

Sheikh Aun Ali vs The State Of Madhya Pradesh on 22 June, 2023

Author: Arun Kumar Sharma

Bench: Arun Kumar Sharma

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE
HON'BLE SHRI JUSTICE ARUN KUMAR SHARMA
FIRST APPEAL No. 602 of 2016

BETWEEN: -

1. SHEIKH AUN ALI S/O ISMAELJI, AGED ABOUT 66 YEARS, R/O MAZAR-E-QUTBI PREMISES, AHMEDABAD (GUJARAT)
2. HAKIMUDDIN (DEAD) ABDUL QADIR S/O LATE HAKIMUDDIN, AGED ABOUT 34 YEARS, R.O. LODHIPURA BURHANPUR VIDE TRIAL COURTS ORDER (MADHYA PRADESH)
3. SHABBIR AHMED S/O ZAHOOD MOHAMMED BAATI, AGED ABOUT 49 YEARS, R/o. LODHIPURA DARGAH ROAD AMAGIRD (MADHYA PRADESH)

.....APPELLANT

(BY SHRI MOHD. ALI - ADVOCATE WITH SHRI SIDDHART PATEL AND MOH RIZWAN KHAN - ADVOCATE)

AND

1. THE STATE OF MADHYA PRADESH THR. COLLECTOR BURHANPUR BURHANPUR (MADHYA PRADESH)
2. COLLECTOR BURHANPUR DISTT. BURHANPUR (MADHYA PRADESH)
3. SUB DIVISIONAL OFFICER REVENUE DEPARTMENT DISTT. BURHANPUR (MADHYA PRADESH)
4. TEHSILDAR BURHANPUR DISTT. BURHANPUR (MADHYA PRADESH)
5. GENERAL PUBLIC THROUGH ISHWAR S/O NAMDEO, AGED ABOUT 46 YEARS, R/O.

Signature Not Verified
Signed by: JITENDRA
KUMAR PAROUHA
Signing time: 6/23/2023
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LODHIPURA BURHANPUR (MADHYA
PRADESH)

6. MAHENDRA SINGH S/O BABU SINGH
THAKUR, AGED ABOUT 58 YEARS, R/O.
LODHIPURA BURHANPUR (MADHYA
PRADESH)
7. HEMLAL S/O ASARAM MORE, AGED
ABOUT 50 YEARS, R/O. AALAM GANJ
BURHANPUR (MADHYA PRADESH)
8. VIVEK S/O JEEWANLAL PATIDAAR, AGED
ABOUT 46 YEARS, R/O. BUDHWARA
BURHANPUR (MADHYA PRADESH)

(SHRI ADITYA CHOUBEY - GOVERNMENT ADVOCATE FOR RESPONDENTS NO
TO 4 / STATE,
SHRI RADHESHYAM TIWARI - ADVOCATE WITH SHRI HEMANT KUMAR
CHOUHAN - ADVOCATE FOR RESPONDENTS NO. 5 TO 8)

Reserved on : 14 -06-2023

Pronounced on : 22 -06-2023

This appeal having been heard and reserved for order,
on for pronouncement this day, the court pronounced the follow

JUDGMENT

With the consent of the parties, the matter is finally heard.

1. This first appeal under Section 96 of the Civil Procedure Code has been preferred being aggrieved and dissatisfied by the judgment and decree dated 18.7.2016 passed in Civil Suit No.4-A/2015 by learned First Additional District Judge, Burhanpur. By the said order, the suit filed by the appellants / plaintiffs has been dismissed. It is also pertinent to mention here that the respondents no. 5.1 to 5.4 have also filed cross- objections being IA No.626/17 & 628/17, respectively. Consequently, the present appeal and the cross objections are being decided by this common judgment.

2. The appellants as plaintiffs filed a civil suit for declaration and perpetual injunction against the respondents / defendants in respect of the land bearing khasra no. 12 as shown in the plaint map situated in village Shahdara, Tahsil and District Burhanpur (hereinafter referred to as the suit land) seeking declaration that part of Khasra no. 12 as shown in the plaint map is the government Chhotaghash (grazing) land and that no temple or permanent religious structure can be constructed or established therein by general public nor any permission to do so can be granted to general public as well as to restrain general public from constructing any permanent religious structure on the suit land and to restrain defendants no. 1 to 4 / respondents no. 1 to 4 herein from granting any permission for such construction and to direct defendants no. 1 to 4 to remove encroachment and the religious symbols.

3. Instant civil suit was filed in a representative capacity under Order 1 Rule 8 of the Civil Procedure Code with due compliance of procedural requirement and permissions against the general public. Respondents / defendants no. 5.1 to 5.4 appeared in representatives capacity of general public. They filed their written statement but the defendants no. 1 to 4 / respondents no. 1 to 4 had not filed any written statement.

4. Admitted facts of the case are that a Dargah Hakimi Burhanpur is a holy religious place of Dawoodi Bohra Community (a sect of Shia Muslims) which is situated at village Shahdara, Tahsil and District Burhanpur wherein graves are situated. The suit land of khasra no. 12 village Shahdara is recorded as government chhota ghash (posture, grass beer or fodder) land. It is also not disputed that throughout the year visitors of Bohra community are coming to the Dargah. This is also not disputed that the suit land is surrounded by Tombs, Graves, Mosque and other structures belonging to Dargah-E-Hakimi.

5. The facts leading to the present appeal in a nutshell are that the appellants as plaintiffs instituted a civil suit in the representative capacity as per the provisions of under Order 1 Rule 8 of the CPC against the respondents before the First Additional District Judge, Burhanpur. In the plaint it was stated that the land Khasra No. 12 (old Khasra No. 6/7) area 0.13 Hectare (0.49 acre) situated at village Shahdara, Tahsil & District Burhanpur is recorded as "Chhota Grass Land" in the revenue papers and is reserved for 'grazing purposes' (pasture) and is surrounded by all sides by the lands and landed properties belonging to Dargah-e-Hakimi, Burhanpur where tombs of three saints belonging to the Dawoodi Bohra community are situated. This piece of land is hereinafter referred to as "the disputed land". The Dargahi is more than 250 years old and is visited by thousands and thousands of people belonging to all religions throughout the year. The Dargah administration arranges for lodging and boarding of the members of the Dawoodi Bohra community. The Dargah premises are surrounded by a boundary wall from all sides and entry to it is controlled through Eastern and Western Gates. The lands of Dargah are stretched in the adjacent three villages namely Brogaonkhurd, Shahadara and Emagird, Tahsil Burhanpur. The properties are connected with each other. A consolidated map is part of the suit wherein lands of the Dargah are shown by red colour and the suit land of khasra no. 12 of village Shahdara which is a government land Chhota Ghash land is shown by blue colour.

6. The plaintiffs have further pleaded that myriads of persons belonging to Bohra community visit the Dargah and persons from other communities also visit the Dargah regularly which includes Hindu, Muslim, Sikh and Christians. For the devotees arrangement of stay and food is done by Dargah administration, Dargah is surrounded by permanent boundary wall and all around the aforesaid Dargah beautiful garden, orchard and parks of Dargah-e-Hakimi are also situated. For the maintenances of such a big edifice, garden, orchard and open land several labourers are employed. Some of them are non-Muslims also. Near about 1970 some of the non Muslims employees of the Dargah have put up a stone in a corner of land of Khasra No.12 (Old No.6/7) and later on same was painted by red colour. However, the laborers were annually celebrating their festival namely Pola only on suit land. No outsider was coming nor there any statue of Hanumanji. However with the connivance of some revenue officers unauthorisedly in column 12 (Kaifiyat column) of Khasra of the year 1972 - 73 entry of "place of Bajrangbali" has been made.

7. The Dargah is situated three kilometers away from Burhanpur City but from November, 2005 some strangers have started encroaching upon the land of said Khasra No.12 and started a mission of establishing a Hanuman Temple and with this intention they have been doing several activities like celebration of Hanuman Jayanti etc. They have been painting the branches of trees and various places by red colour also in order to show the place as Hanuman Temple and to establish a permanent structure for the aforesaid purpose which is not permissible under the law. Specifically provisions of M.P. Sarvajanic Sthan (Dharmik Bhawan Evam Gatividhiyon Ka Viniyaman) Adhiniyam 2001 (hereinafter referred to as "Act, 2001") prohibits the use of such lands unauthorizedly. Consequently the instant civil suit is filed.

8. The Defendants No. 6 to 9 (5.1 to 5.4) have filed a written statement on 02.04.2013 and in brief denied the pleadings of the plaintiffs and pleaded that on Khasra No.12 on ancient temple is existing which is recorded in the revenue records as government land as well as temple of Hanumanju. No other person has ever intervened therein nor has any specific class ever used it. The aforesaid ancient temple has been used as temple of Bajrangbali and worship is continuing. The provisions of Act, 2001 are not applicable to the suit land and the suit is not maintainable so liable to be dismissed.

9. The Defendant No.1 to 4 have not filed any written statement but they have filed written argument. On the basis of the pleadings of plaintiffs and contesting defendants nine issues were framed by the learned Court below and have recorded the finding that the suit land of Khasra No.12 is a government land recorded as Chhota Ghass (pasture, or fodder reserve) and defendants No.5 (5.1 to 5.4) do not have any right to erect any permanent construction or to change the situation of the suit land. The learned trial Court has further held that the permission for religious activities is granted by the administration to defendant No.5, but the Act of 2001 is not applicable. It is also found by the trial Court that the temple existing on suit land is not the ancient temple but the trial Court has held that no unauthorized uses of suit land is done. Consequently civil suit was dismissed by the impugned judgment resulting in instant first appeal and cross objection. Delay in filing Cross Objection is already condoned.

10. The appellant has challenged the impugned judgment and decree on the ground that the learned Court below has committed error of law facts and jurisdiction in holding that the suit land is not being used unauthorizedly and defendants No.1 to 4 have given permission for religious activities to defendant No.5 (Defendant No.5.1 to 5.4). The appellants had submitted that the finding that "the permission is granted to the defendant No.5 (5.1 to 5.4)" is the perverse finding as it is contrary to the admission of the contesting defendants in their evidence. The appellants have also raised the grounds that the suit land is the government land and it is recorded as Chhota Ghass land (Pasture, or fodder reserve) so according to section 237 of M.P. Land Revenue Code (as it was existing in the statute till 30.12.2011 i.e. before the enactment of M.P. Act 42 of 2011, it cannot be diverted to any other purpose than it is prescribed under Section 237 (1) (a) to (k) of the Code. Even the appellants further pleads that even after amendment of Section 237 the land of (posture, grass beer or fodder) can be diverted to very limited purpose mentioned in new Sub Section (3) which does not include religious constructions or place of worship.

11. The respondents No.5 (5.1 to 5.4) have challenged the findings of the trial Court that the existing temple is not an ancient temple as there is lot of evidence on record and no provision of law curtails their right to use the suit land as the place of Hanuman Temple nor it is barred by law as well as they have right to raise the construction of temple and right to the religious activities on the suit land.

12. Having heard learned counsel for the parties and on perusal of the impugned judgment, the main question involved in the appeal in view of admitted fact "that the suit land is the Chhota Ghass (posture, grass, beer or fodder reserve) government land" are that:-

1. Whether the existing temple on the suit land is an ancient temple ? And
2. Whether the defendant No.5 (5.1 to 5.4) are entitled to continue their possession for their religious purposes ? And,
3. Whether the existing construction and religious symbols are liable to be removed from the suit land and so liable to be shifted with honour to some other suitable place belonging to the defendant No.5.

13. The respondents/defendants No.5 (5.1 to 5.4) have sought permission on 10.04.2023 to file instant interim application when the case was already fixed for final hearing on the mutual understanding and request of both of the parties. The respondents No.5 (5.1 to 5.4) have been avoiding the final argument at one or other pretext. They have filed one of these applications under Order 41 Rule 27 of Code of Civil Procedure vide I.A.No.5527/2023 for taking documents on record and thereby they want to file an old Khasra alleged to be that of suit land and some photographs. By these photographs defendants want to prove that the temple is the ancient one. The photographs could have been filed earlier as some other photographs vide Ex.D/1 and Ex.D/2 were filed during trial but no due diligence was exercised by respondents /defendants and failed to file the same timely otherwise also photographs do not prove the fact of temple being ancient. I have seen the photographs proposed to be filed. They do not show iota of evidence of temple being ancient. There is no justification in taking such photographs on record. So far as Khasra of 1912 is concerned which

is a public document and available in revenue record are filed to prove that the land of old Khasra No.6/7 (new No.12) was recorded in the name of one Sevaram Lumbardar. This Khasra could have been filed earlier. Why was it not filed earlier is not explained. In the year 1912 the Central Provinces Land Revenue Act, 1881 was in force which was repealed by the Central Provinces Land Revenue Act, 1917. Section 4 (11) of Act of 1881 defined the "Lumbardar" as following:-

"Person appointed in manner prescribed by this Act to represent the proprietary body of a mahal in its relations with the Government".

The definition itself signifies that the Lumbardar was a representative of government to represent proprietary of a mahal. Any land recorded in the name of such Lumbardar cannot be held to be private property under the Act of 1881. Of course in the Act of 1917 Lumbardar was amplified nevertheless this entry cannot prove the fact that the suit land was not Government Land in 1912. If it is assumed to be so there is no evidence on record to establish further development after 1913 nor any successor or any person related to Sevaram Lumbardar has appeared in the suit despite public notice of the suit because this is a representative suit. The land is recorded as Chhota Ghas (pasture, beer or grass) while Nistar Patrak of village is prepared as such entries in Khasra are borrowed from Nistar Patrak. Legality of this entry cannot be vitiated on assumptions or surmises. Hence the entry proves contrary. Therefore, this application vide I.A.No.5527/2023 being frivolous is liable to be dismissed and is hereby dismissed.

14. Second application under Section VI Rule 17 of Code of Civil Procedure vide I.A.No.5528/2023 is filed to incorporate pleadings summarily to the effect that suit land being recorded in the name of Sevaram Lumbardar in 1912 was not government land. The defendants /respondents including defendants No.1 to 4 have initially pleaded that the suit land being Chhota Ghass Land is Government land. They have admitted this fact in the evidence also and on the basis of these admissions in pleadings are evidence the learned trial Court has rightly recorded finding that the suit land is Government land. By this application defendants/respondents want to withdraw their admission which was not made inadvertently. Supreme Court has held in M/s Modi Spinning & Weaving Mills Co. Ltd and another Vs. M/s Ladha Ram & Co. AIR 1977 SC 680 (para 8 and 9) has held that "defendant cannot be allowed to withdraw admission made in W.S so as to set up entirely different new case and seeking to displace the plaintiff completely from admission made by defendants in written statement. Although Supreme Court has held in Baldeov Singh & Ors Vs. Manohar Singh (2006) 6 SCC 498. That in the case of amendment of W.S. lenient view should be taken. In Heeralal Vs. Kalyan Mal (1998) 1 SCC 278 it was held that once the written statement contains an admission in favour of the plaintiff, the amendment of such admission of the defendants cannot be allowed to be withdrawn and such withdrawal would amount to totally displacing the case of the plaintiff which would cause him irretrievable prejudice. In B. K. Narayan Pillai Vs. Parameswaran Pillai (2000) 1 SCC 712 it was held though the defendant has a right to take alternative pleas in defense by way of amendment, it would be subject to qualification that (i) proposed amendment should not result in injustice to the other side; (ii) any admission made in favour of the plaintiff should not be withdrawn; and (iii) inconsistent and contradictory allegations which negate admitted facts should not be raised. This law has been reiterated by Supreme Court in S. Malla Reddy Vs. Future Builders Cooperative (2012) 9 SCC 349. Therefore, in the stage of final

hearing of First Appeal permitting defendant to make out entirely different new case withdrawing the admission indeed contrary to admissions already made will be unjust that too when the amendment is not likely to help the defendants themselves. New trial on entirely new set of facts cannot be allowed to be substituted by amendment of W.S such a dilatory tactics cannot be allowed to prevail in order to support encroacher of government land. Written statement was filed after more than a year on 02.04.2013 while the suit was filed in 2012. Trial Court granted sufficient time to think over the defence and to file the same. Trial also took a long time and suit was decided on 18.07.2016. Then First Appeal was filed and respondents / defendants also filed counter objection with the application for condonation of delay. In between no such efforts were ever made. After 10 years of filing of the W.S. the proposed amendment is moved. Hence under the proviso of Order 6 rule 17 also such amendment is not permissible. Consequently, IA No. 5528/2023 is also liable to be dismissed and so dismissed.

I.A. No. 5529/2023 for appointment of Commissioner also seems to be frivolous for the reason that Commissioner cannot decide the question as to whether the temple is ancient. There is no dispute of boundaries also between the parties. On the contrary, location and situation of suit land is admitted by both side. So this application is also liable to be dismissed and so dismissed.

15. The question of maintainability of suit was also raised by the defendants under order 7 Rule 11 of Code of Civil Procedure during the course of Civil Suit which was decided by order dated 05.10.2013 and found to be maintainable in view of the judgment of AIR 1969 SC

78....Dulha Bhai V/s. State of M.P. The aforesaid order dated 05/10/2013 of the trial Court has not been challenged further and the same has already attained the finality. The contention of the respondents that suit is barred under Section 10 of M.P. Sarvajanik Sthan (Dharmik Bhawan Evam Gatividhiyon Ka Viniyaman) Adhiniyam 2001. On the other hand the respondents/defendants 5.1 to 5.4 have pleaded and argued that the aforesaid Act is not applicable. But it is the dispute of something more than the issues covered by the aforesaid Act because Chhota Ghass land is registered under the provisions of M.P.L.R. Code. Hence the suit is maintainable. Hence, the aforesaid questions are required to be finally decided.

16. The contention of non-maintainability of the suit for want of notice under Section 80 of the Code of Civil Procedure is also baseless in as much as Writ Petitions and Writ Appeal were litigated with the state by the plaintiffs wherein the respondent No. 2 appeared and expressed his inability to remove the said structure. This suit is filed with exemption under Section 80 (2) because plaintiffs wanted temporary injunction of urgent nature and this is dispute between two communities of the society which may ignite and spark the breach of peace any time. The order sheets of writ petitions support this fact. Therefore want of notice under Section 80 of Code of Civil Procedure is not fatal to the suit and suit is maintainable.

17. The Plaintiffs and contesting defendants have admitted in their pleadings that the suit land is a Government land. Both of the parties have admitted this fact that the suit land of Khasra No. 12 Village Shahdara is the Government Land recorded as Chotta Ghass (Pasture, or fodder reserve). The Pleadings of paragraph 2 of the plaint and para 2 of parawise reply of W.S. are referable. In the

evidence of defendants also no challenges made to the aforesaid facts. Consequently it is held that the suit land is a Government Land recorded as Chotta Ghass (Pasture, or fodder reserve).

18. The question that the Hanuman Temple existing on the suit land is an ancient temple depends upon the pleadings and evidence of both of the parties. Since, this is claimed and pleaded by contesting defendant No. 5 (5.1 to 5.4), the burden of proof lies upon them to prove this fact. In this respect, Ishwar (DW-1) who has deposed on 17.11.2015 before the Trial Court in his paragraph 3 that when he was 8-10 years old and he gained the consciousness he has been seeing the statue of Hanumanji on the suit land. On the date of the evidence his age is mentioned to be 45 years. According to his own evidence, the statue of Hanumanji is existing since the year 1970. But in the Khasra entries of 1970 there is no entry of existence of Hanuman temple in any column. Similarly, Haimlal (DW-2) has also stated in para 3 of his deposition that he has been watching the statue of Hanumanji on the suit land from the time he attained the consciousness. He has not mentioned any specific period or specific time. His deposition was filed on 17.11.2015 before the Trial Court where he has stated to be 48 years old. Accordingly, I find that he is attempting to support the statement of the DW-1. Thus, according to the evidence of contesting defendants the statue of the Hanumanji exists on the suit land sometime from the year 1970.

19. The witnesses of the plaintiffs have in rebuttal stated that the Non-muslim employees of Dargah have placed a stone on the suit land sometime in the year 1970. Shaikh Aun Ali (PW-1) in the paragraph 4 of his deposition submitted before the Trial Court on 11.08.2014 has stated that this was done in the year 1970 and in the year 1972-1973 in column 12 of Khasra unauthorized entry of "Place of Bajrangbali" has been written by Patwari. In paragraph 43 the aforesaid witness has stated that it is incorrect to say that the statue of Hanumanji was existing from various years of 1970. On the contrary in the paragraph 42 he has specifically stated that prior to 1972 there was no entry regarding statue of Hanumanji in the Khasras. He has further stated that the Non-Muslim employees of the Dargah started celebrating their annual function of Pola on the suit land. In Para 44 he has stated that the defendants No. 6 to 9 (5.1 to 5.4) have neither placed the statue nor have they done any construction. It is done by some unknown persons but he has specifically denied that the Statue of Hanumanji is situated from hundreds of years. Shaikh Taher Ali (PW-2) has stated that after the death of his father he happened to be the part of management of Dargah after 1972 for 5 years and after some gap for further period of 3 years i.e. till 1992. During his tenure or during the tenure of his father there was no entry of Place of Bajrangbali in the khasras. Therefore, there is specific denial by the evidence of the defendants regarding existence of statue of Hanumanji or Bahrangbali during the period before 1972. Apart from this evidence read with khasras there is no other evidence to prove the existence of Statue of Bajrangbali on the suit land before the year 1972. For proving the fact of ancient temple the evidence of archaeological department has not been filed by the defendant nor any efforts have been done by defendants to prove it. No devotee or Pujari/Pandit doing regular worship is examined nor any old person of the town is examined who could support the story of existence of temple from the time immemorial. In para 15 of evidence plaintiff Ishwar has stated that Maharaj who was worshipping in temple from 2005 to 2015 has died in 2015, meaning thereby the worship has been stopped from 2015. After 2015 who is doing worship is not pointed out by defendants. It is also not stated by any of witnesses as to whether after 2015 worship is continuing regularly every day. So far as question of entry of existence of Hanuman

temple in column 12 of the Khasra of 1972 is concerned according to law it is not legal because Patwari is not entitled to make such entry nor such entry gives any presumption or correctness or the presumption of possession of the contesting defendants.

In this context reliance on the following judgments can be aptly made namely : -

i. In Chooramani Vs. Shri Ramdhar 1991 RN 61 (HC) (DB) division bench of this court held that entry made by Patwari in remarks column of Khasra or in field book no presumption of correctness can be attached. Patwari is not required to make any entry in land records prepared under Chapter IX of the Code.

ii. In Harisingh Vs. Dheeraj Singh 1993 RN 57 (HC) it was laid down that if any entry existing in the land records is not required to be made either under Chapter IX of the Code or any other provision of the Code, no presumption of correctness can arise in respect of such entry. Entry of possession in remarks column cannot be presumed to be correct.

iii. In Ramkumar Vs. Kamla Prasad 1996 RN 337:

(HC) it is held that the entry of possession made by Patwari in column No. 12 has no value as patwari has no such authority, and iv. In 1993 RN 25: Ranvir Singh Vs. State of M.P:

this court held that entry as to unauthorized possession of the person other than recorded holder made in remarks column of Khasra does not have any presumptive value.

Hence, I find that entry of column 12 is mischievously recorded and so I hold that the defendants have failed to prove that the disputed Hanuman Temple existing on suit land is an ancient temple. Defendants have also failed to prove the period and time of establishment of statue of Hanumanji on the suit land. Therefore, it is not proved that the disputed temple of Hanumanji existing upon the suit land is the ancient temple.

20. For the decision of the next question the rights of the defendants to the suit land is liable to be proved by defendants. Since, they have failed to prove that the disputed temple is an ancient temple the burden of proof of their right to continue possession on the government land is upon the defendants. The appellants have argued that the defendants have not pleaded that they have any legal right for the religious purposes over the suit land nor they have filed any documents showing such permission of Collector or of any competent authority, so no permission by defendant no. 1 to 4 for religious activities is given to defendant no. 5 (5.1 to 5.4) on the suit land nor any permission for constructing a religious structure is given to the defendants no. 5 (5.1 to 5.4). In rebuttal defendants/respondents no. 5 (5.1 to 5.4) have argued that under

Sections 2 and 3 of The Act 2001 permission can be granted by Collector and since 1972-73 khasra is showing entry of Place of Hanumanji and this is 30 years old entry the Act 2001 is not applicable.

Further it is argued that a Writ Petition vide W.P. No. 6420/2006 and a Writ Appeal No. 275/2006 were filed by Plaintiff No. 1 wherein Administrative Officers appeared before a Bench of this Court and by order dated 04.05.2006 the High Court has held that since this is title dispute which cannot be decided in Writ, plaintiffs have no case. Defendants /respondents submit that since plaintiffs / appellants have no objection on worship by defendants on suit land and there is no likelihood of breach of peace as in the past it has never happened, hence the existence of temple is legally authorized. The contesting respondents/defendants No. 5.1 to 5.4 have also argued that for want of notice under Section 80 suit is not maintainable.

21. The question of legality of possession of defendants cannot hinge upon the fact of no objection by plaintiffs against worship by defendants /respondents or no likelihood of breach of peace as such facts do not give any legal right or authority to defendants to encroach upon government land nor Writ Petition has decided the right of plaintiffs or that of defendants. The High Court in writ has merely asked petitioner to invoke other suitable remedy under the law. Therefore, the arguments of defendants / respondents are devoid of merits and liable to be turned down. The question of legality of the possession of defendants has to be proved by the defendants as they have already admitted that the land is government land. The defendants must also prove since when they are in possession of the suit land. The plaintiff/Aun Ali (PW-1) in paragraph 20 (which is a part of cross-examination) of his evidence has specifically stated that from 1970 to 2005 there was no temple and in cross-examination the defendants/ respondents have failed to demolish the same. The defendant/ Ishwar (DW-1) himself in paragraph 16 states that till his death a Maharaj from 2005 to 2015 was doing worship Pooja. Apart from aforesaid evidence and entry in column 12 of Khasra of 1972, there is no other specific evidence given by defendants to show the commencement of their possession on the suit land. None of the witnesses of the defendants gives any inkling of any kind of worship except annual celebration of Pola before 2005. In this respect the photographs of Exhibit P-9 filed by plaintiffs are disputed by defendant (DW-1) in para 18, 19 and 20. Even in para 20 he makes a contradictory statement to his own pleadings in respect of the authority of the photographs. However, photographs are not the evidence of commencement of the possession of the defendants but the oral evidence of plaintiff / Aun Ali in para 20 get support from evidence of defendant/ Ishwar (DW-1) in para 16. The question of validity of entry in column 12 of Khasra has already been decided in para 18 (supra). In any case it is not proved that before 2005 there was any temple on the suit land and any worship was happening and plaintiffs have successfully proved that prior to 2005 there was no temple on the suit land.

22. The legality of the possession of the defendants depends upon the provisions of law. The admitted fact is that the suit land is Chhota Ghass (Pasture, grass, beer or fodder reserve) Government land. Section 237 of M.P. Land Revenue Code 1959 (hereinafter referred to as Code") provides the law in respect of such government land. Section 237 as it stood before amendment of 2011 by M.P. Act 42 of 2011 enacted on 30.12.2011 is reproduced below : -

Sec. 237 Collector to set apart and for exercise of Nistar rights - (I) Subject to the rules made under this Code, the Collector may set apart unoccupied land for the following purposes, namely :-

- (a) for timber or fuel reserve,
 - (b) for pasture, grass, bin or fodder reserve,
 - (c) for burial ground and cremation ground,
 - (d) for gaathan,
 - (e) for encamping ground,
 - (f) for threshing floor,
 - (g) for bazar,
 - (h) for skinning ground,
 - (i) for manure pits,
 - (j) for public purposes such as schools, playgrounds, parks, roads, lanes, drains and the like, and
 - (k) for any other purposes which may be prescribed for the exercise of rights of Nistar.
- (2) Lands set apart specially for any purpose mentioned in sub-section (I), shall not otherwise be diverted without the sanction of the Collector.

According to this provision the suit land comes in the category of Section 237(1)(b) of the Code which cannot be diverted without the sanction of the Collector as per sub-section (2). However, sub-section (2) has been repealed by M.P. Act 42 of 2011 and thereby sub-section (3) has been inserted which runs as under :-

- (3) Subject to the rules made under this Code, the Collector after securing the land mentioned in clause (b) of sub-

section (1) to minimum two percent of the total agriculture land of that village, may divert such unoccupied land as mentioned in sub-section (1) into abadi or for construction of roads, state highways, national highways, canals, tanks, hospitals, schools, colleges, Goshalas and any other public utility projects as may be determined by the State Government.

Provided that the land set apart for the purposes mentioned in sub-section (1) shall not be diverted and allotted to any person for agriculture purpose.

23. Hence, without sanction of the Collector the suit land could not be diverted for any other purpose than that described in Section 237(1)(b), and for that purpose rules were also framed and published by notification no. 215-6477-VII-N-(Rules) on 22 January 1960.

According to defendants they are occupying suit land for religious purpose which purpose is not covered by Section 237 of the Code. There is no evidence on record to prove that the defendants have ever sought and Collector granted the aforesaid sanction diverting the land for religious purposes. Though, it is a different question as to whether such sanction could be legally granted by the Collector or not because there is no such sanction on record and so not required to be answered. Hence, the possession of the defendants (even if presumed to be from 1970 for the sake of arguments merely) is unauthorized and illegal. In the instant case, the evidence of record does not show the existence of Temple before 2005 nor otherwise is possession of defendants proved during any time before the year 2006. The celebration of annual function of Pola which was just gathering of bulls used in cultivation of land of Dargah by employees of Dargah-E-Hakimi does not create or confer any right upon the Defendants No. 5 (5.1 to 5.4). That celebration has also discontinued from 1994 since cultivation by Tractor was started as stated by (PW-1) in paragraph 43 of his evidence which is neither rebutted nor demolished in cross-examination.

24. The respondents/defendants have denied the applicability of Act 2001 on the ground that the temple has been existing from the time prior to the commencement of the Act 2001. Section 14 of Act 2001 has repealed the earlier Act of 1984 namely M.P. Sarvajanic Dharmik Bhawan Tatha Sthan Viniyaman Adhiniyam 1984, (hereinafter referred to as "Act 1984") but in sub section (1) previous operation is saved. So even if the possession of the defendants is presumed to be from the period before 2001 the provisions of Act 1984 and Code were applicable and they also required permission under Section 4 of the Act 1984 and Code were applicable and they also required permission under Section 4 of the Act 1984 and section 237 (2) of the Code before commencement of Act 1984 the Code was in force requiring legal sanction. As there is no permission or sanction for construction of the temple or diverting the Chhota Ghass Land into land for other purpose available on record nor the defendants in their pleadings or oral evidence have stated that they have ever sought or obtained such permission or sanction, their possession on suit land is found to be unauthorized and illegal. Consequently the findings on Issue no. 2 recorded in paragraph 50 of the impugned judgment are reversed and it is held that the construction and existence of all kind of structures on the suit land are unauthorized and illegal. Therefore, the defendants have no right to continue the possession on the suit land and the same is liable to be removed there-from.

25. In the fulcrum of the aforesaid discussion, instant First Appeal is allowed and counter-objections are dismissed. Suit of plaintiffs is decreed in toto. It is declared that suit land bearing Khasra no. 12 (old no 6/7) of village Shahdara, Burhanpur) is the Government land and defendants no. 5 (5.1 to 5.4) have no right to continue their possession as well as defendants no. 5 (5.1 to 5.4) have no right to continue their religious activities thereon. Defendants are directed by mandatory injunction to remove the statue, structures and religious symbols existing on suit land of Khasra No. 12 (old no.

6/7) of village Shahdara, Burhanpur with great honour and full respect and so shift the same to some other place belonging to defendant No. 5 (5.1 to 5.4).

27. Respondents/defendants including general public are restrained by perpetual injunction from using and occupying the suit land of Khasra No. 12 (old no. 6/7) of village Shahdara, Burhanpur shown by blue colour in suit map for any religious purposes. Needless to say that Interim relief, if any granted earlier, stands vacated.

A copy of this judgment along with record be sent back to the trial court for information and its compliance.

(ARUN KUMAR SHARMA) JUDGE JP /-