

Neutral Citation No. - 2023:AHC:155726

CJ's Court

Reserved on 27.7.2023.

Delivered on 3.8.2023

**Case :-** MATTERS UNDER ARTICLE 227 No.7955 of 2023

**Petitioner :-** C/M Anjuman Intezamia Masajid Varanasi

**Respondent :-** Smt. Rakhi Singh And 8 Others

**Counsel for Petitioner:-** S F A Naqvi, Sr. Advocate, Puneet Kumar Gupta, Syed Ahmed Faizan, Zaheer Asghar, Ms Fatma Anjum, Munnaur Hussain, Mumtaz Ahmad, Akhlaq Ahmad, Mehmood Alam, Poorva Agarwal, Vipul Dubey and Devendra Mishra.

**Counsel for Respondents:-** Ajay Mishra, Advocate General, Ashok Mehta, AAG, M C Chaturvedi, AAG, Kunal Ravi Singh, CSC, Vijay Shanker Mishra, CSC, Ishan Mehta, Addl. CSC, Ankit Gaur, Standing Counsel, Hare Ram Tripathi, Standing Counsel, Manoj Kumar Mishra, Standing Counsel, Ishan Dev Giri, for the State, Shashi Prakash Singh, ASGI, Manoj Kumar Singh and Purnendu Kumar Singh for the Union of India, Vishnu Shanker Jain, Prabhash Pandey and Saurabh Tiwari, for plaintiffs/opposite parties 1 to 5 and Vineet Sankalp, for opposite party no.9.

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**CORAM: HON'BLE PRITINKER DIWAKER, CHIEF JUSTICE**

**(03.08.2023)**

The present petition has been filed under Article 227 of the Constitution of India challenging the order dated 21.7.2023 passed by the District Judge, Varanasi in Original Suit No.18 of 2022 (693/2021) (Rakhi Singh & Others vs. State of Uttar Pradesh & Ors). It has been prayed that this Court may direct the court below not to proceed any further in pursuance of the impugned order dated 21.7.2023.

2. By the order impugned dated 21.7.2023, the Court below allowed the applications 327C and 330C of the plaintiffs and 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.9130 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 Masjid Varanasi vs. Rakhi Singh & Ors.;

(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 of 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 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.”

3. In the aforesaid Suit, bearing O.S. No.18 of 2022 (Old Regular Civil Suit No.693 of 2021), filed by the plaintiffs, it has been prayed to protect their right to religion guaranteed under Article 25 of the Constitution of India. They also prayed for issuance of a mandatory as well as permanent injunction to the defendants to the effect that no interference be made in performance of Darshan, Pooja of Goddess Maa Shringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, Mandaps and Shrines, existing within old temple complex, situated at settlement Plot No.9130 in the area of Ward and Police Station Dashaswamedh, District Varanasi and the images of deities be not damaged, defaced, destroyed and no harm be caused to them.

It has been averred in the Suit that there existed a glorious lofty temple at Adivisheshwar Jyotirlinga near Dashaswamedh Ghat in the heart of the city of Varanasi. The Muslim invaders having hatred towards non-Muslims and idol worshippers started damaging/destroying and desecrating Hindu temples right from 1193-94 AD, when Mohd Gori made an attack on our mother land and demolished, plundered and looted the Shiva temple at Kashi (now Varanasi). Thereafter, a number of Muslim invaders attacked Kashi, repeated the barbarous act of Mohd. Gori. Hindus sustained such attacks and temple was rebuilt/restored at the very same place. It has been further averred that it is a matter of history that in the year 1585, the then Governor of Jaunpur at the instance of his Guru Narayan Bhatt, reconstructed a magnificent temple of Lord Shiva at the very same place, where the temple originally existed i.e. at Settlement Plot No.9130 on large scale consisting of central sanctum (Garbh Griha) surrounded by eight Mandaps.

It has been averred in the Suit that Settlement Plot No.9130 along with five *kosh* land already stood vested in the deity Adivisheshwar lacs of years ago and that the deity is the *dejure* owner but despite this fact, Muslims, without creating any waqf or having ownership of land, forcibly, without any authority of law, raised a construction and termed the same as Gyanvapi mosque.

4. According to the plaintiffs, the structure of mosque (Gyanvapi) was a temple but sometimes in the era of 1193-94 AD, the temple was demolished by the Muslim Rulers. The plaintiffs have put forth their claims by pointing out several facts which according to them, make it clear that the structure (Gyanvapi) was nothing but a temple.

5. In the aforesaid Suit, filed by the plaintiffs on 16.8.2021, for declaration, permanent and mandatory injunction, an application (as application paper no.327C and 330C) was filed by the plaintiffs under Section 75 (e) and Order XXVI Rule 10A read with Section 151 of Code of Civil Procedure (in short 'CPC') for issuance of the following directions:

- to undertake the scientific investigation/survey/excavation at the property in question i.e. at Settlement Plot No.9130 in the case excluding the areas sealed by the Hon'ble Supreme Court, vide order dated 17.5.2022, 20.5.2022 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.;
- 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;
- 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 within the stipulated time as provided by the Hon'ble Court and also video-graph the entire survey proceedings;
- to investigate the age and nature of construction of the western wall of the building in question through scientific method (s);

- to conduct Ground Penetrating Radar (GPR) survey just below the 3 domes of the building in question and conduct excavation if required;
- to conduct Ground Penetrating Radar (GPR) survey beneath the western wall of the building and conduct excavation, if required;
- to conduct Ground Penetrating Radar (GPR) survey beneath the ground of all the cellars and conduct excavation, if required;
- 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;
- to conduct dating exercise of the pillars and plinth of the building to find out the age and the nature of construction;
- to conduct GPR survey, excavation wherever required, dating exercise and other scientific methods for determining the age and nature of construction existing at the site in question;
- 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;
- Pass such other order as the Hon'ble Court may deem fit and proper in the interest of justice.”

6. In the application, it was contended by the plaintiffs that pursuant to the order passed by the Court below, a Court Commissioner was appointed, who submitted his report on 18.5.2022 regarding proceedings conducted on 6.5.2022 and 7.5.2022 and from the report, it came to the knowledge of different persons that a (शिवलिंग) ‘*Shivlingam*’ was found within the property in question during the survey made on 16.5.2022 in the presence of the plaintiffs, defendant and learned counsel representing various parties.

7. Assailing the order passed by the Court below directing for appointment of an Advocate Commissioner, the Committee of Management Anjuman Intezamia Masjid preferred a writ petition, being Matter Under Article 227 No.2946 of 2022, which was dismissed by this Court, vide order dated 21.4.2022. The Committee of Management

Anjuman Intezamia Masajid preferred a SLP No.9388 of 2022 before the Apex Court, challenging the order dated 21.4.2022 passed by the Allahabad High Court, upholding the order dated 8.4.2022 passed by the learned Civil Judge (Senior Division), Varanasi. However, the Apex Court, vide order dated 20.5.2022 also passed an order transferring the Civil Suit No.693 of 2021 from the Court of Civil Judge (Senior Division), Varanasi to the Court of District Judge, Varanasi. The Apex Court also observed that:

- “(i) application filed by the defendant under Order VII Rule 11 of CPC shall be decided on priority basis;
- (ii) all interlocutory and ancillary proceedings in the Suit shall be addressed to and decided by the Court of District Judge;
- (iii) since parties are appearing on notice, all orders in the suit shall be passed upon hearing the parties.”

8. Further, according to the plaintiffs, an ancient ‘*Shivlingam*’ was found/discovered by the Advocate Commissioner on 16.5.2022. The ‘*Shivlingam*’ found/discovered is an object of worship by Hindu devotees. It is believed that ‘*Shivlingam*’ is existing within the place in question from the time immemorial. The plaintiffs further submit that for proper adjudication of the case, scientific investigation is necessary based on which length, width, height, age, make up and constituents of the ‘*Shivlingam*’ can be ascertained.

9. Learned counsel for the applicant (defendant no.4) submits that once all the parties have been asked to maintain *status quo* of the property in question, no interference can be directed by the Archaeological Survey of India (hereinafter referred to as ‘the ASI’). Learned counsel submits that the issues are yet to be framed and list of witnesses has not been disclosed or exchanged, yet just to create evidence, application paper nos. 327C and 330C have been filed. It has been submitted that since the plaintiffs are assured that they do not have any admissible evidence, therefore, false tactics are being applied. Learned counsel submits that the **Ayodhya Case, i.e. M. Siddiq (Dead)**

**through Legal Representatives (Ram Janambhumi Temple Case) Vs Mahant Suresh Das & Others, reported in 2020 (1) SCC 1**, has taught a lesson, not to permit any such person or public agency to create evidence in such a manner. It has been argued that while deciding the applications, the Court below has not recorded any finding as to why such scientific investigation without harming the existing structures, is necessary? It has been also submitted that all the aforesaid works cannot be carried without damage to the structures. He submits that if during scientific investigation, any excavation is made, it would damage the structure in question. Learned counsel submits that scientific investigation can only be made when, after adducing evidence, the Court is unable to decide the dispute. He further submits that the Suit is barred by Places of Worship (Special Provisions) Act, 1991, as the disputed structure has been standing since prior to 1947. Learned counsel submits that earlier the plaintiffs have moved an application under Order XXIV Rule 9 CPC for appointment of Advocate Commissioner; the said application was allowed and the Advocate Commissioner was appointed, who submitted his report. The said report is still pending for disposal. It has been further argued that the ASI is not a party to the Suit and, therefore, no direction can be issued to the ASI to conduct scientific investigation of the property in question. Though the suit was filed in the year 2021, but the application has been filed only in 2023 and for two years, the plaintiffs remained silent.

10. In support of his submissions, learned counsel for the applicant (defendant no.4) has placed reliance upon the following judgments:

- (i). **Rama Avatar Soni vs. Mahanta Laxmidhar Das & Ors.**, 2018 Legal Eagle (SC) 933, (Paras 4, 5, 8 & 9).
- (ii). **Rajib Barooah vs. Purnimati Plantation (P) Ltd.**, 2018 (2) Guwahati Law Report, 204 , (Paras 11 & 12);
- (iii). **Shanta Devi vs. Pushpa Devi & Ors.** 2022 Legal Eagle (RAJ) 1594, (Para 9).
- (iv). **Mohd. Aslam Alias Bhure vs. Union of India & Others**, (1994) 2 SCC 48;

- (v). **Sri Kant vs. Mool Chand (Dead) & Others**, 2019 (2) CAR 758 (All.);
- (vi). **Km. Chandana Mukherji Died through Smt. Sarla vs. Addl. District Judge, Special Judge, PC Act Lko & Another** (Matter Under Article 227 No.6654 of 2020);
- (vii). **Naseeb Deen and Anr. v. Harnek Singh**, AIR 2019 HP 173.

11. Relying upon the judgement in the case of **Sri Kant** (supra), learned counsel for the defendant no.4 has submitted that local inspection or Commission by Court is made only in those cases where, on evidence led by parties, Court is not able to arrive at a just conclusion either way or where Court feels that there is some ambiguity in evidence which can be clarified by making local inspection or commission.

A reliance has also been placed in the case of **Naseeb Deen** (supra) to submit that the plaintiffs are trying to create evidence in their favour at this stage, which is not permissible in law and even appointment of Commissioner, before framing of issues, is erroneous.

Also, relying upon the judgments in the cases of **Km. Chandana Mukherji** (supra) and **Rajib Barooah** (supra), it has been submitted that the applications cannot be allowed merely for the purposes of facilitating the case of one or the other party and it is not the business of the courts to discharge the burden of evidence of either party. Onus is upon the plaintiffs to place whatever facts they wanted to prove their case by adducing oral and/or documentary evidence during trial and the same cannot be permitted by way of getting the Commission appointed.

Placing reliance in the case of **Rama Avatar Soni** (supra), it has been submitted that if scientific investigation of document in question facilitates ascertaining of truth, in the interest of justice, naturally it has to be ordered.

Further relying upon the judgement in the case of **Shanta Devi** (supra), it has been submitted that provisions of Order XXVI, Rule 10-A

of CPC cannot be permitted to be used as a tool by the parties concerned to create evidence in their favour.

12. *Per contra*, learned counsel appearing for the plaintiffs argued that the scientific investigation, as prayed for by plaintiffs, is not going to cause any injury to any of the party, rather it would facilitate and crystallise each and every issue, so as to reach to a conclusion with the help of available evidence on record. Learned counsel further submits that the Archaeological Survey of India has mechanism and all facilities to find out the age, composition, nature and other relevant things relating to any monument, relic, artefact etc. Learned counsel for the plaintiffs has also argued that the ASI is authorized to fulfil the objects of the provisions contained in the Ancient Monuments and Archaeological Sites and Remains Act, 1958. The ASI, under Section 22 of the said Act, has the power to excavate any area, other than the protected areas, if it has reason to believe that the area contains ruins or relics of historical and archaeological importance.

While placing reliance upon the **Ayodhya Case (supra)**, it has been argued that the law laid down by the Supreme Court is fully applicable. He referred to the following paragraphs of the said judgment:

“679. Archaeology as a science draws on multi-disciplinary or trans-disciplinary approaches. In considering the nature of archaeological evidence, it is important to remember that archaeology as a branch of knowledge draws sustenance from the science of learning, the wisdom of experience and the vision which underlies the process of interpretation. As a discipline, it nurtures a trained mind. It relies on a cross-fertilization with other disciplines such as history, sociology and anthropology. This is not a weakness but a strength. Archaeology combines both science and art. As a science, it is based on the principle of objective evaluation. As an art, it relies on a vision which is realised through years of commitment to the pursuit of knowledge based on the histories of eras. Archaeology as a discipline cannot be belittled as unreliable. The value of archaeology cannot be diluted in the manner which has been suggested by laying a claim to its being a weak form of evidence.

682. In his book titled —*The Logic of Scientific Discovery*, Karl Popper distinguishes the work of a scientist with that of a philosopher. Popper quotes Lord Acton when he states:

“there is nothing more necessary to the man of science than its history and the logic of discovery.... the way error is detected, the use of hypothesis, of imagination, the mode of testing.

683. The supposed distinction between science as embodying absolute truth and archaeology as unguided subjectivity is one of degree not of universes. Yet as in other disciplines of its genre, archaeology is as much a matter of process as it is of deduction. The archaeologist must deal with recoveries as much as the finds from them. Interpretation is its heart, if not its soul. Interpretations do vary and experts disagree. When the law perceives an exercise of interpretation it must recognize margins of error and differences of opinion. Archaeological findings are susceptible of multiple interpretations. This may in part be a function of the archaeologist’s perception of the past and what about the past the archaeologist seeks to decipher. Tradition based archaeology may seek facts about the past. An archaeologist, on the other hand may set about to validate a belief about the past. An archaeologist may approach the task with an open mind to unravel features that are unknown. Guided by the underlying approach to the discipline, the archaeologist will bring to bear on the task at hand the purpose underlying its own origin. So long as we understand the limits and boundaries of the discipline, we can eschew extreme positions and search for the often elusive median.”

13. In support of his submissions, learned counsel for the plaintiffs has also placed reliance upon the following judgements:

- (i). **Sri Shadaksharappa vs. Kumari Vijayalaxmi**, W.P. No.201274/2022 (GM-CPC) (Karnataka High Court) (Paras 9-14);
- (ii). **Phoolchand Asra v Nagar Palika Nigam, Raipur**, Writ Petition (227) No.821 of 2019 (Chhattisgarh High Court) (Para 10);

- (iii). **Anurag Jaiswal v Collector, Khandwa & Ors.**, 2018 SCC Online (MP) 699 (Paras 7 and 12);
- (iv). **Rajesh Kumar Gautam v Maha Mandleshwar Vedabaysanad Geeta Ashram**, 2003 SCC Online Utt. 9; (Para 6)
- (v). **Narasimhaiah v Smt. Sakammanamma & Anr.**, 2000 SCC Online Kar. 564 (Paras 5 and 7)
- (vi). **Smt Suman Pandagre v Madhu Pandagre**, W.P. No.110376 of 2017 (Madhya Pradesh) (Para 8).
- (vii). **Filmistan Pvt. Ltd. Bombay vs. Bhagwandas Santprakash**, AIR 1971 SC 61.

14. Relying upon the judgement of **Phoolchand Asra** (supra), counsel for the plaintiffs submits that in paragraph 10 of the judgement, it has been clearly laid down that in any Suit in which the court deems a local investigation to be a requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the marked 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.

Further, relying upon the judgment of **Smt. Suman Pandagre** (supra), which finds support of many cases mentioned therein, including that of **Maroli Achuthan** (supra), it has been submitted that it is open to the Court to pass an *ex parte* order for the issue of a Commission for investigation even before the defendant has entered appearance.

15. During the course of arguments, considering the peculiar facts and circumstances as well as seriousness of the issue involved in the present petition, the Court felt it necessary to seek expert's opinion in the matter from Government Agencies having expertise in such field. Therefore, a responsible Officer of ASI was called upon to assist the Court and, in turn, Sri Alok Tripathi, Additional Director General, ASI, New Delhi has appeared, to assist the Court and by means of an affidavit, 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.

16. I find no substance in the submission made by learned counsel for the applicant/defendant no.4 that local inspection or Commission by the Court is made only in those cases, where on evidence led by parties, Court is not able to arrive at a just conclusion either way or where Court feels that there is some ambiguity in evidence, which can be clarified by making local inspection or Commission. It is settled position of law that the purpose of Order XXVI of the Code, is to secure evidence in dispute and the Commission's report and evidence taken by the Commission becomes admissible evidence. As such, there is no bar in law to appoint a Commission for the better adjudication of dispute. Hence, a Commission may be appointed even prior to the trial, if required. The Court itself can exercise the power to elucidate the disputed fact. A plain reading of the provision says that the power can be exercised at any stage and procedural law is to advance the cause of justice and not to strangle the litigant on hyper technical grounds. Thus, the judgement relied upon

by learned counsel for applicant/defendant no.4 in the case of **Sri Kant** (supra) is of no help to him.

17. I find no substance in the arguments that it is not the business of courts to discharge burden of evidence of either party or the provisions of Order XXVI Rule 10-A cannot be permitted to be used as a tool by the parties concerned to create evidence in their favour. 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 interest 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. To such an investigation, sub-rule (2) of Rule 10-A stipulates that the provisions of Rule 10 shall apply, as far as may be, as they apply in relation to a Commissioner appointed under Rule 9. It is settled proposition of law that the Court will not sit as a mute spectator and can always interfere in such matters to arrive at a particular conclusion. Thus, judgements relied upon in the cases of **Naseeb Deen** (supra), **Km. Chandana Mukherji** (supra), **Rama Avatar Soni** (supra) and **Shanta Devi** (supra) are of no help to the applicant/defendant no.4.

18. So far as the submission of the applicant/defendant no.4 that the Suit is barred by the Places of Worship (Special Provisions) Act, 1991, this question is not the subject matter, for the time being, because none of the parties has raised any grievance before the Court below while making their submission in support of their applications.

19. I find no substance in the argument of the applicant/defendant no.4 that if during scientific investigation, any excavation is made, that would damage the structure in question and scientific investigation can only be made when, after adducing evidence, the Court is unable to decide the dispute. During the course of hearing, an affidavit has been filed on behalf of the ASI mentioning therein that they will not carry out any excavation. The officer present in the Court on behalf of the ASI has also

categorically stated as to what sort of invasive tests are to be done for making an attempt to get the reality of the matter just inside the wall of the property in question. This Court has repeatedly asked the officer present in the Court and learned counsel appearing for the ASI that as to what procedure would be adopted at the time of scientific investigation, and they have reiterated that no demolition of the property will take place by any one, nor any existing structure would be altered.

20. I further find no substance in the argument of applicant/defendant no.4 that because the ASI has not been joined as a party to the Suit, it cannot be directed to do any technical investigation. Whenever, the report of the ASI would be utilized by the parties, they can submit their proposition/objection, if any.

21. I also find no substance in the argument of the applicant/defendant no.4 that without digging any wall, things cannot be finalized by the ASI. In this advance stage of time, many new things have been developed and now with the help of new technology and able guidance of responsible officers of ASI, the scientific investigation can be made. The officer present in the Court together with learned Additional Solicitor General of India has made submission in the form of an affidavit that no excavation whatsoever will take place.

22. Further, there is no substance in the argument made by the applicant/defendant no.4 that the applications filed by the plaintiffs, seeking scientific investigation of the structure in question are not tenable in the eyes of law just because the issues have not been framed as yet. The scientific investigation has nothing to do with the other evidence and whatever evidence would be collected, that may be for all the parties and not only for the plaintiffs.

23. Even otherwise the petition is under Article 227 of the Constitution of India and the scope of interference by the supervisory Court on the decisions of the fact finding forum is limited and also, it is not the case of the applicant/defendant no.4 that the order impugned is perverse and

beyond jurisdiction of the Court below. This Court, while exercising the power of the supervisory Court under Article 227 of the Constitution, cannot act as an appellate body and is not supposed to re-appreciate the facts. All, that has to be seen as to whether the Court below has proceeded within the legal provisions of law. In the present case, the Court below has not acted beyond jurisdiction and the order is inconsonance with the provisions of Section 75 (e) read with Order XXVI Rule 10A of CPC.

As per the law laid down by the Apex Court in **Mohd. Yunus v. Mohd. Mustaqim**, AIR 1984 SC 38, wherein it has been held that even the errors of law cannot be corrected in exercise of power of judicial review under Article 227 of the Constitution and the power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction.

The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principle of law or where order of the Tribunal etc. has resulted in grave injustice. (Ref. Constitution Bench judgments of the Apex Court in **D N Banerji v. P R Mukherjee**, AIR 1953 SC 58 and **Nagendra Nath Bora v. Commissioner of Hills Division & Appeals**, AIR 1958 SC 398.)

For interference under Article 227 of the India, the finding of facts recorded by the Authority should be found to be perverse or patently erroneous and *de hors* the factual and legal position on record. (Ref. **Laxmikant Revchand Bhajwani v. Pratapsing Mohansing Pardeshi**, (1995) 6 SCC 576; **Reliance Industries Ltd. v. Pravinbhai Jasbhai Patel**, (1997) 7 SCC 300; **Pepsi Food Ltd. v. Special Judicial Magistrate**, (1998) 5 SCC 749 and **Virendra Kashinath v. Vinayak N. Joshi**, AIR 1999 SC 162.

24. Once the Department of Archaeology and learned Senior Counsel representing the Department have made their stand clear that no damage is going to be caused to the property in question, this Court has no reason to doubt their statements and most importantly, the affidavit filed by the officer of the ASI explaining the circumstances. Further, it is settled proposition of law that issue of a Commission, at this stage, is permissible. In the opinion of the Court, the scientific survey/investigation proposed to be carried out by the Commission, is necessary in the interest of justice and shall benefit the plaintiffs and defendants alike and come in aid of the trial court to arrive at a just decision. The law laid down and discussed above, make it clear that the Court below was justified in passing the impugned order. The present petition lacks substance and is liable to be dismissed.

25. The petition is, accordingly, **dismissed**. Interim order, if any, stands vacated. The order dated 21.7.2023 passed by the District Judge, Varanasi is restored and the parties are to comply the said order, subject to the observations made by this Court hereinabove and the contents of the affidavit filed on behalf of the ASI before this Court.

26. However, dismissal of this writ petition does not affect the right of the parties to the Suit to remain present at the time of scientific investigation to be made by the ASI.

27. As the proceeding of Suit has been lingering on for long, it would be appropriate to observe that the Court concerned shall make all endeavour to conclude the proceedings expeditiously, without granting unnecessary adjournments to either of the parties by giving short dates, keeping in view of the provisions contained in Order XVII Rule 1 of CPC.

**Order Date:** 03.08.2023  
RKK/RK-

(Pritinker Diwaker, CJ)