

N.9 Archaeological report

447. Both in the suit instituted by the Sunni Central Waqf Board²⁷³ and in the suit instituted by the deities²⁷⁴, an issue was framed on whether the disputed structure of a mosque has been erected after demolishing a temple which existed at the site.

448. On 1 August 2002, the High Court proposed that an excavation be carried out by the Archaeological Survey of India²⁷⁵. The High Court proposed that before excavation, ASI will survey the disputed site using Ground Penetrating Radar²⁷⁶ or Geo-Radiology System. After objections to the proposed directions were heard, they were rejected by the High Court on 23 October 2002. The ASI had a GPR survey conducted by a corporate entity which submitted its report to the High Court on 17 February 2003. The report found the presence of “anomaly alignments across the main platform north and south of the sanctum sanctorum corresponding to the Ramchabutra area”. The anomalies suggested the following position:

“...in their cross-section appearance and their areal pattern, the “anomaly alignments” may correspond to a wall foundation of some sort. In the Ram Chabutra area, the crossing patterns of those alignments and the different stratigraphic units from where they (emerge) suggest that they belong to successive construction periods rather than being contemporary to one another.”

²⁷³ Issue 1(b) in OOS No. 4 of 1989 as follows : “Whether the building had been constructed on the site of an alleged Hindu Temple after demolishing the same as alleged by defendant no. 13? If so, its effect?”

²⁷⁴ Issue No. 14 in OOS No. 5 of 1989 reads as follows : “Whether the disputed structure claimed to be Babri Masjid was erected after demolishing Janma Sthan Temple at its Site?”

²⁷⁵ “ASI”

²⁷⁶ “GPR”

The report also found that the sequence in the southern portion of the Ramchabutra area “may be indicative of a flooring structure of some sort, possibly stone slabs if its origin is ancient.” Besides, the report indicated:

“A third type of buried structures covers the entire eastern boundary of the site. It consists of buried mound structures with some internal texture or structure indicative of collapsed material. Similar types of anomalies have been detected to the south-west area just before the terrain slopes down.”

In conclusion, the GPR survey reflected a variety of anomalies ranging from 0.5 to 5.5 meters in depth “that could be associated with ancient and contemporaneous structures such as pillars, foundations, walls slabs, flooring extending over a large portion of a site”. However, the survey indicated that the exact nature of these anomalies could be determined on the basis of archaeological trenching. Upon receiving this report, the High Court directed ASI to conduct an excavation at the disputed site to the following extent:

“The area shown in the report of the Commissioner submitted in Suit No. 2 of 1950 (OOS No. 1 of 1989) covering an area of approximately 100x100 shown in the map plan No. 1 referred to by letters A,B,C,D,E,F and thereafter northern portion up to the end of the raised platform and further to the west, south and east to the said site to the extent of 50 feet.”

449. The archaeologists were directed not to disturb the area where the idol of Lord Ram was installed and an area around the idol to the extent of 10 feet. ASI was asked not to prevent worship at the site. Following this order, the High Court issued further directions on 26 March 2003 for recording the nature of the excavations found at the site and the sealing of the artefacts found in the presence of the parties and their counsel. The ASI team was directed to maintain a record of the depth of the trenches where the artefacts were found as well as

the layer of the strata. Photographs of the findings were permitted to be taken. In order to bring objectivity to the process and sub-serve the confidence of the parties, the High Court ensured that adequate representation to both the communities be maintained “in respect of the functioning of the ASI team and the engagement of the labourers”. During the course of the process, the High Court considered various objections filed by parties with respect to the excavation. The ASI submitted its final report on 22 August 2003 to which objections were addressed by the Sunni Central Waqf Board and other parties. These objections were dealt with by the High Court.

450. A wealth of arguments have been urged on the archaeological evidence in the present dispute. The arguments touch upon diverse issues such as the findings in the report, the inferences which have been drawn from them, archaeology as an inferential science as well as the value of archaeological evidence in disputes such as the present. This Court must address, *inter alia*: (i) the findings of the report and the methodology adopted; (ii) the objections raised against the findings of the report; (iii) the scope of the enquiry at the present stage, including the degree of judicial deference to expert evidence; (iv) The challenge to archaeological evidence as purely inferential and subjective in nature; (v) the standard of proof and (vi) the remit of the report and questions left unanswered. Finally, an enquiry relevant to the present controversy is the probative value of archaeological evidence in the determination of title which shall be adverted to in the course of the judgment.

451. The ASI report has indicated its objectives and methodology at the commencement of the report. The manner in which trenches were planned for excavation is indicated thus:

“In planning the excavation, it was decided to adopt the latest technique of layout of trenches where limited spaces are available and therefore in place of general practice of lay out of 10x10 m. squares divided into four quadrants of 4.25x4.25 m. separated by 0.50 m. baulk all-round, the change in the practice was made by fixing pegs at a distance of every 5 m in both north-south and east-west directions with cutting area of 4x4 m in leaving 0.5 m baulk all around which in contiguous trenches effectively left a space of 1.0 m in between two cuttings for the easy movement of archaeologists and labourers. One meter wide baulk was specially provided, considering the fact that due to modern fillings and debris the trench may not collapse due to earth pressure in a most sensitive area.”

The team laid trenches throughout the disputed area except for the place where the deity has been installed and collected samples for scientific study:

“Samples of plaster, floors, bones, charcoal, palaeo-botanical remains were also collected for scientific studies and analysis. Trenches were also laid in the entire disputed area on all sides excepting the area of the makeshift structure where Ram Lala is enshrined along with its periphery at a distance of 10 feet from Ram Lala as specified by the High Court. The excavation work was planned in phased manner in particular areas as per significant signals for anomalies pointed out by the GPR Survey.”

The work of excavation and its findings were documented by still and video footage. ASI has excavated ninety trenches in a period of five months and submitted its report of excavation within fifteen days of the completion of excavation. The ASI team has carried out its task in the presence of parties and their counsel. Excavated material including antiquities, objects of interest, glazed pottery, tiles and bones recovered from the trenches were sealed in the presence

of parties and their advocates and lodged in a strong room provided by the Commissioner of Faizabad Division.

The Eastern Area

452. The ASI team initially took up excavation in the eastern area where the enclosure wall along with remnants of a gateway were noticed, below which lie floors and walls of earlier phases. The central part of the platform, known as the Ramchabutra was noticed in this area constructed in five stages. The main features which have been exposed are elucidated below:

“The main features exposed in this area include fourteen extant courses of reused brickbats and calcrete stone blocks in the enclosure wall with a part of 2.12 m in the middle of the wall suggesting the entrance doorway which was topped by marble slabs and the floor levels consisting of lime and cement floors topped by marble dedicatory slabs of the second half of the twentieth century. Some elongated hearths and a furnace of late Mughal period were found (Pl.3).”

The Southern Area

Twenty-three trenches were excavated towards south of the raised platform. The excavation resulted in nearly fifty pillars bases of an earlier period being exposed at two points, traces of earlier pillars bases were also found below the pillar bases. The excavation in this area also resulted in the finding of a brick circular shrine on its outer part and squarish on its inner with a rectangular projection for entrance in the east and a chute on its northern side. The relevant part of the ASI report is extracted below:

“Parts of the northern and western walls and their foundation and the foundation of the southern and eastern sides built of calcrete stone blocks of the disputed structure were exposed which were found resting directly in the west over a 1.77 m wide brick wall of earlier period, the lower part of which has decorated stone blocks and calcrete stone foundation and over 50 pillar bases arranged at regular intervals connected with the lime plastered brick wall through a floor. The core of the wall of the disputed structure was filled with brickbats. The pillar bases comprise some courses of brick bats in squarish or circular formations over which two to five calcrete stone blocks are kept, possibly below and stone blocks as found in the northern area, though only one decorated sand stone block was found in this area. Further below the above-mentioned brick wall another brick wall was noticed on the top of which decorated stone blocks were found used. In the levels further down brick structures were noticed in trenches E8 and F8, though their full plan could not be exposed. At two points, below the pillar bases, traces of earlier pillar bases were also found in trenches F8 and F9 which were connected with the second floor below the floor with which most of the other pillar bases were connected. The brick wall mentioned above was found badly damaged on the southern side, possibly for taking out its bricks. This wall was found extending in the northern side of the raised platform. A brick shrine, circular on its outer and squarish on its inner plan with a rectangular projection for entrance in the east and a chute on its northern side was found below the levels of above-mentioned walls. Due to steep slope in the area further south of the trenches, it was not possible to excavate there. The natural soil was reached in G7 at the depth of 10.84 m, which was confirmed by digging further upto the depth of 13.20 m. (PI.5).”

The Western Area

At some places remains of a brick wall having nearly fifty courses were seen.

The Northern Area

The ASI team notes:

“The massive brick wall located in the southern area was noticed running in north-south direction in this area and below its level another wall was also found as seen earlier in the southern area. The top three floors and pillar bases attached

with the top floor were exposed (PI/10). The interesting features of the pillar bases in this area was that over the calcrete stone blocks these bases were given proper finishing by providing squarish stone blocks of sand stone encased with four upright stone pieces placed on the four sides for giving support to the pillar at the base in order to avoid any movement. The stone blocks project a little above the floor.”

The Raised Platform

After the demolition of the disputed structure and in terms of the order of the High Court dated 5 March 2003, excavation was partly carried out in ninety trenches. Parts of four trenches in the southern area were under the raised platform. Here the ASI team noted brick structures, floors and pillar bases below the floors and walls of the disputed structure on the raised platform as well.

453. Chapter III of the ASI report *inter alia* deals with “Stratigraphy and Chronology”. The report indicates that excavation has yielded a continuous cultural sequence involving a depth of 10.80 meters. This can be divided into nine cultural periods (explained below) on the strength of “combined and corroborative evidences of pottery sequence, structural remains and other datable finds”. The report indicates that structural activities in the excavated area had commenced from the Kushan period and continued in the Gupta and post-Gupta periods:

“Excavations have made it amply clear that the site had seen successive structural activities which began from the middle of the Kushan level at the site. The brick and stone structures that were raised in Kushan and the succeeding periods of Gupta and post-Gupta times have added heights to the mound. To build further structures upon the earlier debris the later people added a deposit of earth excavated from the periphery of the mound, which belonged to the much earlier cultural periods. This is true for the rest of the structural phases also.”

The ASI report suggested that the C14 determination of charcoal samples from the early levels (periods I to III) provide dates commencing from the last centuries of second millennium B.C.

The ASI report, as stated above finds the existence of deposits of nine cultural periods. These are:

(i) **Period – I**

Northern Black Polished Ware Level

This period pertains to the sixth to third century B.C. where the earliest people to settle at the site used Northern Black Polished Ware and other associated ware (Grey ware, Black slipped ware and Red ware) which are diagnostic ceramics of that period. No substantial structural activity was noticed except for reed impressions on burnt clay. The findings of the excavation are:

“Period - I (*Northern Black Polished Ware Level*)

...Besides the pottery this level yielded broken weights, fragments of votive tanks, ear-studs, discs, hopscotches, a wheel made on disc, a broken animal figurine (all in terracotta), an iron knife (broken), glass beads, bone point, etc. However, the most significant find from the level is a round bezel in greenish glass with legend 'sidhe' in high relief in Asokan Brahmi on the obverse while the reverse in plain (Rg.No.778).”

(ii) **Period – II**

Sunga Level

The Sunga Level relates to ‘circa second-first century B.C’. During this period, the site witnessed the first structural activities in stone and brick. The ASI report states:

“...It is in this period that the site witnessed first structural activity in stone and brick, as noticed in J3. The level is represented by terracotta objects comprising human and animal figurines, bangle fragment, ball, wheel and a broken sealing with only 'sri' letter in Brahmi extant (Rg No.701), a saddle quern and part of a lid in stone, a glass bead, a hairpin and an engraver on bone and an ivory dice, besides the period pottery of the level.”

(iii) **Period –III**

Kushan Level

This period which relates to circa first-third century A.D. has resulted in the finding of rich deposits of pottery. In one of the trenches, a huge kiln was noticed at the lower levels. The findings of the excavation are as follows:

“In trench G7, however, the limited area yielded animal and human figurines, bangle fragment and a portion of votive tank all in terracotta, a hairpin in bone, a bead in glass and an antimony rod in copper. In trench 15, though the regular stratified deposit was not encountered in the operation area, the eastern section yielded a record of regular deposition and almost all the structural activity at the site. A massive brick construction, running into 22 courses above excavated surface, is noticed at the bottom of J5-J6 which belongs to this period. The Kushan period certainly gave a spurt to construction of structures of large dimensions which attest to their public status. Besides, the same trench provided evidence for a stone structure, nature of which is not very clear.”

(iv) **Period –IV**

Gupta Level

This period pertains to the fourth-sixth century A.D. which is attested by the presence of terracotta figurines and a copper coin. The ASI report indicates:

“Almost 2 m thick deposit, represented by layer 7 and 8 G7, by layers 9 and 10 in J5-J6 and layers 7 and 8 in trenches E8

and F8, above the remains of the preceding period belong to Gupta times (circa fourth-sixth century A.D.), the presence of which is attested mostly by terracotta figurines typical of the period and of course by a copper coin (3.75 m. layer 8, G7, Rg. No.1030) bearing image of king on the obverse and *garuda* standard in upper register and legend '*sri chandra(gupta)*' in lower register on the reverse."

(v) **Period –V**

Post Gupta – Rajput Level

This period pertains to the seventh to tenth century A.D. The excavation pertaining to the above period has resulted in the unearthing of a circular subsidiary shrine belonging to the late level of this period:

"The period is marked by the appearance of the knife-edge bowls and other types which belong to the period from seventh to tenth century A.D. In this period also structural activities were witnessed in numerous phases in trench E8 and F8. A circular subsidiary shrine belonging to the late level of this period was exposed in trench E8-F8 (Fig 24 and 24A). Among the pottery assemblage Kushan type is more frequent than the period pottery."

(vi) **Period VI**

Medieval –Sultanate Level

This period pertains to the eleventh–twelfth century A.D. The findings of the excavation are:

"A thick floor made of brick-crush floor appears, on the circumstantial evidence, to have been attached to a wide and massive looking north-south oriented brick wall (No.17) markedly inclined to east (noticed in trenches D7 and E2-E1, F1 and ZF) which was the major structural activity of the period (circa eleventh-twelfth century A.D.). Another wall in same orientation has been noticed in G2 and ZG1 at a depth of 180 cm which is sealed by layer 6A in G2. The red brick-crush floor is noticed extending in a large area of the mound covering trenches E8, F8, G7, J5 & J6 with varying thickness. At the same level, in trench G5, calcrete stone blocks have been noticed in formation which may be of large dimension."

(vii) Period –VII*Medieval Level*

This period lasted from the end of the twelfth to the beginning of the sixteenth century A.D and comprises of structural activities in three sub-periods - A, B and

C. In sub-period A, the excavation shows:

“..In sub-Period-A, a massive wall (no.16) in north-south orientation was constructed, the foundation trench of which cuts the red brick-crush floor of the previous period. A new style of construction is noticed in this period, however, in a limited area. Level of the mound was raised considerably by the material excavated from the vicinity to lay a floor of lime mixed with fine clay and brick-crush, over which a column-based structure was built (evidence of pillar bases are available in trenches F9, F8 and G7).”

For sub-period-B, the ASI report indicates:

“There is a circular depression specially made by cutting the large brick pavement (Pl. 67), having the diameter of 1.05 m. with a rectangular projection of 0.46x0.32 m towards west. It is interesting to note that the circular depression comes in the centre of the pavement if the central part is calculated on the basis of extant length of wall 16 or wall 17 and longitudinal length of the alignment of pillar bases from north to south. Thus, suggesting it as a place of importance. Besides, the circular depression faces the central part of the disputed structure over which ‘Ram Lalla’ is enshrined. Bricks measuring 50x50x8 to 10 cm. 50x47x8 and 40x40x6 cm were used in the pavement as specially made floor tiles.”

The above finding for sub-period B reports the existence of a circular depression, its centrality indicating it to be a place of importance. It is also stated that the circular depression faces the central part of the disputed structure over which the deity is enshrined.

In sub-period C, there is a finding of foundations to support pillars or columns:

“In this deposit foundations to support pillars or columns were sunk which were overlaid with a 4-5 cm thick floor which had

a grid of square sandstone bases for pillars projecting out, only a few still survive. Floor around most of the pillar bases is found broken with pillar base foundations in much disturbed condition.”

(viii) **Period –VIII**

Mughal Level

The report indicates:

“The floor of the previous period (Period VII-C) is found cut by the stone block (mostly calccrete) foundations of the disputed structure (mosque). However, the north-south wall of the Period VII-A is retained as foundation for the back wall. Inside the foundation and in the immediate front part a layer of rammed earth is laid which is then overlaid with rammed deposit of grey coloured kankars and a thin layer of ashy deposit which contains riverine shells burnt white. The total deposit accounts for a thickness of about 20-25 cm, which acts as a soling for the first floor of the Mughal period inside as well as outside of the structure to a short distance to the east forming an apron floor.”

(ix) **Period –IX**

Late and Post Mughal Level

In this period, two successive floors were laid, another platform was added to the east forming a terrace and subsequently two successive enclosure walls were erected. Moreover:

“In this period to attaché a terraced platform to the east of the existing one, deposits of the earlier periods were excavated and removed, in which the floor of the period VII-C was cut and destroyed from the eastern area. Slightly later, a partition wall was added attached to the first terrace platform along with a small step in the centre. And then was added another floor inside the structure which ran out on the now enclosed platform and abutted to the partition wall. Sometimes later an enclosure wall was added to the entire complex without any foundation which rested over the existing floor, which was provided with two gates, larger one to the north and a smaller one to the east. Sometimes around this period dead bodies were buried in the north and south of the disputed structure which have cut the top floors and which are sealed by layer 1.”

454. Chapter IV of the ASI report deals with structures. A significant aspect of this Chapter is a section titled “The Massive Structure Below the Disputed Structure”. The relevant findings are extracted below:

“From the excavation it could be inferred that there were seventeen rows of pillar bases from north to south, each row having five pillar bases. Due to area restriction and natural barrier, the pillar bases in the central part occupied by the make-shift structure on the raised platform could not be located. Out of excavated fifty pillar bases only twelve were completely exposed, thirty five were partially exposed and three could be traced in sections only. A few pillar bases were noticed during earlier excavation after which a controversy took place about their association with different layers and their load bearing capacity. The present excavation has set aside the controversy by exposing the original form of the bases having calcrete and stone blocks arranged and set in a proper manner over a brick foundation and their arrangements in row including their association with the top floor of the structure existing prior to the disputed structure.

The seventeen rows of pillar bases were constructed along the north-south running brick wall (wall 16) on the west. The distance of the first pillar base in each row from the wall ranges from 3.60 to 3.86 m. Seventeen rows of pillars bases could be categorized in three different groups on the basis of north-south distance which varies in different groups whereas east-west distance from centre to centre of each pillar base vary from 2.90 to 3.30m. Six rows of the pillar bases on north and south were at the equidistance which ranges from 3 to 3.30 m. Central five rows consisting twenty five pillar bases show different equations – two rows on either sides of the central row were placed approximately at the distance of 5.25 m. whereas the other two rows on either side of these three rows were at the distance of 4.20-4.25 m. From this it could be easily concluded that the central part of the pillared structure was important and special treatment was given to it in architectural planning.

In the southern area only one decorated sand stone was found over a pillar base while in the northern area many of the pillar bases were found topped by a plain sand stone block set over the brick bat foundation having calcrete blocks over them (Pl. 36). The plain sand stone block was found in many of the cases having a stone encasing from all the four sides, possibly to avoid shifting of the pillar placed over the

block (Pls 37-38). Top parts of stone encasings had a projection in the middle. In the northern area at a few places where the stone blocks were not found sand stone slabs were found over the calcrete blocks of the brick bat foundation of the pillar bases. **The decorated octagonal sand stone block on pillar base 32 having floral motif on the four corners in trench F7 in the southern area is the unique example at the site (Pl. 39) which definitely belongs to the twelfth century A.D. as it is similar to those found in the Dharmachakrajina Vihara of Kumaradevi at Sarnath (Pl. 40) which belongs to the early twelfth century A.D.”**

(Emphasis supplied)

The ASI report contains a detailed analysis of as many as 47 pillars bases.

The Circular shrine

The ASI report contains an analysis of an east facing brick shrine which was exposed as a result of the excavation. The report notes:

“A partly damaged east facing brick shrine, structure 5 (Pls 59-60, Fig 17,24 and 24A) was noticed after removal of baulk between trenches E8 and F8. **It is a circular structure with a rectangular projection in the east**, the latter having been already visible before the removal of the baulk. The northern part of the circular part has retained its lower eight courses above the foundation of brick-bats while the southern half is damaged by constructional activity of the subsequent phase whose brick-bats have damaged the structure upto its working level. **The structure was squarish from the inner side and a 0.04 m wide and 0.53 m long chute or outlet was noticed on plan made through the northern wall upto the end where in the lower course a 5.0 cm thick brick cut in ‘V’ shape was fixed which was found broken and which projects 3.5 cm outside the circular outer face as a *pranala* to drain out the water**, obviously after the *abhisheka* of the deity which is not present in the shrine now. The entrance of the structure is from the east in the form of a rectangular projection having a twelve course of bricks interlocked with the circular structure and having a 70x27x17 cm calcrete block fixed in it as the threshold. Two sizes of bricks were used in the construction of the shrine measuring 28x21x5.5 cm and 22x18x5 cm. The rectangular projection

of entrance is 1.32 m in length and 32.5 cm projected towards east.”
(Emphasis supplied)

The report infers the existence of a *pranala* to drain out water, “obviously after the abhisheka of the deity which is not present in the shrine now”. The brick shrine which has been found as a result of the excavation is stated to be similar to the findings of the excavation carried out by ASI at Sravasti and at Rewa. On a comparative analysis, ASI has inferred that the circular shrine can be dated to circa tenth century A.D.

Summary of results

455. A Summary of results is contained in Chapter X of the ASI report. The results of the excavation are extracted below:

“The Northern Black Polished Ware (NBPW) using people were the first to occupy the disputed site at Ayodhya during the first millennium B.C. Although no structural activities were encountered in the limited area probed, the material culture is represented by terracotta figurines of female deities showing archaic features, beads of terracotta and glass, wheels and fragments of votive tanks etc. The ceramic industry has the collection NBPW, the main diagnostic trait of the period besides the grey, black slipped and red wares. A round signet with legend in Asokan Brahmi is another important find of this level. On the basis of material equipment and 14 C dates this period may be assigned to circa 1000 B.C. to 300 B.C.

The Sunga horizon (second-first century B.C.) comes to the next in the order of the cultural occupation at the site. The typical terracotta mother goddess, human and animal figurines, beads, hairpin engraver etc. represent the cultural matrix of the level. The pottery collection includes black slipped, red and grey wares etc. The stone and brick structure found from the level mark the beginning of the structural activity at the site.

The Kushan period (first to third century A.D) followed the Sunga occupation. Terracotta human and animal figurines,

fragments of votive tanks, beads, antimony rod, hair pin, bangle fragments and ceramic industry comprising red ware represent the typical Kushan occupation at the site. Another important feature of this period is the creation of large sized structures as witnessed by the massive structure running into twenty-two courses.

The advent of Guptas (fourth to sixth century A.D) did not bring any qualitative change in building activity although the period is known for its classical artistic elements. However, this aspect is represented by the typical terracotta figurines and a copper coin with the legend Sri Chandra (Gupta) and illustrative potsherds.

During the Post-Gupta-Rajput period (seventh to tenth century A.D.) too the site has witnessed structural activity mainly constructed of burnt bricks. However, among the exposed structures, there stands a circular brick shrine which speaks of its functional utility for the first time. To recapitulate quickly, exteriorly on plan, it is circular whereas internally squarish with an entrance from the east. Though the structure is damaged, the northern wall still retains a provision *pranala*, i.e. waterchute which is a distinct feature of contemporary temples already known from the Ganga-Yamuna plain.

Subsequently, during the early medieval period (eleventh-twelfth century A.D.) a huge structure nearly 50 ...north-south orientation was constructed which seems to have been short lived, as only four of the fifty pillar bases exposed during the excavation belong to this level with a brick crush floor. On the remains of the above structure was constructed a massive structure with at least three structural phases and three successive floors attached with it. The architectural members of the earlier short lived massive structure with ...and other decorative motifs were reused in the construction of the monumental structure having a huge pillared hall (or two halls) which is different from residential structures, providing sufficient evidence of a construction of public usage which remained under existence for a long time during the period VII (Medieval-Sultanate level - twelfth to sixteenth century A.D.).

It was over the top of this construction during the early sixteenth century, the disputed structure was constructed directly resting over it. There is sufficient proof of existence of a massive and monumental structure having a minimum dimension of 50x30 m in north-south and east-west directions respectively just below the disputed structure. In course of present excavations nearly 50 pillar bases with brick bat foundation, below calcrete blocks topped by sandstone

blocks were found. The pillar bases exposed during the present excavation in northern and southern areas also give an idea of length of the massive wall of the earlier construction with which they are associated and which might have been originally around 60 m (of which the 50 m length is available at present). The centre of the central chamber of the disputed structure falls just over the central point of the length of the massive wall of the preceding period which could not be excavated due to presence of Ram Lala at the spot in the make-shift structure. This area is roughly 15x15m on the raised platform. Towards east of this central point a circular depression with projection on the west cut into the large sized brick pavement signify the place where some important object was placed. Terracotta lamps from the various trenches and found in a group in the levels of Periods VII in trench G2 are associated with the structural phase.

In the last phase of the period VII glazed ware shreds make their appearance and continue in the succeeding levels of the next periods where they are accompanied by glazed tiles which were probably used in the original construction of the disputed structure. Similarly is the case of celadon and porcelain shreds recovered in a very less quantity they come from the secondary context. Animal bones have been recovered from various levels of different periods, but skeletal remains noticed in the trenches in northern and southern areas belong to the Period IX as the grave pits have been found cut into the deposition coeval with the late disputed structures and are sealed by the top deposit.

In the meanwhile to observe that the various structures exposed right from the Sunga to Gupta period do not speak either about their nature or functional utility as no evidence has come to approbate them. Another noteworthy feature is that it was only during and after Period IV (Gupta level) onwards upto Period IX (late and post Mughal level) that the regular habitational deposits disappear in the concerned levels and the structural phases are associated with either structural debris or filling material taken out from the adjoining area to level the ground for construction purpose. As a result of which much of the earlier material in the form of potter, terracottas and other objects of preceding periods, particularly of Period 1 (NBPW level) and Period III (Kushan level) are found in the deposits of later periods mixed along with their contemporary material. **The area below the disputed site thus remained a place for public use for a long time till the Period VIII (Mughal level) when the disputed structure was built which was confined to a limited area and population settled around it as evidenced by the increase in contemporary archaeological material including pottery. The same is further attested by the conspicuous**

absence of habitational structures such as house-complexes, soakage pits, soakage jars, ring wells, drains, wells, hearths, kilns or furnaces etc from Period IV (Gupta level) onwards and in particular from Period VI (Early Medieval-Rajput level) and Period VII (Medieval-Sultanate level).” (Emphasis supplied)

In regard to the dating of the findings, the report indicates that the earlier human activities trace back to thirteenth century B.C.:

“...earliest remains may belong to the thirteenth century B.C. which is confirmed by two more consistent C14 FROM THE NBPW level (Period I), viz. 910 = 100 B.C. and 880 = 100 B.C). These dates are from trench G7. Four more dates from the upper deposit though showing presence of NBPW and associated pottery are determined by Radio-Carbon dating as 780=80 B.C., 710=90 B.C., 530=70 B.C. and 320=80 B.C. In the light of the above dates in association with the Northern Black Polished Ware (NBPW) which is general accepted to be between *circa* 600 B.C. to 300 B.C. it can be pushed back to *circa* 1000 B.C. and even if a solitary date, three centuries earlier is not associated with NBPW, the human activity at the site dates back to *circa* thirteenth century B.C. on the basis of the scientific dating method providing the only archaeological evidence of such an early date of the occupation of the site.”

Finally, the ASI concludes by indicating that:

“Now, viewing in totality and taking into account the archaeological evidence of a massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patters, *amalaka*, *kapotapali* doorjamb with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having *pranala* (waterchute) in the north, fifty pillar bases in association of the huge structure, are indicative of remains which are distinctive features found associated with the temples of north India.”

(Emphasis supplied)

456. Numerous objections have been urged to the ASI report and will be considered. The report indicates that the post Gupta period commencing from the seventh to the tenth century A.D. witnessed significant structural activity at the site. The report states that this activity has uncovered the existence of a circular brick shrine with a circular exterior with an entrance from the east. ASI has concluded that the northern wall of the shrine contains a *pranala*, i.e. a water chute, which it opined to be a distinctive feature of temples in the plains of the Ganges – Yamuna. The report noted that excavation pertaining to the eleventh–twelfth century A.D. has revealed the existence of “a huge structure” with a dimension of 50 meters by 30 meters. This activity during the early medieval period of the eleventh and twelfth century A.D. reveals the existence of nearly fifty pillar bases. The report notes that on the remains of the above structure, there was a massive structure constructed with at least three structural phases and three successive floors attached with it. The architectural features of the early structure including its decorative motifs were revised in the construction of a “monumental structure” with a large pillared wall indicating evidence of a construction for public use. The report notes that the construction of the disputed structure during the early sixteenth century is found to have rested directly above the earlier structure and that the centre of the central chamber of the disputed structure is stated to fall over the central point of the length of the massive wall of the preceding period.

Findings of the High Court on the ASI report

457. During the course of his judgment, Justice S U Khan did not place any reliance on the ASI report. The learned judge offered the following explanation:

“Conclusions of A.S.I. Report 2003, already quoted, are not of much help in this regard for two reasons. Firstly, the conclusion that there is ‘evidence of continuity in structural phases from the tenth century onward upto the construction of the disputed structure’ is directly in conflict with the pleadings, gazetteers and history books. Neither it has been pleaded by any party nor mentioned in any gazetteer or most of the history books that after construction of temples by Vikramaditya in first Century B.C. (or third or fourth century A.D., according to some) and till the construction of the mosque in question around 1528 A.D. any construction activity was carried out at the site of the premises in dispute or around that. Secondly, in case some temple had been demolished for constructing the mosque then the superstructure material of the temple would not have gone inside the ground. It should have been either reused or removed. No learned counsel appearing for any of the Hindu parties has been able to explain this position.”

The first reason which weighed with Justice S U Khan was that it had not been pleaded by any of the parties that after the construction of a temple in the first century B.C. (or third or fourth centuries A.D.) until the construction of the mosque in the sixteenth century, any construction had been carried out at the site. The case of the plaintiffs in Suit 5 is that the disputed structure of a mosque was constructed after the demolition of a temple and that the mosque was constructed at the site of the demolished temple. The purpose of the excavation which was ordered by the High Court was to enable the court to have the benefit of a scientific investigation by ASI. It was on the basis of this excavation that the court would be apprised of the findings reached by ASI. To attribute to parties an act of default in their pleadings is inappropriate for the reason that the

archaeological evidence which came before the court was as a result of the excavation which was carried out by the ASI. Having ordered the excavation, it was necessary for the High Court during the course of the trial to evaluate those findings. Justice S U Khan did not do so. The second reason which has weighed with the learned judge proceeds on the basis of a conjecture. Justice S U Khan held that it is not conceivable that Babur or Aurangzeb would have ensured prior research to ascertain the exact birth-place of Lord Ram and then have a temple constructed at the site. The purpose of the excavation was to enable the court to determine as to whether the excavation at the disputed site suggested the existence of prior structural activity over centuries and, if so, whether any part of it was of a religious nature. Justice S U Khan has omitted to assess both the finding of the ASI of a circular shrine and a construction partaking of a publicly used structure on the foundations of which the disputed structure rested and its probative value in the present dispute.

458. Justice Sudhir Agarwal observed during the course of his judgment that certain undisputed facts emerge from the excavations. These were catalogued as follows:

“(i) A lot of structural and construction activities existed at the disputed site going back to the level of Shunga and Kushan period.

(i) The exact number of floors, pillar bases and walls (were) noted by ASI though objected but the very existence of several floors, walls, and pillar bases beneath the disputed structure is not disputed.

(ii) The structure below the disputed structure was sought to be explained as Kanati mosque or Idgah. There is no suggestion that the structure below the disputed building was of non-religious nature.

(iii) Some of the constructions or artefacts are sought to relate to Jains or Buddhist but here also it is not the case that it was Islamic in nature or non-religious.

(iv) Though allegations of lack of independence in professional style etc. is sought to be supported from the alleged misinterpretation or wrong interpretation or omission or contradictions and discrepancies in some part of the report but no one of ASI team, individual or group has been named or shown to have worked in a manner lacking integrity, independence etc. (except where two nominees of Muslim side i.e. Dr. Jaya Menon (PW 29) and Dr. Supriya Verma (PW 32) reported creation of pillar bases in Trench G2 vide complaints dated 21.5.2003 and 7.6.2003)."

Initially, the case of the Sunni Central Waqf Board was that the building in dispute was constructed at a place on which there was no existence of a Hindu religious structure and there was no evidence to suggest that the structure was at the place which Hindus believe to be the birth-place of Lord Ram. Justice Agarwal noted that when the excavation progressed there was a marked change in the approach of the plaintiffs in Suit 4 and a new case was sought to be set up that the structure below the disputed structure as shown in the excavation is of Islamic origin namely, either an 'Idgah' or 'a Kanati Masjid'. Justice Agarwal noted that this shift in stance of the Muslim parties clearly excluded the possibility that the structure which was found below the disputed structure was of an origin which is not religious. The enquiry then narrowed down to whether the structure was Islamic or non-Islamic in nature. The learned judge concluded that:

"3905. It is clear from the report that floor 4 which supports the foundation of pillar bases was a floor of a Temple. It cannot be the floor of Idgah or Kanati Mosque because pillars are always absent in Idgah so that maximum persons could be accommodated in minimum space for offering prayer."

459. Justice Agarwal noted that the existence of a circular shrine with its attendant architectural features likely indicated the presence of a Shaivite shrine and that it was not a Muslim tomb. He observed that while on the one hand, the dimensions of the structure were too small for a tomb, a gargoyle would never find presence in a tomb but was an integral feature of the sanctum of a Shiva temple to drain out water poured on the Shivalingam. In that context, after analysing the evidence, Justice Agarwal observed that PWs 29, 31 and 32 who were the witnesses of the plaintiffs in Suit 4 accepted that the features which were found in the excavated shrine were of a non-Islamic origin. The evidence of PWs 29, 31 and 32, insofar as is relevant is extracted below:

(A) Dr Jaya Menon (PW-29)

“The motif of Ghat (pot) is visible on this pillar. It is true that Ghat is also known to be as “Kalash”. Normally, this kind of ‘Ghat’ on the pillar is not found in mosque.

It is correct to say that the figurines of elephant, tortoise and crocodile – all made of terracotta, were recovered during the excavation. Such figurines were found in more than one trench. I know that the crocodile is the seat/vehicle of Hindu holy river Ganga. I agree that tortoise is the vehicle of holy river Yamuna.”

(B) Dr Ashok Dutta (PW 31)

“As I have mentioned that the Muslim people do not believe in the idol worship, hence there is no question of associating terracotta figurine with the Muslim culture. So far I know and my knowledge goes, the question of terracotta figurine to be associated with Muslim culture does not arise”.

“It is true that such animal figurines are not allowed to be kept in the mosque.”

“Makar Pranal is one of the parts of the Hindu temple architecture. I am not very sure whether Makar Pranal has any association with mosque or not. I have not seen any mosque having any Makar Pranal in it.”

(C) Dr Supriya Verma (PW-32)

“I have heard the word ‘Kalash’. Kalash is not found in mosque...”

“Wall No. 16, according to me, was used as a wall prior to the construction of the disputed structure. In this way, Wall 16 was wall of some other construction which was existing prior to the construction of the disputed structure.”

“However, it is true that Wall No. 17 was constructed earlier to Wall No. 16.”

“I know crocodile. It is also very important for the temples. It is called ‘Makar Mukh’. I have not seen Makar Mukh in any mosque...”

Justice Agarwal observed:

“3979. The report of the Archaeological Survey of India, which is a report of an expert in excavation, contains all the details including details of stratigraphy, artefacts, periodisation as well as details of structures and walls. The pillar bases mentioned in the report establish beyond all doubt the existence of a huge structure. In addition to above, existence of circular shrine, stone slabs in walls with Hindu motifs and more particularly sign of Makar Pranal in wall No. 5 (wall of disputed structure), divine couple and other temple materials, etc., conclusively proves the existence of a Hindu religious structure beneath the disputed structure. It is generally admitted by the witnesses that the excavation was conducted as per settled norms of archaeology in presence of parties, experts and observers and three dimensional recording, photography, videography of each and every trench, structure, artifacts, were done by the ASI during excavation in presence of all concerned. Day-to-day register, supervisor's diary and antiquity register were being regularly maintained.

3980. There are some more objections which we find not much of worth for the reason that the experts of Muslim parties ultimately, realizing that structure existed underneath the disputed building made out a new case in their statement. However, a new stand which is not the case of the plaintiff, not pleaded is not permissible.”

One of the objections before the High Court was that the ASI report did not specifically answer whether there was any pre-existing structure which was demolished for the construction of a mosque and whether the pre-existing structure was a temple. Answering this objection, the High Court held:

“3990. ASI, in our view, has rightly refrained from recording a categorical finding whether there was any demolition or not for the reason when a building is constructed over another and that too hundreds of years back, it may sometimes be difficult to ascertain as to in what circumstances building was raised and whether the earlier building collapsed on its own or due to natural forces or for the reason attributable to some persons interested for its damage. Sufficient indication has been given by ASI that the building in dispute did not have its own foundation but it was raised on the existing walls. If a building would not have been existing before construction of the subsequent building, the builder might not have been able to use foundation of the erstwhile building without knowing its strength and capacity of bearing the load of new structure. The floor of the disputed building was just over the floor of earlier building. The existence of several pillar bases all show earlier existence of a sufficiently bigger structure, if not bigger than the disputed structure then not lesser than that also.”

After analysing the evidence, Justice Agarwal observed:

“4055. The ultimate inference, which can reasonably be drawn by this Court from the entire discussion and material noticed above, is: (i) The disputed structure was not raised on a virgin, vacant, unoccupied, open land. (ii) There existed a structure, if not much bigger then at least comparable or bigger than the disputed structure, at the site in dispute. (iii) The builder of the disputed structure knew the details of the erstwhile structure, its strength, capacity, the size of the walls etc. and therefore did not hesitate in using the walls etc. without any further improvement. (iv) The erstwhile structure was religious in nature and that too non-Islamic one. (v) The material like stone, pillars, bricks etc. of the erstwhile structure was used in raising the disputed structure. (vi) The artefacts recovered during excavation are mostly such as are non-Islamic i.e pertaining to Hindu religious places, even if we accept that some of the items are such which may be used in other religions also. Simultaneously no artefacts etc., which can be used only in Islamic religious place, has been found.”

Motifs on the Kasauti stone pillars

460. Evidence was produced before the High Court of the motifs on the pillars in the disputed building. Three sets of albums containing photographs taken by the

State Archaeological Department pursuant to an order dated 10 January 1990 were produced. Dr Rakesh Tewari (OPW-14) who was the Director of the State Archaeological Department verified the photographs. The first album contained 204 coloured photographs and was marked as paper no. 200 C1/1 -204. The second album contained 111 black and white photographs and was marked as paper no. 201C/1-111. The High Court annexed the photographs as Appendices 5(A) to 5(DD) of its judgment. The photographs contain depictions of the black Kasauti stone pillars. Several of the witnesses on behalf of the plaintiff in Suit 4 deposed during the course of their evidence in regard to these photographs. Relevant extracts from the deposition of Farooq Ahmad (PW-3) have been reproduced in the judgment of Justice Sudhir Agarwal. Extracts from the testimony are quoted below:

Farooq Ahmad (PW-3):

“Idols are visible in photograph no. 57, which were not present at that time. This photograph is also of the disputed property but it is possible that it may have been changed because at that time there were no idols over the pillars. An idol is visible in the upper part of photograph no. 58 as well. There was a black pillar at the gate, which did not have any idol and it is possible that it may have been changed subsequently...It is only after looking at the photograph that I am stating that the pillars may have been changed. These pillars have idols on their top and it is only after looking at them that I am stating that these pillars have been changed.”

“In photograph no. 62 there is a pillar like structure near the grill, which has idols. This pillar is at the northern gate of the disputed property... It is visible in white color in photograph no. 64 as well, and the idols are also visible...The photograph no. 65 is of the main gate. However, its pillar contained idols, which are result of change. The photograph no. 66 is also of the eastern side but it has idols, which are result of change.”

“The photograph no. 72 does contain black pillars but it has idols in upper and lower part... Similar is the position of the two pillars of photograph no. 71. Same is with the pillar shown in photograph on. 73. It also contains idols. The photograph

no. 74 is also similar, which has idols over pillars. This pillar has been shown completely from all sides, which had been fixed over there.”

“The photograph no. 101 is also of that place, but many changes have been made therein. The idols are also existing and the pitchers (Kalash) are also existing.”

“It is true that all the photographs contained in this album, had been taken in the presence of my counsel. All these photographs are of the disputed land and property.”

There were witnesses who deposed on behalf of the contesting Hindu parties. They also spoke about the idols depicted in the photographs of the pillars. These idols include depictions of Gods and Goddesses worshipped by Hindus such as Hanuman, Narsimha, Ganesh and Durga. The witnesses have also deposed about the images of a peacock, *garuda* and lotus. The witnesses who deposed in this regard on behalf of the Hindu parties were DW-3/5-1-2, 17/1, B/1-1, 17/1, 20/1 and 12/1.

Coupled with the photographs is the fact that during the course of the excavation, 62 human and 131 animal figurines were found by the ASI. Justice Sudhir Agarwal noted that it was not in dispute that no Islamic religious artefacts were found during the excavation, while artefacts pertaining to a Hindu religious origin were found in abundance. Among them, as the learned Judge noted, were motifs of flowers (plates nos 51 and 62); the hood of a cobra (plate no. 129) and those pertaining to other Gods and Goddesses in human shape (plate nos 104-112, 114-116, 118-123 and 125-126). The witnesses who supported the findings and report of the ASI were Dr R Nagaswami (OPW- 17), Arun Kumar (OPW – 18) and Rakesh Dutt Trivedi (OPW-19).

Objections to the ASI report

461. Ms Meenakshi Arora, learned Senior Counsel has prefaced her submissions by formulating the following objections to the ASI report:

- (i) The ASI report suffers from glaring errors and internal inconsistencies;
- (ii) The ASI report is only an opinion of an archaeologist in view of Section 45 of the Evidence Act 1872; and
- (iii) Archaeology is an inferential science which renders the report a weak account of evidence.

Elaborating the third submission, Ms Arora submitted that archaeology is a social science as distinct from a natural science. Archaeology, in her submission, is not precise or exact as distinguished from the natural sciences which are based on verifiable hypotheses. Archaeology, the learned Senior Counsel urged, is based on drawing inferences in the context of what is found in the course of excavation and does not yield verifiable conclusions.

Ms Arora urged the following additional objections with respect to the ASI report:

- (i) No witness was called to prove the ASI report;
- (ii) No finding has been recorded by the ASI on whether there was a pre-existing temple which was demolished for the construction of a mosque;
- (iii) The Summary of results recorded in the conclusion of the report is not attributed to any specific author unlike the individual chapters; and

- (iv) The report does not indicate whether any meetings were held between the members of the team responsible for undertaking the excavation activity. If they did, the notes of the team meeting should have been furnished.

Subsequently, during the course of his submissions on the scope of the challenge to the report, Dr Rajeev Dhavan, learned Senior Counsel appearing for the plaintiffs in Suit 4 submitted that whether the Summary of results has been signed is a futile line of enquiry because it only goes to the authenticity and authorship of the report. Dr Dhavan fairly submitted that the authorship of the ASI report cannot be questioned since there is no dispute that it is attributed to the ASI and was submitted in pursuance of the directions of the High Court. In view of the submission, the doubt raised earlier by Ms Arora on the authorship of the Summary of results is set at rest. The report has been co-authored by B R Mani and Hari Manjhi. The report emanates from the ASI to whom the task was entrusted by the High Court. There being no dispute about the authorship, origin or authenticity of the report, we find no substance in the objection that was raised by Ms Arora on that count.

Merits of the objections

462. The objections which have been addressed against the ASI report by Ms Arora, learned Senior Counsel have been elaborated in Volume A-91 of the written submissions titled as “**Stratigraphy / Periodisation, Pillar Bases, Walls, Circular Shrine, Divine Couple & Other Artefacts, Glazed Ware & Glazed Tiles; Animal Bones**”. The preliminary submissions are:

- (i) ASI did not properly mark the soil layers on excavation;
- (ii) ASI failed to maintain accurate records of the recovery of artefacts from specific layers and lost the context;
- (iii) Though, the bones found in excavation could have been subjected to carbon dating and Paleo-Botanical studies to arrive at better estimates of chronology, only charcoal samples were sent for carbon dating;
- (iv) Though, ASI had assured the High Court in its interim report that it would collect samples of soil and mortar (for carbon dating), pottery (for thermoluminescence), grains and pollen (for paleo-botanical studies) and bones (for study of faunal remains), this was not done;
- (v) The High Court had issued directions to the ASI to maintain a register for accurate recording of recovery of artefacts from each layer; and
- (vi) ASI prepared and submitted its report in 15 days in a hurried manner.

463. ASI had to conduct a complex exercise. Its excavation was time bound. The excavating team had to work its way around a make-shift temple without affecting the worship of the deity. The trenches had to be arranged with care. The difficulties which ASI encountered were numerous. Its team excavated in the glare of publicity, in the presence of parties or their representatives. The report notes the unusual circumstances which it faced in the course of the excavation:

“a. In planning the excavation, it was decided to adopt the latest technique of layout of trenches where limited spaces are available and therefore in place of general practice of layout of 10 x 10m. squares divided four quadrants of 4.25x4.25m

b. On the directions of the Hon'ble High Court, Archaeological Survey of India has excavated ninety trenches in a limited time of five months soon after which the

excavation report is required to be submitted within fifteen days. This is an unprecedented event in the history of one hundred and forty two years of the existence of the Survey
c. ...Thus the time available for their documentation, study photography, drawing and chemical preservations was limited to just a few hours only and that too not in the case of material recovered from the trenches towards closing of the work for the day...Work was often affected and delayed due to formalities involved in security checks and such other administrative requirements...

d. Working condition worsened at the onslaught of the monsoon from June onwards when the entire site was covered with multi-colored waterproof streets creating heat and humidity besides total darkness in a number of deep trenches. Monkeys started damaging the sheets as a result of which several layers of the sheets were spread over bamboo and wooden poles. They created further darkness...Much difficulty was felt for the stratigraphical observation particularly for determining layers. These factors slowed the process of ongoing work."

Ms Arora urges that these difficulties led to errors. The manner in which ASI carried out "stratigraphy-periodisation" was questioned before the High Court. Justice Sudhir Agarwal while rejecting the objections observed:

"3846. From the statement of the six expert witnesses produced on behalf of plaintiff (Suit-4), we find that all of them are not unanimous in saying that the entire stratigraphy or periodization made by ASI is bad or incorrect or suffers with such material illegality or irregularity that the same deserves to be rejected, which... ultimately may result in rejection of the entire report itself. Their statements are also contradictory, vague, confused and based on...conjectures.
3863... On the contrary, most of them admit that determination of stratigraphy/chronology can be done in one or more method which are well recognized and they are... (1) dynasty wise, (2) century wise and (3) layer wise, and the ASI has followed all the three systems."

The High Court observed:

“3979. The report of the Archaeological Survey of India, which is a report of an expert in excavation, contains all the details including details of stratigraphy, artifacts, periodisation as well as details of structures and walls.”

464. In the course of analysing the ASI report, it is important to bear in mind the criticism levelled on the methodology adopted by and the findings recorded by ASI. Taking them into consideration will be an important evaluative technique for this Court to deduce whether the objections, if found to be valid, are of such a nature as would detract wholly from the utility of the report. Alternatively, this Court may have to consider a more nuanced perspective under which the deficiencies shown to exist in the report can lead to a realistic assessment of the conclusions based on probability, relevance and inconsistency. The judgment must deal with the basic question whether the findings of ASI have relevance to the determination of title.

465. Ms Arora has highlighted the oral testimony of R C Thakran (PW- 30), who assailed the ASI report. PW – 30 noted that periods VI to VII of Chapter III titled “Stratigraphy and Chronology” were subsequently altered in the ‘Summary of results’. Initially at pages 38 to 41 of the report, the nomenclature of periods V, VI and VII is as follows:

“Period V : Post-Gupta-Rajput, 7th to 10th Century
Period VI: Medieval – Sultanate, 11th-12th Century
Period VII: Medieval, 12th to 16th Century.”

PW-30, however draws attention to the fact that in the Summary of results the above nomenclature is revised to read as follows :

“Period V : Post-Gupta-Rajput, 7th-10th century
 Period VI: Early medieval, 11th-12th century
 Period VII: Medieval-Sultanate, 12th-16th century.”

The above inconsistency which has been highlighted carefully by Ms Arora must be borne in mind.

According to PW-30, the transfer of the Medieval - Sultanate period from period VI to VII has “the advantage” of ignoring Islamic period materials like glazed ware or lime-mortar by removing them arbitrarily from period VI levels to those of period VII so that their actual presence in those levels does not pose a challenge to ASI in placing the construction of an alleged “massive” or “huge” temple in period VI.

On the aspect of ‘periodisation-stratification’, Jayanti Prasad Srivastav (DW-20/5) who was formerly a Superintending Archaeologist with ASI stated:

“...However I agree with the opinion of the ASI, which is mentioned in the chart prepared by them at page 37-A, where they have assigned floor 4 and 5 to the early Medieval Sultanate period. On page 37-A in the chart the ASI has mentioned early Medieval Sultanate period whereas at page 40 they have mentioned Medieval period. To my mind it appears that there is difference between the two, but I cannot clarify the same.

Q. Is it correct to say that the term “early Medieval Sultanate” period indicated by light green colour in the chart at page 37-A is no other period than the period described as period VI (Medieval Sultanate level) of 11th – 12th Century on page 40 of ASI report, Vol. I

A. **Since the term “early Medieval” has got a definite meaning in the chronological sense, I cannot equate it with Medieval-Sultanate level lightly, hence the excavators, who got this chart prepared are required to**

clarify the situation before any conclusion is drawn by us.” (Emphasis supplied)

The highlighted excerpts from the answer of the witness emphasise the importance of a clarification being sought from the ASI on the classification which it adopted. This precisely is one of the difficulties which the objectors must confront. If a clarification was necessary (as the witness acknowledges), it was but appropriate that under Order XXVI Rule 10(2), a request should have been addressed to the court for the examination of an appropriate witness from ASI. This was not done.

Objections as to Pillar bases

466. The ASI report states that:

“From the excavation it could be inferred that there were seventeen rows of pillars from north to south, each row having five pillar bases.”

On the other hand it admits that: “Out of excavated fifty pillar bases only twelve were completely exposed, thirty five were partially exposed and three could be traced in sections only. A few pillar bases were noticed during earlier excavation after which a controversy took place about their association with different layers and their load bearing capacity.”

Ms Arora submitted that the so-called pillar bases could not either have formed a part of or supported the alleged massive structure /temple as claimed by the ASI for the following reasons:

- (i) During the excavation, the ASI identified different layers belonging to different periods. Within the different layers, it identified the presence of four different floors which are marked by the existence or presence of

clearly demarcated floors of *lime-surkhi* or *surkhi*. Admittedly, the floors are at different levels, floor 1 being the level of the demolished mosque and floors 2, 3 and 4 being below it at different levels as is illustrated in the report. Given that the alleged pillar bases have been found in different floors or cutting through different floors, it is evident that these pillar bases have been constructed at different time periods. Hence, the so-called pillar bases could not have contemporaneously formed part of a single structure, let alone a purportedly massive structure;

- (ii) There are discrepancies and variations in the number of alleged pillar bases found on different floors in different parts of the ASI Report. The isometric view in Figure 23A contains a number of imagined or conjectured pillar bases which have not even been exposed. Therefore, the claim of a massive structure is an unfounded hypothesis as the exact number of pillar bases is not known;
- (iii) In any case, the so-called pillar bases are not in alignment as revealed from actual measurements and distances (admitted by DW-20/5 and OPW-17, expert witnesses who deposed in support of the ASI Report). The pillar bases are at different distances from the thick western wall. Further, the shapes and sizes of these purported pillar bases vary from elliptical to circular to square to rectangular to irregular, and have differing dimensions. This not only shows that they were built in different time periods but also that they could not have comprised the supporting framework of any massive structure or temple. Furthermore, none of these pillar bases have been found in association with any pillar; and

- (iv) Given the nature of the so-called pillar bases as exposed by ASI, which were mostly made of brick-bats, they could, at best, have supported only wooden pillars on them (as admitted by DW-20/5, an expert witness who testified in support of the ASI Report). Such wooden pillars could not have borne the heavy load of a massive structure.

The above objections are sought to be established on the basis of evidence under the following heads of the submissions of counsel:

(i) **Pillar bases do not belong to the same floor**

Jayanti Prasad Srivastav (DW 20/5); Arun Kumar Sharma (OPW 18); Ashok Datta (PW 31); and Dr Shereen Ratnagar (PW 27) stated that all the pillar bases do not belong to the same floor. OPW 18 stated that 46 pillars belong to floor 3 of period VII (twelfth century A.D) and 4 pillars belong to floor 4 (eleventh century A.D.). PW 31 stated that some of the pillar bases found in the northern part of the mound belonged to a different elevation and structural activity. PW 27 stated that the pillar bases do not belong to the stratum.

(ii) **Pillars and pillars bases are conjectural**

R Nagaswami (OPW 17), Jayanti Prasad Srivastava (DW 20/5) and Ashok Datta (PW 31) claimed during the course of their examination that the finding that there were 17 rows of pillar bases with five in each row is an inference since all the 85 pillar bases have not been excavated.

(iii) **The pillar bases are not in alignment**

R C Thakran (PW 30), Ashok Datta (PW 31) and Dr Supriya Verma (PW 32) stated that the pillar bases were not in exact alignment as would be expected in a pillared hall.

(iv) **Pillar bases are of different sizes and shapes**

Jayanti Prasad Srivastava (DW 20/5) stated that pillar base No. 42 (43X120X28 cm.) was the smallest in size while the largest is pillar base No. 35 (170X160X38 cm).

(v) **Pillars /Pillar bases were not load bearing**

R Nagaswami (OPW 17) stated that the pillars which were used in the pillar bases were probably of wood and not stone – such a pillar could bear a load of a tiled roof but not of a huge superstructure. Ashok Datta (PW 31) stated that the so-called bases are not pillar bases but are actually brick-bat deposits. PW 27, PW 30 and PW 32 also deposed that the pillar bases and the pillars were not of a load bearing character.

Objections as to walls

467. The following objections were addressed to the ASI report before the High Court in regard to the presence of the excavated walls:

“A medieval temple in classical style would have had a central portion with thick internal walls to support a high superstructure.

The key plan of structures, in Trench H1, shows two lengths of a wall or two narrow walls, each less than a meter long, with a gap of about 70 cm. This depiction in the plan and the one line is all the information given about this 'entrance'."

Dealing with the objections, the High Court returned the following findings:

"3926. During excavations, in all 28 walls were traced as shown in Fig. 3A out of which wall no. 1 to 15 are either contemporary to the disputed structure or belong to disputed structure. Walls no. 16 to 28 are earlier to the disputed structure and were found underneath the disputed structure...

...

3928. The statements of Experts (Archaeologists) of plaintiffs (Suit-4) in respect to walls and floors have already been referred in brief saying that there is no substantial objection except that the opinion ought to be this or that, but that is also with the caution that it can be dealt with in this way or that both and not in a certain way. In other words on this aspect witnesses are shaky and uncertain. We, therefore find no substantial reason to doubt the report of ASI in this respect."

Ms Arora has raised the following objections with respect to the walls:

- (i) The inner walls (walls 18A, 18B, 18C and 18D) could not have been load bearing because they are too narrow, only two to three courses high and built from brick-bats. Wall 16 is 1.77m wide whereas walls 18A, B, C and D are relatively thin;
- (ii) Thicker western walls are a feature of mosque construction;
- (iii) Wall 16 could only have been the foundation of the Babri mosque; and
- (iv) According to Jayanti Prasad Srivastava (DW 20/5), wall 16 was built around 1130 A.D. when a pillared hall was erected in front of the shrines. After construction of wall 17, the structures standing below floor 3, towards east of wall 17, got protected from flood and to further strengthen it, wall 16 was constructed.

Objections as to circular shrine

468. The High Court noted the following objections in regard to ASI's findings about the existence of a circular shrine:

- “1. Erroneous to compare structure with certain temple structures and not with circular walls & buildings
2. No object of Hindu worship found on this layer
3. Surviving wall as per ASI's drawings makes only a quarter of circle – such shapes are fairly popular in walls of Muslim construction
4. Nothing found in the structure in the way of image or sacred piece that can be called a “shrine”
5. Shrine could have been a *stupa* belonging to the 6th or 7th century AD.”

While rejecting these objections, the High Court recorded the following findings:

“3931. 'Circular Shrine', more virtually its existence, that was found by ASI has been admitted by most of the Experts (Archaeologist) of Muslim parties though a reluctant attempt has been made for diverting the identity by suggesting that it may be a "Buddhist Shrine" or a tomb of erstwhile Islamic religious structure. PW-30 has categorically admitted it on page 15 and has said that his statement in para 14 of the affidavit was not after looking to the shrine at the spot but on the basis of its photo only.

3935. During excavation at the disputed site between trenches E-8 & F-8 a circular structure of burnt bricks facing east was recovered, commonly termed as "circular shrine", detailed at page 70 to 72 of report, volume 1, and shown in figure 17, 24, 24A, and plates 59, 60 & 62 (volume 2) of the report. The bricks used here are of two sizes: 28x21x5.5 cm and 22x18x5 cm. The bonding material was mud mortar. On its eastern side, there is a rectangular opening, 1.32 m in length and 32.5 cm in width, which was the entrance of the structure. A calcrete block, measuring 70x27x17 cm, has also been found here, fixed, obviously, as the door-sill.

This was an independent miniature shrine. The architectural features suggest that, that it was a Shiva shrine.

3939. It is unthinkable that inspite of these clear features of Shiva shrine, the objectors are identifying the same as a Muslim tomb.

3940. Secondly, it is too small a structure for a tomb, from inside it is only 4.4 ft. square. Neither could it accommodate a grave in its interior, nor a Qiblah-Mihrab on its western wall ; Qiblah was an integral and essential part of tomb-structure

during the Sultanate period (1192-1526 A.D.) as is illustrated by numerous examples all over northern India.

3941. Thirdly, there is no trace of an arch required for constructing dome over the tomb. There are no hook-shafts to bear and no structural trace to suggest any lateral thrust of the mihrab. It may be noted that the sub-structure of the mihrab is built massively on the edges of the four corners, to counter the lateral thrust. One wonders, if it was a tomb without any arch or dome, and without even a grave?

3942. Thus, on the one hand the dimension of this structure are too small for a tomb and on the other the gargoyle was never in tombs while it was an integral feature of the sanctum of Shiva temples to drain out water poured on the Sivlinga.

3943. Shrine is a holy place where worship is performed. It is a structure where holiness is enshrined. Denial for the sake of denial should not be allowed. "No evidence to make this structure a shrine" and "a sheer figment of imagination and a conjecture without any evidentiary basis", such comments grossly lack technical acumen and clearly show the dearth of logical thinking. These themselves are mere arguments lacking "evidentiary basis". These and many like arguments show the 'ostrich attitude' of the plaintiff.

3952. In the overall view we find no reason to doubt the findings of ASI on this aspect also and the objections otherwise are accordingly rejected."

Ms Arora, learned Senior Counsel has raised the following objections with respect to the findings in the report on the circular shrine:

- (i) The structure pertains to seventh to tenth century A.D. (post Gupta Rajput period) and hence, would have nothing to do with the alleged Ram Janmasthan temple which is of twelfth century A.D.;
- (ii) The excavation report shows pillar bases lying right above the shrine which refutes the claim that the circular shrine belonged to the same time period as that of the twelfth century Hindu structure; and
- (iii) There is no evidence of any water residue.

Divine couple and other artefacts

469. The following objections were placed before the High Court:

“Divine Couple:

1. Piece so damaged that it is undecipherable.
2. No reason for calling it “divine” given. Piece found in trench K3-K4 and the recorded layer is “debris”. Thus the piece does not come from a stratified context.
3. Octagonal Shaft: Comes from surface debris above topmost floor (Floor 1) in Trench F3 (Pl. 140) – is of no relevance.
4. Others: Out of 383 architectural fragments only 40 came from stratified contexts. Out of these 40, none were specific to a temple, the 8 fragments separately mentioned (doorjamb, amlaka, divine couple, srivatsa motif, lotus medallion etc.) are of no significance. For example Srivatsa design is associated with Jainism, lotus design could be Buddhist or Muslim.”

The High Court rejected the above objections. Justice Sudhir Agarwal held:

“3958. The identification and appreciation of the excavated material like human or animal figurines etc. is a matter of experts. None of these eight experts (Archaeologists of Muslim parties) claimed to be the experts in this... branch in Archaeology. Even otherwise their stand in respect to these finds is varying. One witness says that these finds were not at all recovered from the layers they are claimed while others say otherwise. We have seen photographs of many of such artifacts and finds and in generality there is no such inherent lacuna or perversity in the observations of ASI or other identification which may warrant any... comment from this Court or may vitiate their report. It is not in dispute that no Islamic religious artefacts have been found during excavation while the artifacts relating to Hindu religious nature were in abundance. For some of the items, it is claimed that it can also be used by non-Hindu people but that would not be sufficient to doubt the opinion of ASI. Plate No.50 (Kapotpalli), Plates No.51 and 62 (floral motifs shown in walls 16 and 17), (Srivats) Plate No.88, Cobra hood (Nag Devta) Plate No.129 and various other Gods and Goddesses in human shape (Plate Nos. 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 118, 119, 120, 121, 122, 123, 125, 126) to our mind were quite clear and admits no doubt. Three witnesses namely Sri Arun Kumar (OPW-18), Dr. R. Nagaswami (OPW 17) and Sri Rakesh Dutt Trivedi (OPW19) were produced who supported the findings and report of ASI. They are retired officers, holding senior position in ASI. Their statements are

sufficiently lengthy and extremely detailed. Since they have supported ASI report, we have not mentioned their statements in detail for the reason that we intended to test the objections raised against ASI report in the light of what the witnesses of plaintiff (Suit 4) have deposed and only when we would have some doubt, we would refer to and compare the statement that of OPW 17 to 19. In totality we find no substance in the objection with respect to the figurines etc. and the same are accordingly rejected.”

Besides the above objections, Ms Arora, learned Senior Counsel has raised the following objections:

- (i) Different teams of the ASI which authored various chapters of the report arrived at inconsistent findings on the periods attributed to the artefacts;
- (ii) The so-called sculpture of the ‘divine couple’ is completely mutilated;
- (iii) There is no basis for the use of the expression “divine” as even the ‘alingan mudra’ does not appear clear; and
- (iv) The other artefacts such as the lotus design are not necessarily associated with the Hindu religious structures.

Objections as to glazed ware and glazed tiles

470. A total of 647 fragments of pottery which were recovered were assigned to nine periods as reflected below:

“Period I : 99
Period II : 73
Period III : 105
Period IV : 74
Period V : 85
Period VI : 63
Periods VII, VIII & IX : 148
TOTAL : 647.”

Of the 647 fragments, 148 fragments have been assigned to periods VI, VIII and IX.

Ms Arora submitted that the principal objections were that:

- (i) Glazed ware was placed in the last phase of period VII since otherwise it would militate against a temple being made in that period;
- (ii) Glazed ware is an indicator of Muslim habitation and is not found in medieval Hindu temples; and
- (iii) Two pieces of glazed wares were found in VI – indicating that the layers were wrongfully assigned.

Objections as to animal bones

471. Ms Meenakshi Arora, learned Senior Counsel has raised the following objections with respect to the animal bones:

- (i) No study was conducted of the bones found during the excavation at every level of the site;
- (ii) The ASI report does not contain a separate chapter regarding the study of bones and there is only a casual reference in the Summary of results, without any understanding of the contextual relationship of the bones recovered with the structural remains; and
- (iii) Recovery of bone fragments with cut marks is a sign of animals being utilised for food which would rule out the possibility of a temple.

The above inconsistency which has been highlighted carefully by Ms Arora must be borne in mind.

The Code of Civil Procedure: Section 75 and Order XXVI

472. Before dealing with the objections raised by Ms Arora both on the preliminary aspects outlined to above and on the merits on report (which will be set out later), the Court must form a perspective of the nature and ambit of the investigation entrusted to the ASI by the High Court.

473. Section 75²⁷⁷ of the CPC empowers the court to issue commissions “subject to such conditions and limitations as may be prescribed”. The court may issue a commission, among other things to hold a scientific, technical or expert investigation. This specific provision was incorporated by Amending Act 104 of 1976 with effect from 1 February 1977.

Order XXVI deals with Commissions. Rules 1 to 8 cover commissions for the examination of witnesses. Rules 9 and 10 deal with commissions for local investigation, while commissions for scientific investigation and for the purpose of ministerial acts and the sale of property are covered by Rules 10A, 10B and 10C.

²⁷⁷ Section 75. Power of court to issue commissions.- Subject to such conditions and limitations as may be prescribed, the Court may issue a commission-

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition
- (e) to hold a scientific, technical, or expert investigation;
- (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- (g) to perform any ministerial act.

The remaining provisions deal with commissions for the examination of accounts and for making partitions and contain general provisions, including commissions at the instance of foreign tribunals.

474. For the present purpose, the court has to deal with Rules 9, 10, 10A and 10B. Rule 9 empowers the court to issue a commission for the purpose of a local investigation which it considers to be requisite or proper for the purpose of elucidating any matter in dispute. After a local inspection, Rule 10 empowers the commissioner, to submit a signed report to the Court together with the evidence.

Rule 10 provides as follows:

“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 deposition 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 suit may examine the Commissioner personally in open Court touching any part 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) 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.”

Rule 10A makes the following provisions in regard to the appointment of a commission for the purposes of scientific investigation:

“10A . 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.”

Rule 10B deals with the appointment of a commission for the performance of a ministerial act which cannot be conveniently performed before the court.

475. While directing the ASI to carry out a scientific investigation, the High Court was exercising its powers under Section 75 and Rule 10A of Order XXVI. To such an investigation, sub-rule 2 of Rule 10A 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. Rule 10(2) stipulates that the report and the evidence taken by the commissioner “**shall be evidence in the suit**”. There is a mandate of the statute that the report and the evidence be treated as evidence in the suit and that it “shall form part of the record”. However, either the court on its own accord or any of the parties to the suit (with the permission of the court) may examine the Commissioner personally. This is an enabling provision under which the Commissioner can be examined either by the court on its own accord or at the behest of a party to the suit. The subject matter on which the Commissioner can be examined is also described in sub-rule 2 of Rule 10. The Commissioner may be examined on:

- (i) Any of the matters referred;
- (ii) Any of the matters mentioned in the report;
- (iii) As to the report; or

(iv) As to the manner in which the investigation has been made.

This covers both matters of procedure followed in conducting the investigation and the substantive aspects of the report.

476. **Dr Bhuvan Vikram Singh**

During the course of the proceedings before the High Court, the plaintiffs in Suit 5 filed an application requesting the examination of Dr Bhuvan Vikram Singh, who was part of the excavation team. The High Court summoned the witness. Dr Bhuvan Vikram Singh filed an application²⁷⁸ requesting that he may be summoned as a court's witness as he was part of the court appointed excavation team and was not willing to depose as a witness of any party to the suit. The counsel for the plaintiffs in Suit 5 did not oppose the application and made a statement that he did not wish to examine Dr Bhuvan Vikram Singh as a witness in Suit 5. However, the counsel made a request that Dr Bhuvan Vikram Singh should be treated and examined as a court's witness. By an order dated 4 December 2006, the High Court discharged the witness without recording his deposition, while observing that the court itself had the discretion to call any witness and be examined as a court's witness and such a discretion could not be fastened upon the court by an application filed by any party.

477. Justice Sudhir Agarwal in the course of his judgment noted that parties had raised objections to the report, which were to be decided by the court. But then, it was found that the nature of the objections was such that unless parties were

²⁷⁸ Application no 25(o) of 2006

allowed to lead evidence, a decision on the objections could not be taken. Hence, on 3 February 2005, the High Court directed that the ASI report shall be admitted in evidence but the objections that were raised by the parties would be decided at the final hearing of the suits by which time the recording of evidence would be complete. The High Court noted that there is no requirement in the law or in Rules 10 or 10A or Order XXVI that the report cannot be treated as substantive evidence unless the Commissioner is examined as a witness. The High Court observed that none of the parties opted to examine the Commissioner on any matter touching the report. Moreover, the objections filed by them did not place a challenge to the entirety of the report but only to the conclusions drawn in the Summary of results. It appears that allegations of bias and *mala fides* were also urged before the High Court; however, these were not pressed during the course of the hearing by Ms Arora, learned Senior Counsel, before this Court.

478. There is no dispute about the factual position that none of the parties sought to examine the Commissioner in terms of the provisions contained in Rule 10(2) of Order XXVI which, as seen above, are applicable by virtue of Rule 10A(2) to a Commission constituted for a scientific investigation. Rule 9 of Order XXVI is a substantive power allowing the court to issue a Commission for making a local investigation. Rule 10 is procedural in nature. Rule 10A is substantive, empowering the court to issue a commission for making a scientific investigation. Rule 10A(2) which applies the provisions of Rule 10, in its application to a Commissioner appointed under Rule 9, to a commission for scientific investigation contains the expression "as far as may be". These words

comprehend the notion of that which is practicable, and to the extent feasible for the purpose of fulfilling the power which is conferred upon the court to issue or appoint a Commission. The second part of Rule 10(2) is enabling insofar as it confers a discretion on the court to either itself examine the Commissioner on matters pertaining to the report or investigation and for enabling parties to request the court to call the Commissioner for examination. Rule 10 does not abrogate the right to question the report of a Commissioner if the enabling power of calling the Commissioner for cross-examination is not exercised. A party may avail of that opportunity by seeking the examination of the Commissioner on matters bearing upon the report. A party may also lead evidence of its own witnesses who seek to controvert the methodology or the findings of the Commissioner appointed for conducting a scientific investigation. The right of a party to object to the report of the Commissioner is not abrogated merely because the Commissioner is not called for cross-examination. Much will depend on the nature of the objections which are sought to be urged by a party before the Court though the Commissioner was not called for examination.

479. In the present case, the High Court was of the view that there was no requirement in law for the Commissioner to be called upon to give evidence as a condition precedent to the report being treated as evidence in the suit. The High Court is justified in this view since Rule 10(2) of Order XXVI stipulates that the report of and the evidence taken by the Commissioner “**shall be evidence in the suit and shall form part of the record**”. Hence, the report was correctly treated as evidence in the suit and as the part of the record. This, however, did not

foreclose any party to the proceedings from questioning the report for which, it was open to it to follow any one or more of the following courses of action namely:

- (i) Calling for the examination of the Commissioner in open court;
- (ii) Leading evidence of its own witnesses to displace the report of the Commissioner; and
- (iii) Placing its objections to the report of the Commissioner for consideration by the court. The judgment of Justice Agarwal does in fact note that the objections which parties had submitted to the report would be decided after the final hearing of the suits, by which time the evidence would be complete. The entitlement of a party to follow or pursue the courses of action referred to in (ii) and (iii) above was independent of the enabling power conferred by the latter part of Rule 10A(2).

480. Having said this, it is necessary to bear in mind Section 45²⁷⁹ of the Evidence Act 1872. When the court has to form an opinion, among other things, upon a point of science, the opinions upon that point of persons specially skilled

²⁷⁹ Section 45 provides thus:

Opinions of experts.—When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts.

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

in the science at issue are relevant facts. Such persons, as the statute provides “are called experts”. The manner in which the report of an expert must be evaluated has been delineated in a decision of the Privy Council in **Chandan Mull Indra Kumar v Chiman Lal Girdhar Das Parekh**²⁸⁰. Lord Romer recorded what the Subordinate Judge in that case had held about the manner in which the report of a local commission should be approached:

“It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.”

Having recorded the above observations of the trial judge, the Privy Council proceeded to affirm them as reflecting the correct position in law:

“This in their Lordships’ judgment is a correct statement of the principle to be adopted in dealing with the commissioner’s report. It is substantially the principle already laid down by this Board in the case of *Ranee Surut Soondree Debea v. Baboo Prosonno Coomar Tagore* [(1870) 13 Moo. I.A. 607 at p. 617.]”

[See also in this context the judgment of a learned Single Judge of the Delhi High Court in **New Multan Timber Store v Rattan Chand Sood**²⁸¹]

481. Dr Rajeev Dhavan, in the course of his written submissions, fairly accepts that “the court may not have the expertise to sit in judgment over the experts”. Yet, according to the submission, certain aspects can certainly be examined by

²⁸⁰ AIR 1940 PC 3

²⁸¹ (1997) 43 DRJ 270

the court without sitting in judgment over the expertise of the Commissioner.

Those aspects are as follows:

- (i) Whether the commission has fulfilled the remit of the court to provide an answer;
- (ii) Whether conditionalities and limitations have been observed;
- (iii) Whether the conclusions are in conformity with the findings;
- (iv) Whether there are obvious inconsistencies in the report; and
- (v) Whether conclusions have been drawn beyond reasonable probabilities.

Hence, Dr Dhavan urged that in a first appeal, it is open to the appellate court to examine the conclusions drawn by the trial court if they are unrelated to and in excess of the report. Moreover, where all the parties have not cross-examined the Commissioner, the trial court and the appellate court would be acting within its jurisdiction in examining objections based on consistency, relevance and probability.

482. In principle, we are of the view that a party to a suit is not foreclosed from raising objections to the report of a Commissioner or from leading the evidence of its own witnesses to controvert the findings merely because it has not requested the court to summon the Commissioner for the purpose of examination. But, a party which fails to take recourse to the enabling power which is conferred by Rule 10(2) to request the court to allow the examination of the Commissioner in court, may in a matter touching upon the expertise of the Commissioner face a peril. In the present case, ASI is an expert authority. Its credentials and expertise are beyond reproach. The nature of the objections which can legitimately be

considered by the court will depend upon the nature of the investigation ordered to be conducted by the Commissioner and the domain expertise involving both knowledge and experience in the particular branch of learning. There may well be certain facets of the report of the Commissioner on a matter pertaining to the scientific investigation which could best be explained by the Commissioner. Rule 10(2) allows the Commissioner to be examined on any matter mentioned in the report or as to the report or as to the manner in which the investigation has been made. Failure to invoke the enabling power which is conferred in Rule 10(2) may result in consequences bearing on the failure of the party to address the clarifications which it seeks to the Commissioner in the course of an examination. In a matter pertaining to scientific investigation, the court lacks expertise on issues requiring domain knowledge which is why the Commissioner was appointed in the first place. The object and purpose of appointing the ASI was to direct an excavation at the disputed site so as to enable the court to form an objective view on the subject matter of the dispute on the basis of the material found and the conclusions drawn by the ASI. The failure of a party which seeks to question the report of the Commissioner to call the Commissioner for cross-examination may circumscribe the nature of the objections which can be raised before the court for the reason that the Commissioner who was best positioned to explain the report has not been called for examination.

483. We accept the proposition urged by Dr Dhavan, learned Senior Counsel that as a matter of principle, despite not having called the Commissioner for

examination, a party could still urge objections before this Court on matters such as the following:

- (i) Whether the remit of the court has been fulfilled by the Commissioner, including
 - a. Whether the Commissioner has decided what was not referred; or
 - b. Whether the Commissioner has not decided something which was referred;
- (ii) Whether there are contradictions or inconsistencies in the report of the Commissioner; and
- (iii) Whether the conclusions or findings of the Commissioner arise from the report.

Ultimately, it lies within the jurisdiction of the court to decide whether the findings that are contained in the report of the ASI sub-serve the cause of truth and justice on the basis of relevance and preponderance of probabilities. Common sense ought to guide the exercise of judicial discretion, here as in other branches of the law.

Analysis

Pleadings

484. The plaintiffs in Suit 5 sought a declaration “that the entire premises of Sri Rama Janmabhumi at Ayodhya... belongs to the plaintiff deities”. The pleading in paragraph 23 of the plaint is that there was an ancient temple dating back to the

reign of Vikramaditya at Sri Rama Janmabhumi which was partly destroyed and an attempt was made to raise a mosque on the site:

“23. That the books of history and public records of unimpeachable authenticity establish indisputably that **there was an ancient Temple of Maharaja Vikramaditya’s time at Sri Rama Janma Bhumi, Ayodhya. That temple was destroyed partly and an attempt was made to raise a mosque** thereat, by the force of arms, by Mir Baqi, a commander of Baber’s hordes...In 1528 **Babar came to Ayodhya and halted there for a week. He destroyed the ancient temple and on its site built a mosque**, still known as Babar’s mosque...”

(Emphasis supplied)

The claim in Suit 5 is that (i) there existed an ancient temple at the site of Ram Janmabhumi; (ii) the temple dated back to the era of Vikramaditya; and (iii) Babur constructed the mosque in 1528 by destroying the temple and at its site.

Issues

485. In view of the pleadings of the parties, the following issues were framed in Suit 4 and Suit 5:

“(a) Issue No. 1(b) in Suit No. 4

“Whether the building had been constructed on the site of an alleged Hindu temple after demolishing the same as alleged by defendant no. 13? If so, its effect?”

(b) Issue No. 14 in Suit No. 5

“Whether the disputed structure claimed to be Babri Masjid was erected after demolishing Janmasthan temple at its site?”

In order to establish their case, the plaintiffs in Suit 5 need to prove that:

- (i) There existed an ancient Hindu temple at the disputed site;
- (ii) The existing ancient Hindu temple was demolished in order to construct the Babri Masjid; and
- (iii) The mosque was constructed at the site of the temple.

The burden of proof to establish a positive case lies on the plaintiffs in Suit 5 in terms of Sections 101 to 103 of the Evidence Act 1872.

The purpose of the excavation ordered by the High Court

486. While ordering a GPR survey, the High Court by its order dated 23 October 2002 explained the purpose and object of doing so in the following terms:

“The nature of super structure to a great extent is related to the foundations. ...If any foundation is existing of any construction, it may throw light as to whether any structure existed and if so what would have been the possible structure at that time...”

The GPR survey report dated 17 February 2003 found a variety of anomalies ranging from 0.5 to 5.5 meters in depth that could be associated with ancient and contemporaneous structures such as pillars, foundations walls and slab flooring extending over a large portion of the site. The survey report however indicated that these anomalies were required to be confirmed by ‘systematic ground trothing’, such as by archaeological trenching. Out of 184 anomalies detected by the GPR survey, 39 were confirmed during excavation.

On 5 March 2003, when the High Court directed the ASI to excavate the site, it was in order to determine:

“Whether there was any temple/structure which was demolished and a mosque was constructed on the disputed site.”

The ASI presented its final report dated 22 August 2003 opining:

“Now, viewing in totality and taking into account the archaeological evidence of a massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patterns, amalaka, kapotapali doorjamb with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having pranala (waterchute) in the north, fifty pillar bases in association of the huge structure, are **indicative of remains which are distinctive features found associated with the temples of north India.**”

(Emphasis supplied)

The basic objection to the ASI report is that no finding was rendered on whether any underlying temple or structure was demolished and a mosque was constructed on its site. In this context, it has been submitted that by its very nature, the report which is an opinion (albeit of an expert body) is not direct evidence of a fact and is inherently speculative and inconclusive.

487. Section 3 of the Evidence Act 1872 defines the expression “fact” thus:

““Fact” means and includes-

- (1) anything, state of things, or relation of things, capable of being perceived by the senses;
- (2) any mental condition of which any person is conscious.”

However, Section 45 allows for an opinion of an expert as a relevant fact when the court has to form an opinion upon a point of foreign law, science or art or as to the identity of handwriting or finger impressions.

The distinction between a witness of fact and an expert witness has been explained in a decision of this Court in **Prem Sagar Manocha v State (NCT of Delhi)**²⁸²:

“20...The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion. But, that is not the case in respect of a witness of facts. Facts are facts and they remain and have to remain as such forever. The witness of facts does not give his opinion on facts, but presents the facts as such. However, the expert gives an opinion on what he has tested or on what has been subjected to any process of scrutiny. The inference drawn thereafter is still an opinion based on his knowledge...”

The report which has been submitted by the ASI is an opinion; an opinion nevertheless of an expert governmental agency in the area of archaeology. The report constitutes the opinion of an expert. Expert opinion has to be sieved and evaluated by the court and cannot be conclusive in and of itself.

Archaeology as a discipline

488. The report which has been presented by ASI is assailed on the ground that as distinct from the natural sciences, archaeology is a branch of knowledge in the social sciences and is inherently subjective. The submission is that an archaeologist, in order to arrive at a conclusion, draws inferences from a variety of other disciplines including history, sociology and anthropology. The process of inferential reasoning – it is urged - may lead to multiple layers of subjectivity affecting the ultimate conclusions. Hence, it has been submitted that an archaeological report does not furnish verifiable conclusions but provides

²⁸² (2016) 4 SCC 571

inferences drawn from data or objects found during the course of excavation. It has been urged that interpretations vary and archaeologists may differ in the conclusions drawn from on the same set of data. Hence, there is no absolute or universal truth.

Justice Agarwal, during the course of his judgment opined:

“3896. Archaeology provides scientific factual data for reconstructing ancient historical material, culture, understanding. Archaeology... is a multi-disciplinary scientific subject and requires a team of workers for effective results. Excavation of ancient sites is one of the major works of Archaeologists. As it is a scientific discipline, it uses scientific methods in its working.”

Ms Meenakshi Arora, learned Senior Counsel has urged that contrary to the above finding, expert witnesses have testified to archaeology being a matter of inference and interpretation:

(i) **Jayanti Prasad Srivastava (DW 20/5)**, who retired as a Superintending Archaeologist in the ASI deposed in support of the report. He stated:

“...Interpretation is an important aspect in excavation...”

“...By the word conjure, I mean conjectural picture which could be based on the available evidence and it is very much in the practice in archaeological diggings...”

(ii) **R Nagaswami (PW 17)**, who retired as Director of Archaeology in the Government of Tamil Nadu and was an expert witness for the plaintiffs in Suit 5 stated:

“...In archaeology data collected in excavation needs to be interpreted from the context and reference to related textual material from known authentic sources. If we are to repeat what is mentioned in the excavation report, **the purpose of**

excavation which is reconstruction of the history, is not possible...”

(Emphasis supplied)

- (iii) **Professor Dr Shereen F Ratnagar (PW 27)**, a former professor of archaeology at JNU who was an expert witness for the plaintiffs in Suit 4 stated:

“What constitutes a fact itself can be disputed. However, if the fact is established, there may be two opinions on the fact by two Archaeologists...”

- (iv) **Dr Supriya Varma (PW 32)**, who was an Associate Professor of Archaeology in the School of Social Sciences at the University of Hyderabad stated :

“...When archaeologists excavate and find archaeological material which can include pottery and bones inference and interpretation are made by archaeologists on the basis of the context in which these finds are exposed. The data does not speak for itself. Inferences are made on the basis of certain principles and methods that are followed in archaeology...”

489. About the existence of 17 rows of pillar bases from north to south with each row having 5 pillar bases, R Nagaswami (OPW 17) stated that it was only an inference as all the 85 pillar bases had not been exposed. A similar statement was made by Dr Ashok Datta (PW 31), a senior lecturer in the Department of Archaeology of the University of Calcutta. Dealing with figure 23 of the ASI report (the isometrical figure), he noted that it was not to scale or elevation of different floor levels and it may be considered purely conjectural. R Nagaswami (OPW 17) and Jayanti Prasad Srivastava (DW 20/5) supported the view of the ASI report regarding the existence of a massive Hindu temple at the disputed site. On the other hand, Dr Supriya Varma (PW 32) agreed with the finding of the ASI

regarding the existence of the structure underneath the disputed structure but disagreed with the interpretation. These depositions have been relied upon to suggest that archaeologists can and do disagree on the interpretation of data because the field is essentially inferential.

490. 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.

491. While considering archaeological evidence within the framework of Section 45 of the Evidence Act and the court-ordered excavation in the context of the provisions of Rule 10A of Order XXVI of the CPC, it is nonetheless necessary for the court to appreciate both the strength and the limits of the discipline. Archaeology is no exception. A distinguished archaeologist, Sir Mortimer Wheeler

summarised the experience which he gained, in his work titled “**Archaeology from the Earth**”²⁸³. Dealing with stratigraphy, Sir Mortimer notes:

“an ancient city in the East is never level. Very rarely is a city completely destroyed and completely rebuilt at one moment and at one horizon. Normally, a house is reconstructed or replaced as it decays, or at the whim of its owner. The town as a whole is constantly in a state of differential destruction and construction. Individual building sites rise above their neighbours; the town-site itself rises and assumes the contour of a hill; buildings on its slopes are contemporary with buildings on its summit. A doorway or a potsherd may be found at one spot 10 feet below a doorway or a potsherd of precisely the same date at another spot.”

Excavation in layers is in and of itself a complex exercise. Interpreting the findings in turn involves navigating through layered complexities. Sir Mortimer notes:

“Well, there are examples of various kinds of stratigraphical evidence: of layers that are contemporary with one another, layers that are separated by greater or lesser time-intervals, layers that have accumulated in unbroken succession. The reading of a section is the reading of a language that can only be learned by demonstration and experience. A word of advice to the student. However practiced, do not read too hastily. Be your own devil’s advocate before passing judgment. And, wherever possible, discuss your diagnosis with others – with colleagues, with pupils, with your foreman. (‘The testimony of one person is no testimony; declares Hywel Dda, the wise Welsh law-giver.) Be humble. Do not ignore the opinion of the uninstructed. ‘Everyone knows as much as the savant. The walls of rude minds are scrawled all over with facts, with thoughts’. Emerson said so, and he was right. Even if you do not accept the views of those you question, the mere act of questioning is at the same time a restraint and a stimulus.”

²⁸³ Mortimer Wheeler, *Archaeology from the earth*, Oxford: Clarendon Press (1954)

Sir Mortimer's caution would apply as much to the law as to archaeology: something that we as judges would do well to bear in mind in arriving at our conclusion in these appeals.

492. In his book titled "**The Logic of Scientific Discovery**"²⁸⁴, 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."

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

²⁸⁴ Karl R. Popper, *The Logic of Scientific Discovery*, Hutchinson & Co (1959)

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.

493. Ms Meenakshi Arora relied on decisions of this Court which consider reports of handwriting experts to be “generally of a frail character” leading it to “be wary to give too much weight” to them. This form of evidence has been held to be “indecisive” and hence something which must yield to positive evidence. The reason for this was explained in **Sri Sri Sri Kishore Chandra Singh Deo v Babu Ganesh Prasad Bhagat**²⁸⁵, on the ground that the conclusions of handwriting experts are drawn “upon mere comparison of handwriting”. The principle was reiterated in **Smt Bhagwan Kaur v Shri Maharaj Krishan Sharma**²⁸⁶. In **Murari Lal v State of Madhya Pradesh**²⁸⁷, this Court held that it would be unsafe to found a conviction solely on the opinion of a handwriting expert. While formulating the principle, this Court however noted that the weight to be ascribed to expert evidence is based on the nature of the science on which it is based. Where the science in question possesses essential ingredients of verifiability and objective analysis, expert evidence would to that extent require some deference.

The Court held:

“4...The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher...”

²⁸⁵ AIR 1954 SC 316

²⁸⁶ (1973) 4 SCC 46

²⁸⁷ (1980) 1 SCC 704

Thus, in the above extract, the court made a distinction between identification of fingerprints and opinions of handwriting experts. Hence, the weight that should be given to expert evidence is based on the nature of the underlying science on the basis of which the expert opines. Commenting on the imperfect nature of the science of identification of handwriting this Court in **State of Maharashtra v Sukhdev Singh**²⁸⁸ held:

“29...But since the science of identification of handwriting by comparison is not an infallible one, prudence demands that before acting on such opinion the court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the court should also be fully satisfied about the competence and credibility of the handwriting expert...

True it is, there is no rule of law that the evidence of a handwriting expert cannot be acted upon unless substantially corroborated but courts have been slow in placing implicit reliance on such opinion evidence, without more, because of the imperfect nature of the science of identification of handwriting and its accepted fallibility...”

[See also in this context: **Shashi Kumar Banerjee v Subodh Kumar Banerjee**²⁸⁹, **S P S Rathore v CBI**²⁹⁰ and **Chennadi Jalapathi Reddy v Baddam Pratapa Reddy**²⁹¹.]

The attempt by Ms Arora, learned Senior Counsel in her submissions to compare archaeological evidence with handwriting analysis is flawed. Underlying this submission is an erroneous appreciation of the knowledge, skills and expertise required of an archaeologist. It becomes necessary to dwell on the process adopted by ASI in conducting the excavation.

²⁸⁸ (1992) 3 SCC 700

²⁸⁹ AIR 1964 SC 529

²⁹⁰ (2017) 5 SCC 817

²⁹¹ (2019) SCC Online SC 1098

The process

494. The High Court issued detailed directions for the preservation of the record of excavation. Following the order of the High Court on 5 March 2003, a fourteen member ASI team was constituted by the Director General. On 11 March 2003, the High Court directed that a general survey of the site and layout of trenches would be conducted in the presence of contesting parties or their counsel. Videography was ordered and the results were to be placed in a sealed cover. The materials recovered were also directed to be preserved “under lock and seal” in a building situated in proximity to the site. Periodical progress reports of the work of excavation were submitted to the High Court. The High Court was periodically informed about the trenches which had been laid, the nature of the excavation and the material that was recovered. On 26 March 2003, the High Court issued specific directions to the ASI team to maintain a register recording the recovery of finds, which was to be sealed in the presence of parties. The following directions were issued:

“(i) ASI team shall note down in its own register to be maintained (in respect of recovery of finds) the depth in meter/feet of the trench where it is found. It may also note down the layer of the strata according to its own interpretation.

(ii) The signature of either the contesting parties or their counsel may be obtained.

(iii) The register should further specify the nature of the finds i.e. bones and glazed ware etc.

(iv) The finds shall be sealed in the presence of the parties/counsel and signatures of either the contesting party or his/their counsel shall also be obtained who are present on the spot.

(v) If the nature of the finds is not certain, a noting may be made accordingly and when it is unsealed, its nature may be verified after the Court permits to do so.”

Photographs both in colour and black and white were directed to be taken. A register of work carried out from day to day was directed to be prepared by the ASI team. Parties were also permitted to observe the work of excavating trenches. The High Court observed:

“228... 4. It is suggested by Sri Jilani, learned counsel for the Sunni Central Board of Waqfs, that not more than two trenches should be excavated at one time after the completion of work in the trenches already being excavated for the reason that the parties or their counsel may not be able to observe the excavation of the trenches at one time. Sri B.R. Mani, Superintending Archaeologist and team leader has submitted a report dated 22.3.2003 stating that it has carved out various trenches of area 4 x 4 meters leaving 0.5 meter baulk all around. If the trenches are adjoining to each other, it can be observed by the contesting parties or their counsel and their nominees. We have permitted for each of the contesting parties to observe with their counsel as well as their nominees (one nominee at one time). The result is that for each of the contesting parties, there are three observers. If the distance is too much and it is difficult to observe another trench by any of them, they can legitimately raise grievance in this respect. It may be noted that the ASI team should ensure confidence of the parties and their counsel in the matter of excavation. It is, however, to be kept in mind that we have directed for expeditious excavation and for that purpose if necessary and without losing the confidence of the parties more than two trenches may also be laid by the ASI team.”

Another suggestion was that there must be adequate representation to the Muslim community in the ASI team and in the engagement of labour for the work of excavation. This was also acceded to by the High Court by directing that adequate representation for both the communities should be given in the constitution of the ASI team and the labour deputed at the site. In order to ensure transparency, two judicial officers from the Uttar Pradesh Higher Judicial Service of the rank of Additional District Judge were deputed to oversee the work. The process of excavation was carried out in the presence of parties and was

governed by the directions issued by the High Court to ensure impartiality and transparency. This was facilitated by directing the preservation of records, videographing of the excavation process, preservation of photographs and by the presence of two judicial officers for the purpose of overseeing the work. After the completion of the excavation work but before the preparation of the final report, further directions were issued by the High Court on 8 August 2003 for keeping intact all the trenches so as to facilitate the ASI team to complete the study and submit its report.

495. The ASI report has ten chapters which consist of:

Chapter I Introduction

Chapter II Cuttings

Chapter III Stratigraphy and Chronology

Chapter IV Structure

Chapter V Pottery

Chapter VI Architectural Fragments

Chapter VII Terracotta Figurines

Chapter VIII Inscriptions, Seals, Sealings and Coins

Chapter IX Miscellaneous Objects

Chapter X Summary of Results

Appendices I to IV to the report contain the following information :

Appendix I C14 Dating of Charcoal Samples from Ayodhya excavation

Appendix IIA Report on the Chemical Analysis of Plaster Samples pertaining to different trenches collected from Ayodhya

Appendix IIB	Report on the Chemical Analysis of Floor Samples pertaining to different trenches collected from Ayodhya
Appendix III	On-Site Chemical Treatment and Preservation of Excavated Artefacts
Appendix IV	Information on the Data-Form as per direction of Special Full Bench, Lucknow of the Hon'ble High Court, Allahabad.

496. The ASI submitted its final report on 22 August 2003 together with a complete record containing field notebooks, series, registers, site notebooks and a laptop together with a hard disk and compact disks. The record that was submitted by the ASI together with its report has been tabulated in paragraph 241 of the judgment of Justice Sudhir Agarwal. In assessing the report of the ASI, it must therefore be borne in mind that a structured process was followed in the course of excavation in order to ensure that the process of excavation was documented both in electronic and conventional forms. What is excavated and found is a matter of fact. Undoubtedly, the archaeologist has to relate the data which emerges from the excavation to a context. The process of drawing inferences from data is an essential element of archaeology as a discipline but to reject this exercise as conjectural and hypothetical would be a dis-service both to the discipline and to the underlying process. No submission questioning the independence of the ASI team has been urged by Ms Arora. In this backdrop, the fact the none of the parties called for examination of any one from the ASI team under the provisions of Order XXVI Rule 10 (2) cannot be ignored.

The Idgah defence

497. The case of the plaintiffs in Suit 5 is that below the disputed site there was an ancient temple dating back to the era of Vikramaditya which was destroyed by Mir Baqi, the Commander of Babur's forces and that the Babri mosque was built upon it. It is alleged that the material used to construct the mosque was taken from the destroyed temple, including the black Kasauti stone pillars.

In its written statement, the Sunni Central Waqf Board denied that there was in existence any temple relatable to the era of Vikramaditya at the site of Babri Masjid. It also denied that the mosque was constructed at the site of a temple by utilising the material used in the underlying temple. In the written statement, the Sunni Central Waqf Board also stated in paragraph 24(b) that:

“Emperor Babur was a Sunni Muslim and the vacant land on which the Babri Masjid was built lay in state territories and did not belong to anyone ...”

It therefore denied that there existed any underlying temple below the disputed site or that the underlying temple was destroyed for the construction of the mosque.

498. Initially, the defence that was urged in response to the plaint in Suit 5 was that there was no underlying structure which was demolished for the construction of the mosque. Confronted with the findings in the ASI report, the Sunni Central Waqf Board altered the stance and sought to claim that among the structures that came to be revealed during the course of the excavation was an 'Idgah' or 'Kanati

Masjid'. This indeed, was not the case which was made out in the pleadings and was directly contrary to the case of the Sunni Central Waqf Board that the mosque had not been constructed upon the site of an existing temple but was constructed on vacant land. The reference to the existence of an Idgah in the underlying excavation was sought to be established through the archaeologist witnesses – Dr Jaya Menon (PW 29), Dr Supriya Verma (PW 32) and R C Thakran (PW 30).

Mr C S Vaidyanathan, learned Senior Counsel appearing on behalf of the plaintiffs in Suit 5, urged that none of the witnesses produced by the Sunni Central Waqf Board deposed to the existence of an Idgah. The High Court observed:

“3809. Initially the case set up by the plaintiffs (Suit-4) was that the building in dispute was constructed at a place where (there) neither...existed any Hindu religious structure nor (was) the place in dispute (a) place of worship...However, when the excavation proceedings progressed, a marked change in the approach of plaintiffs (Suit-4) became evident. Some of the archaeologists, who also deposed later in favour of plaintiffs (Suit-4)...tried to set up a new case that there appears to be an Islamic religious structure existing beneath the disputed building or that there existed an Islamic religious structure when the disputed building was constructed. The suggestion was that it could be either an Idgah or a Kanati Masjid wherein only one long wall on the western side was constructed with a niche. The consensus appears to be amongst the eight experts of Muslim parties, more or less accepting the existence of a structure beneath the disputed structure. The above approach that the earlier structure was a Islamic religious structure excludes the possibility of a non-religious structure at the disputed site beneath the disputed structure. It narrows down our enquiry to the question whether such structure could be an Islamic religious structure or non-Islamic structure i.e. a Hindu Religious Structure.”

The defence which was taken was that the pre-existing structure had an Islamic origin. Once this defence was taken the issue narrowed down to whether the pre-existing structure had an Islamic or non-Islamic origin. The ASI report had concluded that there was a Hindu temple underlying the disputed structure and the correctness of this opinion was being tested.

499. During the course of the excavation, 28 walls came to be traced as shown in figure 3A of the report. Of this, wall numbers 1 to 15 belong to or were contemporaneous to the disputed structure. Wall numbers 16 to 28 dated prior to the disputed structure and were found underneath. The ASI report found that wall 16 with a length of 50m had a width of 1.77m. Ten of its lower brick courses were original while the upper six courses were added later in the subsequent phase of construction:

“The wall 16 having its existing length around 50m, with its unexposed middle part, is 1.77m wide. Its ten lower brick courses are original and belong to the first phase of its construction, but the upper six courses as seen in trenches E6, E7 and E8 are added at a later date – four courses during the second phase of construction and top two courses when its southern length outside the disputed structure was utilized in later constructions by reducing the width of the wall for the new structure along with the structure 3. It is also noticed that the first phase of wall 16 has been plastered in the inner side with lime plaster while on the outer side the plaster was provided in the second phase of its raising. There are a few square cavities at intervals on both the faces of the wall in the second phase which might have been used for providing reinforcement to the wall...”

Walls 16 and 17 were found to be in a similar north-south alignment:

“...Walls 16 and 17 were found running on almost the same alignment in north-south orientation in trenches ZE1 and ZF1.”

Wall 17 is a brick wall which was 1.86 m wide with four courses in the northern area and six courses in the southern area. Wall 17 had the same length as wall

16. Wall 17 runs at a lower level:

“The wall 17 which is a brick wall was found to be 1.86 m wide having the maximum of four courses in the northern area (Pl. 50) and six courses in southern area. It was found to be of the same length as that of wall 16, though having a slight deviation in its orientation in the cardinal direction. Thus, it runs in the lower level than that of wall 16, almost parallel to it in the northern area and comes out below the wall 16 in the southern area as noticed in trench D7 where in the northern part it is projected 0.74 m below wall 16 and in the southern part it is projected 1.07 m below wall 16 having provided decorated stone blocks on its top and also refixed in its veneer (Pl. 51), probably at the time of the construction of wall 16 to serve as its foundation. A thick floor of brick crush (Pl. 52) spread over a large area in northern and southern areas with varying thickness was found associated with wall 17.”

The ASI report notes the existence of inner walls which are attached to wall 16 both in the northern and southern areas. In the northern area, the inner wall (wall 18A) extends to a length of 15m in the East–West direction. Similarly, the excavation found two parallel walls (walls 18C and D). Accordingly, these findings indicate that the case that wall 16 was a single Idgah wall stands belied and the claim of the Sunni Central Waqf Board that an Islamic structure existed below the disputed site cannot be accepted. Moreover, the defence in regard to the existence of an Idgah beneath the mosque would postulate that the mosque was built on the foundation of a demolished Idgah. Besides being a far-fetched hypothesis, the nature of the recoveries belied the claim. The Idgah defence was hence an afterthought, quite contrary to the pleadings of the Sunni Central Waqf Board. The defence was an attempt to gloss over the initial case that the mosque was built over vacant land. The underlying structure was not of an Islamic origin.

Disputed Structure and Pillar Bases

500. The ASI report discloses that the disputed structure or structure 3 was found to be directly resting over structure 4 which is an earlier construction. Structure 4 had a 50m long wall (wall 16) in the west and fifty exposed pillar bases to its east, attached with floor 2 or the floor of the last phase of structure 4.

The report notes:

“A square sandstone block placed at the top and the orthostats provided on its four sides, contemporary with the floor 2 was the prima facie nature of the pillar base which primarily served as base for the pillar erected over it. Their foundations were circular or square or irregular in shapes made of brick-bat courses laid in mud mortar, most of them resting over floor 4, top of which was provided with sandstone or calcrete blocks in lime mortar, these blocks were also encased with brick-bats and somewhere sandstone chips were used to get the desired height and level.”

Seventeen rows of pillar bases were revealed from north to south, each row with five pillar bases. The pillar bases in the central portion below the makeshift structure on the raised platform could not be located due to the area restrictions imposed by the High Court. Out of fifty excavated pillar bases, twelve were completely exposed, thirty-five were partially exposed while three could be traced in sections. The report notes that the controversy about the association of the pillar bases with different layers and in respect of their load bearing capacity was set at rest after the original form of the bases was exposed:

“...The present excavation has set aside the controversy by exposing the original form of the bases having calcrete and stone blocks arranged and set in a proper manner over a brick foundation and their arrangements in rows including their association with the top floor of the structure existing prior to the disputed structure.”

Forty-six pillar bases belong to floor number three and pertain to period VII dating back to the twelfth century A.D., while four pillar bases belong to floor number four dating back to the eleventh century A.D. Seventeen rows of pillar bases were constructed along the north-south brick wall (wall 16). The ASI report deduces from the arrangement of the pillar bases that the central part of the pillared structure was important and special treatment was given to it in architectural planning. The decorated octagonal sand stone block on pillar base number thirty-two having flower motifs on four corners in trench F7 in the southern area is stated to be a unique example at the site which belongs to the twelfth century A.D. as it is comparable to the ones found in Sarnath. In the backdrop of these observations in the ASI report, the finding which was arrived at by the High Court was thus:

“3904. A perusal of the report particularly at page 54 shows that all the 50 exposed pillar bases are attached with floor 2 dateable to 1200 A. D. and most of them are resting over floor no. 4 which has the earliest floor. The carbon dating report referred at page 69 of the report also proves that in a trench ZH1 the date reported between floor 2 & 3 is between 900-1300 A.D. which *prima facie* makes it clear that floor 2 was not made after 1300 A.D. and not before 900 A.D. while floor 3 was made before 900 A.D. It is also clear from the report that all the pillar bases exposed are attached with the floors existing prior to the floor of disputed structure. Pillar base is reported from the same trench, i.e. ZH-1 along with the floor which confirms the association of floor 2/3 and pillar bases along with C14 date between floor 2 & 3 (S. No. 47 of pillar base in page no. 28). The same pillar base of ZH-1 was predicted as an anomaly in the GRP Survey. Therefore, it is clear that floor 4 which supports the foundation of pillar bases was the most extensive floor belonging to period VII A (page 42 of the report & fig. 23 & plate 35). The timing of period VII-A is the beginning of 12th century.”

The ASI report concludes that there is in existence a massive underlying structure, below the disputed structure.

Circular Shrine

501. The ASI report refers to the presence of an east facing brick shrine labelled as Structure 5 (corresponding to plates 59 and 60 of the photographs). The circular structure possesses a rectangular projection in the east and has a chute or outlet which according to the ASI is a 'pranala' for draining out water. This brick circular shrine is stated to be similar to Shiva temples near Rewa in Madhya Pradesh at Chandrehe and Masaon belonging to 950 A.D. and a Vishnu temple and another temple without a deity at Kurari and a Surya temple at Tinduli in Fatehpur district. ASI has drawn an inference that on stylistic grounds, the circular shrine dates back to the tenth century A.D.

In the context of the above findings, Mr C S Vaidyanathan has relied on the testimony of the expert witnesses, to displace the submission of the Sunni Central Waqf Board that these witnesses produced by them do not support the ASI report. The following extracts from the depositions of the expert witnesses need to be borne in mind:

(i) **Suraj Bhan (PW 16) –**

“I agree with the report of ASI about the remains of Temple to the extent that these remains may have been of some temple.”

(ii) **D Mandal (PW 24) –**

“...a decorative stone has been fixed in wall no. 17. This decorative stone is floral motif, it is used in Hindu Temples.”

...

“It is correct to say that construction activities had been carried out at the disputed site even before the Mughal Period. As an Archeologist I admit discovery of structures beneath the disputed structure during excavation.”

(iii) **Supriya Verma (PW 32) –**

“...I agree with the finding of ASI regarding existence of the structure but I disagree with the interpretation arrived at by ASI. Further, it is correct to say the disputed structure was not constructed on the virgin land.”

(iv) **Dr Ashok Dutta (PW 31) -**

“...I agree with the opinion of ASI that there lie a number of structures in the form of walls and floors beneath the disputed structure. Wall no. 1 to 15 may be related to the disputed structure. Wall no. 16 onwards are walls belonging to a period before the construction of the disputed structure.”

Dealing with the circular shrine, the High Court observed:

“3937. The elevation, as shown in the drawing (Fig. 17 of the ASI Report) suggests that this structure was built on a raised platform, viz. adhisthana. The gargoyle, or the drain, was provided on the northern side. The structure may be dated to 9th-10th century A.D. (The ASI carried out C-14 determination from this level and the calibrated date ranges between 900 A.D. and 1030 A.D.).

3938. This was an independent miniature shrine. The architectural features suggest that, that it was a Shiva shrine.

3939. It is unthinkable that inspite of these clear features of Shiva shrine, the objectors are identifying the same as a Muslim tomb.

3940. Secondly, it is too small a structure for a tomb, from inside it is only 4.4 ft. square. Neither could it accommodate a grave in its interior, nor a Qiblah-Mihrab on its western wall ; Qiblah was an integral and essential part of tomb-structure during the Sultanate period (1192-1526 A.D.) as is illustrated by numerous examples all over northern India.

3941. Thirdly, there is no trace of an arch required for constructing dome over the tomb. There are no hook-shafts to bear and no structural trace to suggest any lateral thrust of the mihrab. It may be noted that the sub-structure of the mihrab is built massively on the edges of the four corners, to counter the lateral thrust. One wonders, if it was a tomb without any arch or dome, and without even a grave?

3942. Thus, on the one hand the dimensions of this structure are too small for a tomb and on the other the gargoyle was never in tombs while it was an integral feature of the sanctum of Shiva temples to drain out water poured on the Sivlinga.

3943. Shrine is a holy place where worship is performed. It is a structure where holiness is enshrined. Denial for the sake of denial should not be allowed. "No evidence to make this structure a shrine" and "a sheer figment of imagination and a conjecture without any evidentiary basis", such comments grossly lack technical acumen and clearly show the dearth of logical thinking. These themselves are mere arguments lacking "evidentiary basis". By these and many like arguments show the 'ostrich attitude' of the plaintiff.

3944. A structure is identified by its shape and/or by the use it was put to or by the function it was supposed to perform. This circular structure was found with a well defined 'Pranala' (water chute to drain out ablution liquids). The pranala could well have been denoted as drain but the area from where it was issuing was only 40 x 60 m (including the squarish hollow chamber for fixing the object of worship and the small entrance of the east) which could not be used for bath room or for kitchen, a few alternatives where water is required to be drained out, thus, the only valid explanation was it being a 'pranala' of a shrine, small only a subsidiary one and not the main shrine holding central/main deity.

3945. Circular Shrine is found resting over wall 19A and others, this single fact, does not make the 'Circular Shrine' Contemporary to the said walls, as the working level for the 'Circular Shrine' is much higher, and only foundations of Circular Shrine rest over the existing walls, which have been incorporated as foundation of Circular Shrine, these walls definitely are not made for providing foundation to the circular Shrine. Apparently, when the Circular Shrine was built the wall 19A and others were all buried under the ground and foundation of the circular shrine just reached upto that level."

There is a significant aspect in relation to the circular shrine which must be borne in mind. This is the presence of pillar bases above the circular shrine. This aspect must be taken into account while ascertaining the overall weight to be ascribed to the ASI report.

As regards the use of lime surkhi, it is urged by Ms Meenakshi Arora, learned Senior Counsel that this is a typical material used in Islamic structures. Controverting this, Mr C S Vaidyanathan has placed reliance on the deposition of Suraj Bhan (PW 16) who stated :

“it is correct to say that lime water was found to have been used in the 3rd Century A.D. during the Kushana period in Takshshila and Pakistan...”

Similarly, Dr Jaya Menon (PW 29) also stated that :

“...lime mortar was definitely used from Neolithic period.”

Further elaboration is hence not required on the use of lime surkhi.

Architectural fragments

502. Archaeological excavation of the disputed site at Ayodhya resulted in the recovery of architectural fragments such as pillars, pilasters²⁹², broken door jambs, lintels, brackets, etc. These were retrieved as *disjecta membra* or broken fragments from areas ranging from the surface of the mound to a considerable depth in the trenches which were excavated.

²⁹² “Pilaster is a shallow pier or rectangular form projecting from a wall and, in classical architecture, conforming to one of the orders and carrying an entablature.” - Michael Clarke, *The Concise Oxford Dictionary of Art Terms*, Oxford Paperback Reference, OUP Oxford, 2010, pg 191

Chapter VI of the ASI report which deals with architectural fragments states that among the recoveries, the notable ones are:

“A few intact architectural members like Amlaka (plate 81, figure 59) pillar with Ghata-Pallava base with dwarf beings as weight-bearers and Kirtimukhas (plates 82-83, figure 59) to mention a few, have also been recovered. Besides, there are a number of architectural members which have been decorated with deeply carved foliage motifs. This pattern is a distinct one resembling like that of “stencil” work (plates 86-87). It may be pointed out that the various architectural members with similar decorative designs have been found used in the foundation of one of the major brick structures (wall 16) (see Chapter IV- Structures) exposed in these excavations.

The aforesaid pillars and other decorative architectural members of this site like fragment of broken jamb with semi pilaster (plate 85), fragment of an octagonal shaft of Pillar (plate 84), a square slab with *Srivatsa* motif (plate 88), fragment of lotus medallion motif (plates 89-90) emphatically speak about their association with the temple architecture. Stylistically, these architectural members in general and pillars in particular may be placed in a time bracket of tenth-twelfth Century A.D. It is also pertinent to note that there are a few architectural members (plates 92-94), which can clearly be associated with the Islamic architecture on stylistic grounds, which might belong to sixteenth century A.D. onwards.

In addition to the architectural fragments, a highly mutilated sculpture of divine couple seated in *alinganamudra* has also been recovered. The extant remain depicts the waist, thigh and foot (plate 235).”

503. During the course of the hearing, we have had the benefit of perusing the plates depicting the photographs of the architectural fragments. Ms Meenakshi Arora, learned Senior Counsel criticised the use of the expression “divine couple” to depict the recovery reflected in plate 235. The criticism advanced by counsel is not unfounded. The sculpture reflected in the plate is (as the ASI report states) “highly mutilated”. According to the ASI team, what remains of the sculpture indicates a “waist, thigh and foot” of a couple. This may well be an imaginative

extrapolation of archaeological experience. But, calling it a “divine couple” is beyond the stretch of imagination. Excluding this from consideration, the ASI team has on a cumulative analysis of all the other findings arrived at the inference that stylistically these architectural findings and pillars in particular belong to the time span of the tenth to twelfth century A.D. and are typical of temple architecture. This inference, as it appears from the above extract is independent of the sculpture of the couple found in “alingan mudra”. Hence even excluding the above sculpture, there is a reasonable basis for an expert to draw the above inference.

During the course of excavation, ASI recovered an ‘Amalaka’ which is typically a segmented or notched globular stone disc with ridges on its rim with which sits on top of the Hindu temples’ shikhara or main tower.²⁹³ An amalaka may also resemble a lotus and is a symbol of a deity seated below. ASI also recovered a ‘ghatapalava’ motif which is associated with a ceremonial offering to a deity and as a symbol has been used to decorate shrines.

504. Ms Arora sought to rely on the testimonies of Jayanti Prasad (DW 20/5) and Dr Supriya Verma (PW 32) in support of the submission that apart from Hindu religious structures, these architectural fragments could belong to Buddhist or Jain structures as well. Dr Supriya Verma states that it could well have been a part of palaces or may belong to an Islamic structure. Extracts from the depositions of the two witnesses are set out below:

²⁹³ Adam Hardy, *Indian temple architecture: form and transformation : the Karṇāṭa Drāviḍa tradition, 7th to 13th centuries*. New Delhi: Indira Gandhi National Centre for the Arts (1995)

“(a) Mr. Jayanti Prasad Srivastav (DW 20/5), an expert witness who supported the ASI Report:

“...Amongst Jains, big temples are found but architectural pattern is the same i.e. North Indian Shikhar style...”

(b) Dr Supriya Varma (PW 32) deposed thus:

“I think, very categorically it is very difficult to say that some of the finds of ASI relate to Hindu religious structures because these finds could well have been part of palaces, Buddhist structure, Jain structure and Islamic structure...”

The possible linkages of Buddhist or Jain traditions cannot be excluded. Indeed, in assessing archaeological or historical material one must eschew an unidimensional view. The excavation in the present case does in fact suggest a confluence of civilisations, cultures and traditions.

Carefully analysing these depositions, the issue essentially is whether this will discredit the overall findings contained in the ASI report. In specialised subjects, experts may and do differ. The statement that some of the fragments belong to an Islamic structure has in fact been noticed in the ASI report. The report specifically speaks of those fragments denoted by plates 92-94 which “can clearly be associated the Islamic architecture on stylistic ground”. Hence, the ASI report delineated those architectural recoveries which belong to Islamic architecture of the sixteenth century. Even taking the opinion of DW 20/5 and PW 32 that the recoveries may also be consistent with a palace or a Buddhist and Jain structures, the noteworthy point that emerges is that those fragments are of a non-Islamic origin (except for those specific artefacts which have been identified to be of an Islamic origin by ASI, as noted above).

Once this is the position, the ASI report has to be read and interpreted in its entirety. It would be unfair to reject the conclusions which have been arrived at by

an expert team which carried out the excavation under the orders of the High Court and has carefully analysed the recoveries from distinct perspectives. Yet the report must be read contextually, allowing for genuine divergences that arise on matters of interpretation.

The formulation of conclusions by the ASI was preceded by a careful analysis of the excavated materials. Individually, a different view may be possible in respect of discrete recoveries or finds. However, the test which the court must apply is whether on a preponderance of probabilities, the conclusions which have been drawn by the ASI are justified.

505. Though bias and *mala fides* were sought to be attributed to the ASI during the course of the proceedings before the High Court, Ms Arora, learned Senior Counsel has specifically submitted that no case to that effect is being pressed in the present appeals. In fact, when Mr Vaidyanathan attributed a submission of bias or *mala fides* to Ms Arora with respect to the task undertaken by the ASI, Ms Arora intervened to state that she had not made any submission to that effect.

One of the criticisms of the ASI report is that no analysis was made of the recovery of bones and that thermoluminescence dating of pottery was not carried out. Justice Agarwal has noted that an analysis of the bones would have been instructive if they were recovered from the regular layer. However, in this case, they have been recovered from a filling and hence were held to “lose significance and importance”. It also appears that the facility for thermoluminescence dating of pottery was not available at the Institute at Lucknow and since charcoal samples

were available for C14 dating, further analysis of the pottery was not carried out. This explanation apart, the deficiency is not sufficient to discredit the report in its entirety.

The standard of proof

506. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. “**Phipson on Evidence**” formulates the standard succinctly: If therefore, the evidence is such that the court can say “we think it more probable than not”, the burden is discharged, but if the probabilities are equal, it is not.²⁹⁴ In **Miller v Minister of Pensions**²⁹⁵, Lord Denning, J (as the Master of Rolls then was) defined the doctrine of the balance or preponderance of probabilities in the following terms :

“(1)... It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course it is possible, but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

(Emphasis supplied)

²⁹⁴Phipson on Evidence, 16th Edn. at pgs 154-155

²⁹⁵ (1947) 2 ALL ER 372

The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability. This was succinctly summarized by Denning, LJ in **Bater v Bater**²⁹⁶, where he formulated the principle thus :

“So also in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. **The degree depends on that subject matter.**”

(Emphasis supplied)

The definition of the expression ‘proved’ in Section 3 of the Evidence Act is in the following terms:

“Proved” .—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”

Proof of a fact depends upon the probability of its existence. The finding of the court must be based on:

- A. The test of a prudent person, who acts under the supposition that a fact exists; and
- B. In the context and circumstances of a particular case.

Analysing this, Y V Chandrachud J (as the learned Chief Justice then was) in **Dr N G Dastane v S Dastane**²⁹⁷ held :

“The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. **The first step in this**

²⁹⁶ [1951] P. 35

²⁹⁷ (1975) 2 SCC 326

process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. **Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: “the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue [Per Dixon, J. in *Wright v. Wright*, (1948) 77 CLR 191, 210] ”; or as said by Lord Denning, “the degree of probability depends on the subject-matter.** In proportion as the offence is grave, so ought the proof to be clear [*Blyth v. Blyth*, (1966) 1 AER 524, 536] ”. But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.”

(Emphasis supplied)

The Court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject matter involved.

In **State of U P v Krishna Gopal**²⁹⁸, this Court observed:

“26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a **robust common sense and, ultimately, on the trained intuitions of the Judge.**”

(Emphasis supplied)

²⁹⁸(1988) 4 SCC 302

507. On the basis of the ASI report, Justice Sudhir Agarwal entered the following findings of fact:

“4055. The ultimate inference, which can reasonably be drawn by this Court from the entire discussion and material noticed above, is: (i) The disputed structure was not raised on a virgin, vacant, unoccupied, open land; (ii) There existed a structure, if not much bigger than at least comparable or bigger than the disputed structure, at the site in dispute; (iii) The builder of the disputed structure knew the details of the erstwhile structure, its strength, capacity, the size of the walls etc. and therefore did not hesitate in using the walls etc. without any further improvement; (iv) The erstwhile structure was religious in nature and that too non-Islamic...; (v) The material like stone, pillars, bricks... of the erstwhile structure was used in raising the disputed structure; and (vi) The artefacts recovered during excavation are mostly such as are non-Islamic i.e. pertaining to Hindu religious places, even if we accept that some of the items are such which may be used in other religions also. Simultaneously no artefacts etc., which can be used only in Islamic religious place, has been found.”

Justice S U Khan placed no credence on the ASI report. The reasons which led the judge to that conclusion are specious. Firstly, the learned Judge observed that the finding that there was evidence of continuity in structural phases from the tenth Century onward upto the construction of the disputed structure is directly in conflict with the pleadings, gazetteers and history books. This omnibus finding has no factual basis. The purpose of the excavation was to enable an assessment to be made by the court to determine whether the disputed structure had been constructed on the site of a pre-existing temple. Whether after the construction of temples by Vikramaditya and till the construction of the mosque any construction activity had been carried out under the disputed structure was a matter which could be deduced after the excavation was carried out at the site.

The second reason was that in case a temple had been demolished for constructing a mosque, the super structure of the temple “would not have gone inside the ground”. This again is pure conjecture. The learned judge then disregarded the architectural fragments on the ground that it is only in the case of a natural calamity that such material “goes down inside the ground” and otherwise, a ruined building would be buried under the ground after centuries. The judge observed that there is neither any requirement nor any practice that even in the foundation of a temple, there must be such items which denote the nature of the super structure. These observations and findings of Justice S U Khan are hypothetical and without any basis.

The third learned judge, Justice D V Sharma has relied on the findings contained in the ASI report.

508. The conclusions which have been arrived at by Justice Sudhir Agarwal on the ASI report, as extracted above are worthy of acceptance. There is adequate basis in the material contained in the ASI report to lead to the following conclusions:

- (i) The Babri mosque was not constructed on vacant land;
- (ii) The excavation indicates the presence of an underlying structure below the disputed structure;
- (iii) The underlying structure was at least of equal, if not larger dimensions than the disputed structure;

- (iv) The excavation of the walls of the underlying structure coupled with the presence of pillar bases supports the conclusion of the ASI of the presence of a structure underlying the disputed structure;
- (v) The underlying structure was not of Islamic origin;
- (vi) The foundation of the disputed structure rests on the walls of the underlying structure; and
- (vii) Artefacts, including architectural fragments which have been recovered during excavation have a distinct non-Islamic origin. Though individually, some of the artefacts could also have been utilised in a structure of Buddhist or Jain origins, there is no evidence of the underlying structure being of an Islamic religious nature. The conclusion which has been drawn by the ASI that the nature of the underlying structure and the recoveries which have been made would on stylistic grounds suggest the existence of temple structure dating back to the twelfth century A.D. would on a balance of probabilities be a conclusion which is supported by evidence. The conclusion cannot be rejected as unsupported by evidence or lying beyond the test of a preponderance of probabilities, which must govern a civil trial.

Caveats

509. Having said this, we must also read the ASI report with the following caveats:

- (i) Though the excavation has revealed the existence of a circular shrine, conceivably a Shiva shrine dating back to the seventh to ninth century A.D,

the underlying structure belongs to twelfth century A.D. The circular shrine and the underlying structure with pillar bases belong to two different time periods between three to five centuries apart;

- (ii) There is no specific finding that the underlying structure was a temple dedicated to Lord Ram; and
- (iii) Significantly, the ASI has not specifically opined on whether a temple was demolished for the construction of the disputed structure though it has emerged from the report that the disputed structure was constructed on the site of and utilised the foundation and material of the underlying structure.

The unanswered question of demolition

510. The ASI report has been criticised on the ground that it fails to answer the question as to whether the disputed structure of a mosque was constructed on the demolition of a pre-existing temple at the site.

The High Court dealt with this objection in the following observations of Justice Sudhir Agarwal:

“3990. ASI, in our view, has rightly refrained from recording a categorical finding whether there was any demolition or not for the reason when a building is constructed over another and that too hundreds of years back, it may sometimes be difficult to ascertain...in what circumstances building was raised and whether the earlier building collapsed on its own or due to natural forces or for the reason attributable to some persons interested for its damage. Sufficient indication has been given by ASI that the building in dispute did not have its own foundation but it was raised on the existing walls. If a building would not have been existing before construction of the subsequent building, the builder might not have been able to use foundation of the erstwhile building without knowing its strength and capacity of bearing the load of new structure.

The floor of the disputed building was just over the floor of earlier building. The existence of several pillar bases all show another earlier existence of a sufficiently bigger structure, if not bigger than the disputed structure then not lessor than that also.”

The High Court noted that the floor of the disputed structure was situated just above the floor of the earlier building. The ASI report has opined that the disputed structure did not have its own foundation and was raised on existing walls. Moreover, the existence of pillar bases has been utilised to sustain an inference of a larger structure on which the disputed structure had been constructed.

The High Court justified the inability of ASI to come to a specific finding on whether an erstwhile structure of a Hindu religious origin was demolished for the construction of the mosque. The High Court noted that when a structure has been constructed several hundred years ago, it is difficult to conclude with any degree of certainty whether the underlying structure on whose foundations it rests had collapsed due to natural causes or whether the structure was demolished to give way to the structure of a mosque. This would indicate that the existence of the ruins of an underlying structure is not reason in itself to infer that the structure had been demolished for the construction of a new structure which rests on its foundations. ASI, as an expert body refrained from recording a specific finding on whether the underlying structure was demolished for the purpose of the construction of a mosque. Assuming that an inference in regard to demolition could have been made several hundred years later, ASI evidently did not find specific evidence to suggest that a structure had been demolished for the purpose of constructing a mosque. The report submitted by ASI is silent on this

facet. The High Court, therefore, indicated that there could be one of two hypotheses: either that the underlying structure had collapsed due to natural forces or that its demolition was the work of human intervention as part of the process of building a mosque on its foundations. Though, the ASI did not venture to enter a specific finding, the High Court seems to infer that since the foundation of the erstwhile structure was used for the construction of a mosque, the builder of the mosque would have been aware of the nature of the erstwhile structure and its foundation while constructing the mosque. This is an **inference** which the High Court has drawn though that is not a specific finding which the ASI has returned in the course of its report.

511. Consequently, when the ASI report will be placed in balance in terms of its evidentiary value in the course of this judgment, it is crucial for the court to sift between what the report finds and what it leaves unanswered. The ASI report does find the existence of a pre-existing structure. The report deduces 17 rows of pillar bases (a total of 85 of which 50 were exposed in sections, in parts or whole). The report concludes on the basis of the architectural fragments found at the site and the nature of the structure that it was of a Hindu religious origin. The report rejects the possibility (urged by the Sunni Central Waqf Board) of the underlying structure being of Islamic origin. But the ASI report has left unanswered a critical part of the remit which was made to it, namely, a determination of whether a Hindu temple had been demolished to pave way for the construction of the mosque. ASI's inability to render a specific finding on this facet is certainly a significant evidentiary circumstance which must be borne in

mind when the cumulative impact of the entire evidence is considered in the final analysis.

512. There is another aspect which needs to be flagged at this stage and which will be considered when the question of title is evaluated. That issue is whether a determination of title can rest on the basis of the ASI findings as they stand. Whether the construction of a mosque in 1528 A.D. (over 450 years ago) on the foundations of an erstwhile religious structure (dating back to the twelfth century A.D.) can result in a finding on the question of title is a distinct matter. At this stage, it will suffice to note that a determination of title was not obviously within the remit of ASI. This is a matter on which the court will need to draw a considered and objective conclusion when it deals with the issue of title later in this judgment.

N.10 Nature and use of the disputed structure: oral evidence

513. The plaintiffs in Suit 5 produced nineteen witnesses. A broad categorisation of these witnesses is indicated below:

I. Witnesses on facts:

- i. OPW 1 Mahant Paramhans Ram Chandra Das
- ii. OPW 2 Shri Devaki Nandan Agarwal
- iii. OPW 4 Harihar Prasad Tewari
- iv. OPW 5 Shri Ram Nath Mishra Alias Banarsi Panda
- v. OPW 6 Shri Housila Prasad Tripathi

- vi. OPW 7 Ram Surat Tewari
- vii. OPW 12 Shri Kaushal Kishore Mishra
- viii. OPW 13 Narad Saran

II. Witnesses in relation to Vishnu Hari Inscriptions:

- i. OPW 8 Ashok Chandra Chatterjee
- ii. OPW 10 Dr. K.V. Ramesh
- iii. OPW 15 Dr. M.N. Katti

III. Expert witnesses – Historians

- i. OPW 9 Dr. T.P. Verma
- ii. OPW 11 Dr. Satish Chandra Mittal

IV. Expert witnesses - Religious matters

- i. OPW 16 Jagadguru Ramanandacharya – Swami Ram
Bhadracharya Ji

V. Expert witnesses – Archaeologists

- i. OPW 3 Dr. S.P. Gupta
- ii. OPW 14 Dr. Rakesh Tewari
- iii. OPW 17 Dr R. Nagaswami
- iv. OPW 18 Sri Arun Kumar Sharma
- v. OPW 19 Sri Rakesh Dutta Trivedi.

The depositions of the witnesses of fact need to be analysed to determine the nature and use of the disputed building. The witnesses have spoken also about the basis of their faith about the birth-place of Lord Ram.