

IN THE COURT OF CIVIL JUDGE (S.D.), F.T.C.
VARANASI

(Presiding Officer- Ashutosh Tiwari, Uttar Pradesh Judicial Service)

(J.O. Code: UP2199)

Original Suit Number: 610/1991

CNR No:UPVR-05-000011-1991

Disposal of Application No: 266-Ga

Date: 08/04/2021

1. Today the suit has been listed for order on application no: 266-Ga moved by the plaintiffs whereby they have sought survey of the disputed site by the experts of Archaeological Survey Of India. Defendant no:1 has filed his written objection 273-Ga. Defendant no:2 has also objected above said application of the plaintiff by filing its written objection 286-Ga.
2. Briefly stating, in their application no:266-Ga, the plaintiffs have stated that the present suit is a representative suit wherein the interest of large number of persons, having faith in Hindu religion, are at stake. According to the plaintiffs, *inter alia* other deities, there have been a famous and well recognized ancient temple of Swaymbhu Lord Vishweshwar (Plaintiff No:1) at the disputed site duly earmarked with red ink by crossed lines and described as Schedule-A at the end of the plaint. The Shiv Linga of above said temple is one amongst the twelve Jyotirlingas recognized by great scholars of Hindu religion. According to the plaintiff said temple existed since time immemorial. Way back, 2050 years ago said temple was reconstructed by King Vikramaditya. By the time when said temple got dilapidated, one Narayan Bhatta received financial assistance from Raja Todarmal under the command of Raja Man Singh, a confidant of Mughal King Akbar, and got said temple be reconstructed again. Further version of the plaintiffs is that on April 18th 1669,

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Ancient Idol Swaymbhu Lord Vishweshwar and Others Vs. Anjuman Intejamiya Masjid and Another.

Mughal Badshah Aurangjeb issued a *farman* to the effect of demolishing above said temple and get a mosque be constructed at the very same place. The local officials of Mughal Badshah Aurangjeb duly executed the command and in furtherance thereof they demolished the temple of Swaymbhu Lord Vishweshwar and constructed a mosque with the help of the ruins of said temple. According to the plaintiffs, since the Shivlinga of above said temple is self-existing and naturally arisen from deep inside the earth, hence even after demolition, the Swaymbhu Shivlinga of Lord Vishweshwar continues to exist along with the *argha* surrounding the Shivlinga at the very same place where it was prior to demolition of the temple. According to the plaintiffs, they continue to worship and offer prayers to Lord Vishweshwar by circumbulation but they and all the Hindus having faith in Lord Vishweshwar are deprived off their right to offer *Jal* to Shivalinga. Hence the plaintiffs became compelled to institute this representative suit against the defendants. In said suit certain issues were framed which were related to the question as to whether plaintiff's suit is barred by section 4 of Places Of Worship (Special Provisions) Act, 1991 and consequently by Order 7 Rule 11 (d) of Code of Civil Procedure, 1908. Said issues were decided negatively by the predecessor court vide its order dated 18/10/1997. Said order was challenged in revision, and the revisional court vide its order dated 23/09/1998 directed this court to decide said issue afresh only after taking evidences of the parties. According to the plaintiffs, it is therefore the necessity of survey commission, by an expert agency, has arisen.

3. In its written objection 273-Ga, defendant no:1 has stated that since disputed site is a mosque at present, and the same is identifiable, hence no survey commission can be issued in the case in hand. The defendant no:1 has further encountered on the ground that no provision has been mentioned in the application of the plaintiffs under which the survey is sought hence said application is not maintainable in the eyes of law and more so the court cannot issue survey commission for the purpose of collecting evidences on behalf of the plaintiffs. Defendant no: 2 has stated similar grounds in his written objection 286-Ga. Additionally defendant no: 2 has stated that the plaintiffs have filed this application with *mala fide* intent to unnecessary

complicate the suit proceeding. On these grounds defendants have sought rejection of the plaintiff's application.

4. The defendants have also filed their written arguments by Paper No: 332-Ga. During the course of oral arguments, the plaintiffs argued that all that matters is the substance of the application not the form thereof. Hence even if no provision has been mentioned in the application the same cannot be rejected merely on that ground. The plaintiffs have based maintainability of their application under section 45 and 49 of the Indian Evidence Act, 1872, and Order 26 Rule 10-A of the Code Of Civil Procedure, 1908. The plaintiffs have argued that since they, in their plaint, have categorically asserted existence of the temple of Lord Vishweshwar at the disputed site and demolition of the same by local officials in obedience of *farman* of Badshah Aurangjeb dated 18/04/1669, and since the defendants have out rightly denied the plaintiff's version to above said effect, hence survey of the disputed site has become incumbent on the part of this court for the just disposal of this representative suit. Defendants on the other have argued that as per plaintiff's plaint temple of several deities apart from the temple of Lord Vishweshwar, are located at the disputed site. Since those deities have not been made parties in this suit, hence plaintiff no:1 alone can not seek survey of the disputed site to prove the existence of the temples of those deities. Defendants have further argued that the application of the plaintiffs is vague and ambiguous and the same is based upon false beliefs, myths and hearsay evidences. As per revenue records the mosque has been entered at the disputed site, hence the same cannot be questioned anymore. The defendants have further argued that survey by commission can be issued only to supplement the evidences already on record and since the parties have not led any evidence so far, hence survey by commission cannot be done at this premature stage. Defendants have further argued that *Hindu Sanatan Dharma* recognizes only twelve *Jyotirlingas* which at present are duly identifiable at different cities and outskirts of the country. In Varanasi Lord Vishwanath is the only Jyotirlinga, recognized by *Hindu Sanatan Dharma*. By way of this application the plaintiffs are trying to recognize a thirteenth Jyotirlinga which is clearly against the spirit and established tenets of *Hindu Sanatan Dharma*. Defendants have lastly argued that the description of the disputed site as given

by the plaintiff is vague and false and the map relied upon by them is manipulated. On these grounds the defendants have sought rejection of the plaintiff's application.

5. Both the parties and their Ld. counsels have been duly heard at length and documents filed by the parties have been comprehensively perused.
6. In the case in hand, before this court adventures to examine the necessity of survey of disputed site, this court is inclined to find out as to whether this court indeed has power to direct survey of disputed site by Archaeological Survey Of India and if so then what should be the particular stage for doing so. On this point it is pertinent to mention certain provisions of the Indian Evidence Act, 1872 and of the Code Of Civil Procedure, 1908. Rule 10-A of Order 26 of CPC read as follows:

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 the 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.

Thus from above said provision it is clear that this court indeed has power to get a scientific investigation be conducted with respect to the subject matter of the suit. Said provision also leaves it to the liberty of the court as to who should be entrusted to conduct such investigation. In **M. Siddiq Vs. Mahant Suresh Das, 2019 (4) Cur CC (SC) 182 (5 Judges Bench)** Hon'ble Apex Court has observed that "Archaeology as a branch of knowledge draws sustenance from science of learning, wisdom of experience and vision which underlies 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

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science, it is based on principle of objective evaluation. As an art, it relies on a vision which is realized through years of commitment to pursuit of knowledge based on histories of eras. Archaeology as a discipline cannot be belittled as unreliable. Value of archaeology cannot be diluted by laying a claim to its being a weak form of evidence. Supposed distinction between science as embodying absolute truth and archaeology as unguided subjectivity is one of degree not of universes".

7. Archaeology is the study of the human past using material remains. The remains may be in the nature of any object that people created, modified, or used. Portable remains are termed as artefacts. Archaeologists examines the artefacts and features thereof to find as to how people of a particular place had lived at a given time. We might have no written records to trace the pattern of living of our prehistoric societies, but the archaeologists of our times are professional and well trained enough to help us to know about our remote past. Today archaeologists share some general fieldwork and lab skills, and by that they have developed expertise enabling them to give almost infallible opinion about certain types of architectural design, style of artefacts and monuments and their probable age. Now Archaeologists are well equipped with the several kind of modern technological devices and tools by which they can trace a structure's past by analysing data such as materials, building techniques, how elements connect with one another, and further that whether there is any over lapping of one or more structures separately identifiable in terms of time and sculpture and so on. The archaeology now does not require invasive digging procedures in order to make visible the sources of data, whereas on the whole, a building can be analysed by observation of its exposed surfaces, materials and building techniques without impacting upon the structure itself. For example the adoption of method of trial trench excavation in vertical manner enables the archaeologist to concretise their satisfaction to the effect as to whether they should or should not go ahead with horizontal excavation. Similarly by use of the Ground Penetrating Radar (GPR) system in a deeply buried structure the particular monumental design and their date can be unveiled without disturbing the surface of the structure in question.

8. In India the Archaeological Survey of India (in short ASI) functioning under the Ministry of Culture, Government of India, is the premier organization and specialized agency for archaeological researches and protection of the cultural heritage of the nation. Maintenance of protected areas, ancient monuments and archaeological sites and remains of national importance is the prime concern of the ASI. Besides, it regulates all archaeological activities in the country as per the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958. Under section 22 of said act, the ASI has been conferred with the power to excavate an area even if the same has not been declared a protected area. It also regulates Antiquities and Art Treasure Act, 1972. The ASI has a large workforce of trained archaeologists, conservators, epigraphist, architects and scientists for conducting archaeological research projects through its circles, museums, excavation branches, prehistory branch, epigraphy branches, science branch, horticulture branch, building survey project, temple survey projects and underwater archaeology wing. At this stage it is quite pertinent to mention section 45 and 49 of the Indian Evidence Act, 1872, which read as follows:

Section 45: 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*.

Section 49: Opinion as to usages, tenets, etc., when relevant: When the Court has to form an opinion as to the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people, the opinion of persons having *special means of knowledge* thereon are, relevant facts.

There can hardly be any dispute that ASI is an *expert* within the meaning of section 45 of the Indian Evidence Act, 1872. It can also not be disputed that ASI is well equipped with technological advancements concerning archaeology so as to enable it to have *special means of knowledge* to opine on existence or non-existence

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of a particular usage or custom within the meaning of Section 49 the Indian Evidence Act, 1872. Thus it can be said that a triangle of above said provisions clearly empowers this court to seek assistance of ASI in the case in hand.

9. Now the question is as to what should be the proper stage for issuance of survey commission during the proceedings of a suit. This court is a bit convinced with the argument of the defendants that that survey by commission can be issued only to supplement the evidences already on record and if the parties have not led any evidence so far, survey by commission should not be done as a matter of propriety. However this court is of the view above said procedure is only part of a general rule when the court is dealing with ordinary civil suits involving private parties. This court cannot lose sight of the fact that present suit is different from ordinary civil suit. The case in hand has been brought before this court by way of a representative suit. Even the defence is being taken by the defendants in representative capacity. A large numbers of persons including Indians and Non-Citizens, belonging to two religions are equally interested in knowing the truth of the cause of action of the plaintiffs as well as of the defence of defendants. Here the very existence of a deity alleged to have existed since time immemorial is in question. Here religious structure of a formless divine figure is being asserted to have existed on a vacant land from the very inception. Here the question of superimposition of a particular religious structure over an existing structure of different religion is under contest. The plaint categorically mentions the circumstances under which and the time when such superimposition took place. The circumstances in the case in hand are such that none of the parties are in a position to lead direct evidence to prove their assertions and counter assertions, as at presently hardly any person would be alive to come and testify before this court. The matter in dispute pertains to have connection with our deep history. In these circumstances it would be too much to expect from the plaintiffs to lead first other documentary or oral evidences and then apply for survey commission. This court is of the view that since the defendants have out rightly denied the factum of demolition of the temple of Lord Vishweshwara in obedience of *farman* of Badshah Aurangjeb at the disputed site and subsequent conversion of the same into a mosque, hence in these circumstances it is incumbent

on the part of this court to find the truth. In **Ram Avtar Soni Vs. Mahanth Laxmidhar Das**, AIR, 2018, SC 5597, it was held that "if scientific investigation facilitates ascertaining of the truth, in the interest of justice, it has to be ordered. Same can be done at any stage". Similar view was taken in **Bhagwati Vs. Umakan and Ors** 2013 (2) ARC-373. Further in **New Meena Sahkari Awas Samiti Ltd. Vs. ADJ Court No:2- LKO, 2016** (6) ADJ-595, it was held that "a party cannot be prevented from adducing best evidence even such evidence can be gathered with the help of a commissioner. Refusal to appoint commissioner in an appropriate case amounts to failure of exercise of jurisdiction vested in it". Hence relying upon above said precedents this court finds that present stage of the suit is not premature for issuance of scientific survey by ASI. The report of ASI, after completion of the survey work, shall be the best evidence for the case in hand. In its journey from stupefaction to truth, this court finds that at this stage only an expert like ASI can enable this court to complete its journey. This court is of the view that ASI, which is a neutral and secular instrumentality of the Central Government, is the most suitable agency to tell the truth of the matter in dispute to this court.

10. The defendants have relied upon **Ram Kishan Taparia Vs. Shyamlal and Others** 2000 (3) Civil LJ 239 Rajasthan High Court, however the same is not relevant to the case in hand, as unlike the present case in that case question of issuance of second commission was in dispute. Similarly **Sri Kant Vs. Mool Chand (Dead) and Others**, 2019 (2) CAR 758 (All) is also not relevant to the case in hand as said case concerned a landlord-tenant dispute regarding tenanted premises in an eviction suit.
11. The defendants have argued that temple of several other deities have been asserted by the plaintiffs but they have not been made parties to this suit, hence survey commission cannot be issued at the behest of the plaintiff no:1 alone. The fallacy of the arguments lies in the supposition that every deity situated in the temple has their independent legal capacity to sue and be sued. This court finds above said argument of the defendant to be based on superficial understanding of Hindu religion. The fact remains that a Hindu temple may be devoted to a particular deity and at the same time the statue of some other demi Gods may also be installed therein. Such demi Gods may occupy the

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space in such temple either due to being part of the family of the main deity or because some mythological or spiritual connections with that deity. The plaintiffs have throughout asserted that pre-dominantly it was the temple of Swayambhu Shivlinga of Lord Vishweshwar at the disputed site and the temple of other demi Gods and Goddesses were of ancillary importance. It is therefore this court is of the view that non-joinder of other deities in the suit as co-plaintiffs, does not prevent the plaintiff no:1 to seek issuance of survey commission at its own behest. Further argument of the defendants that a mosque has been entered at the disputed site in the revenue records, hence the same is not open for the challenge. This court however is not prepared to accept said argument of the defendants as it is well settled that a revenue entry is not conclusive piece of the evidence establishing the title of the person whose name has been mutated. It is always open to be challenged in a regular civil suit. A successful challenge can potentially compel the revenue authorities to bring necessary alteration in the revenue records. Further argument of the defendants to the effect that by way of this application the plaintiffs are trying to recognize a thirteenth Jyotirlinga which is clearly against the spirit and established tenets of *Hindu Sanatan Dharma* which has already recognized an exhaustive and sacrosanct list of 12 Jyotirlingas. Contrary to this argument, this court finds the argument of the plaintiffs more convincing. On this point the plaintiffs have argued that after demolition of the temple of Lord Vishweshawara, the Learned Schollars of Hindu religion had to make an alternative arrangement, and a temple of Lord Vishwanath was then got constructed at nearby site of the disputed site. More so it is up to the Learned Schollars of Hindu religion to recognize or de-recognize a particular Jyotirlinga. It is therefore again this court is not prepared to accept the above mentioned argument of the defendants. Further argument of the defendants is that description of the suit property is vague and ambiguous, hence survey commission cannot be issued in air. A bare perusal of the plaint shows that the description of the disputed site has been duly earmarked with red hatched lines which falls within the Settlement Plot No: 9130 located at Mauja Shahar Khas, Pargana Dehat Amanat, Tehsil and District Varanasi. The disputed site includes Naubat Khana situated at the Northern Gate of the Gyanvapi compound

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and the house towards the northern gate of the Naubatkhana, i.e. the Gate. Entire disputed site has been termed as Schedule-A and the boundaries of the surrounding properties thereof have also been mentioned. Schedule B has been described to be part of the Gyanvapi Compound, but the same has been stated to be in the possession of the plaintiffs, where several other temples including the temple of Lord Vishwanath, are situated. Thus it would be quite preposterous to term above said description of the disputed site as vague and ambiguous.

12. Thus this court finds that survey by ASI alone can bring truth of the matter before this court. Irrespective of what surfaces, the survey by ASI may go on to help not only to the plaintiffs but also to the defendants, if their version is indeed true. Keeping in mind above said discussion, now this court is inclined to order as follows:

ORDER

- I. The Director General, Archaeological Survey Of India, Darohar Bhawan, 24 Tilak Marg, New Delhi, functioning under the Ministry of Culture, Government of India, is hereby directed to get a comprehensive archaeological physical survey be done of the entire Settlement Plot No: 9130 located at Mauja Shahar Khas, Pargana Dehat Amanat, Tehsil and District Varanasi including the Naubat Khana situated at the Northern Gate of the Gyanvapi compound and the house towards the northern gate of the Naubatkhana, i.e. the Gate (Hereinbefore termed as disputed site and duly described in the plaint as Schedule-A).
- II. For above said purpose, the Director General shall constitute a five member committee of imminent persons who are experts and well versed in the science of archaeology, two out of which should preferably belong to minority community.
- III. The Director General, shall also appoint an imminent and highly experienced person who can be regarded as expert in the science of archaeology to act as the observer for the committee so constituted. Such person should preferably be a scholarly personality and established academician of any Central University. The committee so constituted shall

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report the observer about the survey work done on a particular day.

IV. The committee shall prepare a comprehensive documentation along with the drawing, plan, elevation, site map with precise breadth and width of the disputed site, marked with hatched lines in the plaint map.

V. The prime purpose of the archaeological survey shall be to find out as to whether the religious structure standing at present at the disputed site is a superimposition, alteration or addition or there is structural overlapping of any kind, with or over, any other religious structure. If so then what exactly is the age, size, monumental and architectural design or style of the religious structure standing at present at the disputed site and what materials has been used for building the same. The committee shall also trace as to whether any temple belonging to the Hindu community ever existed before the mosque in question was built or superimposed or added upon it at the disputed site. If so, then what exactly is the age, size, monumental and architectural design or style of the same, and also, as to which of the Hindu deity or deities the same was devoted to.

VI. For that purpose the committee shall be entitled to enter into every portion of the religious structure standing at present at the disputed site. The committee shall firstly resort to Ground Penetrating Radar (GPR) or Geo-Radiology system or both, to satisfy itself as to whether any excavation or extraction work is needed at any portion of the religious structure standing at present. Even if by use of GPR system the committee feels satisfied that further excavation or extraction work is needed to be carried out, the same shall firstly be done by trial trench method vertically and that too at a very small scale and not more than four square feet at a time. Horizontal excavation shall be done only when the committee is fully satisfied that there is indeed a certainty of belief that by such excavation they would be able to reach a more concretized conclusion regarding ascertainment of the precise archaeological remains below the ground level.

VII. During the entire survey proceeding every artefacts supporting the plaint or defence version shall be properly

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preserved. If any artefacts is so deeply entrenched with the earth or super structure standing at the disputed site, removal of which can potentially disturb the existing super structure, or the committee otherwise feels that the same should not be removed due to being bulky in nature or for any other reasons to be recorded, then photography, videography and external measurement, sketching and drawing (comprehensive documentation of the architectural remains) of the same shall only be done and the same shall not be removed.

- VIII. The committee shall also record its finding to the effect as to whether true architectural structure traced at the disputed site (Schedule-A) has any sort of connection with the temples and artefacts mentioned in the Schedule-B of the plaint.
- IX. While carrying out the survey, the committee shall ensure that the people belonging to Muslim community is not prevented to offer *Namaj* at the disputed site. If due to ongoing survey work, it is not practicable to facilitate the offering of *Namaj* to the persons belonging to Muslim community at a particular place, then the committee shall provide such persons an alternative and suitable place to offer *Namaj* at any other place within the precincts of the mosque. The committee is expected be throughout aware of the sensitivity of the matter, hence the committee shall always ensure that stakeholders of both Hindu and Muslim religions shall not be subjected to any partisan or preferential treatment and both shall be equally respected.
- X. Before entering into survey work at any point of the time, the committee shall give advance notice to the parties or their counsels. The parties to this suit shall be entitled to remain present in person or through their counsels. But no party appearing through a counsel shall be entitled to nominate more than one counsel at a time.
- XI. Entire survey work shall be done in camouflaged manner, i.e. entire disputed site shall be camouflaged before the commencement of survey and till the same is finished. No general public or media person shall be allowed to have access to witness the ongoing survey work. Neither the observer nor any of the members of the committee will ever brief the media about the status of ongoing survey work.

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- XII. No party shall dictate the committee to interpret this order or act in particular manner. The committee alone shall be entitled to do the same.
- XIII. Photography (coloured as well as black and white and slides) and videography of the entire survey proceeding shall be ensured by the committee as a record of the proceeding. Comprehensive documentation and preparation of map stating placement of necessary artefacts, and drawings shall be done. A report of survey work on routine basis shall be prepared stating the time of entering at the disputed site and exist therefrom.
- XIV. To ensure that entire survey work is not tampered with at the behest of the either party, the committee shall be entitled to get necessary security personals be deputed at the disputed site during the survey work as well as after tentative closure thereof.
- XV. It shall be the duty of the district administration to ensure that complete peace and tranquillity is maintained at the disputed site and in nearby areas during the entire survey proceeding, and the committee is given due assistance and cooperation by the district administration at all point of time till the survey proceeding is completed so that the committee could be enabled to discharge its functions without any fear or favour.
- XVI. The survey work shall be carried out between 09:00 A.M. to 05:00 P.M.
- XVII. The committee and parties participating in the survey proceeding shall give due adherence to the norms and guidelines issued time by time by the Central and State Government with regard to upsurge of second wave of pandemic Covid-19.
- XVIII. After completion of the survey work, the committee shall submit its report on the record of the entire survey proceeding in sealed cover without undue delay.
- XIX. Keeping in mind the representative capacity in which the suit is being prosecuted by the plaintiffs and contested by the defendants, and the fact that public at large is interested in the controversy in hand, it would be unjust to burden the

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plaintiffs alone to bear the expenses and cost of the survey work. It is therefore the cost and expenses of the entire survey proceeding shall be borne by the Archaeological Survey Of India.

The application of the plaintiffs namely 266-Ga and objections of the defendants namely 273-Ga and 286-Ga and written argument 332-Ga stand hereby disposed of on aforesaid terms. A copy of this order be sent to the Hon'ble Ministry Of Culture, C-Wing, Shashtri Bhawan, New Delhi, the Director General, Archaeological Survey Of India, Darohar Bhawan, 24 Tilak Marg, New Delhi, the Principal Secretary, Government Of Uttar Pradesh, Lucknow, the Director General Of Police, Uttar Pradesh, Lucknow, District Magistrate, Varanasi and to Commissioner Of Police, Varanasi, for necessary compliance of this order. Writ be accordingly issued. List the suit for further orders on 31/05/2021.

Date: 08/04/2021

(Ashutosh Tiwari)

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Civil Judge (S.D.), F.T.C. Varanasi

Noted for
31-05-21
[Signature]

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