

Dissecting the Ayodhya Judgment

ANUPAM GUPTA

Judged by the opinion of the two judges who constituted the real, as distinguished from the ostensible, majority of the three-member special full bench of the Allahabad High Court, the 30 September 2010 verdict in the Babri masjid title suits qualifies, in every sense, to be described as the judicial equivalent of the Ram janmabhoomi movement, which has had a highly “creative” character. Religious imagination and fervour have served to make up for a deficit of rationality, logic and historical evidence, with clerics turning into historians and judges becoming clerics. A close examination of the judgment shows much of it stands on flimsy legal grounds, and it would hardly be tenable if not supported by some very specious reasoning.

In June 2001, Bharatiya Janata Party (BJP) stalwart and then Union Home Minister Lal Krishna Advani and I were involved in a verbal duel over Jawaharlal Nehru’s support, or lack of it, for the restoration of the Somnath temple in Gujarat in the early 1950s. This was when he was testifying before the Liberhan Ayodhya Commission of Inquiry, for which I was counsel. Preceding this, there had been a spirited exchange on the *Ram shila puja* (worship of bricks) movement launched by the Vishwa Hindu Parishad (VHP) in 1989, which culminated in the *shilanyas* (foundation laying ceremony) in Ayodhya in November that year.¹ Like the consecration of bricks in the name of Ram, the sacred geography of Ram janmabhoomi has a highly “creative” character. Religious imagination and fervour make up for a deficit of rationality, logic and historical evidence. Beliefs and convictions no longer require justification and become their own, and the only, measure of truth. Emotions get an easy and fiery tongue; words, slogans and semantics acquire massive power and momentum. Politicians abandon legislative chambers to lead mobs, clerics turn historians and judges become clerics.

1 Introduction

Judged by the opinion of the two judges who constituted the real, as distinguished from the ostensible, majority of the three-member full bench, the 30 September 2010 verdict of the Lucknow bench of the Allahabad High Court in the Babri masjid title suits qualifies, in every sense, to be described as the judicial equivalent of the Ayodhya/Ram janmabhoomi movement. Read together and closely, and overlooking for the moment the differences between them, the two judgments of justice Sudhir Agarwal and justice Dharam Veer Sharma constitute – to borrow Romain Rolland’s felicitous phrase – the annexationist propaganda of faith.²

No less a scholar than A L Basham mistook “the Hinduism of the artist and poet, with its rich mythology and legend, the Hinduism of the simple man, with its faith, its ritual, its temples, and its sacred images” as some kind of an antithesis to “the Hinduism of the intellectual and the mystic, the Hinduism of the kind expounded by Professor Radhakrishnan”, later president of India. Both, wrote Basham, in his postscript as editor to S Radhakrishnan’s essay on Hinduism published in the *A Cultural History of India*, are part of India’s heritage, and it is impossible to pronounce objectively on their relative merits or importance, but “there is little doubt which has more strongly affected the majority of the inhabitants of the subcontinent for more than 2000 years”.³ More recently, and additionally to the point, Peter van der Veer confessed that in their research carried out in the 1970s both Hans Bakker and he relied heavily on the local tradition in Ayodhya that Babar’s general had destroyed a temple on Ram’s

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birthplace. "But all this has become the subject of bitter dispute ever since the VHP attempted to incorporate local tradition into the history of the Hindu nation... While Bakker and I could naively accept local tradition, this cannot be done any longer."⁴

Turning local traditions into judicial dogma, and constructing, through the Hinduism of mythology and legend, faith, ritual and sacred images, a temple where none existed, justices Agarwal and Sharma complete the "unfinished" task of demolition of the Babri masjid with a remarkable indifference to the sensibilities of secularism. Even more than the report of the Archaeological Survey of India (ASI), the theological justification provided by the judges for the Hindu claim to the site serves not only to remove the taint of illegality from the demolition but also to lend it some kind of a moral lustre, as it were. It would be naive in the extreme not to see this.

Five thousand and nineteen pages long (without annexures), the leading judgment of justice Agarwal is a monumental feat in judgment writing. Not many judges across the country could lay claim to such a titanic capacity for intellectual labour. The prose is lucid and coherent and the judgment maintains a unity of thought and expression across the 21 volumes that comprise it. For all the mastery over his professional craft, however, and despite his final direction giving one-third of the disputed area (outside the central dome) to Muslims, justice Agarwal remains firmly rooted in the universe of orthodox, scriptural, ritualistic Hinduism. His understanding of the vast religious literature of Hinduism is entirely uncritical and unquestioning and his narration of that literature abounds in "fanciful mythologies, theogonies, cosmogonies and mystical genealogies", to use Monier Williams' picturesque and inimitable expression.⁵ To continue to grow is the mark of the religious soul, observed Radhakrishnan. "Hinduism is bound not by a creed but by a quest, not by a common belief but by a common search for truth".⁶ Justice Agarwal, too, quotes Radhakrishnan albeit from a different text but the Hinduism that he espouses is an immutable credal religion governed by the oligarchy of the myth.

The lesser of the two in learning and craft, with a judgment much slimmer in size (1,130 pages), justice Sharma sweeps across the thorny terrain with an *élan* befitting a devotee. Counsel's contention often merges imperceptibly with judicial appraisal, making the analyst's task rather difficult. His wholesale rejection of the oral testimony of all the Muslim witnesses,⁷ his remarkable finding that the Babri masjid was not a mosque at all (for it violated the tenets of Islam),⁸ and his rather simplistic allusion to Aurangzeb as "a descendant of Babar...coming out from his family"⁹ reveal a distinct anti-Muslim strain. Holding, mercifully, that the structure was a mosque¹⁰ and, curiously, that it was built during Aurangzeb's time and not Babar's,¹¹ justice Agarwal denies nonetheless that it was ever in the possession of Muslims albeit they did visit it and offer *namaz* from 1860 onwards. Even if we assume that it was built in AD 1528, he observes, "there is no evidence whatsoever that after its construction, it was ever used as a mosque by Muslims at least till 1856-57".¹² This, the non-possession of the mosque by the Muslims, is a theme to which he returns time and again, drawing (for the post-1860 period) a distinction between "possession" and "user" that is taxing even for a trained legal mind accustomed to the oppressive technicalities of semantics. And while he refrains from a blanket rejection of Muslim testimony

on any point, he reads it generally with such a critical eye that the result is not very different from that which flows from justice Sharma's less differentiated and more abrupt approach.

The warm compliment paid to him by justice Sibghat Ullah Khan, the third judge on the full bench, whose judgment is, in truth, a dissenting opinion, bespeaks therefore a purely personal chemistry.¹³ In a Hindu-Muslim litigation of such ominous importance, the nuances of the distinction between the anti-Muslim and the "non-Muslim" (within an overall construct of Hinduness), between justice Sharma on the one hand and justice Agarwal on the other, may not always add up to much. And, indeed, but for the final direction, they do not.

Loading the Dice

It is here that we must consider what is probably the most fateful part of the entire verdict (all the three separate judgments taken together), one that completely tilts the scales against the Muslims – the recasting or reformulation by justice Agarwal of Issue No 11 in the leading suit (Suit No 4 filed by the Sunni Central Wakf Board). The issue as framed reads, "Is the property in suit the site of Janambhumi of Sri Ram Chandrajai?" If the issue really requires us to answer, observes justice Agarwal (in paragraph 4156), where Ram was actually born, it "requires us to perform an impossible task". Here, "where the period of Lord Rama ranges in several thousand and lacs of years", can it be said where he was actually born and can this be decided by a court of law by collecting positive evidence on this aspect? Issues pertaining to history, the judge goes on to hold (in paragraph 4157), cannot be decided like this and, therefore, "it appears that by necessity" the issue (Issue No 11 in Suit No 4, read with the connected Issue No 1 in Suit No 1 and Issue No 22 in Suit No 5) has to be treated "as if we are required to answer" the following common question – "whether the property in suit is the site of birth of Sri Ramchandrajai according to tradition, belief and faith of Hindus in general..."

Having thus transformed the issue on the far side of recognition, and beyond redemption by Muslims, and converted an inter-religious *lis* between Hindus and Muslims into a *lis* purely intra-religious, to be adjudicated solely on the basis of Hindu tradition, belief and faith, justice Agarwal then proceeds over the course of the next 560 pages to examine and establish the fact – not the historical or actual fact, that is, of Ram's birth or the site underlying the Babri masjid being his birthplace (both of which justice Agarwal himself admits, and more than once, it is impossible to establish) but the fact that the Hindus *believe* it to be so. How can the whole course and direction of a suit be changed, and changed so drastically, by the simple expedient of rewriting or reframing the issue between the parties at the stage of final judgment? Rather, in the final judgment itself, to be precise.

"Whether Lord Rama was born and was a personality in history, as a matter of fact cannot be investigated in a Court of Law for more than one reason", observes justice Agarwal (paragraph 4150). "According to the faith and belief of the Hindu people, the period when Lord Rama was there, ranges from several thousands of years to lacs and crores of years." If history cannot be investigated and is not justiciable for that reason, how can mythology fare any better? Both jurisdiction and justiciability are this-wordly, not other-wordly,

concepts even if judicial thought is inclined to the transcendental. The impossibility of determining the birth or the existence of Ram, as averred by justice Agarwal, necessarily destroys the very basis of the Hindu claim to the site of the Babri masjid and renders that claim a complete non sequitur. By recasting Issue No 11 justice Agarwal not only stands the issue, as originally and properly framed, on its head but virtually ousts Muslims from the forensic contest for the “tradition, belief and faith” of Muslims is no longer relevant. The testimony of non-Hindus such as the British authors of provincial gazetteers – Thornton, Carnegy, Benet, Nevill et al – is thrown into the ring, but they only reflect local Hindu tradition or belief in Ayodhya and that is how justice Agarwal himself takes it to be.

Article 25 of the Constitution, and the corpus of Supreme Court precedents interpreting it, is if no avail here to justify what the high court has done.¹⁴ The law laid down in the context of disputes (as to tenets, practices, rites and ritual) between different factions or sects within a religion or religious order, or in the context of a single religious sect, order or denomination without reference to any other, can be applied to inter-religious disputes only at the risk of subverting the very purpose of guaranteeing the freedom of religion under a secular constitution. Beliefs or practices, the “essential part” of one religion (however objectively or otherwise examined), cannot, under Article 25, be transplanted or imposed on another religion equally entitled to the protection of that Article. “If this is the belief of the community... a secular judge is bound to accept that belief – it is not for him to sit in judgment on that belief.” These words of the Bombay High Court¹⁵ (in 1909) picked up by justice Agarwal from the dissent of justice A R Lakshmanan in the Supreme Court in the second *tandava dance* case,¹⁶ and cited by him with approval (in paragraph 4414) to buttress his own conclusion on Issue No 11, are necessarily applicable only to disputes within the same religion or within a religion without reference to any other.

No Religious Refuge

As held by the Supreme Court in *Ratilal Gandhi's* case (1954), the observations of the Bombay High Court “afford an indication of the measure of protection” provided by Article 26(b), which deals with a particular aspect of religious freedom, as distinct from Article 25, which deals with it generally and in much broader terms.¹⁷ Justice Lakshmanan’s endeavour to relocate the observation in Article 25 instead of Article 26(b) cannot succeed, since he speaks only for himself and not for the court with whom he is in disagreement. A step below the Supreme Court, justice Agarwal’s attempt to “desecularise” Article 25 must also fail for a similar reason – the Supreme Court’s overarching emphasis on secularism (from *Kesavananda Bharati* to *S R Bommai* and from *Bommai* to *Nagaraj*) does not permit it.¹⁸ Article 25 is not an island of immunity in the name of religion, a fortress locked in from all sides with the flag of religion flying menacingly atop its ramparts and announcing itself to the world. Subject to public order, morality and health and to the other provisions of Part III of the Constitution (enshrining the fundamental rights), it guarantees the freedom of religion equally to all religions, nay, to “all persons” in India, and not just to Hindus.

Neither Vivekananda, “the paragon of Vedantist missionaries”¹⁹ who first put reformed Hinduism on the “religious and

philosophical map of the world”,²⁰ nor Vinayak Damodar Savarkar, the valiant nationalist who journeyed backwards from the Andamans to the Hindu Mahasabha and gave Hinduism a new perverse name, definition and identity, ever raised the issue of Ayodhya or Ram janmabhoomi. Vivekananda visited Ayodhya in 1888, and again in 1890, as a *parivrajaka* or wandering monk;²¹ and Savarkar, writing in 1908 on the first war of Indian independence 51 years earlier, devoted a whole chapter titled “Ayodhya” to the havoc wrought by the British in Oudh before 1857.²² The absence of any allusion to the Ram janmabhoomi issue in their speeches and writings²³ is an eloquent reminder of the artificiality of the main issue decided by the Allahabad High Court on 30 September 2010. That the issue has been found in favour of the Hindus, that too as an “essential part” of their religion entitled to the protection of Article 25, is an irony, of course, but even more than that it is an insight into the *Weltanschauung* of both justices Agarwal and Sharma.

2 Unnecessary Haste

The great merit of Justice Khan’s judgment is his unravelling of the criminality of 1949 and the illegality of 1986, the two landmarks in the modern history of Babri masjid before its demolition. The opening of the locks, says justice Khan, “catapulted the dispute at the national (rather international level). Prior to that no one beyond Ayodhya and Faizabad was aware of the dispute. The order dated 01.02.1986 triggered a chain reaction leading to the demolition on 06.12.1992.”

Like the 285-page judgment as a whole, his eight-page analysis of the 1986 order (directing the opening of the locks) is compact and to the point. But the effect is devastating. Passed in “extreme haste” by the district judge, on an appeal preferred by a person who was not a party to any of the title suits, and implemented “within minutes” by the district administration, the order “obviously shook the faith” of the parties affected by it. None of them (but for Mohammed Hashim, a plaintiff in Suit No 4) were aware of the proceedings before the district judge though both the district magistrate and superintendent of police personally appeared in court and conceded that the unlocking would pose no problem. Mohammed Hashim’s application to be impleaded as a party in the proceedings or appeal (for opening the locks) was rejected by the district judge. Filed on 31 January 1986, the appeal was allowed by the district judge the very next day. There was “absolutely no occasion to show such undue haste” nor was any reason for it assigned by the district judge. An appeal filed by a complete “stranger” and therefore “not maintainable” was entertained while an affected person who was a party in the connected, leading suit was refused permission to oppose. It is a settled principle that justice must not only be done but it must also appear to be done. The district judge “buried the second limb of the principle (appearance of justice) very deep”. Probably he thought that if he “bothered about the appearance of justice being done”, he would not be able to pass the order. Reading justice

We are grateful to Romila Thapar for helping us in putting together this section.

Khan, it is difficult to resist the conclusion that the 1986 order was both politically and judicially mala fide.

The district judge who passed the order has, however, a different explanation to offer. In his memoir *Voice of Conscience*, published in 1996, K M Pandey (who was later elevated to the high court and retired as a high court judge) maintained that he had been impelled by an “inner voice”. He also revealed a larger divine inspiration.

On the date of the order when orders for opening locks was passed a Black Monkey was sitting for the whole day on the roof of the Court Room in which hearing was going on, holding the flag-post. Thousands of people of Faizabad and Ayodhya who were present to hear the final orders of the Court had offered him ground-nuts, various fruit.

Strangely the said Monkey did not touch any of the offerings and left the place when the final order was passed at 4.40 pm. The District Magistrate and SSP escorted me to my bungalow. The said Monkey was present in the verandah of my bungalow. I was surprised to see him. I just saluted him treating him to be some Divine Power.²⁴

The facts of December 1949, including Faizabad Deputy Commissioner K K K Nayar’s correspondence with Uttar Pradesh Chief Secretary Bhagwan Sahai, are already known to the more discerning observers of the Ram janmabhoomi issue.²⁵ Justice Khan adds immeasurably to our knowledge by his disclosure of a letter written by District Superintendent of Police Kripal Singh to Nayar on 29 November 1949, almost a month before the idols were placed in the Babri masjid. Writing immediately after visiting the premises that evening, the SP informed the deputy commissioner that several *havan kunds* (places for sacrificial fires) had been constructed “all around the mosque”. Bricks and lime were also lying near the site. There was a proposal to construct a “very big” *havan kund*, where *kirtan* (chanting hymns) and *yagna* (sacrificial rituals) would be performed on *Puranmashi* (full moon day) on a very large scale. “The plan [wrote the SP] appears to be to surround the mosque in such a way that entry for the Muslims will be very difficult and ultimately they might be forced to abandon the mosque.” There was a strong rumour, he added, that on *Puranmashi* the Hindus “will try to force entry into the mosque with the object of installing a deity”. This single letter, placed on the judicial record by justice Khan, is worth more than all the gazetteers of Oudh in British India taken together.

3 Stretching Reason

Describing (in paragraph 2558) the surreptitious placement of the idols in the Babri masjid in the early hours of 23 December 1949 as a “mere shifting of idols” from the outer courtyard or Ram Chabutra to the inner courtyard, a finding that in itself undermines the credibility of his entire judgment, justice Agarwal (backed by justice Sharma) proceeds to develop and dilate on the concept of an idol as a juristic person under Hindu Law. The discussion occupies 208 pages in all. A colossal waste of intellectual effort, if one may say so with great respect, for the proposition has never been doubted. Pronouncing on the subject 85 years ago in *Pramatha Nath vs Pradyumna Kumar*, the Privy Council stated, “A Hindu idol is according to long-established authority ... a ‘juristic entity’. It has a juridical status, with the power of suing and being sued. ... It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established.”²⁶ Alluding to the popular view on deities in a seminal article titled “Religious

Endowments in India: The Juristic Personality of Hindu Deities”,²⁷ Gunther-Deitz Sontheimer, who, along with Hermann Berger and Lothar Lutze, shaped Heidelberg Indology for two decades, wrote in 1965, “Religious reality in India beyond the fringe of even a minority of the literate people, leaves no doubt that deities are regarded by most Hindus as symbolised or personified by an idol and that deities are considered in many ways as corporal and sentient.” Though the modern trend among the westernised upper classes, he added, is to disregard idol worship or to stress faith in god without elaboration of ceremonial worship, and Hinduism knew that the supreme being need not be worshipped with idols, the majority of Hindus firmly believe in deities personified by idols, or their presence symbolised by the idol.

The reason why Justice Agarwal expands on the obvious is that he intends to, and actually does, extend the proposition to a limit never attempted before, establishing a novelty in the process – that not only the idol but also the *place* where the idol is kept is a juristic person. Nay, the place itself is a deity, for, like the deity, the place of “reincarnation or manifestation” of the supreme being is invested with the sanctity of the sacred. Applying this test to Suit No 5 (filed by “Asthan Sri Ram Janam Bhoomi, Ayodhya” as plaintiff No 2, besides “Bhagwan Sri Ram Virajman at Sri Ram Janam Bhoomi” as plaintiff No 1), it is evident to Justice Agarwal that the place in question, being Ram’s birthplace, is a deity. “On the prayer made by Kaushalyaji (queen Kaushalya, wife of king Dashratha)”, he holds, “Sri Vishnu took the form of Sri Ramlala and manifested himself in human form” at this very place. The place “bears the spirit and power of the Lord of Lords” and a visit to the place is “sufficient to confer all the merits and salvation upon the believer” (paragraph 1913). There is no law here, only a preoccupation with the allegories of faith, the translation of faith into jurisprudence being so direct as to verge on the vulgar.

In the “large-scale economy of pilgrimage”, observes Peter van der Veer, in his study of the Pandas of Ayodhya,²⁸ the element of economic security is of greater importance than other elements. The established Pandas with their fixed constituency of patrons are losing ground to entrepreneurs who make better use of agents to direct new pilgrims to their houses and riverside stalls. The “complexity of the pilgrimage system” has created a situation in which the agents are a kind of buffer between the Pandas and donors. The greatest Panda of Ayodhya (whom Peter van der Veer specifically names) demands 50% of all the offerings given by “his” pilgrims to whatever agent or Panda. Do the Pandas of Ayodhya, asks Peter van der Veer, actually model themselves on the ideal Brahman, the world renouncer? “From interviews and participant observation”, he says, answering his own question, “I have never been able to discern anything having the faintest connection with the cultural model of the ‘ideal Brahman’. The Pandas are engaged in a daily struggle for livelihood and their actions and orientations are connected with that struggle.” But these are verities on the ground which the Allahabad High Court would rather not see.

4 No Cause of Action

“The facts, as are pleaded, in fact, are a bit puzzlesome and make it very difficult at first flush to understand as to what really the cause of action was which the plaintiffs claim to have accrued day to day

and how the suit is protected from the clutches of the statute of limitation.” This is paragraph 2617 of justice Agarwal’s judgment, and the suit in question is Suit No 5 filed by “Bhagwan Sri Ram Virajman” and “Asthan Sri Ram Janam Bhoomi, Ayodhya”, already held by the court to be juristic persons entitled to sue. The issue now is whether the suit is barred by limitation, having been filed as late as 1989. The snag is that, on reading through the case as set out by the plaintiffs, justice Agarwal can detect no cause of action or any right to sue. Eight pages (and 13 paragraphs) later, he observes again, “If we look at the entire issue in the light of the above facts, we find that there was no occasion for the plaintiffs to feel aggrieved that on a particular date, any right has accrued to sue” (paragraph 2630).

Seeking a “declaration” that the entire premises of Ram Janmabhoomi in Ayodhya belong to the plaintiff deities and a “perpetual injunction” against the defendants prohibiting them from interfering with or obstructing the construction of a new temple at the site, the suit gave a long-winded account of the other title suits instituted since 1950. The nature and importance of the premises as the place where Ram manifested himself in human form as an incarnation of Vishnu was highlighted. The events of the last four decades, the plaintiffs added, and many material facts and points of law required to be pleaded from their viewpoint for a just determination of the dispute relating to Ram Janmabhoomi, and the plaintiffs had accordingly been advised to file a fresh suit of their own. Paragraph 25 of the suit gave a succinct formulation of its essential theme.

That the worship of the plaintiff Deities has continued since ever throughout the ages at Sri Ram Janmabhumi ... Nor has there ever been any person, living or juridical, who might have put forward any claim to ownership of the property or any part of it. Occasional acts of trespass or attempts to get into possession by the Muslims were successfully resisted and repulsed by the Hindus from time to time and there was no blemish or dent in the continuity of title and possession of the plaintiff Deities.²⁹

Combing through the pleadings, and tracing the entire history of the mosque, the legal history of Oudh and the administrative system of the “Muslim dynasties of India” in the context of the plea of limitation, justice Agarwal concludes (67 pages later),

Neither the plaintiffs 1 and 2 were disturbed at any point of time in 1949 or even prior thereto ... This has continued even when the property was attached on 29 December 1949 but it was ensured that the worship by Hindus shall continue ... Mere filing of some other suit by some other persons, in which the deity is not impleaded cannot necessarily give a cause of action to the deity (paragraph 2737).

A tribute to justice Agarwal’s legal acumen, these observations could lead to only one logical end – the dismissal of the suit, under Order 7, Rule 11 of the Code of Civil Procedure (CPC) or otherwise. The provision empowers, nay, obligates the court to reject a plaint or suit “where it does not disclose a cause of action”. If, on a meaningful reading of a plaint, the Supreme Court ruled in 2008, reiterating what justice Krishna Iyer had first held in 1977, it is found to be vexatious and meritless, “in the sense of not disclosing a right to sue”, the power under Order 7, Rule 11, CPC, must be exercised. This is all the more so if clever drafting has “created the illusion of a cause of action”. For judges must realise that, as George Bernard Shaw remarked on the assassination of Mahatma Gandhi, “it is dangerous to be too good”.³⁰

The high court has not only been good but also extremely large-hearted. Since the Hindus were never really adversely affected or disturbed, and their right to worship continued for all practical purposes, they had no right (or occasion) to sue. And since limitation does not begin to run in law till a cause of action accrues, “we find no period of commencement wherefrom it can be said that the suit stands barred by limitation” (paragraph 2737). The simplism of this circularity is striking but that is how justice Agarwal converts a suit without any cause of action into a timeless suit that limitation can never reach. And lest the reader forget, it is precisely this suit that the full bench decreed, constructing through judicial imagination a temple where the Babri masjid once stood.

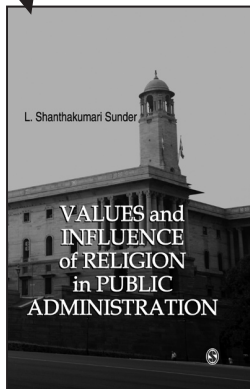
5 Barred by Limitation

Filed within 12 years of 23 December 1949 (when the idols were placed inside the central dome), Suit No 4 is treated differently than Suit No 5 filed 28 years later. The only suit (among the four title suits) preferred by the Muslims, it has been dismissed as time-barred. Barred by limitation, that is. Justice Sharma clearly overshadows justice Agarwal here. Tight and lucid, the 43 pages devoted by him to the issue excel the 346 pages consumed by justice Agarwal. Both miss the wood for the trees, however, and not surprisingly.

Quite apart from all else, the demolition of the Babri masjid added a fundamentally new dimension to the entire controversy about limitation. The demolition gave a fresh cause of action, a new right to sue to Muslims, reducing to secondary importance their cause of action before the demolition – the ouster of Muslims from the mosque in December 1949. Six years before the demolition, the opening of the locks in 1986 confirmed, before the entire world, the reality of that ouster or dispossession. It becomes necessary to state this, however platitudinous it might otherwise sound, since justice Agarwal actually doubts it and in so many words while pronouncing on limitation. “Placement of idols or desecration of the mosque is one thing but dispossession of Muslims from the disputed property is another.” The assertions in the suit, he holds, are “insufficient to constitute a case of ‘dispossession’ or ‘discontinuance of possession’ of the plaintiffs of the property in dispute” (paragraph 2292) and the suit falls short, therefore, of the requirements of Article 142. The article covers suits for possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and prescribes a period of 12 years from the date of dispossession or discontinuance as the period of limitation within which the suit must be filed.

Indefensible in itself, the silence over the crime of 1949 is compounded by the refusal to treat it even as the starting point of limitation for the victim. Significantly however, and almost unwittingly, the judge slips into a contradiction, a fatal one, a little later. Brushing aside the argument that the injury to the right of Muslims is a case of a “continuing wrong”, which does not attract the bar of limitation, justice Agarwal holds,

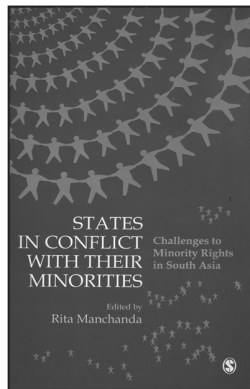
One has to make a distinction between a continuing wrong and continuance of the effect of wrong. In the case in hand, the facts pleaded by the plaintiffs show that they were ousted from the disputed premises on 22/23 December, 1949 and the wrong is complete *since thereafter*



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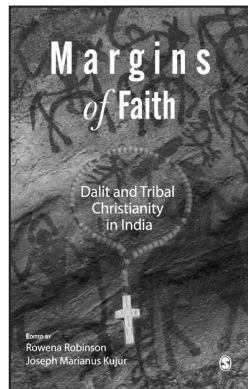
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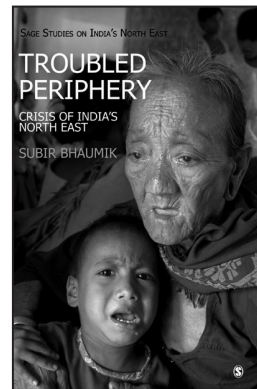
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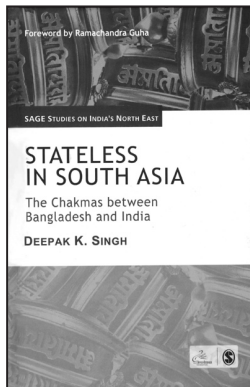


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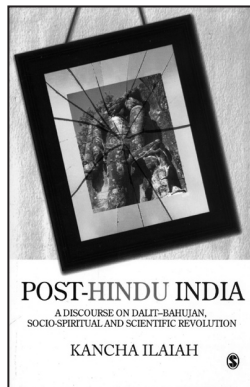


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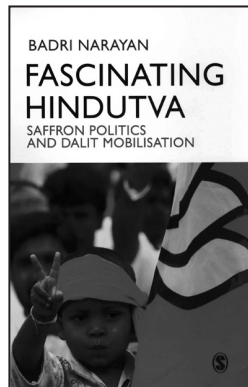


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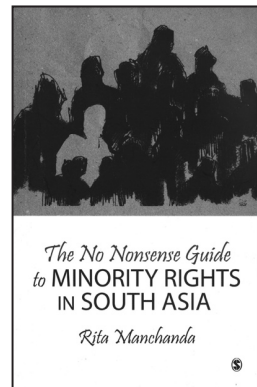
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The Tribune

2009 / 328 pages / Rs 350 (paper)

they were totally dispossessed from the property in dispute on the ground that they have no title. Hence, we find it difficult to treat the alleged wrong to be a continuing wrong (Paragraph 2439, emphasis added).

Though not disagreeing with his colleague, justice Sharma has a different focus. Article 142 applies only where the plaintiff while in possession has been dispossessed or has discontinued possession. “In this case since the property was attached, the question of dispossession does not arise”, he holds. The reference is to the attachment of the Babri masjid premises, both the inner and outer courtyards, by the executive magistrate on 29 December 1949, by an order passed under Sections 145-146 of the Criminal Procedure Code (CrPC). The attached premises or property was ordered to be placed in the charge of Municipal Board Chairman Priyadatta Ram, acting as Receiver. Earlier, disregarding the orders of the state government, Deputy Commissioner Nayar had refused to remove the idols even though he acknowledged that their installation was “illegal” and had placed the government “in a false position”. Writing to the chief secretary on 27 December 1949, he proposed instead that the mosque be attached and both Hindus and Muslims be excluded from it, with the exception of a few *pujaris* (priests) who would offer *puja* (worship) and *bhog* (food for the god) before the idol. The parties would be referred to the civil court for adjudication of rights and “no attempt will be made to hand over possession to the Muslims until the civil court, if at all, decrees the claim in their favour.”³¹ This was precisely what was done two days later by the magistrate, with the Receiver taking charge on 5 January 1950.

The possession of a Receiver is, in law, deemed to be the possession of the court (here magistrate) which appoints him, and the property attached is said to be in *custodia legis* or “in the custody of the law”. The Receiver holds the property during the period of the attachment for the benefit of the party who may ultimately be determined to be entitled to it. This being so, it is Article 120 of the old Limitation Act of 1908 that applies to Suit No 4, and not Article 142, holds justice Sharma, justice Agarwal agreeing with him. A residuary “omnibus” article of the old Limitation Act (corresponding to Article 113 of the new Act of 1963), Article 120 covers suits for which no period of limitation is provided elsewhere in the statute and prescribes a period of six years for filing of the suit from the date “when the right to sue accrues”. Filed by the Sunni Central Wakf Board on 18 December 1961, more than six years after 1949, Suit No 4 has been held to be time-barred for this reason as well.

Recovery of Possession

The inconsistency will be immediately seen. The placing of the idols in December 1949 is declined as the starting point of limitation under Article 142. It is nonetheless taken as the accrual of the right to sue under Article 120. In part, the finding that Article 120 (and not Article 142) applies, owing to the attachment under Sections 145-146, CrPC, stems from a misreading of the observations of the Supreme Court in *Deo Kuer vs Sheo Prasad Singh* (1966).³² “In our view, in a suit for declaration of title to property filed when it stands attached under Section 145”, the Supreme Court held, echoing the Privy Council, “it is not necessary to ask for the further relief of delivery of possession”. A suit for declaration without claiming the relief of possession “would still be competent”. Such a

suit, the Privy Council had held earlier in 1942 in *Maharaja Jagatjit Singh's* case, is governed by Article 120, and Article 142 (or Article 144, also dealing with suits for possession) does not apply.³³

Relying on the two cases, both justices Sharma and Agarwal treat Suit No 4 as essentially a claim for declaration alone, disregarding the plaintiff's claim for possession. Unlike the suit filed by the Sunni Wakf Board, the Privy Council as well as the Supreme Court was dealing with suits where only a declaratory decree was sought by the plaintiffs, without any claim for possession. In both cases, the court upheld the suit as maintainable even in the absence of a claim for possession. This is particularly true of the case before the Supreme Court, where the maintainability of the suit (in the absence of a claim for possession) was the only issue that fell for consideration. The correct legal position, never actually in doubt, was stated by the Supreme Court in *Shanti Kumar Panda vs Shakuntala Devi* (2004).³⁴

A party unsuccessful in an order under Section 145(1) would initiate proceedings in a competent court to establish its entitlement to possession over the disputed property against the successful party. *Ordinarily, a relief of recovery of possession would be appropriate to be sought for.* In legal proceedings initiated before a competent court consequent upon attachment under Section 146(1) of the Code it is not necessary to seek relief of recovery of possession. As the property is held *custodia legis* by the Magistrate for and on behalf of the party who would ultimately succeed from the court, it would suffice if only determination of the rights with regard to the entitlement to the possession is sought for. *Such a suit shall not be bad for not asking for the relief of possession* (emphasis added).

It is evident that the Wakf Board's suit has been dismissed as time-barred under a misconception of law, the permissibility of a mere declaratory suit respecting property attached under the CrPC being treated as a prohibition against claiming the relief of possession. Nor does this detract from the practical unreality of the Receiver's possession of the Babri masjid being treated, in law, as possession on behalf (or for the benefit) of Muslims, debaring Muslims from claiming possession of the mosque. Strictly speaking, even this question (on whose behalf the magistrate actually holds possession under Section 146, CrPC) was left open by the Supreme Court in *Deo Kuer's* case. But that the magistrate, right from the inception (and much before 1986), allowed *puja* and *bhog* to be held in the masjid while Muslims were completely deprived of their right to offer prayers makes it improbable to maintain, given the facts and circumstances of the case, the legal fiction that normally attaches to a Receiver's possession.

In any event, and without any scope for contradiction, 6 December 1992 changed everything. And that is why a five-member Constitution Bench of the Supreme Court, in *Ismail Faruqui vs Union of India* (1994), while striking down Section 4(3) of the Acquisition of Certain Area at Ayodhya Act, 1993, and reviving the title suits that were sought to be extinguished by that provision, expressly affirmed that “the parties to the suit would be entitled to amend their pleadings in the light of our decision”.³⁵ Justice Agarwal's finding that the demolition, and the subsequent entrustment of the property in dispute to the Government of India, acting as a “statutory Receiver” under the 1993 Act, would not give any benefit to the Wakf Board in the matter of limitation, for once limitation starts running it does not stop and must “meet its natural consequence”, is not only impractical in the extreme but also a violation of the judgment in *Ismail Faruqui's* case.

6 The ASI Report

The last witness to be examined by the Liberhan Commission was former Chief Minister of Uttar Pradesh Kalyan Singh. Running into more than 400 pages, his was the longest deposition of all the witnesses. As a prelude to the deposition, he filed an affidavit on 2 December 2004. Among other things, the affidavit maintained that a “grand temple existed at this very place in Ayodhya” which was the birthplace of Ram. Midway during his cross-examination, on 17 March 2005, he filed another affidavit placing on record the last chapter of the ASI Report, containing the “Summary of Results” of the excavation conducted by it in 2003 under the orders of the Allahabad High Court. Testifying on 12 May 2005, Kalyan Singh cited the conclusion drawn by the ASI as a vindication of his stand. I had read the entire report and seized the opportunity to place my perception of it on record. The following three questions (or “suggestions” in legal parlance), which he obviously denied, marked the end of my cross-examination of the former head of government in Uttar Pradesh.

Question: I put it to you that the ASI report marks a grave departure from, and a brazen distortion of, the scientific basis, principles and methods of archaeology.

Question: I put it to you that the analysis, interpretations, projections, inferences and conclusions made and given by the ASI on and from the miscellaneous, fragmentary evidence yielded by the excavation, in order to state or suggest that there existed a massive structure in the nature of a temple below the disputed structure, are all supremely imaginative and completely lacking in the restraint, the objectivity, and the rational and scientific rigour that must necessarily mark an appraisal of the results of any archaeological examination.

Question: I put it to you that the report submitted by the ASI is the product of a mind or minds that were intellectually, ideologically and politically predetermined to create and construct evidence of a temple beneath the disputed structure, in order to stand history on its head and provide the “ultimate” justification for the demolition of the disputed structure.

Two major developments have taken place since then. D Mandal’s analysis of the ASI Report in his and Shereen Ratnagar’s *Ayodhya: Archaeology after Excavation* was published in 2007. The analysis is a compelling critique of the report, both about what it says and what it suppresses.³⁶ Both Mandal and Ratnagar had visited the site of the excavation in June 2003 with the permission of the court, and were also allowed to enter the trenches and make their own observations on site in September 2003, after the report was submitted. Both of them also appeared as witnesses and testified against the report, besides other experts. The second, more important development was the 30 September 2010 verdict itself, with both justices Agarwal and Sharma accepting the ASI Report and justice Khan “not sure as to whether at the end of the tortuous voyage” he would find a

“treasure of truth or the monster of confusion worst confounded”, choosing to maintain a safe distance.³⁷

Among its many wilful infirmities, undetected by the high court, is the cognisance taken by the ASI of Koenraad Elst’s *Ram Janmabhumi vs Babri Masjid* (1990). A small point in itself, the reference to Elst (who has no pretensions to archaeological expertise of any kind) is nonetheless a clue of some significance to those interested in the larger picture. A self-confessed protagonist of Hindu revivalism, committed to “decolonising the Hindu mind”³⁸ of all secular conceptions, Elst happens to be one of the sangh Parivar’s most prolific apologists in recent times. His book, cited by the ASI on page 51 of its report, was released by Advani as BJP president in August 1990. It concludes with the following ominous assertion.

It is quite certain that the VHP effort to make Hinduism into a politically conscious unity, has met with considerable success. It is equally certain that the Ram Janmabhoomi campaign has been instrumental in this development. The question is whether the VHP will prove right in predicting: “Make no mistake. We will build a Hindu Rashtra and we have taken a start on 9 November 1989”.³⁹

Justice Sharma gives short shrift to the objections against the ASI Report, disposing of them in a mere 76 pages but softly and without rancour. Justice Agarwal ranges across a little less than 800 pages to the same end. The effort put in by him is impressive but the reading is highly selective. And compared with the style in other parts of his judgment, he descends here into sheer gracelessness. This is especially true of his reflections on the scholars who testified against the ASI Report. Unmerited and unkind, these strictures (as it were) betray a strong, even crude, anti-Marxist prejudice. These godless Marxists!

The learned judge was perhaps not aware that a critical approach to the *Ramayana* story found one of its earliest and most accomplished exponents in the doyen of Indian archaeologists, H D Sankalia. Belonging to a devout Hindu family, which traditionally followed the Vallabhacharya school of Vaisnavism, Sankalia moved away from idol worship after he studied iconography, particularly Tantric Siddhis, but remained a deeply spiritual person all his life. His critical insights into the *Ramayana* were first published in 1973 under the meaningful title *Ramayana: Myth or Reality?*⁴⁰ With great respect to the Allahabad High Court, it is not the presence of Marxists, real or suspected, but the absence of non-Marxists like Sankalia, excelling in their craft and undauntedly independent, that holds the key to understanding the crisis that the archaeology of Ayodhya faces today. “I had not intended to be an iconoclast”, Sankalia writes in his memoir *Born for Archaeology*, “nor am I a self-appointed critic of century-old beliefs of our people, but the distortions of truth I hate”.⁴¹

NOTES AND REFERENCES

1 A master of the un rebutted half-truth, Advani would have liked the commission to believe that India’s first prime minister supported the renovation. He said, “I was really impressed to discover that when the *sthapna* [installing] of the *jiyotirling* [idol representing Lord Shiva] was to take place, embassies from all over the world had been requested to send water and earth to India” for the consecration. He did not expect to be contradicted on the point, or to be confronted with Nehru’s angry letter to his food and civil

supplies minister K M Munshi, pulling him up for the “most embarrassing” request to Indian embassies or missions abroad, which had been disclosed by an upset K M Panikkar, ambassador in Peking. “I fear there is no realisation here [wrote Nehru] of how other people react to some of our ways of thinking and action ... I am very much troubled over this business.”

Before this, had been a series of questions focused on a relatively “modern” manifestation or construction of Hindu religious faith – the *Ram shila puja*. My study of Hinduism had yielded no precedent

whatsoever for consecration of bricks and I sought to understand the concept from Advani. He parried, even though he had participated in a *shila puja* in Delhi. It was a programme conceived by the VHP he said, “So it is they who can elaborate upon it”. The *rath yatra* (chariot procession) was conceived by him, *shila puja* by them, though both *shila puja* and *rath yatra* were part of the Ayodhya movement. What exactly does *shila puja* entail or imply, I asked. “Once again, I would reply, let this question be posed to the VHP leaders when they come before the commission”, he answered. “They

would be able to give an elaborate explanation for their programme of *shila puja*.”

In the previous sitting he had referred, in the context of the *rath yatra*, to Vivekananda's concept of religion being the soul of India. To what extent did a ceremony such as the *Ram shila puja* conform to that larger perspective of religion, I asked. Vivekananda was not referring to any ceremonies or rituals, said Advani, displaying fairness. He used the word “religion” only because he was writing and speaking in English, otherwise he had in mind the concept of *dharma*, “which is not bound down by any ceremonial or rituals.” What impact did such religious ceremonies or imagery have on the growth of the Ram Janmabhoomi movement as a whole, I pressed. This time, however, he ducked, “The question would be appropriately addressed to the VHP leaders”. “This question, I believe, is rightly addressed to Mr Advani”, I said unrelentingly. “Did anything of this kind as *Ram shila puja* – consecration and worship of bricks in the construction of a temple – take place in the reconstruction and renovation of the Somnath temple?” No countrywide movement, no mass movement, had to be undertaken in the case of the Somnath temple, he answered. It was the result of a decision taken by Nehru's Cabinet. But so far as the ceremonial part of it is concerned, “even though there were no *Sri Ram shilas*, what was actually done [requesting embassies abroad to send water and earth to India] was of far greater ritual and ceremonial significance.” Moments later, following our exchange over Nehru, he exploded and stood up to protest my foray into religious history and ideology as an abuse of my position as the commission's counsel.

The clash with Advani during his deposition (on 13 June 2001) was highlighted by leading national newspapers the next day. See *The Indian Express*, p 1, “Advani snaps on Nehru's role in Somnath”; *The Times of India*, p 1, “Advani fumbles before panel”; and *Hindustan Times*, p 1, “I am proud of Ram Movement: L K Advani eyeballs Liberhan Commission”, all of 14 June 2001. See also the author's interview to *Outlook*, 13 July 2009, pp 36-38. The questions and answers cited above are taken from Advani's deposition before the Liberhan Ayodhya Commission of Inquiry.

For Nehru's objection, see *Selected Works of Jawaharlal Nehru* (1994), Second Series, Part I, Vol 16, pp 605-06. The letter is dated 17 April 1951. See also Romila Thapar (2004), *Somanatha: The Many Voices of a History* (New Delhi: Penguin-Viking), pp 197-201, for Nehru's strong opposition to any association with or involvement in the restoration of the Somnath temple.

- 2 Romain Rolland (1931), *The Life of Vivekananda and the Universal Gospel*, translated by E F Malcolm-Smith, Advaita Ashrama, Calcutta, 16th impression 1999.
- 3 “Postscript by the Editor” in A L Basham (ed.) (1975), *A Cultural History of India* (New Delhi: Oxford University Press), third impression 1999, pp 78-82 (on 82).
- 4 Peter van der Veer (1994), *Religious Nationalism: Hindus and Muslims in India*, University of California; published in India by Oxford University Press, New Delhi, second impression 2000, p 161.
- 5 Monier Williams (2001), *Indian Wisdom*, Rupa & Co, New Delhi, p 549.
- 6 S Radhakrishnan, *Hinduism*, in A L Basham (ed.) (1975), *A Cultural History of India* (New Delhi: Oxford University Press), third impression 1999, pp 60-77 (on 72).
- 7 Justice D V Sharma's judgment, Vol 3, p 256.
- 8 Justice D V Sharma's judgment, Vol 1, pp 240-63.
- 9 Justice D V Sharma's judgment, Vol 4, p 161. All the four volumes of Justice Sharma's judgment are independently paginated.
- 10 Justice Sudhir Agarwal's judgment, pp 3332-36, paras 3403-09.
- 11 Justice Sudhir Agarwal's judgment, pp 1796-97, para 1682. Also see pp 1763-65, paras 1638-39.
- 12 Justice Sudhir Agarwal's judgment, p 2297, para 2314.

- 13 Justice S U Khan's judgment, p 280. Justice Agarwal is described by him as “extremely laborious, very upright and considerably balanced”.
- 14 The leading Supreme Court judgments on Article 25 include All India Reporter (AIR) 1954 SC 282: *The Commissioner, Hindu Religious Endowments, Madras vs Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*; AIR 1963 SC 1638: *Tilkayat Shri Govindlalji Maharaj etc v State of Rajasthan and others*; (1972)2 Supreme Court Cases (SCC) 11: *Shamall and others v State of Tamil Nadu*; (2002)8 SCC 106: *N Adithayan vs Travancore Devaswom Board and others*; and (2004)13 SCC 770: *Commissioner of Police and others vs Acharya Jagadishwarananda Avadhuta and another*.
- 15 Indian Law Reports (ILR) (1909) 33 Bom. 122: *Jamshedji Cursetjee Tarachand vs Soona Bai*.
- 16 (2004)13 SCC 770: *Commissioner of Police and others vs Acharya Jagadishwarananda Avadhuta and another*.
- 17 AIR 1954 SC 388: *Ratilal Panachand Gandhi and others vs State of Bombay and others*.
- 18 AIR 1973 SC 1461: *His Holiness Kesavananda Bharati Sripadagalvaru and others vs State of Kerala and others*; (1994)3 SCC 1: *S R Bommai and others vs Union of India and others*; and (2006)8 SCC 212: *M Nagaraj and others vs Union of India and others*.
- 19 William James, cited in *Great Thinkers on Ramakrishna-Vivekananda*, Ramakrishna Mission Institute of Culture, Kolkata, revised second edition 2009, p 159.
- 20 “Editor's Introduction” in Amiya P Sen (ed.) (2006), *The Indispensable Vivekananda: An Anthology for Our Times* (Delhi and Ranikhet: Permanent Black), p 5.
- 21 *The Life of Swami Vivekananda by His Eastern and Western Disciples*, Advaita Ashrama, Kolkata, sixth edition 1989, ninth reprint 2008, Vol 1, pp 217, 240.
- 22 *Selected Works of Veer Savarkar* (2007), Abhishek Publications, Chandigarh, Vol 1, pp 40-51.
- 23 See *The Complete Works of Swami Vivekananda* (1989), Advaita Ashrama, Kolkata, 11th reprint 2006, Vol I-VIII, and *Selected Works of Veer Savarkar* (2007) (Chandigarh: Abhishek Publications), Vol 1-4.
- 24 Justice K M Pandey (1996), *Voice of Conscience*, Din Dayal Upadhyay Parkashan, Lucknow, p 215.
- 25 See A G Noorani, ed. (2003), *The Babri Masjid Question, 1528-2003* (New Delhi: Tulika Books),

- Vol I, chapter V, pp 208-51. Nayar's letters to Chief Secretary Bhagwan Sahai are on pp 212-18.
- 26 AIR 1925 Privy Council 139: *Pramatha Nath Mullick vs Pradhyumna Kumar Mullick and another*.
- 27 Heidrun Bruckner, Anne Feldhaus and Aditya Malik, ed. (2004), *Gunther-Dietz Sontheimer, Essays on Religion, Literature and Law*, Indira Gandhi National Centre for the Arts, in association with Manohar, New Delhi, pp 15-68. The observations cited, or referred to, are on p 17.
- 28 Peter van der Veer (2001), *The Concept of the Ideal Brahman as an Indological Construct*, in Gunther-Dietz Sontheimer and Hermann Kulke (ed.), *Hinduism Reconsidered* (New Delhi: Manohar), pp 153-170. All the references or citations are from this work.
- 29 A G Noorani, ed. (2003), *The Babri Masjid Question, 1528-2003* (New Delhi: Tulika Books), Vol II, p 238.
- 30 (1977)4 SCC 467: *T Arivandandam vs TV Satyapal and another*. Reiterated in (2008)12 SCC 661: *Kamla and others vs K T Eshwara Sa and others*.
- 31 A G Noorani, ed. (2003), *The Babri Masjid Question, 1528-2003* (New Delhi: Tulika Books), Vol I, p 216.
- 32 AIR 1966 SC 359: *Deo Kuer and another vs Sheo Prasad Singh and others*.
- 33 AIR 1942 Privy Council 47: *Raja Rajgan Maharaja Jagatjit Singh vs Raja Partab Bahadur Singh*.
- 34 (2004)1 SCC 438: *Shanti Kumar Panda vs Shakuntala Devi*.
- 35 (1994)6 SCC 360: *Dr M Ismail Faruqui and others vs Union of India and others*.
- 36 D Mandal, “An Analysis of the ASI Report” in D Mandal and Shereen Ratnagar (2007), *Ayodhya: Archaeology after Excavation* (New Delhi: Tulika Books), pp 25-100.
- 37 Justice S U Khan's judgment, pp 276-77.
- 38 Koenraad Elst (2001), *Decolonising the Hindu Mind: Ideological Development of Hindu Revivalism*, Rupa & Co, New Delhi.
- 39 Koenraad Elst (1990), *Ram Janmabhoomi vs Babri Masjid: A Case Study in Hindu-Muslim Conflict* (New Delhi: Voice of India), p 167.
- 40 H D Sankalia (1973), *Ramayana: Myth or Reality?* (New Delhi: People's Publishing House), reprint 1991.
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