

SUPREME COURT OF INDIA

Archaeological Survey of India

Vs.

State of M.P.

C.A.No.5529 of 2014

(Surinder Singh Nijjar and Arjan Kumar Sikri JJ.)

09.05.2014

JUDGMENT

A.K. SIKRI, J.

1. Two Writ Petitions, both in the nature of Public Interest Litigation came to be filed in the High Court of Madhya Pradesh, Principal Seat at Jabalpur. In one petition Archeological Survey of India (ASI) was the Petitioner. Other petition was filed by Mr. Mohammed Azam Khan claiming himself to be a public spirited person. They were/are concerned with the Jain Temples which were constructed sometime in 6-7th Century A.D. and scattered over an area of 199.45 acres in villages Kundalpur, Fatepur and Teergarh in Tehsil Hata, District Damoh (MP). This cluster of temples include most famous among them known as the temple of "Bade Baba". According to the Petitioners, even when they are protected ancient monuments under the Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1958 and Rules 1959 framed thereunder, Jain Temple Trust (Respondents 9 to 11) is carrying out illegal construction and thereby vandalizing the said Bade Baba Jain Temple.

2. Both these Writ Petitions are disposed of by the High Court vide common judgment dated 17.9.2012 holding that the original temple which was declared to be an ancient monument by virtue of Notification issued Under Section 3 of Ancient Monuments Protection Act, 1904 (hereinafter referred to as "1904 Act") does not survive and the idol of "Bade Baba" which is an ancient monument, alone survives. The Court has, thus, held that question of preservation and/or protecting

of the monuments does not arise. In so far as idol of "Bade Baba" is concerned, the same is governed by the local Act, namely M.P. Ancient Monuments and Archeological Sites and Remains Act 1964 (hereinafter referred to as the "1964 Act") and therefore ASI has no jurisdiction over it. At the same time, keeping in mind the provisions of Section 19 of 1964 Act which provides that there cannot be any construction or mining etc. by any person including the owner or occupier of the said protected area without permission of the State Government, the Jain Temple Trust will not proceed with the construction without obtaining the permission of the State Government. Accordingly, direction is issued to the Trust to submit an application for grant of permission to raise construction of the temple to preserve and protect idol of "Bade Baba" and a further direction is issued to the State Government to consider that application in accordance with law within a period of 2 months. It is also held that in case the State Government refuses to grant permission to raise construction of the temple the trust shall restore the construction to its position which existed on the date of the passing of the interim order by the High Court on 20th May 2006.

3. Obviously, both the writ Petitioners were not satisfied with the aforesaid outcome of their Writ Petition and it is maintained that ASI is the appropriate authority as the temple and the idol of "Bade Baba" are the protected monuments of national importance under 1958 Act. The Petitioners have also taken the position that the Trust has materially altered the character of the temple which was impermissible and therefore the same be directed to be restored to its original condition and in so far as the Trust is concerned, it has no right to carry out any construction thereon. Petitioners also maintain that 1964 Act does not apply and therefore State Government has no jurisdiction over the said temple. This, in nutshell, is the controversy on which we had heard counsel for the parties in detail.

4. Leave granted in both the SLPs.

5. Let us turn to the factual details at this point. We shall traverse these facts from the SLP Paper Book filed by the ASI by talking note of those facts which are admitted. Wherever there is a variance of the stand taken by the parties, we shall be indicating the same as well. Kundalpur Jain Temples, totaling 58, are located at different levels on the hills of Kundalpur starting from the foot hill. According to

the Central Provinces District Gazettes, 1906, Kundalpur is a well-known sacred place of the Jains and the temples therein are "all square blocks with domed roofs and pinnacles at the corners. They are all whitewashed and look very like Muhammadan tombs. The principal temple contains a colossal image of Mahavira which is of 12 feet". According to District Gazetteers published in 1974 based on Archaeological Survey of India Volume VII, "there are 58 Digambar Jain Temples. On the circular hill range stand 30 of these temples, all gleaming white and the remaining 28 temples are situated at the foot of the hill range...Most of the ancient temples have been renovated and reconstructed during the period of last three centuries. The oldest is...in the middle of them. It enshrines a colossal red sandstone image of Jain Tirthankar...Secondly on both sides of this image, images of Yaksha and Yakshni of Rishabhanatha are noticed. The main interest of place lies in the beautiful huge images of Rishabhanatha and two of Parshwanatha in standing posture. The later are installed on either side of the former. These are probably of 6th or 7th century A.D." "Kundalgiri as one of the Nirvarana Kshetras finds mention in Daska Bhakti by Swami Pujiyabada of fifth or sixth century A.D. and in Prakrit Nivayukandan....it is one of the most ancient and sacred Nivarana Kshetras of the Jains. On another small temple date of Samvat 1505 (1444 A.D.) is given."

6. As pointed out above, the most sacred temple among these is the temple of Bade Baba. This monument was declared as protected ancient monument by Central Provinces Government vide gazette notification dated 16.7.1913/30.11.1914 under the Ancient Monuments Protection Act, 1904 (for short the Act of 1904). As per the ASI, by virtue of Section 2, read with Part I of the Ancient and Historical Monuments and Archaeological Sites and Remains Act 1951 (for short the Central Act of 1951) all ancient and historical monuments in part A and B States which before the commencement of the 1951 Act have either been declared by the Central Government to be a protected monument within the meaning of the 1904 Act or which have been taken possession by the Central Government as protected monuments were declared to be ancient and historical monuments of national importance.

7. It is also stated by the ASI that the 1958 Act, particularly Section 3, specifically declared that all ancient and historical monuments which have been declared by

the Central Act of 1951 or by Section 126 of the State Reorganizations Act, 1956 to be of national importance, shall be deemed to be ancient and historical monuments declared to be of national importance for the purposes of 1958 Act. Vide S.O. No. 1147 dated 15.5.1991 published in Gazette of India dated 25.5.1991, the Central Government gave one month notice of its intention to declare areas up to 100 meters from protected limits and further beyond up to 200 meters near or adjoining protected monuments to be prohibited and regulated areas respectively for the purposes of both mining operations and construction. S.O. No. 1764 dated 16.6.1992 was issued in exercise of the powers conferred Under Rule 32 of 1959 Rules declaring that the area of 100 meters from the limit of protected areas as the prohibited area and 200 meters from the prohibited area as the regulated area and in such areas construction/mining activity were barred. According to ASI since Bade Baba temple and Jain Temples on the hills of Kundalpur are protected under national monuments, they would be covered by the Notification dated 16.6.1992.

8. The then Conservation Assistant, Sagor on 5th June 1995 wrote to the Jain Temple Trust stating that no construction activities can be undertaken on the protected monuments without the permission of the competent authority. It was pointed out in this Notice that a foundation laid near Bade Baba was illegal. Since construction was still going on, the Superintendent Archaeologist Bhopal sent a telegram dated 13.6.1995 to the Collector, Damoh informing him about serious violations committed by the Jain Trust disregarding the provision of 1958 Act and 1959 Rules. Another letter dated 19.9.1995 was written by the Superintendent Archaeologist Bhopal to Jain Trust to desist from committing those violations.

9. While the ASI was pointing out these so called illegalities, Secretary Department of Revenue, M.P.(Respondent No. 2) issued orders dated 5.4.1999 whereby be handed over the said Jain Temples including Bade Baba temple to Respondents 9 to 11 (Jain Trust) with certain conditions. According to the ASI this Notification is issued under 1964 Act is void as the monuments is covered by 1958 Act which is the Central Act and that gives exclusive jurisdiction to ASI.

10. An extensive inspection was carried out by the Assistant Superintendent Archaeologist of the ASI on the basis of which he submitted a written report

bringing out large scale violations allegedly committed by the Jain Trust. It was specifically reported that the members of the Trust ignoring the historical significance and antiquarian value of the temples, were destroying the pristine beauty and ancient ambience of the monument by cutting and adding new construction within the prohibited/protected area. In particular it was reported that the Bade Baba Ka temple had suffered tremendous damage and more than 80% of the temple had been destroyed.

11. This provoked the then Director General, ASI to write a letter dated 1.7.1999 to the Chief Secretary of the M.P. Government highlighting, what ASI termed as the vandalism being done at Bade Baba temple by the Jain Trust. However, no response was received. After a lull of almost six and half year, the ASI approached the High Court by filing the Writ Petition, wherein impugned orders are passed.

12. This Writ Petition as well as other Writ Petition which was already filed in the year 2006, were contested by the State Government as well as the Jain Trust. The State Government maintained that the structure in question was covered by the State Act i.e. 1964 Act and therefore ASI was unnecessarily intervening in the matter. The State Government also defended its Notification dated 5.4.1999 whereby management of the temples was given to Respondents 9 to 11 i.e. Jain Temple Trust.

13. The Jain Temple Trust also took the position on the same lines as was taken by the State Government. It added that if any direction is required under the law i.e. under 1964 Act, the Trust was ready to submit an application for obtaining the permission to raise construction before taking any construction work. It was also argued by the Respondents that the main temple was no more existing which had crumbled due to natural decay, being a very old temple of 6-7 Century A.D. It was only the Bade Baba idol which survives and the entire effort on the part of the Trust was to restore the said idol to its original form and to build a structure of very high quality, whereby said idol could be safely kept, which will facilitate the public to worship the Bade Baba idol.

14. As stated in the beginning, the High Court while rendering the impugned judgment has accepted the case set up by the State Government as well as Jain Temple Trust and rejected the pleas raised by the Appellants.

15. Mr. Paras Kuhad and Mr. Sidharth Luthra, learned Additional Solicitor Generals argued the matter on behalf of the Archaeological Survey of India. Mr. P.C. Jain, Advocate made his submissions on behalf of the Appellant in the other appeal. These submissions were rebutted by Ms. Vibha Dutta Makhija, learned senior counsel appearing for the State of Madhya Pradesh as well as Mr. Gopal Subramaniam, learned senior counsel who appeared on behalf of the Jain Temple Trust.

16. Mr. Kuhad opened his submissions by pointing out that magnificence, importance, glory and architectural grandeur of these Kundalpur Jain Temples which has already been taken note of in the beginning. Thereafter, he referred to Notification dated 20th November 1914 passed Under Section 3 of the 1904 Act which was duly published in the Central Provinces District Gazette, as well as Notification dated 16.7.1913 which was issued by Public Works Department of Central Provinces. He further submitted that even as per the case set up by the Jain Temples Trust these 58 temples are in the nature of one of the most important heritages of the country which was built anywhere between 6th-11th Century and Bade Baba idol between 6th to 7th Century. It was submitted by him that the Scriptures of the 6th Century contain a reference to this temple; that the said temples have withstood the vagaries of time for more than 10-14 centuries; that the temples are built in ancient Nagar Shaili and are all square blocks with domed roofs and Pinnacles at the corners and they are all white washed and look very like Muhammadan Tombs; that the idol of Bade Baba was always flanked by the idols of Parasnathji on the sides and Yaksha and Yakshni at the top and bottom; that the sculpture thus consisted of seven idols carved/placed in a certain way historically.

17. According to Mr. Kuhad, however, this sanctity of the Bade Baba idol was tempered when on 17th January 2006 this idol was removed from the ancient temple and the ancient temple ceased to exist thereafter. The sculpture now stands divided whereby idol of Bade Baba is separated from the idols of Parasnathji on the sides and Yaksha and Yakshni at the top and bottom. Currently all the seven

idols stand separated and installed/stored at different locations. This according to Mr. Kuhad amounts not only to vandalizing the Bade Baba but destroying the very sanctity of the said idol and the manner in which it was placed in the temple.

18. Coming to the legal aspects of the matter, Mr. Kuhad argued that Section 2(1) of the Act of 1904 defines "Ancient Monument" as any structure, erection or monument...which is of historical, archaeological or artistic interests, or any remains thereof, and includes: (a) the site of an Ancient Monuments; and (b) a portion of land adjoining the site of an Ancient Monument as may required for fencing or otherwise preserving such monument; and (c) the means of access to Ancient Monument. Section 3 of the said Act (as originally enacted) read as under:

Section 3: - Protected monuments.-(1) The local Government may, by notification in the Local Official Gazette, declare an ancient monument to be a protected monument within the meaning of this Act.

Thus, according to the learned ASG the temple in question is clearly covered by the definition of "Ancient Monuments" which is the protected monument Under Section 3 of the Act by virtue of Notifications 1913 and 1914 referred to above.

19. In an endeavour to show that it is the 1958 Act which applies to the temple in question, the learned ASG referred to the provisions of Government of India Act 1935 as well as Government of India (Adaptation of Indian Laws) Order, 1937 to give effect to Federalism and other constitutional changes brought about by the Government of India Act, 1935. On that basis, he argued that Notification dated 20th November 1914 was in fact of Notification of the Central Government under 1904 Act. The expression "Local Govt." was defined Under Section 2(1) of the General Clauses Act of 1868 as meaning 'the person authorized by law to administer executive government in the part of British India in which the Act containing such expression shall operate. Thus, at the relevant times, the expression "Local Government" did not mean Provincial Govt. (as it came to be understood after 1935) but meant, the authority authorized by law to administer the Executive Govt. in that part of British India. Every such Authority, irrespective of its designation, represented the same constitutional authority, namely the Crown/Her Majesty's exercising its executive powers through its different arms.

The Adaptation Order 1937 added Section (8ab) to the Act of 1897 and it provided that the 'Central Government' shall mean in relation to anything done before the commencement of Part III of Act of 1935, the Governor General in Council, or the authority competent at the relevant date to exercise the functions corresponding to those subsequently exercised by the Governor-General in Council. The Adaptation Order, 1937 also substituted the term 'Local Government' occurring under the Act of 1904 by the term 'Central Government'. Mr. Kuhad submitted that a reading of the definition of Central Government as inserted by the Adaptation Order 1937 makes it clear that the authority i.e. the Local Government, that was competent upto the year 1937, to exercise the functions that came to be subsequently exercised by the Governor General in Council, was in fact, the Central Government, at that point of time. He also referred to the definitions of 'British India' and 'Local Government' under the Act of 1868, and pointed out that the 'Local Government' was the authority that was competent to exercise the powers under the Act prior to 1937. With the separation of powers brought about by the Act of 1935, the Governor General in Council came to be known as the Central Government, and thus the term 'Local Government' was substituted by 'Central Government'.

20. Taking this line of argument further, he submitted that under the Constitution of India the legislative powers of the Union as well as State are demarcated in the form of three separate entries in List I, List II and List III and the entries in List I are in the exclusive domain of the Union. He referred to Entry 67 of List I which pertains to "Ancient and historical monuments and records, and archaeological sites and remains, (declared by or under law made by Parliament) to be of national importance. His submission was that since the monument was in question was ancient monument of national importance and was so declared by the 1951 Act, it comes under the jurisdiction of the Central Government. He specifically drew attention to the provisions of Sections 2, 3 and Item 1 of Part 1 of the Schedule to the Act of 1951 in this behalf. He also referred to Section 3 of the 1958 Act which provides that all ancient monuments declared under the 1951 Act to be of national importance and shall be deemed to be ancient and historical of national importance for the purpose of 1958 Act as well. According to him, this legal position clearly suggests that the Jain Temples at Kundalpur would be covered by 1958 Act and ASI has the jurisdiction to deal with these temples which are not

only ancient and historical but are of national importance referring to Notification dated 16th July 1992. He submitted that no construction by any person can be raised within the prohibited/regulated area without the permission of the ASI and therefore under this Notification dated 16th June 1992, an area of 100 meter from the boundary of the Ancient Monument is declared as a Prohibited Area and an additional area of 200 m. starting from the boundary of Prohibited Area is declared as a Regulated Area. Therefore the Jain Temple Trust was violating the provisions of the aforesaid Notification as well as 1958 Act and 1959 Rules framed thereunder and was exposing itself to the penalties that are provided Under Section 30 of the 1958 Act.

21. Apart from making the aforesaid legal submissions, the learned ASG also submitted that even the ground reality was that the ASI has been exercising consistent control over these 58 Kundalpur Jain Temples. It was for this reason that in its survey carried out by ASI under 1904 Act these were notified as ancient monument of great historical archaeological and artistic importance and notified as protected monument under 1904 Act. However, the Central Provincial Government decided that "no agreement need be taken from the owner as these temples are well looked after by the Jain Community". On 24th September 1956, ASI supplied an abstract of the list of the Ancient Protected Monuments entered in their Central Register which includes the 58 Jain temples. In the year 1974, the ASI again carried out a survey of the Jain Temples and published the said survey in the Damo District Gazetteers. The result of the survey was also entered in Vol. VII of the ASI maintained in respect of Ancient Monuments. Several attempts were made by ASI to prevent destruction of Bade Baba temple and raising of a new temple on the hills. The order dated 5th April 1999 issued by Government of M.P. also unequivocally state that the monuments would be subject to the regulatory control of the laws of Archaeological Survey of India.

22. Another submission of learned ASG was that in any case, protected monuments are deemed to be of national importance and once that is so, they are covered by the 1958 Act over which ASI will have the exclusive jurisdiction. Reference was made to the judgment in the case of Rajiv Mankotia v. Secretary to

the President of India and Ors. MANU/SC/0743/1997 : (1997) 10 SCO 441 wherein this Court held as under:

It would, therefore, be manifest that all ancient and historical monuments and all archaeological sites and remains or any structure, erection or monument or any tumulus or place of interment shall be deemed to be ancient and historical monument or archaeological sites and remains of national importance and shall be so declared for the purpose of Ancient Monuments Act if they have existed for a century; and in the case of a State monument, of State importance covered by the appropriate State Act. The point of reference to these provisions is that an ancient monument is of historical, cultural or archaeological or sculptural or monolithic or artistic interest existing for a century and is of national importance or of State importance. In other words, either of them are required and shall be protected, preserved and maintained as national monuments or State monuments for the basis which not only gives pride to the people but also gives us insight into the past glory of our structure, culture, sculptural, artistic or archaeological significance, artistic skills and the vision and wisdom of our ancestors, which should be preserved and perpetuated so that our succeeding generations learn the skills of our ancestors and our traditions, culture and civilization. They would have the advantage to learned our art, architecture, aesthetic tastes imbibed by the authors of the past and to continue the same tradition for the posterity. Preservation and protection of ancient monuments, is thus the duty of the Union of India and the State Governments concerned in respect of ancient monuments of national importance or those of State importance respectively to protect, preserve and maintain them by preserving or restoring them to their original conditions.

23. Emphasizing on the other limb of the same arguments, Mr. Kuhad argued that the monuments in question is in any case in the nature of a protected monument having so declared specifically under 1904 Act. He submitted that 1958 Act had not repealed the earlier Act of 1904 Act as Section 39(2) of the 1958 Act merely states that the Act of 1904 would cease to have effect "in relation to" ancient and historical monuments declared by or under this Act to be of national importance.

Therefore, all monuments which were not covered by 1958 Act continue to remain covered under 1904 Act. For this proposition, sustenance from the judgment of this Court in the case of ASI v. Narender Anand and Ors. MANU/SC/0086/2012 : (2012) 2 SCC 562 was sought to be drawn which laid down that for a monument to be an ancient monument, Notification under Section 3 of the 1904 Act was sufficient without any further Notification under 1951 or 1958 Act.

24. Alternate submission of the learned ASG was that the monument in question is in any case liable to be declared as monument of national importance as was done by this Court in National Anand (supra). In the case of Viceregal Lodge in Shimla, in the following words:

such being the historic evidence furnished by the Viceregal Lodge, is it not the duty of Indians and of the Government of India to preserve the Viceregal Lodge as a monument of national importance for posterity as the historic evidence so that every Indian citizen while visiting Shimla would have glimpse of it to recall the folly of disunity, teaching us the lesson of being united so as not to destroy ourselves once over and lose democracy and liberties on account of disunity, disharmony on grounds of religion, region, caste, language; and denial of all opportunities and facilities to our own weaker segments of the society; of equality of opportunities and of status to improve excellence in chosen facets of the respective lives. The answer is obviously "YES". If we forget the past and repeat the same mistake, we would stand to lose our nation's unity and integrity; stand to lose the opportunity to integrate into the world our great democratic Bharat Republic. Viceregal Lodge teaches us these lessons and it is for all of us, individually and collectively, to learn, awake, arise and work for integration, unity and fraternity, which are our fundamental duties.

25. Summing up the arguments, Mr. Kuhad pleaded that in spite of aforesaid legal web standing as a wall in front of the Jain Temple Trust, it had the audacity to destroy the ancient monument on or after 17th January 2006 under the garb of protecting Bade Baba idol in blatant violation of 1992 Notification and without seeking permission of the ASI. It was argued that the Jain Temple Trust was going on without the expert advice of the National Monuments Authority and has

constructed a new temple illegally of a punishable offence. He submitted that under the order of the High Court dated 20th May 2006, subject to undertaking to demolish the structure upon a judicial determinations, a dome was allowed to be constructed to cover the idols at the new location. No other construction has been carried out owing to the restraint imposed by the High Court. Clearly the construction raised so far is completely violative of the provisions of the Act and Rules, and in any case by virtue of the operative provisions of the Act of 1958 Act, no further construction can now be undertaken. The photograph placed on record clearly bear out that the new structure is in no manner harmonious with the existing structure either in terms of architectural style, or in terms of construction material or in terms of aesthetics involved. The photographs also bear out that all other temples on Kundalpur hills are in a pristine condition and in the original form without any change. He, thus, pleaded for issuance of necessary directions for preservation and protection of the ancient monuments with no further construction and demolition of structure, erected so far, along with suitable directions for restoration of this sculpture to its original form and its reinstallation in a structure that confirms to the artistic, historical and archaeological style, in tune and harmony of rest of the monuments.

26. Mr. Ajay Choudhary, the learned Counsel appearing for the Appellant in the other appeal has filed a written submission. On a perusal thereof, one finds that it is almost on the same lines as the submission of the learned ASG, already taken note of. Mr. Choudhary has also appeared on behalf of the intervener, viz. Jain Sanskriti Raksha Manch and filed written submissions on identical lines. Additionally, however, the intervener has sought to trace out the history of Kundalpur and the Jain Temple structures which were erected some time between the 6th-7th Century A.D. It is sought to be emphasized that temple of Bade Baba being an ancient is not governed an ancient temple. These temples were maintained by Jain community and as such it is a public trust. Therefore, Respondents 9 to 11 cannot claim ownership of the temple and at the most they may be considered to be the trustees of the temple with no title to the trust properties which vest in them only for the purpose of administration and management. It is, further, argued that preservation and protection of ancient monument is the forte of the ASI; no law permits demolition of a temple; the

temple of Bade Baba is a protected temple and a monument of national importance and therefore is governed by the Act of 1958 over which ASI will have the exclusive jurisdiction.

27. Ms. Vibha Dutta Makhija, learned Counsel appearing for the State of Madhya Pradesh, submitted at the outset that the core issue was as to whether temple in question falls under the provision of State Archaeological Department or ASI. Her argument on this issue was that once we go into the legal history of the statutory framework regarding the ancient monument and archaeological sites in India and examine the same in juxtaposition with the State Act namely 1964 Act of M.P., it would become clear that in so far as Bade Baba is concerned, it is the State Act which is the governing law. We would take detailed note of these submissions and the historical perspective which Ms. Makhija drew, at the time of our discussion on this seminal issue. It can be pointed out in brief that as per the learned senior counsel, The Madhya Pradesh Ancient Monuments and Archaeological Sites and Remains Act, 1964 (No. 12 of 1964) was enacted by the Madhya Pradesh Legislature on 16.4.1964. Section 3 gives power to State Government to declare ancient monuments to be State-protected monuments or archaeological sites and remains to be State-Protected Area. Section 5 provides for maintenance of the State protected monuments by entering into an agreement with the owner of the monument. Section 38 of the Act repeals the Ancient Monument Preservation Act, 1904 in its application to the State of Madhya Pradesh shall cease to have effect in relation to ancient and historical monuments, archaeological sites and remains and all other matters pertaining to the Act. The said enactment has duly been given assent by the President on 16.4.1964. The learned senior counsel also pointed out that the Madhya Pradesh Ancient Monuments and Archaeological Sites and Remains Rules, 1976 were framed Under Section 37 of the 1964 Act by the State Government. Rule 10 in Chapter III provides that no person shall undertake any construction in a State protected area without proper permission of the State Government. Rule 25 in Chapter V provides that an application may be submitted to move an antiquity. Her submission, thus, was that the Bade Baba is not declared as an ancient monument of national importance under 1951 or 1958 Act and therefore it is covered by the State Act of 1964. She also argued at length the doctrine of implied repeal of entire 1904 Act cannot be applied and the 1951 Act

has not fully repealed the 1904 Act impliedly. There was only a partial repeal in relation to ancient and historical monument and archaeological sites and remains declared or under the 1958 Act to be of national importance.

28. Her further submission was that with respect to the issue regarding the applicability of the 1951 Act in case of the monument not covered under the said Act, the issue has been dealt with by a 5-judge bench of this Court in *Joseph Pothen v. State of Kerala* MANU/SC/0367/1965 : 1965 (2) SCR 868. The question to be determined was whether the Travancore Act was repealed by the 1904 Act or by the 1951 Act or by the 1958 Act. This Court held that the 1951 Act applied to ancient and historical monuments referred to or specified in Part I of the Schedule thereto which had been declared to be of national importance, and since the monuments in question was not included in the Schedule, the 1951 Act did not apply to the said monument, with the following observations:

For the aforesaid reasons it must be held that notwithstanding the extension of the Central Act 7 of 1904 to the Travancore area and the passing of Central Acts 71 of 1951 and 24 of 1958, the State Act continued to hold the field in respect of the monument in question. It follows that the notification issued under the State Act was valid.

29. With regard to the ownership of the land Ms. Makhija submitted that the issue of the ownership of the land has been raised by the Appellant. The same has been examined by the Committee set up by the State Government which has conducted site inspection and has inspected all records. The ownership according to the land revenue records is in private ownership of the Digambar Jain Atishay Kshetra Kundalpur Public Trust and the contemporaneous record of the Archaeological Survey of India also records the same in its Monument Register. She submitted that the record of the Revenue Department for the year 2011-12 for Village Kundalpur, Tehsil Patera, District Damoh shows the name of Shri Digambar Jain Sidh Kshetra Kundalpur as the owner of 50.72 hectares of land which is approximately 125.33 acres which includes land other than that of the temples. She also referred to the records of ASI and argued that the ASI Register entries itself establish that the temple in question was in private ownership and was not taken under the guardianship of the government. It has been held that the entries in

the monument register are conclusive proof of ownership by this Court in *Karnataka Board of Wakf v. Govt. of India* MANU/SC/0377/2004 : (2004) 10 SCC 779.

30. Mr. Gopal Subramaniam, the learned senior counsel appeared for the Jain Temple Trust (Respondents 9 to 11). He took pains in making an endeavour to demonstrate that legal position was that there was no notification issued under 1951 Act to declare the Bade Baba temple as the national monument and therefore this temple was not covered under the provisions of 1958 Act. Referring to the Entry 67 of the Union List in 7th Schedule of the Constitution as well as Entry 12 of the List II thereof, his submission was that whereas Entry 67 of the Union List expressly covered such monuments declared by Parliamentary law to be of national importance, all other monuments would be covered by legislation to be enacted under Entry 12 of List II of the State List. 1964 Act was passed by Madhya Pradesh under Entry 12 of the State List and therefore it was the State Government which had the locus standi and jurisdiction over the Bade Baba temple. Mr. Subramaniam also pleaded reliance upon the Constitution Bench judgment in the case of *Joseph Pothan* (supra) and submitted that the impugned judgment of the High Court was in sync with the aforesaid judgment which makes the impugned judgment of the High Court unblemished. Justifying the findings of the High Court that the original temple which was declared to be an ancient monument under 1904 Act does not survive and only the idol of Bade Baba alone survives, Mr. Subramaniam highlighted the facts that the Bade Baba temple contains the idol of Bade Baba which admeasures 12 ft x 12 ft. It is made of stone. It is an extraordinary precious idol. It was submitted that the temple which housed Bade Baba idol, itself had to be demolished and rebuilt in the year 1940. He pointed out that in the year 1976, just like in 1940, prior to the reconstruction of the temple, the dome again fell and a new dome had to be constructed. Thus, in 1976, yet another dome was made. Again extensive repairs were carried out in 1992. On account of the repeated cracks which were occurring in the temple and having regard to the Deity itself being endangered, it was decided that a new temple must be built. Referring to the Jain Agamas (the sacred texts which govern the construction of Jain temples), his argument was that, as per these Agamas, a Deity cannot be in a dilapidated structure nor should an idol be subject to danger.

An idol to which energisation rights are imparted becomes a live Deity which has to be worshipped on a continued and regular basis thereby attracting devotees who come and offer prayers and who return once again. Therefore, in order to follow the Agamas and keeping in view the height of this Deity, it was decided that a temple be constructed in accordance with the "Nagara" style of architecture. According to the Trust, the said design is completely in conformity with the Agamas and has been approved by the Acharyas of the Digamber Jain Sect. In fact, in order to ensure that the idol was correctly removed after proper ceremonies and was installed at a new place it is stated that the said installation of the Deity was also undertaken in the presence of the Acharyas and proper ceremonies were performed. In fact, on account of the status quo order passed by this Court on 15th March 2013, further construction has not taken place.

31. Mr. Subramaniam also submitted that by looking into the statutory regime under the Central Acts as well as the State Act in right perspective the submission of the learned ASG that it was a protected monument under 1958 Act would stand refuted. He also countered the claim of the ASI that the statue was fragmented and destroyed. According to him, Bade Baba is the main Deity. The Deities which are shown on the side of Bade Baba include two individual idols of Lord Parswanath. These idols on pieces of stone were placed together on the side of Bade Baba in the Old Temple. The said pieces have been dismantled and kept intact. But on account of the status quo order, they have not been placed with Bade Baba for the present. The Trust undertakes that all the Deities, namely, the two Parswanath (left and right), two of Pushpavrishtis and two of Chavardaris and two Yaksha and Yakshinis are intact. Each one of these idols/statues is available with the Trust.

32. The learned senior counsel also joined issue on the ownership of the temple, which according to him belongs to a private entity. For this purpose, he referred to the averments made in the counter affidavit filed by the Trust before the High Court as well as the counter affidavit filed in the present proceedings. He submitted that the Trust had ample evidence to the effect that the total land measuring 199.45 acres (Patwari Halka No. 81, Gram Kundalpur, out of Bandobast No. 337, Area being 158.65 acres; Gram Fatehpur, out of Bandobast No. 346, being 34.35 Acres; Patwari Halka No. 79, Gram Teergarh, out of Bandobast No. 171, area being 6.45 acres) as mentioned in the letter dated

5.4.1999 is distinct from the land under the private ownership of the Trust. Further, it is common ground between the parties that no agreement pursuant to 5.4.1999 was ever executed. No further steps were taken even under the 1904 Act either to enter into an agreement or place any restrictive conditions. Thus, according to him, these circumstances make it clear that these temples were treated as private temples, yet they were not taken over in any way since the idols were being preserved, looked after and were being worshipped on a continued basis.

33. At the end, Mr. Subramaniam laid great stress on the religious freedom which is given to the Jain community under Article 29 of the Constitution, being a religious minority and argued that the attempt of the ASI to interfere with the religious freedom of the Jain Trust was impermissible and violative of this provision.

34. We have given our utmost consideration to each and every aspect of the matter, which it deserves as the issue is of great public importance. Though the central issue pertains to the jurisdiction of ASI over the temple in question (which depends upon the answer to the question as to whether it is State Act i.e. 1964 Act which is applicable or the Central Act i.e. 1958 Act that governs the field), few incidental facets of this issue which have also cropped up. These have factual as well as legal hues. After deliberating on this core issue, we would be providing answers to all such peripheral issues, as the outcome of the main issue will not only remove the cob webs but also lead us to the right path, showing direction to find solution to those issues. We, thus, proceed with the discussion on the central issue, which is the fulcrum, in order to construct the edifice on which main structure would be erected.

RE: APPLICABILITY OF STATE ACT OR CENTRAL ACT

35. Adverting to the aforesaid primary issue in the first instance, no doubt Notification No. 99 dated 20th November 1914 was passed Under Section 3 of the 1904 Act followed by the Notification dated 16th July 2013 which was issued by Public Works Department of Central Provinces. It is pertinent to note that 1904 Act was enacted by the Legislative Department of then Government of India to provide for the preservation of ancient monuments and of objects of archaeological, historical or artistic interest. Section 2(1) of this Act contained the

meaning of 'ancient monument', Section 2(3) defined the word "Commissioner" to be any officer authorized by the Local Government to perform the duties of a Commissioner under the Act. Section 3 of the Act granted the Local Government power to declare any ancient monument to be a protected monument by way of notification in the official Gazette. Section 4(6) provided that where there is no power of a protected monument then the Commissioner will assume the guardianship of the monument.

36. The moot question is what is the effect of these Notifications after the repeal of 1904 Act and on the enactment of 1951 Act and 1958 Act. The High Court has held that while issuing these Notifications, the then Commissioner was acting as "Local Government", as the term was then understood. The legal position in this behalf that prevailed at that time and came into being on the passing of 1919 Act, 1935 Act and the Constitution of India, is explained by the High Court in the following manner:

While issuing these notifications, the Chief Commissioner was acting as the "Local Government" as the term was then understood. The Government of India Act, 1919 was enacted to make further provisions with respect to Government of India. The Preamble to the Act provides that concurrently with the gradual development of self-governing institutions in the provinces of India it is expedient to give to those provinces in provincial matters the large measure of independence of the Government of India which is compatible with the due discharge by the letter of its own responsibilities. Thereafter, the Government of India Act, 1935 brought about the concept of federal government with distribution of powers in the real sense for the first time. In the 1935 Act, the subject "ancient historical monuments and archaeological sites and remains" was put in the Federal List by the Government of India-(Adaptation of Indian Laws) Order 1937, the provisions of 1904 Act were adopted and it was provided that the expression "local Government" shall be read as "Central Government".

37. We agree with the aforesaid conclusion. Let us examine the scheme of these statutes in some detail to understand which will clarify the aforesaid position beyond pale of doubt. The Government of India (Adaptation of Indian Laws)

Order 1937 was enacted by the then Parliament on 18.3.1937 and came into force on 1.4.1937 wherein it was stated that the "Chief Commissioner" and "Local Government" would be within the meaning of Provincial Government. Under Section 3(14) of the General Clauses Act, 1897 defines "Commissioner" to mean the chief officer in charge of the revenue administration of a division. Further Section 3(31) of that Act defines "local authority" to mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund. These provisions give a flavor as to what was understood by the Local Government. While passing Adaptation Order, 1937, significant changes were simultaneously made to the 1904 Act. In Sections 3, 4, 10A, 14, 15, 16, 17, 18 and 19 "Local Government" was substituted by "Central Government". In Section 5 "the Local Government", "the Secretary of State for India in Council", "the Government" and "Government" substitute "the Central Government" and omitted Sub-section (3) of Section 5 provided that the Collector may enter into an agreement on behalf of the Secretary of State for India in Council but the same shall not be executed until the same has been approved by the Local Government. So, it is only with these amendments, Central Government came to be substituted for the Local Government.

38. It is, therefore, not possible to accept the contention of the Appellant that the expression "local Government" did not mean provincial Government but meant the authority authorized by law to administer the executive Government in that part of British India. Having regard to the clear position mentioned in the aforesaid Acts, as described by the High Court, it is clear that the concept of the Federal Government was brought about by passing of Government of India Act, 1935 and not before.

39. It is noteworthy to mention here that the 1951 Act as well as the 1958 Act are the post-Constitution Acts. In both the Acts, the Parliament has used the expression "Central Government". The Parliament is deemed to be aware about the concept and meaning of the term "Central Government" under the Constitution. Therefore, the contention made by learned ASG that the expression "Central

Government" should be read so as to include "local Government" cannot be accepted.

40. Let us now see as to whether, by virtue of the aforesaid notifications issued under 1904 Act, the structure in question automatically attained the tag of "National Importance" under 1951 Act or 1958 Act. Answering this aspect in the negative, the High Court has dealt with issue in the following manner:

After commencement of the Constitution of India, the Parliament enacted the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 to declare certain ancient and historical monuments and remains in part A State and Part B States to be of National Importance and to provide for certain matters connected therewith. Section 2 of the 1951 Act inter alia states that all ancient and historical monuments and all archaeological sites and remains declared by this Act to be of "National Importance" shall be deemed to be protected monuments and protected areas respectively within the meaning of the 1904 Act. But a crucial aspect is noteworthy here that all protected monuments under the 1904 Act did not automatically become of "national importance". Part 1 of the Schedule of the 1951 Act states that all ancient and historical monuments which before the 1st day of April, 1956 have either been declared by the Central Government to be protected monuments within the meaning of the 1904 Act or possession of which has been taken by the Central Government as protected monuments shall be monuments of national importance. Section 2(j) of the 1958 Act defines 'protected monument' to mean an ancient monument which is declared to be of national importance by or under the 1958 Act.

In order to attract the applicability of 1958 Act, declaration in respect of a monument has to be made by the Central Government Under Section 4 of the 1958 Act. Section 4 of the 1958 Act provides that where the Central Government is of opinion that any ancient monument or archaeological site and remains not included in Section 3 is of national importance, it may, by notification in the Official Gazette, give two months' notice of its intention to declare such monument to be of national importance. The Central

Government neither under the provisions of 1951 Act nor under the provisions of the 1958 Act has issued by notification in respect of the temple in question.

41. We are in agreement with the aforesaid approach of the High Court. It is to be kept in mind that under Article 246 of the Constitution, the power to legislate has been divided between the Parliament and the State Legislatures on the basis of the three lists in the Seventh Schedule of the Constitution. Entry 67 of the Union List covers "Ancient and historical monuments and records, and the archaeological sites and remains, declared by or under law made Parliament to be of national importance". Entry 12 of the State List covers "Ancient and historical monuments and records other than those declared by or under law made Parliament to be of national importance". Entry 40 of the Concurrent List covers "Archaeological sites and remains other than those declared by or under law made Parliament to be of national importance". 1951 Act was enacted by the Parliament to declare certain ancient and historical monuments and archaeological sites and remains in Part A and B States to be of national importance. Section 3 which is the declaratory provision declares that "all ancient and historical monument and all archaeological sites and remains declared by this Act to be of national importance shall be deemed to be protected monuments and protected areas respectively within the meaning of the Ancient Monuments Preservation Act, 1904, and the provisions of that Act shall apply accordingly to the ancient and historical monuments or archaeological sites and remains as the case may be, and shall be deemed to have so applied at all relevant times". The Schedule enumerates two categories of ancient monuments which are declared as those of national importance. Under Point I of the Schedule, "all ancient and historical monuments in Part A States which, before the commencement of this Act, have either been declared by the Central Government to be protected monuments within the meaning of ancient monuments, the Ancient Monuments within the meaning of ancient monuments, the Ancient Monuments Preservation Act, 1904, or which have been taken possession of by the Central Government as protected monuments." Further, the ancient monuments declared to be of national importance were enumerated specifically in Part II of the Schedule. Thus, Point I of Part I of Schedule declared only those ancient and historical monuments declared by the 1951 Act as those of

national importance in Part A States and Part B States which, before the commencement of the 1951 Act, were declared by the Central Government (in contradistinction to Local Government or State Government) to be protected monuments within the meaning of the 1904 Act. Since the Notifications dated 16.7.1913 and 20.11.1914 were issued prior to the 1951 Act but were not issued by the Central Government, the monument in question falls out of the ambit of the 1951 Act. The same is apparent from the definition of "Central Government" in Section 3(8) of the General Clauses Act 1897 which defines "Central Government" as (a) in relation anything done before the commencement of the Constitution, mean the Governor-General or the Governor-General-in-Council as the case may be; and shall include,-(i) in relation to functions entrusted under Sub-Section 1 of Section 124 of the Government of India Act, 1935, the Government of a Province, the provincial government acting within the scope of authority given to it under that Sub-section; and (ii) in relation to the administration of a Chief-Commissioners Province, the Chief Commissioner acting within the scope of the authority given to him under Sub-Section 3 of Section 94 of the said Act;.....". By virtue of Section 94 of the Government of India Act, 1935, Chief Commissioners' Provinces have been delineated as British Baluchistan, Delhi, Ajmer-Merwara, Coorg and the Andaman and Nicobar Island, the area known as Panth Piploda. Central Province and Berar were not Chief Commissioners Province but it was a Governors Province (see Section 46 of the 1935 Act). It is thus clear that the acts of the Chief Commissioner Central Provinces (who issued the 1913 & 1914 notifications.) could not be deemed to be that of the Central Government and stood on a different authority and footing, and could subsequently be deemed to be that of the Provincial Government only under the 1937 Adaptation of Laws Order.

42. Argument of the learned ASG loses sight of the relevant provisions of 1951 Act. It also ignores the fact that not only there is a central legislation enacted under Entry 67 of the Union List, but State Legislation as well in the form of 1964 Act enacted by the State Legislature under Entry 12 of the State List. We may elaborate these aspects by pointing out that in order to be covered under the provisions of the 1958 Act, it was necessary that the monument in question should be declared to be of national importance as defined Under Section 2. The High

Court rightly held that in terms of Sections 2 and 3 of the said Act, the monuments must be referable to part I of the Schedule. Part I of the Schedule clearly contemplated a declaration by the Central Government or monuments whose possession was taken over by the Central Government. However, in the present case, neither there is any notification by the Central Government nor has the possession ever been taken by the Central Government.

43. It is to be noted that 1958 Act was enacted for the preservation of ancient and historical monuments and archaeological sites. Vide Section 39, the 1958 Act repealed the Ancient & Historical Monuments & Archeological Sites & Remains (Declaration of National Importance) Act, 1951 and Section 126 of the States Reorganization Act 1956. The enactment is a comprehensive legislation dealing with the meaning of "ancient monuments" and "owner" in Section 2(a) and 2(g) respectively. Under Section 2(j) "protected monument" means any monument which is declared to be of national importance under the 1958 Act. Section 3 specifically declared certain ancient monuments to be deemed to be of national importance which were so declared under the previous enactment of 1951. Further Section 4 the Act empowered the Central Government to declare certain monuments to be of national importance. Section 9 provides that if any owner fails or refuses to enter into an agreement Under Section 6 for maintenance, the Central Government may make an order on any or all matters covered Under Section 6(2) of the Act and the same shall be binding on the owner. It is thus to be noted that the 1958 Act replaced the 1951 Act and covered only the ancient monuments which were declared to be of national importance. Since the Central Government has not declared the said Bade Baba Temple to be an ancient monument vide the 1913 & 1914 notifications under the 1904 Act, and nor was it declared to be of national importance even under the 1951 Act, the same fell outside the purview of the 1958 Act as well.

44. While this is the position of the Central Act, Madhya Pradesh State enacted 1964 Act on 16.4.1964. Section 3 gives power to State Government to declare ancient monuments to be State-protected monuments or archaeological sites and remains to be State-protected Area. Section 5 provides for maintenance of the State protected monuments by entering into an agreement with the owner of the monument. Section 38 of the Act repeals the Ancient Monument Preservation Act,

1904 in its application to the State of Madhya Pradesh shall cease to have effect in relation to ancient and historical monuments, archaeological sites and remains and all other matters pertaining to the Act. The said enactment has duly been given assent by the President on 16.4.1964.

45. At this juncture, we would like to discuss the Constitution Bench judgment in *Joseph Pothan* (supra) which is squarely applicable. The question to be determined in the case was whether the Travancore Act was repealed by the 1904 Act or by the 1951 Act or by the 1958 Act, the Court held that the 1951 applied to ancient and historical monuments referred to or specified in Part I of the Schedule thereto which had been declared to be of national importance, and since the monument in question was not included in the Schedule, the 1951 Act did not apply to the said monument. The Court held:

For the aforesaid reasons it must be held that notwithstanding the extension of the Central Act 7 of 1904 to the Travancore area and the passing of Central Acts 71 of 1951 and 24 of 1958, the State Act continued to hold the field in respect of the monument in question. It follows that notification issued under the State Act was valid.

46. There is yet another vital factual aspect regarding the temples in question, that clinches the issue. Even the Register maintained by the Archaeological Survey of India expressly records that the Temples were 'private' Temples, and also that no agreement was required to be entered and could be left to be dealt with by the State (as against being declared 'National'). The said Register is of the year 1956 and constitutes an admission that the said Temples are not covered by the 1951 Act and were not intended to be taken over as monuments of national importance.

47. The aforesaid discussion persuades us to accept the conclusion arrived at by the High Court accepting the legal position as enunciated by the High Court, i.e. qua these temples it is the 1964 Act passed by the State Legislature that would be applicable and the monuments are not covered by the 1958 Act. Once we arrive at this conclusion on law point, the argument of the learned ASG that since the temples are of national importance, they should be treated as deemed covered by 1958 Act, cannot be countenanced. After all, State Act namely 1964 Act has received the assent of the President of India. It can co exist with the Central Act

namely 1958 Act and there is no repugnancy between the two. Accepting the argument the learned ASG would amount to rendering the provisions of 1964 Act inapplicable even where that Act applies. It is not possible to accept such a consequence.

Having clarified the legal position, we discuss the case at hand.

RE: KUNDALPUR HILL AND BADE BABA TEMPLE

48. The Kundalpur Hill consists of three villages, namely Kundalpur, Fatehpur and Teergarh. This is a hill of sacredness which is worshipped as a "Siddha Kshetra" by members of the Jain community as it is believed that the last disciple of Lord Mahavira attained salvation from the hill of Kundalpur. A total of 58 temples are located at different levels on the hills of Kundalpur starting from the foot hill. According to District Gazetteers published in 1974 based on Archaeological Survey of India Volume VII, "there are 58 Digambar Jain Temples. On the circular hill range stand 30 of these temples, all gleaming white and the remaining 28 temples are situated at the foot of the hill range...Most of the ancient temples have been renovated and reconstructed during the period of last three centuries. The oldest is..in the middle of them. It enshrines a colossal red sandstone image of Jain Tirthankar...Secondly on both sides of this image, images of Yaksha and Yakshni of Rishabhanatha are noticed. The main interest of place lies in the beautiful huge images of Rishabhanatha and two of Parshwanatha in standing posture. The later are installed on either side of the former. These are probably of 6th or 7th century A.D.

49. Out of the aforesaid 58 temples, Bade Baba is the main Deity. It admeasures 12 ft x 12 ft. It is made of stone. It is an extraordinary precious idol. The Deities which axe shown on the side of Bade Baba include two individual idols of Lord Parswanath as well as images of Yaksha & Yakshni. These idols on pieces of stone were placed together on the side of Bade Baba in the Old Temple.

50. Since we are concerned with the construction that has taken place in Bade Baba temple, it would be necessary to narrate the condition of this temple that existed from time to time. As per the Jain Temple Trust, since the structure dates back 6th-7th Century, there has been natural wear and tear of this temple over a

period of time. The version of the Trust, which is not specifically refuted, is that the temple which housed Bade Baba idol was in fact earlier demolished and rebuilt way back in the year 1940. Again in the year 1976, the dome fell and a new dome had to be constructed. Extensive repairs were carried out again in the year 1992. However, there was a recurring damage to the main temple building from time to time. Significantly, the idol of Bade Baba has remained intact.

51. There is no quarrel up to this, which means that the main temple building which houses Bade Baba idol needed repairs. It is at this juncture that the parties have joined issue as to who is to carry out the repairs and in what manner. As per the ASI, it is the ASI under whose supervision the aforesaid task is to be accomplished whereas Jain Temple Trust claims its prerogative to undertake this job. That is an aspect which we have already dealt with, negating the claim of ASI in this behalf. Now, we would deal with other aspects, namely, whether removal of the idol was justified and whether the repairs/construction carried out by Jain Temple Trust amounts to vandalizing the said temple or it was permissible to make the construction by the Trust in the present form.

REMOVAL OF THE MAIN IDOL

52. As per the Trust, on account of the repeated cracks which were occurring in the temple and having regard to the fear that Deity itself was endangered, it was decided that a new temple must be built. A Deity cannot be in a dilapidated structure nor should an idol be subject to danger. An idol to which energisation rights are imparted becomes a live Deity which has to be worshipped on a continued and regular basis thereby attracting devotees who come and offer prayers. Therefore, in order to follow the Agamas and keeping in view the height of this Deity, it was decided that a temple be constructed in accordance with the "Nagara" style of architecture. According to the Trust, the said design is completely in conformity with the Agamas and has been approved by the Acharyas of the Digamber Jain Sect. In fact, in order to ensure that the idol was correctly removed after proper ceremonies and was installed at a new place it is stated that the said installation of the Deity was also undertaken in the presence of the Acharyas and proper ceremonies were performed. In fact, it became imperative

to shift the idol so that outer structure wherein the idol is housed could be reconstructed. That step was necessary to protect the idol.

53. Having regard to the above, we would, in the first instance, like to comment that claim of the ASI that the statute was fragmented and destroyed is totally unfounded. What has happened is that on a big piece of stone there was an idol of Bade Baba. On the two sides of this main idol were two individual idols of Lord Parswanath. In order to carry out construction in the temple, without damaging the main idol or the individual idols of Lord Parswanath the said pieces were dismantled and removed from the dome to protect them from common damage while the construction in the temple is carried out. It was assured at the Bar that after the construction is completed, all the deities namely two Parshwanaths (left and right), two of Pushpavishtis and two Chavardaris and two Yaksha and Yakshinis would be placed back at the same spot and in the same form. Bade Baba idol will be reinstalled in the same manner it existed earlier. Such a course of action in the exigency of circumstances, temporarily shifting Bade Baba idol with assurance to shifting back and installing in the same form and at the same place it existed earlier, is taken on record, making the Jain Temple Trust bound by this statement. We may add that such a course of action was upheld by the Madras High Court in Venkatachala Mudaliar v. Sambasiva Mudaliar MANU/TN/0080/1926 : AIR 1927 Mad 465, viz. to shift an idol from an old Temple to a new one, if the same was in the beneficial interest of the worshipper community. The said view has also been approved by this Court in Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi MANU/SC/0173/1959 : (1960) 1 SCR 773 (para 40).

RE: NATURE OF CONSTRUCTION

54. This leaves us with the issue relating to the nature of construction that is carried out. As the outside structure had become totally dilapidated and there was reasonable danger of its collapse which could damage the main deity and other deities, it became necessary to re-erect the outside structure of the temple. May be, it would have been better to construct the same in the same format in which it was existed earlier.

Admittedly, the construction which is carried out now upto by the Trust that too substantial, is not the replica of the old structure. However, case of the Trust is that the construction is as per the Jain Agamas. Therefore the question that would arise as to whether it was necessary to make the construction of new temple exactly in the manner in which it existed earlier or the manner in which it is constructed is permissible, being in conformity with these Agamas.

55. There is no gain saying that Jain community claims antiquity for its religion, and rightly so for a documented commentary of Jain religion, running into Volume titled "Jainism: its history, principles and precepts, the culture heritage of India at volume 1, (page 400) it is said:

The Jains claim great antiquity for their religion. Their earliest prophet was Rsabhadev, who is mentioned even in the Visnu and the Bhagwata Puranas as belonging to a very remote past. In the earliest Brahmanic literature are found traces of the existence of a religious Order which ranged itself strongly against the authority of the Vedas and the institution of animal sacrifice. According to the Jaina tradition, at the time of Mahabharata war, this Order was led by Neminatha, who is said to have belonged to the same Yadava family as Krsna and who is recognized as the twenty second Tirthankar. The Order gathered particular strength during the eight century B.C. under Parshwanatha, the twenty third Tirthankar, who was born at Varanasi. This Order we may call the Sramana Sangha (as distinct from the Vedic Order), which later became divided into the Jaina and the Buddhist Orders under Mahavira and the Buddha, respectively.

While describing the history of Jain Darshana, it has been noted:

Through out Vedic Literature we find two parallel currents of thought, opposed to each other, one enjoining animal sacrifice in the Yajanas (sacrifices), and the other condemning it, the former being represented by the Brahmanas of the Kuru-Pancala country in the west, and the later by the Kshatriyas of the eastern countries consisting of Kasi, Kosala, Videha, and Magadha. It is also noteworthy that in these areas the Kshatriyas at the head of society, whereas in the Kuru-Pancala country, the Brahmanas were

leaders. And again, in the eastern countries, instead pure Sanskrit, Prakrits were prevalent, which were the canonical language of Jainism and Buddhism. Further, the Atma-Vidya of the Upanishads is found to be cultivated by the Kshatriyas of these eastern countries, as against the sacrificial religion and the adoration of the Gods in the Kuru-Pancala country. As we find these features in Jainism, and in Buddhism, which later arose in this very area, we may conclude that Jainism was prevalent in the eastern countries, and is as old as the Vedas. It is also held by the Jains that the Vedas, atleast the portions that are not lost, advocated Ahimsa, and the cleavage arose between the two schools when there was difference of opinion in the interpretation of the Vedas, as illustrated in the story of Kid Vasu found in Jaina Literature as well as in the Mahabharata.

The emphasis on Samaiya or Equality is described as follows:

Jainism lays great stress upon the attitude of equality. It has identified this attitude with the famous brahmanic conception of Brahman, and has designated the whole religious conduct and philosophical thought that helps the development of the attitude of equality as Bambhacera (Brahmacharya), even as Buddhism has designated the principles of goodwill (Maitri) and the like as brahmavihara. Further, justice like the Dhammapada and the Mahabharata, the Jaina texts identify a Sramana, who embodies equality, with a Brahmana.

Agamas of the Jains are described as

The Agamas or the scriptures of the Jains are revealed by the Sarvajana or the Omniscient being. The Jaina scriptures should not be in conflict with the well-known Pramanas, the criteria of correct knowledge. They must be capable of leading men towards higher goals, to swarga and moksa, must give correct information as to the nature of reality, and must describe the four purusharthas (ends of human life): dharma (religious merit), artha (wealth), kama (enjoyment), and moksa. The Agamas with such characteristics, revealed by sarvajana, have been handed down from generations to generations by a succession of teachers called gandharas, beginning with Sudharman, the chief disciple of the Tirthankar Vardhamana

Mahavira. They are known by the following appellations: the Siddhanta, Paramagama, Krtanta, Veda, Sruti, Sastra, etc. The Agamas are grouped under three classes: Anga, Purva and Prakrma.

On Architectural Traditions and Canons, the Nagara Temples are described as follows:

Nearly all over northern and central India one comes across a type of upright building used for religious purposes, which have a number of distinctive features. The compartment within is square in plan and so is the outside. But portions of the outer surface are progressively projected forwards as one proceeds from the outer edge of any one face of the building towards its middle. These vertical strips disposed in several planes are called pagas. They run from the base to below the crown. The planes are sometimes distinguished from one another by the nature of their decoration. But the outermost pagas on any face of the tower are very frequently divided from bottom upwards into a number of storeys, the upper ends of which bear an ornaments moulding called bhumi-amla or bhumi-amalaka, 'the amalaka which marks the bhumi or level.

On Jaina Architecture and Traditions and Canons:

While several words were anciently current to denote what is known as architecture, a common and appropriate word was vastu-sastra. Through the word silp-sastra has very much the same meaning, it has a distinct leaning towards sculpture and iconography. The word sthapatya has a more restricted connotation, viz. a house or school, gharana, relating to some particular type of architecture or sculpture workshop. Apart from the traditional gharanas, there are several other classes of architects. The Vaisyas, the Mewads, the Gurjaras, the Pancolis, and the Pankalas, all spread over West India, include expert in wood-carving, traditional engineering etc. The Gouda-Brahmanas of Jaipur and Alwar are famed for marble carving. Some specialize in metal craft and painting. The Jangadas are known for wood-carving and traditional engineering; they are known in Madhya Pradesh, Uttar Pradesh and Delhi.

While the Gharanas are hereditary bearers of the ancient architectural tradition, such tradition is also recorded in a vast number of available texts. These treaties generally follow one and the same canon throughout, but they differ considerably inter-se, both object-wise, leading to the Gharanas mentioned above, and subject-wise, by putting architecture into various types of sails like nagara vesara, dravida, etc.

While some of these texts, like the Diparnava of Visvakarman, the Rupa-Mandana and Prasada-Mandana, both of Mandana, the Vastu-Manjari of Nathaji, etc. deal inter-alia with Jaina architecture perhaps the only book independently written on Jaina architecture is the Vatthusara Payarana in Prakrit, with three chapters devoted respectively to residential houses, iconography and temple architecture.

56. Relying upon the aforesaid scriptures, it is argued that when the new structure is in accordance with the Jain Agamas and is in tune with the Jain Architectural on which basis Nagara temples are constructed, it would be unwise to direct demolition of these structures and to carry out fresh construction as per the earlier existing design.

57. Mr. Gopal Subramaniam had also referred to the judgment in the case of Seshammal v. State of Tamil Nadu MANU/SC/0631/1972 : (1972) 3 SCR 815, wherein this Court upheld the importance of Agamas. Although this Court upheld the validity of the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1970, it was observed in paragraph 11 as follows:

...The authority of these Agamas is recognized in several decided cases and by this Court in Sri Venkataramana Devaru v. The State of Mysore, Agamas are described in the last case as treatises of ceremonial law dealing with such matters as the construction of temples, installation of idols therein and conduct of the worship of the deity....

Thus, we find that on the one hand, the Jain Temple Trust justified the construction which is being undertaken in the present manner with the submission that once the existing dome and outer structure decayed to such an extent that the repairs were not possible and it needed reconstruction,

while doing so, the tenets of the Jain religion are kept in mind and new structure follows agamas. It is explained that the temple is being constructed in accordance with 'Nagara' style of architecture, which is approved by the Acharyas and Digambar Jain sect. To this extent, the stand of the Trust appears to be correct, viz. the new construction is as per established Jain culture, as described in Agamas. However, it is argued by the Appellants that in order to keep the sanctity of ancient monument, the construction should have been on the same pattern of structure but which existed before demolition. It is also their case that the construction of Bade Baba temple should be in sync with other 57 temples and this sanctity has not been maintained. We find that this aspect is not specifically looked into by the High Court.

58. We have already held that ASI has no jurisdiction in the matter and the archaeological site in question is governed by the 1964 Act, over which it is the State Government authorities who are competent to play their statutory role in accordance with the provisions of the 1964 Act. The High Court, in the impugned judgment, has directed the Trust to submit an application for grant of permission to raise construction of the Temple to preserve and protect idol of Bade Baba. Direction is also issued to the State Government to consider the application, in accordance with law, within a period of two months. We are of the opinion that while considering this application, the competent authority under the 1964 Act would specifically consider the aforesaid issue/aspect as well. We are leaving the matter to the experts/public functionaries under the 1964 Act with a hope that they would weigh the positions taken by both sides on this limited aspect about the nature of construction and to find an appropriate solution. In case the State Government has already taken a decision on the application of the Jain Temple Trust, but the aforesaid aspect is not dealt with, we direct the State" Government to take decision in this behalf within a period of two months. It would also be open to the Trust to press the argument that Jains are declared religious minority and therefore, Jain community enjoys the religious freedom, as a fundamental right, guaranteed under Article 29 of the Constitution. It is their case that the Temple Trust had performed all necessary rituals as required under the Jain religion and followed at the time of temporary shifting of the idol and also before deciding to

have the outer structure of the temple as per Agamas while performing these rituals are performed of Agamas by Suri Mantras. Their plea shall also be kept in mind while taking the decision. We further make it clear that if the Government functionaries approve of the constitution, the Appellants shall not be allowed to challenge it again.

59. Subject to the aforesaid observations/directions, the appeals of the Appellants are dismissed. There shall, however, be no order as to costs.