of mind thereon. A restriction on the exercise of power by the court has been imposed, namely, the court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit."*
>
> ***34.*** *The law, in our view, has been succinctly expressed in the aforesaid judgment. The language of Section 80(2) of the Code leads us to hold that if leave is refused by the original court, it is open to the superior courts to grant such leave as otherwise in an emergent situation a litigant may be left without remedy once such leave is refused and he is required to wait out the statutory period of two months after giving notice."*

45. In **Smt. Janak Raji Devi Vs. Chandrabati Devi, AIR 2002 Cal 11**, the Calcutta High Court while interpreting Section 80(2) CPC held that there was no requirement for separate application and an express order. Leave can be presumed and implied from what the Court does. Relevant para 20 is extracted hereasunder:-

> *"**20.** However, my reading of sub-section (2) of S. 80 of the Code of Civil Procedure is that no separate application and an express order are the essential requisites; such leave could be presumed; the leave need not be granted by passing a formal order. The leave under sub-section (2) of S. 80 could be implied and could be gathered from what the Court does. The prayer for leave could be in any form. From the reading of the plaint it appears that the plaintiff has expressly prayed for leave to present the plaint under sub-section (2) of S. 80 of the Code of Civil Procedure and gave reasonable explanation in support of such prayers. I hold that the trial Court has granted leave to the plaintiff to present the plaint in exercise of its power under sub-section (2) of S. 80 of the Code of Civil Procedure. I, further, hold that the requirements of S. 80(2) of the Code of Civil Procedure were substantially complied with."*

46. In **T.V. Parangodan Vs. District Collector, Trichur and others, AIR 1989 Ker 276**, the Kerala High Court also took a similar view and held that sub-section (2) of Section 80 does not prescribe any form or amendment in which leave has to be granted. What it says is only with the leave of the Court, without serving any notice as required by sub-section (1). Leave need not be by a formal order. It can be implied also and could be gathered from what the Court does.

47. The Division Bench of this Court in case of **Himachal Steel Rerollers and Fabricators Vs. Union of India and others, AIR 1988 All 191** while considering whether the suit is bad or not with a notice under Section 80 held as under:-

> *"**13.** Amended S. 80 now consists of two parts. Sub-clause (1) of Section 80 is imperative in nature and requires that every suit filed against the Government must be filed after serving a notice under Section 80 C.P.C. in the manner prescribed. Sub-clause (2) of Section 80 is an exception to clause (1) and in certain limited class of cases where some urgent or immediate relief against the Government or a Public Officer is needed, the service of notice can be dispensed with by the leave of the Court. Sub-clause (2) of S. 80 is extracted below:*
>
> > *"A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any Public Officer in respect of any act purporting to be done by such public officer in his official capacity may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1) but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or Public Officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:*
> >
> > *Provided that the Court shall, if it is satisfied after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1)."*
>
> ***14.** A bare perusal of the above provision will go to show that even in the excepted class of cases the suit has to be filed only with the leave of the Court. Such leave must precede the institution of the suit. It is not possible to read into the language of above provision that a plaintiff can be permitted to obtain such leave even subsequent to the institution of the suit. The bar of notice under Section 80(1) can be removed only when requisite leave of the court has been obtained before or at the most while filing the plaint for institution of the suit.*

> ***15.*** *Appellant's learned counsel submitted that the use of the word 'shall' in sub-clause (1) and the word 'may' in sub-clause (2) of S. 80 indicates that this leave can be obtained subsequently. We find it difficult to agree to this. A plaintiff intending to institute a suit against the Govt, has two options before him, either he may file a suit after serving two months' notice under S. 80 C.P.C. or he may file the suit without serving the notice but in that event he must satisfy the court that an urgent and immediate relief is required and also obtain previous leave of the court. *(Emphasis provided.) In the event of the first course being adopted the suit can not be filed before the expiry of the two months of giving of the notice and this explains the reason for using the word 'shall' in sub-clause (1) of S. 80 C.P.C. by the Parliament. However, in the second case he has the choice to file the suit without giving the requisite notice but only after obtaining leave of the court and it is for this purpose that the word 'may' has been used in Cl. (2) of Section 80 C.P.C.*

48. In **State of U.P. Vs. Jaman Singh and another, AIR 2007 UTT 10**, the Court refused to entertain the case against judgment and decree where permission was granted under sub-section (2) of Section 80. Relevant para 11 is extracted hereasunder:-

> *"**11.** The third submission advanced on behalf of the defendant/appellant is this that the suit was filed without service of notice as required under Section 80 of the Code. Had there been no exemption granted by the trial Court, I would have accepted the submission of learned Standing Counsel for the defendant/appellant, but the order sheet of original suit No. 26 of 1983, in which the impugned decree is passed, shows that the permission to file suit without service of notice under Section 80 was granted by the trial Court on 1-7-1983 i.e. the day of institution of suit. Since, the said permission was granted under Sub-section (2) of Section 80 of the Code, as such, the impugned judgment and decree cannot be interfered with on said ground."*

49. In **K.K. Sharma Vs. Punjab State, AIR 1989 P&H 7**, the Punjab and Haryana High Court held that Court must pass specific order on application for considering the nature of case and reaching the conclusion whether or not immediate relief is required to be afforded.

50. In **State of Karnataka Vs. M. Muniraju, AIR 2002 Kar 287**, the Court held that mere dispatch of notices to the address of the person is not sufficient, it must be actually either delivered or tendered to the person to whom they are required to be given under Section 80(1) CPC.

51. In **State of Kerala and others Vs. Sudhir Kumar Sharma and**

others, (2013) 10 SCC 178, the Hon'ble Apex Court while considering the scope of Section 80(2) held that mere filing of application under the aforesaid provision would not simplicitor regularise the suit proceedings and effective order has to be passed granting the leave. The Court, thereafter, held that mere filing an application under Section 80(2) CPC would not mean that said application was granted by trial court. It has to pass effective order on the same.

52. Now, coming to the instant case, it is not in dispute that application under Section 80(2) CPC was filed for granting leave to institute the suit before expiry of period of notice. In para no. 5 of the application filed on 19.11.2024 by plaintiff, it is stated that notice under Section 80 was sent to defendant nos. 1 to 5 on 21.10.2024 being the Government and its officers. There is no denial to the said notice. In fact, in the written statement filed by defendant nos. 2 to 4 (present respondent nos. 10 to 12), no objection has been taken as to the notice under Section 80 CPC.

53. The District Magistrate, defendant no. 5 (present respondent no. 13) who is represented by Chief Standing Counsel has not objected to the maintainability of the suit on the ground of Section 80 CPC, meaning thereby that Government and its officers have waived for the expiry of notice and not objected to granting leave to institute the suit.

54. Sub-section (1) of Section 80 clearly provides that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after the notice in writing has been delivered.

55. Sub-section (2) mitigates the rigour of sub-section (1) and provides a leverage to the extent that suit may be instituted with the leave of the Court without serving any notice as required by sub-section (1). It is admitted that notice was sent to defendant nos. 1 to 5 on 21.10.2024. Only

the period of notice sent has not expired and leave has been sought from the Court which was not objected by defendant nos. 1 to 5.

56. The entire objection is from defendant no. 6/revisionist on whom Section 80 is not applicable. The object of Section 80 is to provide protection to the Government and its officials against *ex-parte* orders. If in a particular case that person does not require protection, he can lawfully waive his right. This was held in case of **Dhirendra Nath Goari, Subal Chandra Nath Saha and others Vs. Sudhir Chandra Ghosh and others, AIR 1964 SC 1300**.

57. The Full Bench of this Court in **Gopal Singh Visharad (Supra)** held that plea of want of notice under Section 80 cannot be taken by a private individual since it is for the benefit of Government and its officials. Relevant paras 639 to 644 are extracted hereasunder:-

> *"**639.** Considering the objective of such enactment and the fact that party concerned can waive it, we are of the view that the plea of want of notice under Section 80 cannot be taken by a private individual since it is for the benefit of the Government and its officers.*
>
> ***640.** A Division Bench of Hon'ble Bombay High Court in **Hirachand Himatlal Marwari v. Kashinath Thakurji Jadhav AIR (29) 1942 Bombay 339** said "In the first place defendant 3 is not the proper party to raise it, and in the second place the receivers in our opinion must be deemed to have waived their right to notice. It is open to the party protected by S. 80 to waive his rights, and his waiver binds the rest of the parties. But only he can waive notice, and if that is so, it is difficult to see any logical basis for the position that a party who has himself no right to notice can challenge a suit on the ground of want of notice to the only party entitled to receive it. We think therefore that this ground of attack is not open to defendant 3; and for our view on this point direct support may be obtained from 32 Cal. 1130."*
>
> ***641.** The same view has been taken by Kerala High Court in **Kanakku v. Neelacanta, AIR 1969 (Kerala) 280** holding that the plea of want of notice cannot taken by private individuals.*
>
> ***642.** A Single Judge of this Court in **Ishtiyaq Husain Abbas Husain v. Zafrul Islam Afzal Husain and others AIR 1969 Alld. 161** has also expressed the same view:*
>
> > *"It appears to me that the plea of want of notice is open only to the Government and the officers mentioned in section 80 and it is not open to a private individual. In this particular case the*

> *State Government did not even put in appearance. The notice, therefore, must be deemed to have been waived by it."*
>
> ***643.*** *We respectfully endorse the aforesaid view of the Hon'ble Single Judge.*
>
> ***644.*** *The entire* ***issue 10 (a) and 10 (b) (Suit-3) is, accordingly, decided in favour of plaintiffs (Suit-3).*** *We hold that a private defendant cannot raise objection regarding maintainability of suit for want of notice under Section 80 C.P.C."*

58. Sri Naqvi's apprehension to the granting of leave to institute the suit by trial court is totally misplaced, in the facts of the present case. The Government authorities were well informed on 29.07.2024 for giving right to access of the monument under Section 18 of the Act, 1958. Thereafter, notice under Section 80(2) was given on 21.10.2024 to defendant nos. 1 to 5 which remained unopposed. The court below on due consideration of the application and after recording reason had allowed the application and granted permission to institute the suit.

59. Thus, upon overall consideration of the provisions of Section 80(2) CPC and the case laws cited above, I find that there is no infirmity in the order dated 19.11.2024 granting leave to institute the suit before expiry of period of notice. Moreover, the notice under Section 80 was already sent by plaintiff on 21.10.2024 which was never objected by defendant nos. 1 to 5 either in their written statement or before this Court. Revisionist being a private individual cannot object for want of notice under Section 80 which is for the benefit of Government and its officers.

60. The question framed above stands answered i.e. in favour of plaintiffs and against defendant nos. 6/revisionist.

Question No. II

61. This question has been posed by the revisionist/defendant no. 6 on the ground that no necessity arose on 19.11.2024 for allowing application 8C for appointment of Commission under Order XXVI Rule 9 and 10 CPC. Further, Rule 68 and 69 of the General Rules Civil was not followed.

62. It is an admitted fact that after leave to institute the suit was granted pre-lunch session. The case was fixed post-lunch session and two applications, one application 6C for grant of temporary injunction and another application 8C for appointment of Advocate Commissioner was taken up by the trial court. On application 6C, the court had issued notices to the defendants and fixed 29.11.2024 for further consideration.

63. On application 8C, the court after recording its finding allowed the same and appointed Advocate Commissioner and directed him to carry out the Commission and do photography and videography of the place to be surveyed and place the report on the next date fixed.

64. Order XXVI CPC provides for Commissions. Rule 9 provides for Commissions for local investigations. Rule 10 provides for the procedure to be followed by the Commissions, so appointed. Relevant Rule 9 and 10 of Order XXVI CPC are extracted here as under;

> *"**9. Commissions to make local investigations.**—In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*
>
> *Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.*
>
> ***10. Procedure of Commissioner.**—(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*
>
> *(2) **Report and depositions to be evidence in suit. –**The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*
>
> *(3) **Commissioner may be examined in person.** – Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it*

may direct such further inquiry to be made as it shall think fit."

65. From bare reading of Rule 9, it is clear that in any suit if the court deems that a local investigation is requisite or proper for the purpose of elucidating any matter in dispute, or ascertaining the market value of any property, or the amount of any *mesne profits* or damages or annual net profit, it may issue a Commission to such persons as it thinks fit directing for making such investigation and reporting back to the court. Thus, it is clear that where it appears to the court that a local investigation is required or proper for adjudicating any dispute it may order for the same. The object of Rule 9 of Order XXVI is not to assist a party to collect the evidence where the party can get the evidence itself, but in the same time the court cannot prevent a party from adducing the best evidence if such evidence can be gathered with the help of a Commission.

66. Thus, the very object of local investigation is not to collect the evidence which can be taken in the court, but to obtain such material, which from it's particular nature can be had only at the spot. It is not necessary that either of the parties may apply for issuance of Commission, and the court *suo moto* has a power to invoke the provisions of Order XXVI Rule 9 CPC.

67. In the instant case, the plaintiffs had alleged in their application 8C that defendants are trying to remove the artefacts, signs and symbols of Hindu Temple hurriedly, as such, local investigation was necessary. The court had only appointed the Advocate Commissioner in terms of its power under Order XXVI Rule 9 and allowed the application for making the local investigation. The order appointing the Advocate Commissioner does not in any way affect any of the parties. The court had ordered for local investigation keeping in mind the peculiar nature of the evidence which can be collected only at the spot.

68. By the order appointing the Advocate Commissioner no prejudice is caused to either of the party as no lis is decided. A Commission can be

appointed *ex parte* in appropriate cases without any notice to either of the party. The rule does not provide for presence of both the parties when the order of appointing a Commission is made. It is only when the Commission begins its investigation that a notice is necessary to the parties.

69. Under Order XXVI Rule 9 CPC a Commission can be appointed to make local investigation to investigate the facts or other materials which are found in the property in dispute and to make a report in that regard to the court.

70. In **Rajinder & Co. Vs. Union of India & Others, 2000 (6) SCC 506**, the Apex Court held that the order of appointment of a Commissioner cannot be challenged, as the report is finally acceptable or not, would be decided by the court. The Apex Court held as under;

> *"**1.** Leave granted.*
>
> ***2.** We cannot appreciate why the High Court had interfered with that part of the order passed by the trial court appointing a Commission for inspecting the site and to file a report and to measure the work done by the respondent. The learned counsel for the appellants submits that the respondent will not be made responsible for the cost or expenses which may be involved in the Commission to file the report. The question whether the Commissioner's report is finally acceptable or not would be decided by the Court dehors the order passed by the authority concerned. In the light of the said innocuous position it was not necessary for the High Court to alter the trial court's order. We, therefore, set aside the impugned order of the High Court and restore the order of the trial court in full measure, with the rider that this action will be without prejudice to the right of the parties to substantiate the respective contentions regarding the tenability or untenability of the Commissioner's report and its conclusions.*
>
> ***3.** The appeal is disposed of."*

71. Coming to Rule 10 of Order XXVI CPC, it is clear that a Commissioner, so appointed by the court, after making local investigation and adducing it in writing, the evidence taken by him together with his report shall file it before the court concerned. The report, so filed, and the evidence taken by him shall be evidence in the suit and shall form part of the record. The Sub-rule (2) of Rule 10 provides that the report, so filed,

alongwith the evidence will be examined by the court *suo moto* or by any of the party with the permission of the court. Thus, before the report and evidence is made part of the record it has to undergo the test as provided in Sub-rule (2) of Rule 10. Sub-rule (3) of Rule 10 further provides that in case the court is not satisfied with the proceedings of the Commission it may direct further inquiry.

72. Composite reading of Rule 9 and 10 of Order XXVI make it abundantly clear that the court where the suit is tried in case requires for proper adjudication of the matter direct for local investigation. The Commissioner, so appointed, during investigation has to give notices to the parties. After completing the investigation the Commissioner has to submit report alongwith the evidence, so collected, before the court. The report alongwith the evidence is put to test either by the court itself or on the application of the parties. Further, if the court is not satisfied with the proceedings of the Commissioner it may direct for further inquiry.

73. Thus, a complete mechanism has been provided under Rule 9 and 10 of Order XXVI CPC for Commission for local investigation. In the instant case consideration of application 8C was the first step which trial court took and appointed an Advocate Commissioner for making the local investigation of the property in dispute.

74. Moreover, Rule 68 and 69 of the General Rules Civil, 1957 only compliment the provisions of Order XXVI CPC. It provides for procedure when a court issues a Commission for making local investigation and shall define the points on which Commissioner has to report. Further, the court shall also fix reasonable time for execution of the Commission. Rule 68 and 69 of the General Rules Civil are extracted here as under;

> *"**68. Particulars to be given in the order for local investigation** – When issuing a commission for making a local investigation under Order XXVI, Rule 9 the Court shall define the points on which the Commissioner has to report. The spot inspection proceedings carried out by Advocate Commissioner or Civil Court Amin shall be*

> *videograph at the expense of party concerned and the same be provided to the Court unedited by Advocate Commissioner or Civil Court Amin, as the case may be. No point which can conveniently and ought to be substantiated by the parties by evidence at the trial shall be referred to the Commissioner.*
>
> ***69. Time for executing commissions** – A reasonable time shall be fixed for execution of every commission and the Court shall see that it is executed within such time unless the Court for sufficient reason extends the time."*

75. Thus, it is abundantly clear that the order dated 19.11.2024 was strictly passed in consonance with the provisions of Rule 9 of Order XXVI CPC read with Rule 68 and 69 of the General Rules Civil, as the court while appointing an Advocate Commissioner had directed for the survey to be made with the help of police force and necessary photography and videography was to be carried out of the site to be inspected and surveyed. Moreover, the court had directed for submitting the report by the next date fixed which was 29.11.2024. Thus, ingredients of Rule 68 and 69 stood complied in the order under challenge. From the record, it has been brought to the notice of the court that the Advocate Commissioner had given notice to the defendants before making local investigation therein complying with necessary provisions of Rule 9.

76. The argument of Sri Naqvi, learned Senior Counsel, that survey took twice though there was only one order dated 19.11.2024, is factually incorrect. Learned Chief Standing Counsel has clarified that partial survey could be conducted on 19.11.2024 from 6 PM to 7.15 PM and when the crowd gathered, the Advocate Commissioner was asked to stop the Commission work and leave the site. Commission work could not be carried out on 20th due to by-election and, thereafter, on 22nd due to Friday Namaz and, thereafter, on 23rd due to counting of votes of by-election, so held. The Commission work continued on 24.11.2024 after the notices were given on 23.11.2024 to all the parties concerned and the same was completed between 7 AM to 11 AM on 24.11.2024.

77. From the record, it is clear that the investigation which was

commenced by the Advocate Commissioner on 19.11.2024 was completed on 24.11.2024 between 7 AM to 11 AM. It was not carried out on 20th, 21st , 22nd and 23rd of November 2024 due to the reasons given by the State. There was no requirement for the Advocate Commissioner to have sought permission from the court for continuing the Commission work as the order dated 19.11.2024 itself reflects that the report of the Commission was to be submitted by the Advocate Commissioner by the next date fixed i.e. 29.11.2024.

78. The contention of Sri Naqvi as to two Commissions having taken place falls flat in view of the fact that Commission which started on 19.11.2024 continued till 24.11.2024 with a break of four days in between. However, it is an admitted case to both the parties that the local investigation has completed and when the matter was fixed on 29.11.2024 the Advocate Commissioner had sought time for filing the report alongwith the evidence collected by him, which was allowed by the trial court.

79. It has already been settled by the Apex Court in **Rajinder & Co. (Supra)** that the order for appointment of Commission cannot be challenged as it is only a preliminary stage where a report is called and has to be submitted before the court concerned, which needs to be proved, to be considered as an evidence in the suit forming part of the record only at the stage of Order XXVI Rule 10 (2) CPC. The stage of which has not come as yet.

80. Moreover, during the pendency of this revision, the revisionist had moved a Misc. Application No. 4 of 2025 seeking permission for whitewashing and cleaning of alleged Masjid as the month of holy Ramadan was going to start. The said application was objected by the plaintiff nos. 1 to 8.

81. This Court on 25.2.2025 had directed the ASI to seek instructions in

the matter and the case was posted for 27.2.2025. On the said date revisionist had relied upon an agreement alleged to be executed on 13/19.1.1927 registered on 1.3.1927 between the Mutawalis of Jami Masjid Sambhal and the Secretary of the State for India Council.

82. According to the said agreement it was the ASI who was required to maintain structure in dispute which has been registered as a protected monument in the year 1920. The Court appointed three officers of ASI namely Sri Madan Singh Chauhan, Joint Director General, Sri Zulfequar Ali, Director (Monument) and Sri Vinod Singh Rawat, Superintending Archaeologist, ASI, Meerut Circle alongwith Mutawalis of Masjid to conduct the survey and submit report to this Court on 28.2.2025 as to whether there was any requirement of whitewashing and maintenance of the site in question.

83. On 28.2.2025 inspection report, conducted by ASI team on 27.2.2025, was placed before the Court alongwith coloured photographs and a pendrive of the videography, so conducted. The said pendrive has been kept in a sealed cover with Registrar General of this Court. The inspection report dated 27.2.2025 is extracted here as under;

> ***"Inspection Report of Jama Masjid Sambhal, UP conducted by ASI team on 27.02.2025***
>
> *Hon'ble High Court of Allahabad vide order dated 27/02/2025 in Civil Revision no 4 of 2025 has directed ASI to inspect Jama Masjid, Sambhal, a Centrally Protected Monument by deputing a team of three officers namely Sri Madan Singh Chouhan, Joint Director General, ASI Sri Zulfeqar Ali, Director (Monument) ASI and Sri Vinod Singh Rawat, Superintending Archaeologist, ASI, Meerut Circle along with the Mutawalis of the Masjid on 27/02/2025. The purpose of the inspection as per the direction of the Court was to see if there is any requirement of whitewash as part of the masjid maintenance/repair. The same would be specified in the inspection report and to be submitted to the Hon'ble court on 28.02.2025 by 10 AM. In compliance of the aforementioned order, the team of ASI along with the said officers reached the site on 27.02.2025 and inspected the monument.*
>
> *Jami Masjid, Sambhal is declared as protected monument vide notification No. 1645/1133-M dated 22/12/1920 under the Ancient Monument Preservation Act. 1904, provisions of Ancient Monuments and Archaeological Sites and Remains Act, 1958. The mosque with the*

central domes surrounded by courtyard can be approached from the gateway followed by a flight of steps located towards east of the Mosque. There is an ablution tank located in the center of the mosque.

Earlier the Masjid Committee had undertaken several works of repair and renovation in the mosque resulting into addition and alteration of the historic structure. The floor of the monument has been completely replaced by tiles and stones. The interior of the mosque has been painted with thick layers of enamel paint of sharp colours like golden, red, green and yellow concealing the original surface of the monument. As per the observation of the team the said modern enamel paint is still in good condition and there seems to be no urgency to repaint the same. However, the exterior of the monument has some signs of flaking of the paint but the condition doesn't require an immediate treatment at the moment.

The Monument as whole is in good condition however there seems to be some signs of deterioration at the entrance gate as well in the chambers located behind and the northern side of the prayer hall. The main entrance of the mosque is from the east side which opens through a wide doorway with a large wooden door. The lintel of the doorway is badly decayed which needs replacement.

Similarly, at the backside (west side) and at the north side of the mosque there are numbers of small chambers which has been used for the store purpose by the mosque authority. These chambers are in dilapidate condition especially ceilings, which are supported by wooden shingles are vulnerable. Apart from that, the other modern work/intervention occurred in the mosque premise needs to be identified thoroughly by the Conservation and science wing of the ASI to bring the monument into its original fabric.

In the meanwhile a detail items of work would be identified and documented by the ASI Meerut Circle for preparation of estimate so that the urgent Conservation and repair work may be undertaken.

As far as day-to-day maintenance such as cleaning, removal of dust and removal of vegetation growth in and around the monument etc. are concerned, ASI shall undertake the said work, provided Masjid committee would not put any hinderance and would cooperate ASI in doing the same."

84. The report filed by ASI on 27.2.2025 *prima facie* proves the apprehension of the plaintiffs and filing of application under Order XXVI Rule 9 and 10 CPC, as it has been stated in the report that the interior of mosque has been painted with thick layer of enamel paint of sharp colours like golden, red, green and yellow concealing the original surface of monument. The report further reveals that as per observation of the team the said modern enamel paint is in good condition and there is no urgency to repaint the same.

85. Thus, allowing the local investigation in no way affects the right of the revisionist, only the ground reality which exist will be brought on record by the Advocate Commission through his report, which can be objected by the revisionist before it is accepted and made part of the record under Rule 10 (2) of Order XXVI CPC.

86. Both, the report and pendrive filed by the ASI before this Court be transmitted to the trial court which is the investigation conducted on the application of the revisionist for permission of whitewashing of the alleged property in dispute, which was conducted on 27.2.2025 in presence of officials of ASI and Mutwallis of the revisionist Masjid.

87. In view of the above, I find that the court below did not commit any illegality or irregularity in passing the order dated 19.11.2024 as entire provision under Order XXVI Rule 9 read with Rule 68 and 69 of the General Rules Civil was complied with and the court after recording satisfaction allowed the application 8C on the basis of the averment made therein and ordered for Advocate Commission.

88. Thus, the question no. II framed as above, stands answered in negative against the defendants and in favour of the plaintiffs respondent nos. 1 to 8.

Question No. III

89. During the course of hearing, revisionist' counsel had raised objection as to maintainability of suit instituted by plaintiffs-respondent nos. 1 to 8 on the ground that it was barred by the Act of 1991 and provisions of the Act of 1958 would not be attracted. Though the revision only questions the order passed on Application 3C & 8C, which are in regard to institution of suit and appointment of Advocate Commission.

90. To decide this question, provisions of the Act of 1904, Act of 1958 and Act of 1991 has to be scanned in regard to maintainability of the suit

filed seeking relief under Section 18 of the Act of 1958.

91. The Ancient Monuments Preservation Act, 1904 was enacted during the British rule with an object for preservation of Ancient Monuments and objects of archaeological, historical, or artistic interest. It provided for preservation of ancient monuments alongwith control over trafficking antiquities and for excavation in certain places and also for protection and acquisition in certain cases of ancient monuments. It came into effect on 18.03.1904.

92. Section 2(1) defines "ancient monument" which is as under:-

> *"(1) "ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archeological or artistic interest, or any remains thereof, and includes—*
>
> *(a) the site of an ancient monument;*
>
> *(b) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and*
>
> *(c) the means of access to and convenient inspection of an ancient monument;"*

93. Section 3 provides for the "protected monuments", which is as under:-

> *"**3. Protected monuments.**—(1) The Local Government may, by notification in the [Official Gazette], declare an ancient monument to be a protected monument within the meaning of this Act.*
>
> *(2) A copy of every notification published under sub-section (1) shall be fixed up in a conspicuous place on or near the monument, together with an intimation that any objections to the issue of the notification received by the Local Government within one month from the date when it is so fixed up will be taken into consideration.*
>
> *(3) On the expiry of the said period of one month, the Local Government, after considering the objections, if any, shall confirm or withdraw the notification.*
>
> *(4) A notification published under this section shall, unless and until it is withdrawn, be conclusive evidence of the fact that the monument to which it relates is an ancient monument within the meaning of this Act."*

94. Section 5 provides for "preservation of ancient monument by agreement", which is as under:-

*"**5. Preservation of ancient monument by agreement.**—(1) The Collector may, with the previous sanction of Local Government, propose to the owner to enter into an agreement with Local Government for the preservation of any protected monument in his district.*

(2) An agreement under this section may provide for the following matters, or for such of them as it may be found expedient to include m the agreement:—

(a) the maintenance of the monument;

(b) the custody of the monument, and the duties of any person who may be employed to watch it;

(c) the restriction of the owner's right to destroy, remove, alter or deface the monument or to build on or near the site of the monument;

(d) the facilities of access to be permitted to the public or to any portion of the public and to persons deputed by the owner or the Collector to inspect or maintain the monument;

(e) the notice to be given to the Local Government in case the land on which the monument is situated is offered for sale by the owner, and the right to be reserved to Local Government to purchase such land, or any specified portion of such land, at its market-value;

(f) the payment of any expenses incurred by the owner or by Local Government in connection with the preservation of the monument;

(g) the proprietary or other rights which are to vest in Government in respect of the monument when any expenses are insured by Local Government in connection with the preservation of the monument;

(h) the appointment of an authority to decide any dispute arising of the agreement; and

(i) any matter connected with the preservation of the monument which is a proper subject of agreement between the owner and Local Government.

*[* * *]*

(4) The terms of an agreement under this section may be altered from time to time with the sanction of Local Government and with the consent of the owner.

(5) With the previous sanction of Local Government the Collector may terminate an agreement under this section on giving six months' notice in writing to the owner.

(6) The owner may terminate an agreement under this section on giving six months' notice to the Collector.

(7) An agreement under this section shall be binding on any person claiming to be owner of the monument to which it relates, through or under a party by whom or on whose behalf the agreement was executed.

(8) Any rights acquired by Local Government in respect of expenses

incurred in protecting or preserving a monument shall not be affected by the termination of an agreement under this section."

95. After the enforcement of the Act of 1904, the property in question was declared as a protected monument under Section 3(3) of the Act by Notification No. 1412M dated 18.11.1920 and was published in Part I of United Provinces Gazette. It was on 22nd December 1920, the Lieutenant Governor confirmed the notification and Juma Masjid, District-Moradabad situated at Sambhal became a protected monument under the Act of 1904. Copy of the notification of 1920 has been brought on record by Archaeological Survey of India in its counter affidavit.

96. Pursuant to notification of the year 1920, the Mutwallis of Juma Masjid at Sambhal entered into an agreement with Collector of Moradabad acting on behalf of Secretary of State for India in Council on 13/19.01.1927, which was registered on 01.03.1927, is as under:-

*"**Copy of Agreement***

This indenture made subject to the provision of the Ancient Monuments Preservation Act VII of 1904 the 13th day of January 1927 between the Mutwallis of Juma Masjid Sambhal (hereinafter called the Mutwallis) of the one part and the Collector of Moradabad on behalf of the Secretary of State for India in Council (hereinafter called the Secretary of State) of another part. Whereas the Juma Masjid (hereinafter referred to as the said Masjid) has been duly declared to be a protected monument under the provision of section (3) of the said Act by the notification of the government of the United Provinces of Agra and Oudh, Public Works Department, Buildings and Roads Branch No. dated and whereas the terms of this agreement executed under section V of the said Act have been approved by the government of the United Provinces of Agra and Oudh. Witness as follows, namely:-

***1.** That the said Masjid shall be maintained in repair by the Archaeological Department acting on behalf of the Secretary of State, provided that it shall be entirely within the discretion of the Archaeological Department to determine what repairs if any, shall from time to time, be carried out under this condition. The cost of such repairs shall be met out of any endowment that may have been created for the purpose of keeping the said Masjid in repair or for that purpose among others, and additional funds provided by the Secretary of State only if the endowment funds attached to the said Masjid prove insufficient for the required repairs.*

***2.** That the Mutawallis shall not undertake any repairs to the said Masjid without the permission in writing of the Collector of Moradabad.*

***3.** That the Mutwallis shall not destroy, remove, alter, deface or imperil*

the said Masjid.

4. *That the Mutwallis shall not build on or near the site of the said Masjid without the permission in writing of the Collector, Moradabad.*

5. *That the Secretary of state shall not interface with or hinder in any way the performance of religious observances according to the tenets of Islam at the said Masjid.*

6. *That visitors will have the free access to the said Masjid but with a due regard to the religious susceptibilities of the Mutwallis and the Muslim public.*

7. *That the Mutwallis shall permit the Archaeological officers or such other persons as may be deputed by the collector Moradabad to repair or inspect the said Masjid.*

8. *That the Mutwallis shall be the custodian of the said masjid and shall be responsible for keeping it neat and tidy.*

9. *That the agreement shall be binding on any person claiming to be Mutwallis of the said Masjid.*

10. *That the terms of the agreement may be altered from time to time as the occasion arises with the sanction of the Government of the United Provinces of Agra and Oudh and with the concurrence of the Mutwallis.*

11. *That the Collector, Moradabad may with the previous sanction of the Government of the United Provinces of Agra and Oudh terminate the agreement on giving six month's notice in writing to the Mutwallis.*

12. *That similarly the Mutawallis may terminate the agreement on giving six months notice to the Secretary of State, provided that the Mutawallis will have to pay to the Secretary of State, should the Secretary of State so claims all the expenses incurred by the Secretary of State in repairing the building, maintenance and upkeep of the said Masjid during the five years previous to the termination of the said agreement or during such part thereof as the agreement may have been in force.*

13. *The Commissioner of Rohilkhand Division will be the authority to decide any dispute arising out of the agreement.*

14. *That the Mutwallis shall give the Collector Moradabad six months' previous notice in writing in case the said Masjid or any portion thereof is offered for sale.*

15. *That the Secretary of State reserves to himself the right to purchase at its market value the said Masjid or any portion thereof in case it is offered for sale by the Mutwallis to other person than the co-sharer. N.B. the condition nos. 14 & 15 shall not be necessary in the case monuments used for religious purpose, as such monuments being the public property cannot be offered for sale.*

In witness whereof the Mutwallis have here unto set their hands and the Collector of Moradabad has on behalf of the Secretary of State, here unto set his hand and the seal of his office.

Sd/Md. Faigilur Rahman

Sd/A.P. Collector, Esqr. I.C.S.

Collector Moradabad.

19.1.1927

(Registered on 1st March 1927)"

97. The alleged agreement provided that the structure would be maintained and repaired by Archaeological Survey of India on behalf of Secretary of State and it was on the entire discretion of Archaeological Department to determine whether any repair is required from time to time or not. The cost of repair was to be borne out by endowment created for the purpose of keeping the Masjid in repair and if the funds proved insufficient then the State was to provide. The Mutwallis were restrained from undertaking any repair in the said Masjid without permission of the Collector of Moradabad. The third condition attached to the alleged agreement provided restrain to the Mutwallis not to destroy, remove, alter, deface or imperil the said Masjid. No construction work was to be carried out near the site without the permission of the Collector, Moradabad. Further, Condition No. 6 provided that visitors will have free access to the said Masjid but with a due regard to susceptibilities of the Mutwallis. The alleged agreement also permitted to Archaeological Department and its officers to repair and inspect the site. Condition No. 8 provided that Mutwallis will be custodian of the Masjid.

98. Thus, it clearly culls out from the reading of alleged agreement that Mutwallis will be the custodian of the structure standing therein. The agreement so executed does not define the ownership of the property in question of either of the parties at the time when the alleged agreement was entered into.

99. Post independence, the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (*hereinafter called as "the Act of 1951"*) was enacted. The Act of 1951 merely declared certain monuments etc. to be of national importance and the Act of 1904 also applied to such monuments.

100. After the Constitution of India was enforced, the said "ancient and historical monuments, archaeological monuments, archaeological sites

and remains" were bifurcated under three heads and find place in the 7th Schedule under the Union List, State List and Concurrent List. Under the Union List, Entry 67 provides ancient and historical monuments and records and archaeological sites and remains declared by or law made by Parliament to be of national importance. Under List II-State List, under Entry 12, ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance find place.

101. Similarly, under List III-Concurrent List, Entry 40 provides for archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

102. The Act of 1904 governs all ancient monuments whether falling under the Central field or State field. The executive power vested in the Central Government.

103. Need was felt to legislate a self contained law at the centre which will apply conclusively to ancient monuments of national importance falling under Entry 67 of List-I and to archaeological sites and remains falling under Entry 40, the Concurrent List. Simultaneously, State Governments were to be advised to enact a similar law in respect of ancient monuments falling under Entry 12 in the State List.

104. The Act No. 24 of 1958 was enacted with this objective and was enforced on 28.08.1958 with Section 39 providing for repeal and saving clause. The earlier Acts stood repealed while all the things done or omitted to be done pursuant to the Act of 1904 stood saved.

105. Under the Act of 1958, "ancient monument' was defined in Section 2(a) as under:-

> *"**2(a)** "ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than one*

hundred years, and includes—

(i) the remains of an ancient monument,

(ii) the site of an ancient monument,

(iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and

(iv) the means of access to, and convenient inspection of, an ancient monument;"

106. Section 2(i) defines "protected area" which is as under:-

> *"**2(i)** "protected area" means any archaeological site and remains which is declared to be of national importance by or under this Act;"*

107. Section 3 provides that all ancient and historical monuments and all archaeological sites and remains which have been declared to be of national importance shall be deemed to be ancient and historical monuments. Section 4 provided the power to the Central Government to declare any ancient monument or archaeological site which till date has not been declared can be declared as of national importance. Section 5 provides for the acquisition of rights in a protected monument while Section 6 speaks of preservation of protected monument by agreement. Both Section 5 and 6 are extracted hereasunder:-

> *"**5. Acquisition of rights in a protected monument**.—(1) The Director-General may, with the sanction of the Central Government, purchase, or take a lease of, or accept a gift or bequest of, any protected monument.*
>
> *(2) Where a protected monument is without an owner, the Director-General may, by notification in the Official Gazette, assume the guardianship of the monument.*
>
> *(3) The owner of any protected monument may, by written instrument, constitute the Director-General the guardian of the monument, and the Director-General may, with the sanction of the Central Government, accept such guardianship.*
>
> *(4) When the Director-General has accepted the guardianship of a monument under sub-section (3), the owner shall, except as expressly provided in this Act, have the same estate, right, title and interest in and to the monument as if the Director-General had not been constituted a guardian thereof.*
>
> *(5) When the Director-General has accepted the guardianship of a monument under sub-section (3), the provisions of this Act relating to agreements executed under section 6 shall apply to the written to agreements executed under the said sub-section. (6) Nothing in this*

section shall affect the use of any protected monument for customary religious observances.

6. Preservation of protected monument by agreement.—*(1) The Collector, when so directed by the Central Government, shall propose to the owner of a protected monument to enter into an agreement with the Central Government within a specified period for the maintenance of the monument.*

(2) An agreement under this section may provide for all or any of the following matters, namely:—

(a) the maintenance of the monument;

(b) the custody of the monument and the duties of any person who may be employed to watch it;

(c) the restriction of the owner's right—

(i) to use the monument for any purpose,

(ii) to charge any fee for entry into, or inspection of, the monument,

(iii) to destroy, remove, alter or deface the monument, or (iv) to build on or near the site of the monument;

(d) the facilities of access to be permitted to the public or any section thereof or to archaeological officers or to persons deputed by the owner or any archaeological officer or the Collector to inspect or maintain the monument;

(e) the notice to be given to the Central Government in case the land on which the monument is situated or any adjoining land is offered for sale by the owner, and the right to be reserved to the Central Government to purchase such land, or any specified portion of such land, at its market value;

(f) the payment of any expenses incurred by the owner or by the Central Government in connection with the maintenance of the monument;

(g) the proprietary or other rights which are to vest in the Central Government in respect of the monument when any expenses are incurred by the Central Government in connection with the maintenance of the monument;

(h) the appointment of an authority to decide any dispute arising out of the agreement; and

(i) any matter connected with the maintenance of the monument which is a proper subject of agreement between the owner and the Central Government.

(3) The Central Government or the owner may, at any time after the expiration of three years from the date of execution of an agreement under this section, terminate it on giving six months' notice in writing to the other party:

Provided that where the agreement is terminated by the owner, he shall pay to the Central Government the expenses, if any, incurred by it on the maintenance of the monument during the five years

immediately preceding the termination of the agreement or, if the agreement has been in force for a shorter period, during the period the agreement was in force.

(4) An agreement under this section shall be binding on any person claiming to be the owner of the monument to which it relates, from, through or under a party by whom or on whose behalf the agreement was executed."

108. Similarly, Section 18 speaks of right of access to protected monument. According to it, public shall have a right to access any protected monument. Relevant provision is extracted hereasunder:-

*"**18. Right of access to protected monuments.—**Subject to any rules made under this Act, the public shall have a right of access to any protected monument"*

109. The Central Government, thereafter, framed the rules which are called as The Ancient Monuments and Archaeological Sites and Remains Rules, 1959.

110. Rule 3 has been relied upon by the revisionist, which is extracted hereasunder:-

*"**3. Monuments governed by agreement.**—(1) Access to protected monuments in respect of which an agreement has been entered into between the owner and the Central Government under section 6, or in respect of which an order has been made by that Government under section 9, shall be governed by the provisions of the agreement or, as the case may be, the order; and nothing in rules 4, 5, 6 or 7 shall be construed as affecting any such agreement or order.*

(2) A copy of the relevant provisions of every such agreement or order shall be exhibited in a conspicuous part of the monument concerned."

111. From the reading of the aforesaid Rule, it is clear that the agreement executed in respect of a protected monument between the owner and the Central Government under section 6, or any order made by Government under section 9, shall be governed by the provisions of the agreement, as the case may be. The alleged agreement executed in 1927 *prima facie* reveals that Mutwallis are the custodians of the structure in dispute. The alleged agreement nowhere records the ownership of the revisionist. It is a matter of evidence which shall be seen by court below during trial of the suit.

112. Thus, from the reading of the Act of 1904, thereafter, the notification of the year 1920 and subsequent alleged agreement of the year 1927 and the Act of 1958, it is clear that structure in dispute is a protected ancient monument notified in the year 1920. It was post notification that an agreement was executed by then Collector, Moradabad acting on behalf of Secretary of State for India in Council and Mutwallis of Juma Masjid for the protection and preservation of the protected monument. The declaration made by then Government in 1920 was never challenged by revisionist before any Court of law and it became final. In fact, the revisionist had entered into an agreement in the year 1927 accepting the fact that it is a protected monument governed by the Act of 1904.

113. The argument set up by Sri Naqvi that dispute in regard to Masjid already stood settled in 1877 and decree having been confirmed by this Court cannot be accepted at this stage in view of the fact that judgment of 1877 speaks of an old building, whereas in 1920 Juma Masjid was declared as a protected monument under the Act of 1904. If the title suit was decided in favour of revisionist in the year 1877, then, question arises as to why the revisionist had entered into an agreement in the year 1927 subjecting the structure in dispute to the Act of 1904. The alleged agreement does not reveal the ownership of the revisionist and clearly speaks that the structure needs to be protected in pursuance of the Act of 1904 by Archaeological Department.

114. The alleged agreement of 1927 has been brought on record by revisionist himself. It is part of paper-book of the revision and during the consideration of application for whitewashing, their entire emphasis was on the said agreement.

115. On the contrary, during hearing of the case, Sri Naqvi vehemently submitted that the Act of 1991 bars the suit filed by plaintiffs as it

prohibits conversion of any place of worship and provides for maintenance of religious character of any place of worship as existed on 15.08.1947.

116. In the instant case, plaintiffs, initially in the month of July, 2024, had given a notice to ASI for right of public access under Section 18 of the Act of 1958. Prayer made in the plaint is for seeking right of access to the disputed structure in view of notification issued under Section 3 in the year 1920 under the Act of 1904 and also seeking declaration that ASI has a complete control over the same.

117. The entire case set up by revisionist is on the basis of alleged agreement entered between then Collector, Moradabad and the revisionist in the year 1927. Once revisionist himself admitted to the execution of the alleged agreement which was in pursuance of the Act of 1904, prior to the enforcement of the Act of 1991 and cut off date mentioned therein, he cannot say at this stage that suit is barred by provisions of the Act of 1991.

118. This is not a case where any conversion of place of worship is taking place or any religious character of place of worship is being changed. Plaintiffs have only sought right to access to a protected monument declared in the year 1920 under Section 18 of the Act of 1958. Once, it is an admitted position that the structure in question has been declared as a protected monument in 1920 and the same remained unchallenged till date, it is bound to be governed by provisions of law which existed when the notification was made and, thereafter, the laws enacted to govern such protected monument.

119. The Act of 1904 and 1951 were repealed and new law was enacted in the year 1958 saving all the actions which took place earlier. There is no denial to the fact that status of the structure standing which was declared as a protected monument in 1920 still exists as a protected

monument under the Act of 1958. The alleged agreement as executed in the year 1927, according to revisionist, still holds ground and governs the relationship between the revisionist and the State.

120. Once, the revisionist himself has subjected to the Act of 1904 and, thereafter, to 1958, he cannot take shelter of the Act of 1991. There is no claim in the plaint of 2024 seeking conversion of place of worship or changing religious character of any place. Right as accrued to the plaintiffs has been claimed under Section 18 of the Act of 1958.

121. In view of above, I find that the argument advanced by revisionist in respect of ouster of the suit instituted by plaintiffs being barred by the Act of 1991 is wholly misplaced, at this stage. It is open to the revisionist/ defendant no. 6 to raise such issue at time of framing of issue, or by moving application under Order VII Rule 11 CPC.

122. The question framed stands answered against the revisionist/defendant no. 6 and in favour of plaintiffs.

Conclusion

123. Thus, to sum up, I find that court below had not committed any error, irregularity or illegality in granting leave to institute the suit before the expiry of period of notice under Section 80(2) CPC, as it was never objected by the Government or its officials defendant nos. 1 to 5 and revisionist/defendant no. 6 being a private person is not covered under the canopy of Section 80.

124. Further, the act of allowing application under Order XXVI Rule 9 for local investigation and appointing Advocate Commission has not caused any prejudice to the revisionist as he has right to question the same at the stage of Order XXVI Rule 10(2) CPC before the report is confirmed and admitted as an evidence and made part of the record. Only one Commission had taken place whose survey started on 19.11.2024 and

completed on 24.11.2024 at 11:00 a.m.

125. Lastly, in view of the finding recorded above, present suit is not *prima facie* barred by provisions of the Act of 1991, in fact, it has been filed seeking right to access to property in dispute under Section 18 of the Act of 1958 being a protected monument.

126. Considering the facts and circumstances of the case, I find that no interference is required in the order dated 19.11.2024 passed by court below allowing application Paper No. 3C granting leave to institute suit and application 8C for appointment of Commission for local investigation.

127. Revision fails and is hereby dismissed. Interim order stands vacated. Suit to proceed. No order as to cost.

Order Date :- 19.05.2025
Shekhar/V.S. Singh