

**2023 LiveLaw (SC) 634 : 2023 INSC 702**

**IN THE SUPREME COURT OF INDIA  
EXTRAORDINARY APPELLATE JURISDICTION**

**DR. DHANANJAYA Y. CHANDRACHUD; CJI., J.B. PARDIWALA; J., MANOJ MISRA; J.**  
**Special Leave Petition (Civil) No of 2023 [Diary No 31345 of 2023]; August 4, 2023**

**Committee of Management Anjuman Intezamia Masajid, Varanasi versus Rakhi Singh and Others**

**Constitution of India, 1950; Article 136 - Code of Civil Procedure, 1908; Order XXVI Rule 10A - Survey of Gyanvapi Mosque - Commission for Scientific Investigation - Application seeking a direction to the Archaeological Survey of India (ASI) to undertake a scientific survey for the purpose of ascertaining the nature of the construction and the age of the structure. The District Judge allowed the applications and directed the ASI to “undertake the scientific investigation / survey / excavation on the property. High Court dismissed the appeal against the order of the District Judge directing an archeological survey of the area in which the Gyanvapi Mosque is situated. However, during the course of the proceedings before the High Court, ASI has clarified on affidavit that it was neither carrying out any excavation nor would the survey involve any destruction of the property. Held that the Order of the Trial Judge under Order XXVI Rule 10A cannot prima facie be construed to be without jurisdiction. Having regard to the nature and ambit of a court appointed Commissioner, we are unable to differ with the view of the High Court, particularly while exercising the jurisdiction under Article 136 of the Constitution. The survey shall not involve any excavation at the site or any destruction of the structure. The entire process shall be concluded by any non-invasive methodology that may be adopted by the ASI. (Para 15 -17)**

**Code of Civil Procedure, 1908; Order XXVI Rule 10 - Procedure of Commissioner - In terms of Order XXVI Rule 10, the Commissioner has to submit a report in writing to the court. The report of the Commissioner and the evidence taken by him constitute evidence in the suit and form a part of the record. However, the court and, with its permission, any of the parties may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in the report or as regards the report including the manner in which the investigation has been made. The court is also empowered to direct such further inquiry if it is dissatisfied with the proceedings of the Commissioner. The evidentiary value of any report of the Commissioner is a matter to be tested in the suit and is open to objections including cross-examination. A report of the Commissioner does not by and of itself amount to a substantive finding on matters in dispute and is subject to the process of the court during the course of the trial. (Para 14)**

**(Arising out of impugned final judgment and order dated 03-08-2023 in MUA227 No.7955/2023 passed by the High Court of Judicature at Allahabad)**

**For Petitioner(s) Mr. Huzefa Ahmadi, Sr. Adv. Mr. Fuzail Ahmad Ayyubi, AOR Mr. Nizam Pasha, Adv. Ms. Rashmi Singh, Adv. Mr. Ibad Mushtaq, Adv. Ms. Akanksha Rai, Adv.**

**For Respondent(s) Mr. Tushar Mehta, SG Mr. Sharan Dev Singh Thakur, AAG Ms. Ruchira Goel, AOR Mr. Siddharth Thakur, Adv. Mr. Shantanu Singh, Adv. Mr. Ravi Sehgal, Adv. Mr. Adit Jayeshbhai Shah, Adv. Mr. Sharanya Sinha, Adv. Ms. Keerti Jaya, Adv. Mr. Barun Kumar Sinha, Adv. Mr. Anantha Narayana M.G., AOR Mrs. Pratibha Sinha, Adv. Mr. Rakesh Mudgal, Adv. Mrs. Beby Devi Bonia, Adv. Mr. Tarun Gulia, Adv. Mr. Prabhsimar Singh, Adv.**

**For R-2,3,4 & 5 Mrs. Madhavi Divan, Sr. Adv. Mr. Hari Shankar Jain, Adv. Mr. Vishnu Shankar Jain, AOR Mr. Parth Yadav, Adv. Ms. Mani Munjal, Adv.**

## J U D G M E N T

### Dr Dhananjaya Y Chandrachud, CJI

1 The proceedings under Article 136 of the Constitution have been initiated to challenge an order of the High Court of Judicature at Allahabad dated 3 August 2023. The High Court dismissed the appeal against an order of the District Judge directing an archeological survey of the area in which the Gyanvapi Mosque [Settlement Plot No. 9130] is situated.

2 The respondent-plaintiffs filed a suit (Civil Suit No. 18 of 2022) seeking a declaration that they were entitled to perform rituals of deities which are allegedly present within the premises of the Gyanvapi mosque. The respondents also filed an application under Section 75 and Order XXVI Rules 9 and 10 read with Section 151 of the Civil Procedure Code 1908<sup>1</sup> for the appointment of an Advocate Commissioner for inspection of the premises. The petitioner-defendant moved an application under Order 7 Rule 11(d) of the CPC for the dismissal of the suit on the ground that it is barred by the provisions of the Places of Worship (Special Provision) Act 1991.

3 The application seeking the appointment of the Advocate Commissioner was allowed by the Civil Judge. The appeal against the order of the Civil Judge was dismissed by the High Court by an order dated 21 April 2022. The petitioners instituted proceedings (SLP No. 9388 of 2022) under Article 136 challenging the order of the High Court. In the meanwhile, the Advocate Commissioner submitted a report recording that a Shivaling was found in the premises of the mosque. By an order dated 16 May 2022, the Civil Judge directed the place where the Shivaling was allegedly found be sealed. This Court by an order dated 17 May 2022 directed the order of the Civil Judge dated 16 May 2022 shall not restrain the access of Muslims to the mosque or the use of the mosque for the purpose of performing Namaz. By another order dated 20 May 2022, this Court directed that the application filed by the petitioner under Order VII Rule 11 of CPC be decided on priority.

4 The District Judge dismissed the application of the petitioner under Order VII Rule 11. The appeal against the order dismissing the application was dismissed by the High Court by an order dated 31 May 2023. The Special Leave Petition challenging the order of the High Court dismissing the Order 7 Rule 11 application of the petitioner is pending before this Court.

5 Meanwhile, the respondents filed application nos. 327C and 333C under Section 75(c) and Order 26 Rule 10A of the CPC seeking a direction to the Director of the Archaeological Survey of India (ASI) to undertake a scientific survey of Settlement Plot No 9130 for the purpose of ascertaining the nature of the construction and the age of the structure. The District Judge allowed the applications and directed the ASI to “undertake the scientific investigation/survey/excavation on the property bearing Settlement Plot No 9130”, excluding certain areas which were sealed by the orders of this Court dated 17 May 2022, 20 May 2022 and 11 November 2022. The District Judge while allowing the applications issued the following directions:

“(a) The Director of ASI is directed to undertake the scientific investigation/survey/excavation at the property in question i.e. at Settlement Plot No.9110 in the case excluding the areas sealed by the Hon’ble Supreme Court vide order dated 17.05.2022, 20.05.2022 as well as vide order dated 11.11.2022 in SLP(C) No.9388/2022 titled as Committee of Management Anjuman Intejamia Masajid Varanasi vs. Rakhi Singh & Ors.;

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<sup>1</sup> “CPC”

- (b) The Director of ASI is also directed to conduct a detailed scientific investigation by using GPR Survey, Excavation, Dating method and other modern techniques of the present structure to find out as to whether same has been constructed over a pre-existing structure of Hindu temple;
- (c) The Director of ASI is also directed to conduct scientific investigation in the light of the averment made in this application after associating the Plaintiffs, Defendants and their respective counsels and submit report to this Hon'ble Court upto 04-08-2023 and also to photograph and video-graph the entire survey proceedings;
- (d) The Director of ASI is also directed to investigate the age and nature of construction of the western wall of the building in question through scientific method(s);
- (e) The Director of ASI is also directed to conduct Ground Penetrating Radar (GPR) survey just below the 3 domes of the building in question and conduct excavation, if required;
- (f) The Director of ASI is also directed to conduct Ground Penetrating Radar (GPR) survey beneath the western wall of the building and conduct excavation, if required;
- (g) The Director or ASI is also directed to conduct Ground Penetrating Radar (GPR) survey beneath the ground of all the cellars and conduct excavation, if required;
- (h) The Director of ASI is also directed to prepare a list of all the artefacts which are found in the building specifying their contents and carry out scientific investigation and undertake dating exercise to find out the age and nature of such artefacts;
- (i) The Director of ASI is also directed to conduct dating exercise of the pillars and plinth of the building to find out the age and the nature of construction;
- (j) The Director of ASI is also directed to conduct GPR survey, excavation wherever required, dating exercise and other other scientific methods for determining the age and nature of construction existing at the site in question;
- (k) The Director of ASI is also directed to investigate the artefacts and other objects of historical and religious importance existing in different parts of the building and also beneath the structure which may be found during such exercise;

The Director of ASI is also directed to ensure that there should be no damage to the structure standing on the disputed land and it remains intact and unharmed. Report will be submitted up to 04-08-2023. Put up on 04-08-2023 for further proceedings."

**6** The order of the District Judge was assailed before the High Court of Judicature at Allahabad in proceedings under Article 227 of the Constitution. By a judgment dated 3 August 2023, the order of the District Judge was affirmed subject to (i) the observations made by the High Court in the text of its judgment; and (ii) the contents of the affidavit which was filed by the ASI before the High Court.

**7** During the course of the hearing before the High Court, the ASI was called upon to assist the Court. In pursuance of the direction of the High Court, the Additional Director General, ASI filed an affidavit setting out the nature of the proposed survey that would be carried out. Paragraphs 13 to 20 of the affidavit filed by the ASI are extracted below for convenience of reference:

"13 That it is also submitted that the GPR survey would be conducted by the renowned experts of the technical institutions such as IIT, Kanpur.

14 That it is further submitted that the survey team will study the pillars and architectural members, detail study of western wall, survey of complex and structure, study of open place/floor, GPR survey and photo documentations etc.

15 That it is pertinent to mention here that Scientific Archeological Studies do not damage or remove the structure rather they are preserved and wherever any structure is exposed that area is left untouched.

16 That it is further submitted that while Scientific Archeological Studies would be carried out beyond the structures and in open areas only.

17 That it is further submitted that no drilling, no cutting, no removal of brick or stone from the existing structure will be done while conducting the survey and study.

18 That it is further submitted that archeological sites will be in open place floor area which will not affect the structure at all.

19 That it is further submitted that no wall/structure would be damaged and the entire survey will be conducted by the non destructive method by using techniques such as GPR survey, GPS survey, the other scientific methods and other modern techniques.

20 That it is further submitted that the ASI is premier organization to conduct archeological investigations in the country, and undertakes that entire survey will be conducted in accordance with the directions issued by the Hon'ble Courts without using any destructive method and damage to the structure. In case any further investigation/excavation is required permission of Hon'ble Court would not be sought."

**8** Apart from the affidavit, the deponent Shri Alok Tripathi, who is the Additional Director General of the ASI, appeared before the court in-person. The submissions which were made by the Additional Director General have been recorded in the following extract of the judgment of the High Court:

"...he submitted that the ASI will conduct a detail survey in accordance with law and prepare a list of the antiquities which are found in building and carry out detail survey and undertake the exercise to find age and nature of the structure. He further submitted that the ASI will conduct survey, documentation, photography, detail description, GPR survey and full studies without harming the existing structures. He also submitted that all the aforesaid works would be carried without any damage to the structures. He has submitted that the scientific investigation would be carried out beyond the structure and in open areas only: no drilling, no cutting, no removal of brick or stones from the existing structure will be done while conducting the survey and study. It has been further submitted that archaeological sites will be in open place floor area which will not affect the structure at all and no wall/structure would be damaged and the entire survey will be conducted by the non-destructive method by using techniques such as GPR survey. GPS survey the other scientific methods and other modern techniques. It has also been submitted that in case any further investigation/excavation is required, permission of the Hon'ble Court would be sought."

**9** The High Court held that the order of the District Judge directing a survey falls within the ambit of Order XXVI Rule 10A of the Code of Civil Procedure 1908. The High Court rejected the submission of the petitioners that Order XXVI Rule 10A cannot be used by the parties to gather evidence in their favour. The Court observed that where a question arising in a suit involves a scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the court, it may, if it thinks necessary or expedient in the interest of justice so to do, issue a commission for that purpose. In paragraph 21 of its judgment, the High Court has dealt with the apprehension that the survey would envisage an act of excavation or destruction of the structure existing at the site. The High Court has recorded the statement of the Additional Director General, ASI as well as of the Additional Solicitor General who was appearing for the Union of India, that no excavation whatsoever will take place. The High Court observed that since the Department of Archeology and counsel representing the Department had expressly stated that no damage would be caused to the property in question, the survey which is proposed, may be permitted to be carried out. In the concluding paragraph of its order, the High Court clarified that while it was affirming the order dated 21 July 2023 of the District Judge, this was subject to the

observations of the High Court and the contents of the affidavit which was filed on behalf of ASI.

**10** Before we deal with the submissions which have been urged on behalf of the petitioners by Mr Huzefa A Ahmadi, senior counsel, it needs to be clarified at the outset that it has been clarified on behalf of ASI by Mr Tushar Mehta, Solicitor General that the entire survey which is envisaged to be carried out in pursuance of the order of the District Judge would be completed without any excavation at the site and without causing any damage to the structure.

**11** On behalf of the petitioner, it has been submitted by Mr Huzefa A Ahmadi, senior counsel that this Court ought to interfere with the order of the High Court because:

(i) The carrying out of a survey is contrary to the provisions of the Places of Worship (Special Provisions) Act 1991, the genesis of which has been explained in the judgment of the Constitution Bench in ***M Siddiq (Dead) Through Legal Representatives vs Mahant Suresh Das and Others***<sup>2</sup> [*Ram Janmabhumi Temple Case*];

(ii) In the suit of 1991, pursuant to a similar plea, a survey by the ASI was ordered which has been stayed by the High Court by an order dated 9 September 2021;

(iii) A similar issue pertaining to an order for carbon dating of a structure which is claimed to be a 'Shivaling' by the plaintiffs and a 'fountain' by the defendants is pending in Committee of Management Anjuman Intezamia Masajid, ***Varanasi vs Rakhi Singh and Others***<sup>3</sup>. In the course of the proceedings before this Court, the order for survey was stayed, on the Solicitor General joining in the submission that the process of carbon dating may partake of an invasive nature;

(iv) An order of *status quo* in respect of the property was passed in the judgment of this Court in ***Mohd Aslam Alias Bhure vs Union of India and Others***<sup>4</sup> because of a threat to the property; and

(v) While an order for conducting a scientific investigation or survey under Order XXVI Rule 9 may be passed at any stage, ordinarily a scientific survey ought not to be ordered until the court is cognizant of the issues that would arise in the suit.

**12** On the other hand, Ms Madhavi Divan, senior counsel appearing on behalf of the original plaintiffs in the suit submitted that:

(i) An order under Order XXVI is essentially for the benefit of the court which requires such a survey to be conducted to assist it in deciding the substance of the controversy in a suit;

(ii) The order of the trial Judge ordering a survey is neither adversarial nor prejudicial since it is not determinative of the substance of the rights of the parties;

(iii) All parties would be entitled to file their objections to the report of the ASI and to seek cross-examination should the survey be intended to be let into substantive evidence;

(iv) The issue in terms of the provisions of Section 4(1) of the Places of Worship (Special Provisions) Act 1991 is as regards the religious character of the place. The frame of the plaint would indicate that the contention of the plaintiffs is that both before and after 1947, the religious character of the place is indicative by acts of continuing worship;

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<sup>2</sup> (2020) 1 SCC 1

<sup>3</sup> SLP (C) No 11351 of 2023

<sup>4</sup> (1994) 2 SCC 48

(v) The function of the ASI is to preserve and protect monuments of historical importance and hence there is no basis for any apprehension that damage would be caused to the structure; and

(vi) The circumstances pertaining to the earlier suit of 1991 are distinct inasmuch as in that case the suit was on title in which an application under Order VII Rule 11 CPC was allowed by the Trial Judge. The order of the Trial Judge was set aside in First Appeal against which proceedings under Article 227 were instituted by the original defendants before the High Court. In those proceedings, there was a stay of the proceedings in the suit. In this backdrop, when the Trial judge allowed an application for a survey by the ASI, the order was stayed by the High Court during the pendency of the proceedings.

**13** Order XXVI Rule 10A stipulates that where any issue in a suit involves any scientific investigation which cannot in the opinion of the Court be conveniently conducted before the court, the court may, if it thinks necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit directing them to inquire into such question and report thereon to the court. Under sub-rule (2) of Rule 10A, the provisions of Rule 10 of the order shall, as far as may be, apply in relation to a Commissioner appointed under the rule as they apply to a Commissioner appointed under Rule 9. Rules 9 and 10 of Order XXVI therefore assume relevance and are extracted below:

**“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.

**10-A. *Commission for scientific investigation.***—(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of Rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9.”

**14** In terms of Order XXVI Rule 10, the Commissioner has to submit a report in writing to the court. The report of the Commissioner and the evidence taken by him constitute evidence in the suit and form a part of the record. However, the court and, with its

permission, any of the parties may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in the report or as regards the report including the manner in which the investigation has been made. The court is also empowered to direct such further inquiry if it is dissatisfied with the proceedings of the Commissioner. The evidentiary value of any report of the Commissioner is a matter to be tested in the suit and is open to objections including cross-examination. A report of the Commissioner does not by and of itself amount to a substantive finding on matters in dispute and is subject to the process of the court during the course of the trial.

**15** At this stage, the court must notice that the District Judge while acting as a trial Judge in the suit exercised discretion under Order XXVI Rule 10A to direct a scientific investigation by the ASI. The order of the learned Trial Judge under Order XXVI Rule 10A cannot *prima facie* be construed to be without jurisdiction. The High Court has found no reason to interfere, having set out the legal position which constrains the nature of the challenge under Article 227 of the Constitution while dealing with an interlocutory order of this nature. At the same time, the High Court has introduced certain safeguards which need to be reiterated in the course of the present judgment of this Court.

**16** Having regard to the nature and ambit of a court appointed Commissioner, we are unable to differ with the view of the High Court, particularly while exercising the jurisdiction under Article 136 of the Constitution. The High Court has introduced certain specific directions to circumscribe the nature of the order which was passed by the District Judge. Reading the directions which have been issued by the District Judge, it is apparent that they would be amenable to the carrying out of an excavation at the site. However, during the course of the proceedings before the High Court, ASI has clarified on affidavit that it was neither carrying out any excavation nor would the survey involve any destruction of the property.

**17** We reiterate the direction of the High Court that there shall be no excavation at the site which was in accordance with the statement which was made before the High Court by the Additional Solicitor General and which has been reiterated in the submissions made by the Solicitor General on behalf of the ASI. We have recorded the submission of the Solicitor General in the earlier part of this order to the effect that the survey shall not involve any excavation at the site or any destruction of the structure. In terms of the statement and the directions of the High Court, we direct that the entire process shall be concluded by any non-invasive methodology that may be adopted by the ASI.

**18** The report which would be prepared by the ASI shall in terms of the provisions of Order 26 shall be remitted to the Trial court and shall thereafter abide by the directions which would be passed by the District Judge at the trial of the suit.

**19** The Special Leave Petition is accordingly disposed of.

**20** Pending applications, if any, stand disposed of.